



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**MISC. CIVIL CASE NO. 233 OF 2018**

**OTIENO RAGOT & CO. ADVOCATES.....ADVOCATE/APPLICANT**

**-VERSUS-**

**KENINDIA ASSURANCE CO. LTD.....CLIENT/RESPONDENT**

**RULING**

The application before me was brought pursuant to **Section 51 (2)** of the **Advocates Act**.

1. The Applicant, **OTIENO, RAGOT & COMPANY ADVOCATES**, have asked the Court to adopt the Certificate of Costs issued by the learned Taxing Officer, as a Judgment of the Court.
2. The Respondent, **KENINDIA ASSURANCE COMPANY LIMITED**, have indicated that it does not oppose the adoption of the taxed costs as a judgment sum, in favour of the Applicant.
3. However, the Respondent raised a strong objection to the Applicant's application, which would see the taxed costs attract interest at Court rates from 6<sup>th</sup> June 2011.
4. When canvassing the application, Mr. Otiemo D. submitted that the Applicant was entitled to earn interest on the costs from 6<sup>th</sup> June 2011 because, pursuant to **Rule 7** of the **Advocates (Remuneration) Order**, interest is payable from the expiry of one month from the date when the Bill is delivered.
5. In this case, the Court was told that the Applicant had delivered the Bill on 6<sup>th</sup> May 2011.
6. He emphasized that there is no distinction between the "*Delivery of the Bill*" and the "*Filing of the Bill.*"
7. The Applicant submitted that if **Rule 7** was given any other interpretation, that would imply that the advocate was not entitled to earn any interest on costs unless his Bill became contentious.
8. In answer to the application, Miss Aron, the learned advocate for the Respondent, submitted that it is important to bear in mind the fact that **Rule 7** mentions the word "*Bill*".
9. In this case, the Respondent says that it was never served with a Bill. The document which the Applicant served upon the Respondent was a "*Proforma Invoice.*"
10. Secondly, the Respondent submitted that as a precondition for the "*Bill*" beginning to attract interest, it had to be served, and also it must contain a demand for interest.
11. According to the Respondent, as no Bill was served, and also because there was no demand for interest, the Applicant was not entitled to interest from June 2011.
12. Finally, the Respondent submitted that **Rule 7** was not couched in mandatory terms. It was contended that, because the word used is "*may*", the court has the discretion to determine whether or not interest was payable.
13. When replying to the Respondent's submissions, Mr. Otiemo D; the learned advocate for the Applicant, submitted that Paragraph 7 of the **Advocates (Remuneration) Order** stipulates that the Advocate may charge interest provided the claim is raised before the Bill is paid in full.

14. He added that the Respondent ought to have paid the sums due, immediately after the Bill was taxed.

15. As far as the Applicant was concerned, there was no reason why the Respondent would be entitled to wait until the Applicant had made a demand for payment.

16. Finally, the Applicant submitted that pursuant to **Clause 7**, the Court does not have a discretion. The Applicant was of the view that it is the Advocate who had the option to choose whether or not to charge interest.

17. In the case of **OTIENO RAGOT AND CO. ADVOCATES Vs KENINDIA ASSURANCE CO. LIMITED, MISC. CAUSE NO. 78 OF 2015**, the Hon. Lady Justice E. N. Maina dealt with the question about whether interest was calculable from the date when the Judge delivers a Ruling on application under **Section 51 (2)** of the **Advocates Act**, or if it is calculable from the date when the Bill of Costs was filed in court.

18. The learned Judge first addressed her mind to the issue as to the meaning of the word “*Bill*”. This is what my learned sister said;

*“Each case is to be decided on its own, and I must reiterate that my interpretation of the “bill” referred to in paragraph 7 of the Advocates (Remuneration) Order is one that the Advocate intends that the client should settle, but not the bill of costs served on the client for purposes of taxation.”*

19. On the question of when Interest became payable, the learned Judge said;

*“Both paragraphs 6 and 7 of the Advocates (Remuneration) Order are clear on when interest becomes payable. Here the Advocate has demonstrated that he served the client with a proforma invoice, which it duly received, with the intention that the same be settled. This in my view fits the description of the bill referred to in paragraph 7.”*

20. Nonetheless, the learned Judge went on to make the following observation;

*“It is instructive, however, that part of that interest was claimed at Item 53 of the Bill of Costs, and as the bill of costs was taxed as drawn, the interest from 16<sup>th</sup> October 2014 to June 2015 should be excluded when calculating the interest now accruing.”*

21. In effect, the court did not simply award interest on the basis of some perceived obligation. The court exercised its discretion, by expressly excluding some interest, as stated above.

22. The court further excluded the interest which had been sought in “*prayer 2*” of the application.

23. In the circumstances, it is clear that the court has discretion to determine when interest becomes calculable.

24. In relation to the meaning that my learned sister subscribed to the word “*Bill*”, I find myself unable to share the view. With the utmost profound respect for my learned sister, I hold the view that a proforma invoice is not synonymous with a bill.

25. In **ODHIAMBO OWITI & CO. ADVOCATES Vs DOMINION FARMS LIMITED, MISC. CIVIL CASE NO. 36 OF 2019**, I noted as follows;

*“The ‘Black’s Law Dictionary’ defines*

*Proforma as;*

*1. Made or done as a formality and not involving any actual choice or decision.*

*2. (Of an invoice or financial statement) provided in advance to describe items, predict results or secure approval.*

*A Proforma Invoice or Proforma Bill would thus constitute an advance document, upon which no obligation attaches. It is the precursor of the actual Invoice or Bill.”*

26. The document which the Applicant sent to the Respondent was a **PROFORMA INVOICE**. Accordingly, it was not a Bill as envisaged under **Rule 7** of the **Advocates (Remuneration) Order**.

27. I find that Interest was not payable from the date when the alleged “*Bill*” was sent or was delivered to the Respondent.

28. In the case of **OTIENO RAGOT & COMPANY ADVOCATES Vs KENYA AIRPORTS AUTHORITY, MISC. CIVIL APPLICATION NO. 95 OF 2011**, Majanja J. found guidance from the following words of Ochieng J. In the case of **D. NJOGU & COMPANY ADVOCATES Vs KENYA NATIONAL CAPITAL CORPORATION NRB HIGH COURT MISC. NO. 21 OF 2005**;

***“In my considered view, it would be wrong to calculate interest from the date when the bill was sent to the client, regardless of the fact that such a bill was then watered down through taxation. If clients had to pay interest regardless of subsequent reductions on their bill, advocates would not have the incentive to charge the correct fee notes on the first occasion. It is for that reason that I hold that the date from when interest should be calculable should be pegged to the date when the advocate sends the correct fee note. And by the ‘correct fee note’ I mean the bill which is in accordance with the terms upon which the advocate had contracted with the client, or the bill which the client does not dispute, or the bill which is in accordance with the sums awarded by either the taxing officer or by the deputy registrar in a certificate of costs.”***

29. I still hold the same considered view on the issue.

30. And I note that Majanja J. did, (In **Misc. Civil Application No. 95 of 2011**) state as follows;

***“Rule 7 entitles the Advocate to claim interest, but the time from when interest will run is not stipulated under the rule, hence it is left to the discretion of the court.”***

31. In my understanding, **Rule 7** stipulates that interest is chargeable at 14% per annum, from the expiration of one month from the delivery of the bill to the client. It therefore follows that there is a reference point, from when interest is calculable.

32. It cannot accrue before one month has expired, from the time when the bill is delivered to the client.

33. On the other hand, interest does not have to be charged, nor does it become automatically chargeable after the lapse of the one month from the date when the bill was served.

34. Pursuant to **Rule 7**, interest is chargeable provided that such claim for interest was raised before the amount of the bill is tendered in full.

35. In **JACKSON OMWENGA & CO. ADVOCATES Vs EVEREST ENTERPRISES LTD, NBI MISC. APPLICATION NO. 96 OF 1996**, L. Njuguna J. pronounced thus;

***“I have perused the Advocates Remuneration (Amendment) Order, Rule 7. Under the said rule, an advocate can only charge interest from the expiration of one month from the delivery of the bill to the client, providing such claim for interest is raised before the amount of the bill has been paid or tendered in full.***

***To comply with that provision, the applicant must prove two things:***

***(a) That one month has expired from the time he delivered his bill to the client;***

***(b) He has raised his ‘claim’ for interest before the amount of the bill has been paid or tendered in full.”***

36. In this case, the Applicant did not make a claim for interest, when the law firm delivered the Proforma Invoice to the client. Therefore, even if the said Proforma Invoice had been construed as constituting a bill, (which it is not), interest would not have been chargeable after the expiry of one month, because the law firm did not make any claim for interest.

37. Finally, I accept the advocate’s reply to the Respondent’s submissions, when they said that immediately after the taxation of the Bill of Costs, the Client should have paid the taxed costs.

38. If the client was present when the ruling on taxation was delivered, it would have immediately become aware of the quantum of the taxed costs.

39. But if the client was absent when the ruling on taxation was delivered, the advocate would need to notify him of the quantum of the taxed costs.

40. And as long as the Certificate of Costs or the Certificate of Taxation has not been varied or set aside, the sums thereon certified are final.

41. Therefore, when the advocate provides the court with information about the date when the client became aware of the quantum of the taxed costs, the client would be expected to make immediate payment from that date.

42. However, considering that under **Rule 7**, the client is given a grace period of one month from the date when the bill is delivered, until the bill starts to accrue interest, I find that a commensurate grace period would advance justice for the client, if the Advocate/Client bill is taxed.

43. Accordingly, I order that the taxed costs of Kshs 79,761/= should attract interest at Court rates from 30<sup>th</sup> September 2019, which date is 30 days from the date when the taxing officer delivered the ruling on taxation.

44. I therefore enter judgment in favour of the Applicant for

Kshs 79,761/=, together with interest thereon at 14% per annum, calculable from 30<sup>th</sup> September 2019.

45. The costs of the application dated 30<sup>th</sup> September 2019 are awarded to the Applicant.

**FRED A. OCHIENG**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF JANUARY 2020**

**T. W. CHERERE**

**JUDGE**