



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. APPLICATION NO. 296 OF 2012

BETWEEN

MAKHECHA AND COMPANY ADVOCATES.....APPLICANT

AND

CENTRAL BANK OF KENYA.....RESPONDENT

RULING

Introduction and Background

1. This matter was commenced by the applicant's advocate- client bill of costs dated 15th May 2012 in which it claimed Kshs. 25,299,686.00 from the respondent ("the Bank"). By a ruling dated 12th October 2012, the Deputy Registrar awarded the applicant Kshs. 8,917,163/-. The applicant filed a reference to the High Court contesting the Deputy Registrar's decision. On 23rd January 2013, Havelock J., upheld the decision of the Deputy Registrar. Aggrieved by that decision, the application lodged **Civil Appeal No. 48 of 2014** in the Court of Appeal. On 8th December 2017, the Court of Appeal allowed the appeal whose effect was to set aside the decision of the High Court and allow the reference which prayed that bill of costs be taxed as drawn. The decree of the Court of Appeal was finally settled on 6th December 2019.

The Application

2. By a Notice of Motion dated 16th January 2020 made under **section 51(2)** of the *Advocates Act (Chapter 16 of the Laws of Kenya)*, the application moved this court for the following orders:

1. THAT the Honorable Court be pleased to covert Certificate of Costs for Kshs. 25,299,686.90/- dated 16th day of December, 2019 into a decree and Judgment together with interest at 14% from the date of demand, i.e 16th March 2012 until payment in full.

2. THAT costs of this Application be provided for.

3. The application was supported by the affidavit and further affidavit of Wambugu Gitonga, advocate in applicant's firm, sworn on 16th January 2020 and 5th March 2020 respectively. The Bank opposed the application by the replying affidavit of Kennedy Abuga, its Director of Legal Services, sworn on 24th February 2020 and preliminary objection dated 24th February 2020.

4. When the application came up for hearing on 6th February 2020, the parties agreed that the Bank pay the principal amount of Kshs. 25,299,686.90 and the matter of interest be reserved for determination by the court. I also directed that preliminary objection be heard together with the application. The parties filed written submissions in support of their respective positions.

5. It is not in dispute that the Bank has settled the principal amount.

Applicant's Case

6. **The applicant's case is grounded on Rule 7** of the *Advocates Remuneration Order* which provides as follows;

7. An advocate may charge interest at 14% per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, providing such claim for interest is raised before the amount of the bill has been paid or tendered in full.

7. Counsel for the applicant submitted that by the letter dated 22nd April 2010, the applicant raised the issue of interest at 14% on the principal sum before filing the bill of costs in court. It argued that this gave the Bank an opportunity to negotiate or agree on the issue of interest but the respondent ignored the proposal. Counsel pointed to the letter dated 16th March 2012 from the applicant addressed to the Bank demanding settlement of fees in support of its position.

8. Since the fees remained unpaid until 13th February 2020, the applicant argued that it was entitled to interest because the delay in settling its fees has caused it great prejudice and that it is entitled to interest as prayed. Counsel cited the case of *Njeri Onyango & Co. Advocates v Ufundi Co-operative Society HC Misc. Appl. No. 100 of 2013 [2016] eKLR* where the Court, referring to **Rule 7** of the *Advocates Remuneration Order* stated that, “That provision is instructive and is as clear as day light. Accordingly, the advocate may charge interest at the rate of 14% p. a provided that the claim for interest was raised before the amount of the bill has been paid or tendered in full...”

Respondent’s Case

9. The Bank raised a preliminary objection on the ground that the Notice of Motion dated 16th January 2020 is *res judicata* as it is contrary to **section 7** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* and in particular **Explanation No. 4** which provides as follows:

7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation 4 – Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

10. Based on the aforesaid provision, counsel for the Bank submitted that during the hearing of the applicant’s reference before this court and the subsequent appeal to the Court of Appeal, the applicant never raised the issue of interest payable at all stages of those proceedings. Counsel contended that the prayer for interest runs contrary to **section 7** of the *Civil Procedure Act* as it is a matter that ought to have been a ground of attack either before the Deputy Registrar, as Taxing Officer, the High Court determining the reference and even before the Court of Appeal.

11. The Bank denied that the applicant is entitled to any interest as prayed on the ground that once all matters concerning the bill of costs were settled by the Court of Appeal and the Certificate of Taxation issued by the Deputy Registrar on 16th December 2019, the Bank promptly settled the amount due to the applicant. The Bank also took the position that as a public institution responsible for public funds, it was enjoined to adhere to efficient and transparent fiscal management and as such it would not have paid any money to the applicant until the amount due to it was finally established.

12. As regards **Rule 7** of the *Advocates Remuneration Order*, counsel for the Bank submitted that the applicant must prove that the demand for fees and interest was served on the client. Counsel stated that in this case, the applicant did not serve any demand for fees or of any intention to charge interest under **Rule 7** aforesaid. The Bank maintained that the demand for interest was made after the amounts owed were settled by an email dated 13th February 2020 at 1.07pm, following the judgement of the Court of Appeal consequently the applicant is estopped from demanding interest from 16th March 2012 as claimed. The Bank submitted that if any interest was due, then it should accrue from 13th February 2010, that is, 30 days from the date of the demand.

13. The Bank also submitted that ultimately, the award of interest is discretionary and in the circumstances, the court should strive to do justice based on the facts of the case. It urged that it would be inequitable and unconscionable to condemn the Bank to pay interest for the period the amount due was undetermined. It urged the court to take into account the Bank’s conduct and the fact that it was accountable to tax payers for its funds and any order for interest would amount to unjustly enriching the applicant.

Determination

14. From the application, depositions and submissions, two issues fall for determination. First, whether the claim for interest is *res judicata*. Second, whether the application is entitled to interest as claimed or at all.

Whether the application is *res judicata*

15. The starting point for this determination is **section 26** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* which empowers the court to award interest on the following terms:

26.(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the

court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.

16. What is clear from the aforesaid provision is that unless interest is agreed upon, the court has discretion to award interest once the amount due is ascertained by the decree. In other words, the award of interest can only be made once the amount due is ascertained by the decree. In this case, the amount due from the Bank was determined by the Certificate of Taxation issued by the Deputy Registrar. The implication of this is that the issue of interest was not an issue and could not be raised as a ground of attack in the proceedings leading to certification of the applicant's fees.

17. Further, the jurisdiction of the Deputy Registrar, as Taxing Officer, is to determine the amount due to the applicant by taxing the bill of costs in accordance with the scales provided in **Advocates Remuneration Order**. There is no provision for the Taxing Officer to determine or award interest at all and such award must await an application for judgment to be entered by the court under **section 51(2)** of the **Advocates Act**. I therefore find and hold that the issue of interest could not be raised during the proceedings prior to certification of the application costs. The applicant's Notice of Motion is therefore not *res judicata*.

Whether the applicant is entitled to interest

18. Interest is ordinarily awarded on the amount found due in accordance with the principles set out in **section 26** of the **Civil Procedure Act**. **Rule 7** of the **Advocates Remuneration Order** entitles an advocate to charge interest above the normal or applicable rate of 12% per annum provided the claim for interest was raised before payment or settlement of the advocate's bill of costs.

19. Did the applicant demand payment of interest within the meaning of **rule 7** of the **Advocates Remuneration Order**? The applicant relied on its letter dated 22nd April 2010 addressed to the Bank to support its position that it was entitled to interest at 14% per annum. The context of the letter is clearly explained in the affidavit in support of the bill of costs sworn by Wambugu Gitonga on 3rd July 2012. He explained that he represented the Bank in **Miscellaneous Bill of Costs No. 427 of 2000 (Central Bank of Kenya v Reliance Bank)** and negotiated a compromise.

20. The letter dated 22nd April 2010 addressed to the Bank by the applicant stated, in part, as follows;

22nd April 2010

The Governor

Central Bank of Kenya

Haile Sellasie Avenue

P O Box 60000

NAIROBI

Dear Sir,

RE: CIVIL APPEAL NO. 125 of 2005

CENTRAL BANK OF KENYA v KAMAL Z. SHAH

The above matter and your letter dated 20th April 2010 refers.

We write to confirm that we have communicated the Bank's proposal to the advocates for the respondents

.....

Nevertheless, the lawyers are agreeable to settling this matter on the following terms.

(1) Payment of the principal Party & Party costs awarded by the Court at Kenya Shilings Twenty Five Million Nine Hundred Sixty Four Thousand, Four Hundred & Eighty (Kshs. 25,964,480/-)

(2) Interest on the said principal amount at 14% per annum from 21st November 2001 until payment in full as provided under the **Advocates Remuneration Order**.

(3) *The respondents have indicated that they would be amenable to negotiation on the interest amount.*

(4) *The said settlement be done within the next 30 days from 21st April 2020.*

As regards our fees in the matter, we are agreeable to computation as provided under Schedule VI B paragraph (b) of the Advocates (Remuneration) Order 2006.

Your expedience in the matter will be highly appreciated.

Yours faithfully,

Signed

MAKHECHA & GITONGA

WAMBUGU GITONGA

21. My understanding of that letter is that the issue of interest at 14% per annum was in relation to the proposal that had been negotiated by the applicant on behalf of the Bank in relation to the party and party bill of costs. Its proposal on its fees was distinct and did not mention any issue of interest. In fact, the Bank responded by the letter dated 23rd April 2010 that it was willing to, "Settle Advocate/Client fees payable to yourselves based on the sum of Party & Party Costs agreed under (1) above and computed as provided for in Schedule VIB of the Advocates Remuneration Order." Again the issue of interest was not raised or dealt with in the response.

22. To confirm that the issue of interest was in respect of the proposal by the party claiming against the Bank, the applicant wrote the letter dated 27th April 2010 to the Bank, in response to the Bank's letter dated 23rd April 2010, in which it stated as follows:

27th April 2010

The Governor

Central Bank

Haile Sellasie Avenue

P O Box 60000

NAIROBI

Dear Sir,

RE: CIVIL APPEAL NO. 125 of 2005

CENTRAL BANK OF KENYA v KAMAL Z. SHAH

The above matter and your letter dated 23rd April 2010 refers.

We confirm having conveyed the Banks's revised settlement offer to the Respondent's and having received their reaction to the offer.

The position taken by the Respondent's advocates is that whilst they appreciate the Bank's offer to settle the claim at the sum of Kshs. 25,944,480/- awarded by the Court, they strongly feel that having regard to the period of time that has lapsed since the costs were awarded, it is only fair and just that the Bank pats interest accrued on the said amount, at the court rate of 14% per annum.

However, in consideration of the effort made by the Bank to bring this matter to an early conclusion, the Respondent's advocates are ready to offer a rebate to the Bank on the interest sum, subject to the Bank arranging payment within 30 days. In that regard, the advocates have offered to accept payment of interest on the decretal sum at the reduced interest rate of 10% per annum from the date of award of the costs i.e. 21st November 2001.

Kindly favour us with your final position in regard to the issue of interest which is what is now outstanding.

Yours faithfully,

Signed

MAKHECHA & GITONGA

23. Even the letter dated 13th May 2010 addressed by the applicant to the Bank, which was the subject of the reference and proceedings in the court of appeal, the applicant did not raise the issue of interest to be paid by the Bank. In that letter the applicant stated, “As regards out fees, we are agreeable to settlement of the same as per your letter dated 23rd April 2010 and confirm you may proceed to pay Kshs. 12,972,240/=”. Finally, the applicant’s letter to the Bank dated 16th March 2012 making demand for fees did not notify the Bank that it was charging interest on the outstanding fees.

24. The letters, whose contents I have set out, leaves no doubt that the issue of interest was raised by the applicant in reference to the party and party bill of costs it was defending on behalf of the Bank. The purpose of making a claim for interest is notify the client that the advocate is making a claim for interest if the bill is not settled. This is fortified by the fact that a month must elapse before the higher interest is due. In conclusion, I find and hold that the applicant did not give the Bank notice that it would be claiming interest at 14% p.a. The applicant did not comply with **Rule 7** of the **Advocates Remuneration Order** by raising the claim for interest before payment of the amount of fees certified.

25. The conclusion I have reached means that the default position on interest in **section 26** of the **Civil Procedure Act** applies and which states as follows:

26.(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.

25. Under **section 26(1)** aforesaid the court has discretion to award interest in two stages. First, the period from the date the suit is filed to the date when the Court gives its judgment and second, the period from the date of the judgment to the date of payment of the sum adjudged due or such earlier date as the Court may, in its discretion fix. For purposes of this case, the date the suit was filed was when the bill of costs was lodged, that is 15th May 2012. Interest for the period prior to filing suit is determined by substantive law either under the contract or by custom and usage which is not applicable to these proceedings (See generally *Gulamhussein v French Somaliland Shipping Company Limited* [1959] EA 25, *Highway Furniture Mart Limited v The Permanent Secretary & Another* EALR [2006] 2 EA 94 and *Jane Wanjiku Wambu v Anthony Kigamba Hato and 3 Others* KBU HCCA No. 32 of 2016 [2018] eKLR).

27. The purpose of an award of interest to compensate the claimant for being denied it money (see *Lata v Mbiyu* [1965] EA 592). In this case, the applicant had been kept out of its money since the bill of costs was filed. The applicant is therefore entitled to interest at court rates from 15th May 2012.

Disposition

28. For the reasons I have set out, the respondent shall pay interest at 12% per annum on the Kshs. 23,772,981.90 from 15th May 2012 until the date of payment. The respondent shall pay costs of the application assessed at Kshs. 20,000/=.

DATED and DELIVERED at NAIROBI this 12th day of JUNE 2020.

D. S. MAJANJA

JUDGE

Ms Shaw with her Ms Munyu instructed by Virginia Shaw and Company Advocates for the applicant.

Mr Ouma instructed by Murgor and Murgor Advocates for the defendant.