



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

MISC. CIVIL APPLICATION NO. 50 OF 2020 (FORMERLY H.C.MISC. 17 OF 2020)

MWANGANGI & COMPANY ADVOCATES.....APPLICANT

VERSUS

MACHAKOS COUNTY.....RESPONDENT

AND IN THE MATTER OF A TAXATION DECISION DELIVERED ON 12.3.2020

BUT DATED 5.3.2020 IN MACHAKOS HIGH COURT MISC.APPLICATION NO.197 OF 2014:

MWANGANGI & COMPANY ADVOCATES vs MACHAKOS COUNTY

AND

IN THE MATTER OF

MACHAKOS H.C.C.C NO. 225 OF 2019 (formerly Nairobi H.C.C.C No. 2765 of 1998):

DANSON MUTUKU MUEMA & 118 OTHERS –VS- COUNTY OF MACHAKOS & 3 OTHERS

JUDGEMENT

1. By a Notice of Motion dated 3rd August, 2020 expressed to be brought under the provisions of Section 51(2) of the *Advocates Act*, Cap 16 Laws of Kenya; Paragraph 7 of the Advocates Remuneration Order; Order 51 Rule 1 of the *Civil Procedure Rules*; Section 1A, 1B and 3A of the *Civil Procedure Act* and all other enabling provisions of the law, the applicant herein, **Mwangangi & Company Advocates**, substantially seeks an order that this Honourable Court be pleased to enter judgement for the Applicant against the Respondent for the sum of Ksh.71, 095, 942/= together with interest at 14% per annum from 16/12/2014 till payment in full. The applicant also seeks an order that the costs of the said application be provided for.

2. According to the applicant, through her legal firm she rendered legal services to the Respondent in Machakos H.C.C.C No. 255 of 2009 (formerly Nairobi H.C.C.C No. 2765 of 1998): **Danson Mutuku Muema & 118 Others versus County Council of Masaku & 3 Others (“the Suit”)**, upon instructions of the Respondent. However, the Respondent failed/neglected to pay our costs in the suit prompting her to file, on 16/12/2014, an Advocate/Client Bill of Costs dated 15/12/2014 (“**the Bill of Costs**”) in Machakos High Court Misc. Application No. 197 of 2014: **Mwangangi & Company Advocates versus Machakos County**.

3. On 12/3/2020 the Taxing Officer delivered a Decision/ruling dated 5/3/2020 on a re-taxation of the Bill of Costs done pursuant to the Orders of this Court issued in Misc. Application No. 318 of 2016. The Applicant was dissatisfied with the re-taxation Decision and filed the Reference application herein to challenge the same and vide a Ruling of this Court delivered on 16/6/2020 in the Reference herein, the Court assessed the costs payable to the Applicant on the Bill of Costs and VAT thereon at Ksh.71, 095, 942/= and a Certificate of Taxation was issued upon the said Order of 16/6/2020. The said Order of 16/6/2020 on the said Ruling herein and the Certificate of Costs have been served upon the Respondent and have not been satisfied nor set aside and the retainer has not been disputed.

4. According to the Applicant, the Reference application herein was filed under a Certificate of Urgency on the basis of the injustice, hardship and inconvenience occasioned to the Applicant by the long delay in settling the matter of the costs herein, and this Honourable Court certified the urgency and expeditiously heard and determined the application and the urgency subsists to-date as the costs have not been settled. It was therefore averred that it is in the interest of justice and fairness that this Court do grant the prayers sought herein since the Court has inherent power to do so.

5. In response to the said application, the Respondent vide a replying affidavit sworn by **James Kathili**, its Chief Legal Officer, while acknowledging that the applicant's costs were assessed in the said sum deposited that interest on the aforementioned figure ought to be tabulated from 16th June, 2020 when the judgement was entered and not from 16th December, 2014 as proposed by the applicant.

6. It was deposed that since the said bill had been taxed twice before on 14th November, 2016 and 12th March, 2020, and after each taxation the applicant filed a reference challenging the same eventually leading to the ruling of 16th June, 2020, the respondent cannot be condemned to pay interest for a period of six years while it is the applicant who always challenged the decision of the taxing master.

7. In her submissions, the Applicant contended that since the Respondent does not deny that the first bill of costs was served on the 16th December, 2014, this Court should hold that that this is the effective date of the payment of interest on the taxed costs which the Applicant claims at the rate of 14%. In support of this position the Applicant relied on the decision of **Nzioka, J** in the case of **Nyaundi Tuiyott & Co. Advocates versus African Merchant Assurance Co. Limited [2018] eKLR** where she held that:

“There is no challenge against the Taxation and/ or the Certificate of Taxation.As regards the interest rates, I find that the provisions of Rule 7 of the Advocates (Remuneration) Rules provides for interest rates at 14% per annum, payable from the 30th day from the date on which the Bill of Costs was delivered.”

8. She also relied on the decision of **Majanja, J** in the case of **Makecha and Co. Advocates versus Central Bank of Kenya [2020] eKLR** where he held that:

“under Section 26(1) of the Civil Procedure Act 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...the purpose of an award interest is to compensate the claimant for being denied its 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.”

9. The Court was therefore urged to wholly adopt this finding and award interest on the costs effective 16th December, 2014.

10. It was further submitted that since the Court failed to find in favour of the Applicant on the issue raised of the loss of the value of the Kenya Shilling and/or inflation since 1998 when the suit giving rise to the taxation was filed and hence the instruction fees was deemed to have been earned, a factor that called for the enhancement of the costs taxed on *inter- alia* the instruction fees which costs have remained unpaid to-date, this Court has the discretion to make any such other orders as it deems fit herein in order for ends of justice to be met since the Applicant had provided documentary evidence of the loss of value of the Kenya Shilling from Central Bank of Kenya.

Determination

11. I have considered the issues raised in this application.

12. Section 51(2) of the **Advocates Act** under which the application was based provides:

The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.

13. It is therefore my view that where an advocate's costs have been taxed and a certificate issued, the only bar to the entry of judgement is if there is a dispute as to the retainer.

14. In this case as retainer is not disputed there is no reason why judgement cannot be entered in terms of the Certificate of Costs. In **Mbai & Kibuthu Advocates vs. Mbo-I-Kamiti Farmers Company Limited Nairobi (Milimani) HCMA No. 659 of 2004, Ochieng', J** held that where there is no dispute as to the retainer and the bill has been taxed, the certificate of the taxing officer by whom the bill has been taxed shall, unless set aside or altered by the Court, be final as to the amount of costs covered thereby. Accordingly, the Court proceeded to grant judgement in favour of the applicant.

15. In other words once a certificate of the taxing officer by whom an advocate and client bill has been taxed, unless the same is set aside or altered by the Court, it is final as to the amount of the costs covered thereby, and there is no need to file a suit for recovery therefor and the Court is thereby empowered, to order that judgment be entered for the sum certified to be due with costs. **Warsame, J** (as he then was) therefore held in **Ragot & Company Advocates vs. West Kenya Wholesalers Ltd Kisumu HCMISCCA No. 244 Of 2002** that under section 51(2) of the **Advocates Act**, a certificate of the taxing master when acquired is final as to the amount and when there is undisputed retainer section 48(2) and 49 of the **Advocates Act** cannot apply. Similarly, **Ochieng' J** in **Kerandi Manduku & Company vs. Gathecha Holdings Limited Nairobi (Milimani) HCMA No. 202 of 2005** held that section 51(2) of the **Advocates Act** gives the Court the discretion to enter judgement where a suit has not been filed for recovery of costs due to an advocate. This section is, however, only exercisable where there is no dispute as to the retainer and a certificate of the taxing officer has been issued and has not been challenged.

16. The only issue raised by the Respondent is the period when the interest ought to accrue on the taxed or assessed costs.

17. Paragraph 7 of the **Advocates Remuneration Order** provides as hereunder:

An advocate may charge interest at 14 per cent 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, provided that such claim for interest is raised before the amount of the bill shall have been paid or tendered in full.

18. From the foregoing, it is clear that an advocate is entitled to charge interest at 14 per cent per annum after expiry of one month from the delivery of the Bill. In this case it is contended which contention is not disputed that the Bill in issue was served on 16th December, 2014. Therefore, unless the Respondent paid or tendered the amount in the Bill in full, the Applicant is entitled to the said interest. In other words, a Client upon whom a Bill is served can escape the payment of the interest by either paying the amount claimed or tendering the same. In my view the fact that the said amount is tendered does not bar the Client from still contesting the amount claimed. However, where the Client neither pays the same nor tenders it, he runs the risk of having to contend with the payment of interest from the date commencing one month from the date of delivery of the Bill till payment in full.

19. Consequently, judgement is hereby entered in favour of the Applicant/Advocates in the sum of Kshs 71,095,942/= with interest at 14% from 16th January, 2015 till payment in full together with costs.

20. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 19th day of November, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Muumbi for the Respondent

CA Geoffrey