REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MACHAKOS

MISCELLANEOUS CIVIL APPLICATION NO. 74 OF 2015

IN THE MATTER OF THE ADVOCATES ACT CHAPTER 16, LAWS OF KENYA

MUEMA KITULU

T/A MUEMA KITULU & CO ADVOCATES............APPLICANT

VERSUS

COUNTY GOVERNMENT OF KITUI.................RESPONDENT

RULING

1. By a Notice of Motion dated 6.6.18 and filed on 12.6.2018, brought under Section 51(2) of the Advocates Act Cap 16 Laws of Kenya, Rule 7 of the Advocates Remuneration Order, Order 50(1) of the Civil Procedure Rules and Sections 3 & 3A of the Civil Procedure Act and all other enabling provisions of the law, Muema Kitulu (hereinafter referred to as the Advocate) prays for Orders:-

> *a)* ***THAT the Honourable Court be pleased to enter Judgment for Kshs 771,189 against the Respondent being the taxed and certified costs.***
>
> *b)* ***THAT the Honourable Court be pleased to award interest of 14% from 14th April 2015 until payment in full.***
>
> *c)* ***THAT the costs of this Application be borne by the Respondent.***

2. The application is premised on the grounds set out in the application and supported by the affidavit of the advocate dated 6.6.2018.

3. There was opposition to the application vide grounds of opposition dated 19.10.2018. The Respondent finds the application incompetent, bad in law, devoid of merit and that there is no basis to condemn the respondent to pay 14% interest as from 14.2.2015. The Respondent sought for the dismissal of the application with costs.

4. The application was canvassed vide written submissions. The Applicant filed his on 27.1.2019 while the Respondent filed theirs on15.11.2018.

5. The Applicant framed two issues for consideration. Firstly, whether the applicant is entitled to the 14% on the taxed cost and secondly, when does the 14% begin to run? On the first issue, learned counsel relied on the provisions of Rule 7 of the Advocates Remuneration Order and submitted that the amount on the bill has not been paid in full and therefore the cited provision entitled the advocate to charge 14% interest. Counsel cited the case of **Otieno Ragot & Co Advocates v Kenindia Assurance Co Ltd (2018) eKLR** where the court found that a client may avoid the interest by settling the bill immediately he is notified of the same and also that the client ought not to be penalized for interest if there is delay in prosecuting the bill.

6. On the 2nd issue, learned counsel submitted that in line with the provisions of Rule 7 of the Advocates Remuneration Order, the 14% begins to run from the date of service. He relied on the case of **Kithi & Co Advocates v Menengai Downs Ltd (2015) eKLR.** Counsel further submitted that the s were taxed vide ruling delivered on 3.11.2015 and the applicant filed an application for review on 6.11.2015 that was dismissed on 6.6.2018 whereupon the instant application for judgement was made and there was no delay in following the required procedure. Hence the Applicant is entitled to charge the 14% interest and prayed that the preliminary objection be found to be without legal foundation and judgement be entered as prayed.

7. The Respondent submitted that there is no evidence on record as to when the bill of costs was served on the respondent. Further that the Applicant filed an objection to the taxed bill of costs and thus the Respondent had to wait for the decision before any payment could be made. Learned counsel relied on the case of **Machira & Co Advocates v Arthur K. Magugu & Another (2015) eKLR** where the court

held that the court has discretion to order from when and at what rates interest would be payable on the principal sum and further that it would be punitive for a client to pay interest in respect of an application for entry of judgement made many years after the issuance of the certificate of taxation.

8. I have considered the application before me, the grounds of opposition and the submissions. The issues for determination are firstly, whether this court should grant the application for entry of judgement on taxed costs. Secondly, whether the respondent has raised sufficient grounds to deny the advocate interest of 14%.

9. In addressing the first issue, an advocate armed with taxed or assessed costs and the relevant certificate of taxation should make a formal demand of the assessed amount from the client and whatever amount the client fails to pay, the advocate should proceed pursuant to Section 49 and Section 51 (2) of the Advocates Act. It appears that this is the path the Applicant has taken.

10. According to the record, the advocate-client bill of costs was lodged on 23rd April, 2015 and on 29.4.2015 a date was taken for hearing in the absence of the Respondent, which date was 2.6.2015. On 4.6.2015, a notice of appointment was filed by J.K. Mwalimu and Co Advocates and on 10.7.2015 they filed submissions in response to the bill of costs dated 10.4.2015. The advocate filed their submissions on 18.8.2015. A ruling in respect of the bill of costs was delivered on 3.11.15 in the presence of advocates for both parties and on 17.11.2015 the Applicant filed a notice of objection under Rule 11(1) and (2) of the Advocates Remuneration Order. The application for review was dismissed on 6.6.2018. A certificate of taxation dated 17.1.2018 was received by counsel for the Applicant. There is no evidence of service of the same and service has not been challenged by affidavit or otherwise by the Respondent. Therefore it can be concluded that the Certificate of Taxation was served on the Respondent.

11. Section 51 Sub-rule (2) of the Advocates Act provides that :

> **"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."**

12. From the record, a Certificate of Taxation dated 17.1.2018 was issued and as it stands now, the same has not been set aside or altered. I find that the Respondent has not raised any grounds to oppose the application for judgment and there may be no reason to deny the Applicant, the Judgment being sought. I am guided by the case of ***<u>Musyoka & Wambua Advocates v Rustam Hira Advocate (2006) eKLR</u>*** where it was held:-

> **"Section 51 of the Act makes general provisions as to taxation, as the marginal note indicates. One of those provisions is that the Court has discretion to enter Judgment on a Certificate of Taxation which has not been set aside or altered, where there is no dispute as to retainer. This in my view is a mode of recovery of taxed costs provided by law, in addition to filing of suit……**

13. The Respondent herein on the other hand challenged the entitlement of the advocate to interest. The challenge is vide grounds of opposition filed by the Advocate for the respondent who has averred to factual matters. I find that this concern would have been well addressed in a Replying Affidavit. The law is clear that a preliminary objection and/or grounds of opposition relates purely to matters of law.

14. In the Court of Appeal decision of; ***<u>Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd [1969] E.A. 696</u>***, **Law, JA (as he then was)** stated as follows:

> ***"I agree that the application for the suit to be dismissed for want of prosecution should have taken the form of a motion, and not that of a 'preliminary objection' which it was not. So far as I am aware, a preliminary objection <u>consists of a point of law</u> which has been pleaded, or which arises by clear implication out of pleadings, and <u>which if argued as a preliminary point may dispose of the suit.</u> Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."***

15. Further, the said grounds of opposition are limited to matters of law and the absence of rebuttal by way of facts, the grounds of opposition have not shaken the Applicants case. From the pleadings on record, there is no serious objection to the application by the Respondent. On the record is grounds of opposition that contain insufficient grounds. The same is rather vague and in the absence of factual evidence that the Respondent ought to present to court, it is not clear what the Respondent seeks from the court and the court cannot cure the defect therein. The grounds of opposition do not convince me why the Applicant is not entitled to interest. The upshot of my finding on the second issue is that the grounds of opposition have not seriously challenged the Applicant's application.

16. Even if for argument's sake were to consider the grounds of opposition, service of the certificate is not challenged. An attempt was made in the submissions but submissions cannot take the place of pleadings or evidence. This was held in the case of **<u>Daniel Toroitich Moi vs. Stephen Muriithi & Another [2014] eKLR.</u>** Therefore, I find that there is no reason to deny the Applicant judgement based on the Certificate of taxation dated 17.01.2018 as no reason has been raised to deny the Applicant interest on the taxed costs.

17. It is trite law that the costs follow the event. Therefore the applicant shall have the costs of the application.

18. In the result it is the finding of this court that the Applicant's application dated 6.06.2018 has merit. The same is allowed as prayed save that the interest of 14% shall run from 3.11.2015 until payment in full.

Signed, Dated and delivered at Machakos this 20th day of June, 2019.

D. K. KEMEI

JUDGE