



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL MISC. APPLICATION NO. 968 OF 2006

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

AND IN THE MATTER OF AN APPLICATION UNDER S. 51 OF THE ADVOCATES ACT

MERCY NDUTA MWANGI T/A

MWANGI KENG'ARA & COMPANY ADVOCATES.....ADVOCATE/APPLICANT

AND

INVESCO ASSURANCE COMPANY LIMITED.....CLIENT/RESPONDENT

RULING

Introduction and background

1. Pursuant to Section 51(2) of the Advocates Act (Cap 16) the Applicant launched a Notice of Motion application on 12 April 2017 in which she seeks the following relief:

a. That judgment be entered for the taxed Advocate / Client costs of Kshs. 79,177.00 per the certificate of Taxation dated 29 March 2017 with interest therein at the rate of 9% per annum with effect from 3 November 2006 until payment in full.

b. That the costs of [sic] this suit be awarded to the Advocate/Applicant.

2. The factual background to the applicant's application is as follows.

3. The Applicant is a legal practitioner of this court. In 2004 she was instructed by the Respondent to represent the Respondent in Civil Case No. 13533 of 2004 filed before the Chief Magistrate's Court. The Respondent had been sued. The Applicant duly carried out the retainer and filed a defence statement. The claim was for Kshs. 997,772/= plus interest.

4. The Respondent was to later sever the retainer. On 14 September 2006 the Applicant filed her Bill of Costs for assessment. The Bill which was contested was however not taxed until some ten years later on 27 March 2017 and a certificate of taxation issued two days later. The Applicant's costs were assessed at Kshs. 79,177/=. On 28 March 2017, the Applicant notified the Respondent that the Applicant would be claiming interest on the taxed costs at the rate of 9% p.a from 3 November 2006 being the thirtieth day after service of the Bill of Costs upon the Respondent. The Respondent neither paid the taxed principal costs nor the demanded interest.

5. On 10 May 2017 when the application first came up before me for hearing the Respondent gave an

informal notice of its intention to oppose the application on the claim for interest. The Respondent was however later to file on 13 July 2017, a formal notice of opposition consisting some five grounds. The Respondent pleaded laches. The Respondent also contended that the applicant would unfairly enrich herself if awarded interest. Finally, the Respondent asserted that the application was incompetent, fatally defective and amounted to a gross abuse of the court's process.

The claim

6. The Applicant's case was relatively straight forward.

7. The Applicant contended that the assessed costs had not been challenged by way of reference and were thus payable. The applicant asserted that the certificate of costs had also not been varied; set aside or vacated and that there was no dispute on the retainer. According to the Applicant judgment had to be summarily entered in favour of the Applicant together with interest as the Respondent had failed to pay the costs even after the taxation.

8. It was also the Applicant's case that she was entitled to interest both under Section 51 of the Advocates Act which gives the court powers to make orders as may be appropriate including orders on interest and also under Rule 7 of the Advocates Remuneration Order.

9. The Applicant explained the delay of nearly ten years in taxing the Bill of Costs on the fact that there was a moratorium ordered by court which stayed any court proceedings, including taxation, against the Respondent. The order was stated to have been issued on 1 July 2008 in High Court Case No. 318 of 2008. The Applicant contended that it was not until January 2017 when the orders staying the proceedings were vacated.

10. The Respondent's response was to the point that the delay in taxing the Advocate/Clients' Bill of Costs had robbed the court of any jurisdiction to award the Applicant interest. The Respondent contended that the Applicant was not entitled to interest as a matter of course.

Discussion and Determination

11. In view of the foregoing background and the respective submissions by counsel, the two issues which I am called upon to determine are the following:

a. Is the applicant's application incompetent and an abuse of the court process.

b. Is interest payable and, if so, does the interest on the taxed amount of Kshs. 79,177/= run from 3 November 2006 or from the date of taxation and until when.

12. Factually, there is no controversy between the parties save the date when the moratorium on legal proceedings against the Respondent was lifted.

13. It is common cause that the Respondent retained the Applicant in 2004 to represent the Respondent in Civil Suit No. 13533 of 2004 and that the Applicant duly represented the Respondent. It is also common case that the Applicant filed a Bill of Costs on 14 September 2006 after the Respondent failed to settle the applicant's fee note and, that the Bill of Costs was only taxed in March 2017.

14. There is also no controversy that there existed a moratorium or stay of all legal proceedings against the Respondent. The stay was imposed in 2008. As a result the Applicant could not proceed with the taxation. Controversy emerges when the Applicant contends that the moratorium was only lifted in January 2017 whilst the Respondent states that it was lifted in 2011.

15. On the principal amount, I have no hesitation entering judgment for the Applicant. Under Section 51(2) of the Advocates Act, the court may enter judgment on a certificate of taxation where it is demonstrated that the certificate of taxation has neither been set aside nor altered and further that there is

no dispute as to the retainer.

16. The Respondent has not shown cause, as provided under Section 51(2) of the Advocates Act and I have no option but to go along with the Applicant's contention that she is entitled to judgment on the principal amount.

17. The instant proceedings were also appropriately commenced by the Applicant after the assessment of her costs and after the Respondent had been served with a notice to pay the amount assessed to no avail.

18. In the circumstances, I do not see how it may be contended that the proceedings are an abuse of the court process. In any event, I did not hear the Respondent to pursue this line of argument with any vigor and neither did the Respondent point to any particulars amounting to abuse of the court process. I consequently reject the Respondent's argument that the proceedings are incompetent.

19. There is however need for a closer consideration of the Applicant's claim for interest.

20. The court's power to award interest to an attorney on taxed costs is discretionary and obtains under s.51(2) of the Advocates Act . Rule 7 of the Advocates Remuneration Order also in a way also almost guarantees an advocate interest on his costs and disbursements. Couched in non-mandatory terms, an advocate is entitled to charge interest on his disbursements and costs. The Rule states as follows:

7. Interest may be charged

An advocate may charge interest at 14per cent per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from 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.

21. The interest charged by the advocate is deemed as a claim and is recoverable, where not voluntarily paid by the client, through the ordinary process of the court at the time of enforcement of the payment of costs or disbursements. The court has in such a case the discretion to confirm the claim or deny the claim and it ought not to be argued that the notification alone under Rule 7 issued by the advocate obliges the court to award interest.

22. Rule 7 is pre-emptory. The interest payable under Rule 7 will be awarded once it is shown that the advocate has issued an appropriate notification that he has a claim in interest. Such a notification, in my view, may assist to embolden the courts resolve as well to make an order for the payment of interest under Section 51(2) of the Advocates Act.

23. Section 51(2) of the Advocates Act expressly grants the court powers to make any such order in relation to a certificate of taxation as it thinks fit. By the better reason, the court may under the same provision of the law, make an order for the payment of interest on the amount certified as costs and from any specified date. Again, it must be pointed out that the award of interest is discretionary.

24. The court's discretion to award interest extends, in my view, to reducing the period for which interest is payable on any award. The discretion also extends to altering the rate at which interest is payable on any award. And, the court may exercise both. Ordinarily, the conduct of the parties to the litigation will be a relevant factor to be considered by the court and where there has been delay in litigating, the question will be whether it was caused by the party claiming interest or the party liable to pay it. Even, where the law, including regulations, provide for payment of interest, the court may actually withhold awarding the same if justice requires that it be withheld.

25. I heard both parties on this issue of interest and of the delay in having the Applicant's profit charges (costs) and disbursements assessed.

26. The Applicant states that she already raised her claim for interest pursuant to the provisions of Rule 7

of the Advocates (Remuneration) order. This is not disputed. It is also noteworthy that the Respondent since the taxation or claim for payment has failed or neglected to make any payment. In my view, the applicant is entitled to interest and the only question would be from which date.

27. Perhaps, I may also point out that the award of interest under Section 51(2) is guided by various factors including but not limited to the circumstances of each case, conduct of client, the amount demanded, default in payment after demand and or delays in payment after demand. Ordinarily, the consequences for a person who wrongfully delays or defaults in making payment is that interest will be payable on the liquidated sum: see **Prof Kerr “The principles of the Law of contract”, 2002, 6th Ed pp 19,616**. The obligation to pay interest arises when one obliged to pay is in default or is *in mora*.

28. In the present matter, the Applicant contends that the obligation arose immediately the Bill was served upon the Respondent. The Respondent in turn argues that the amount claimed as interest was only payable once the principal amount was assessed due to the delay in assessing the bill. The applicant retorts that assessment was stalled by the court and not by the applicant.

29. There is evidence before me that even after assessment of costs and notifications to pay the Respondent is yet to satisfy the principal amount. There is also evidence before me that there was indeed a moratorium as well as a court order which stayed all proceedings including taxation proceeding as against the Respondent. Indeed, any proceedings undertaken during the moratorium period were declared null and void by the court on 16 November 2011.

30. I would consequently agree with the Applicant’s submissions that her hands were tied. The Bill as filed could not have been taxed earlier as the Respondent contended.

31. I have perused the order which re-confirmed the moratorium as well as the stay. The order which was issued pursuant to Section 67C of the Insurance Act (Cap 487) did not however cover interest. It did not stay or put on hold the accrual of interest on the debt. Thus while proceedings could be stayed the accrual of interest could not.

32. The Respondent additionally submitted that the moratorium was lifted in 2011 with the Applicant countering that it was in 2017. It was truly for the Applicant to show the court when the moratorium was lifted. She did not.

33. Consequently, in the circumstances of this case, I would only allow interest for the period running 2006 to end 2011. The delay in prosecuting the Bill after 2011 was not explained to my satisfaction. The ends of justice may never be met when indolent litigants are rewarded even by an award of interest.

34. By way of disposal the application is allowed to the extent only that judgment will be entered as against the Respondent for the taxed amount together with interest thereon at the rate of 9% from 3 November 2006 until 31 December 2011. A decree is to be issued for execution forthwith. I also award costs of the application to the Applicant, assessed at Kshs 7500/= recoverable under the decree issued herein.

Dated, signed and delivered at Nairobi this 31st day of July, 2017

J. L.ONGUTO

JUDGE