



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
MISC CASE NO 33 OF 2010
IN THE MATTER OF THE ADVOCATES' ACT

AND

IN THE MATTER OF ADVOCATES REMUNERATION ORDER

AND

IN THE MATTER OF THE ADVOCATES CLIENT BILL OF COSTS

SINGH GIATU & CO ADVOCATES.....ADVOCATE

VERSUS

CITY FINANCE BANK LIMITED.....CLIENT

RULING

1. The Advocate's Notice of Motion application dated and filed on 8th April 2014 was brought pursuant to the provisions of The Advocates Remuneration Order Part 7, Sections 80 and 26, Order 45 of the Civil Procedure Act Rules 1, 2 and 6 and Order 51 Rule 1 and the inherent jurisdiction of the court. Prayer No (1) was spent. It sought the following remaining orders:-
 1. Spent.
 2. **THAT judgment of 24th January 2014 and decree be reviewed so that interest be paid on the principal sum and adjudged from 6th May 2010.**
 3. **THAT costs be provided for.**

THE ADVOCATE'S CASE

2. The application was supported by the Affidavit of James Singh Gitau, Advocate that was sworn on 8th April 2014. It was his contention that the taxed costs in the sum of Kshs 1,442,726/= ought to have attracted interest from 6th May 2010 when the Taxing Master delivered her ruling and not from the date when the Certificate of Costs was issued, a prayer the Client had not opposed when the Advocate filed its Notice of Motion application dated 28th June 2013 and filed on 4th July 2013.
3. The Advocate therefore sought a review of the Ruling that was delivered on 24th January 2014 in

which the Court found that interest ought to have accrued from 19th June 2013 and not from 6th May 2010 which was an error apparent on the face of the court record. The Advocate's written submissions were dated 21st July 2014 and filed on 22nd July 2014.

THE CLIENT'S CASE

4. In opposition to the said application, on 23rd May 2014, Fred Chumo, the Client's Head of Legal Services swore a Replying affidavit on behalf of the Client. The same was filed on 26th May 2014. Its written submissions were dated and filed 22nd July 2014.
5. The Client stated that the court considered the Advocate's claim for interest at fourteen (14%) per cent with effect from 6th May 2010 and exercised its discretion when it directed that interest would accrue from 19th June 2013 till payment in full.
6. It was therefore its contention that there was no error apparent on the face of the court record and the Advocate had failed to disclose the ground upon which the review had been sought. In any event, the Client was emphatic that the question of when interest ought to have been awarded was a question of law that could only be heard on appeal and not by way of review.
7. It averred that it fully complied with the Ruling that was issued by the court on 24th January 2014, a fact that the Advocate failed to disclose and that it would suffer prejudice if the said judgment was varied. It therefore urged the court to dismiss the Advocate's present application as it had been brought in bad faith.

LEGAL ANALYSIS

8. It is not in dispute that the court can review its own orders as has been stipulated in Section 80 of the Civil Procedure Act Cap 21 (Laws of Kenya) and Order 45 Rule 1 of the Civil Procedure Rules, 2010. Order 45 Rule 1(1) of the Civil Procedure Rules, 2010 provides as follows:-

“Any person considering himself aggrieved-

- a. **by a decree of order from which an appeal is allowed, but from which no appeal has been preferred; or**
 - b. **by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be procured by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”**
9. Indeed, the court was in agreement with the position that was taken in **Panthion Limited vs Industrial and Commercial Development Corporation [2008] eKLR** which referred to the holding in the case of **Sansora Wire & Nail Works Ltd vs Shreeji Enterprises Kenya Ltd [2005] eKLR** a case that was relied upon by the Advocate regarding the circumstances under which such a review can be undertaken.
 10. The court did also note that that was the same position that has been held in the cases of **Njoroge & 104 Others (Suing in representative capacity for Kariobangi South Civil Servants Estate Tenant Purchasers) vs Savings & Loans Kenya Ltd & Another [1990] KLR 78** and **National Bank of Kenya Limited vs Ndungu Njau [1997] eKLR** that were relied upon by the Defendant.
 11. The pertinent question that was before the court for determination, however, was whether or not the Advocate had met the threshold of review of orders and if the court could review its decision rendered under Section 51 (2) of the Advocates Act Cap 16 (Laws of Kenya).
 12. From the submissions by the Advocate, the issue that appeared to be before the court for determination was whether or not interest on the sum of Kshs 1,442,726/= ought to have attracted interest from 6th May 2010 when the Taxing Master delivered her ruling or from 19th June 2013 when the Certificate of Costs was issued. It was the Advocate's argument that it ought to have

- been compensated from the date the Taxing Master delivered her ruling to the time the Certificate of Costs was issued, a period of about three (3) years.
13. The Advocate placed reliance on the case of **C.M. Mitema & Co Advocates vs City Council of Nairobi [2011]eKLR** where Dulu J held that interest could only run from the date of taxation and Section 26 of the Civil Procedure Act, which was that interest could be awarded from the date of the suit to the date of the decree. It urged the court to exercise its discretion to allow the review on the time interest should run.
 14. On the other hand, the Client emphasised that the Advocate had not demonstrated any of the grounds under Order 45 Rule 1 of the Civil Procedure Rules that would warrant a review and that the Advocate's argument that interest ought to have run from 6th May 2010 was not an error on the face of the court record.
 15. The court wishes to point out that the Advocates Remuneration Order is a complete code that would render certain provisions of the Civil Procedure Act and Civil Procedure Rules, inapplicable. Appreciably, Order 52 of the Civil Procedure Rules provides that only applications under Section 26(2) and (6), Section 28(2), Section 45, Section 45(2), (4) and (5), Section 50 (1), Section 52, Section 62 (1), Section 73 (1) all of the Advocates Act Cap 16 (Laws of Kenya) are governed by the Civil Procedure Rules.
 16. The rest of the Sections of the said Advocate Act would not come within the ambit of Order 45 Rule of the Civil Procedure Rules or Section 26 of the Civil Procedure Act that deals with the issue of interest for the reason that Section 51 (2) of the Advocates Act and Rule 7 of the Advocates Remuneration Order guide the court on how to award interest.
 17. While the circumstances of the case of **Pius Kinuthia Njuguna vs John Mushembi & Another [2005] eKLR** that was relied upon by the Client were distinguishable from the facts of this case, it will suffice for this court to state that the principle that failure to award interest would not be an error on the face of the court record as was held therein would also apply in a case such as this. This is because the court has wide and unfettered discretion to grant such orders as it thinks fit.
 18. Section 51 (2) of the Advocates Act provides as follows:-

“The certificate of the taxing master 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 costs covered thereby, and the Court may make such order in relation thereto as it thinks fit,(emphasis court) including in a case where the retainer is not disputed, an order that judgment be entered for the sum to be certified to be due with costs.”

19. Several principles can be derived from the said Section. These are that :-
 - a. **the amount by the taxing master shall be final unless set aside or altered by the court under Rule 11 of the Advocates Remuneration Order;**
 - b. **the court has power to exercise its discretion to make such order it thinks fit to grant;**
 - c. **the court can enter judgment where the retainer is not disputed; and**
 - d. **the court can make an award on costs.**
20. In its written submissions dated 4th October 2013 and filed on 7th October 2013 in respect of its Notice of Motion application dated 28th June 2013 and filed on 4th July 2013, the Advocate submitted that Part 7 of the Advocates Remuneration Order provided that an Advocate may charge fourteen (14%) per cent the Advocate on costs on expiration of one (1) month from the delivery of his bill to the client provided such claim is raised before the bill has been rendered in full.
21. It also pointed out that Ogola and Mabeya JJ had in **HC Misc 709 of 2011 Singh Gitau Advocates vs City Finance Bank** (unreported) and **HC Misc 468 of 2011 Singh Gitau Advocates vs City Finance Bank** (unreported) respectively awarded interest at fourteen (14%) per cent from the date of award.
22. In its Ruling of 24th January 2014, this court exercised its discretion and entered judgment in favour of the Advocate for the sum of Kshs 1,442,726/= together with interest at fourteen (14%) per cent effect from 19th June 2013 when the Certificate of Costs was issued until payment. This was an issue that was well set out in Paragraph 25 of the said Ruling.
23. The court could very well have awarded interest from 6th May 2010 and awarded it at a lower rate if it deemed it fit to do. Notably, in its written submissions dated and filed 6th November 2013 in

- respect of the Advocate's aforementioned application, the Client did not address itself to the interest that could be awarded. Its silence led the court to find that it did not object to the Advocate being awarded interest at fourteen (14%) per cent. It is not the place of the court, which is a neutral arbiter, to advance legal arguments on behalf of a party especially where it is represented by counsel, lest it be perceived as being biased on behalf of such party.
24. However, it is the view of this court that it can award interest from the date of entry of judgment pursuant to the Certificate envisaged in Section 51 (2) of the Advocates Act as it is the certificate of the taxing master of the taxed costs that is final and binding upon which the court enters judgment therein provided that the same is not set aside and/or varied. This is unless of course it can be shown that a party was entitled to interest as envisaged under Rule 7 of the Advocates Remuneration Order where interest would accrue thirty (30) days after it has been raised in a bill of costs and the full payment has not been paid or tendered in full.
25. Indeed, as has been seen hereinabove, Section 51(2) of the Advocates Act provides that **"The certificate of the taxing master 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 costs covered thereby..."** (emphasis court)
26. The fact that the Advocate felt very strongly that it had been kept out of funds for almost three (3) years since the date of taxation would not be in itself a ground under which this court can review its Ruling of 24th January 2014 if the court deemed it fit not to grant interest from such date.
27. The Advocate did not demonstrate or give any plausible explanation in its Notice of Motion application dated 28th June 2013 and filed on 4th July 2013 why it took almost three (3) years before it obtained the Certificate of Costs. It would be punitive to a Client if an advocate sat on his rights once it was awarded costs and claim escalated interest many years after, when such an advocate could have taken out the Certificate of Costs immediately the ruling by a taxing master was delivered to mitigate the accrual of interest.
28. The objective of any party in any claim ought to be that it is paid for the principle sum. It ought not to hinge its claim on the interest it can accrue on the unpaid monies as interest is merely intended to compensate a party for the period it has been kept away from monies that were due and owing to it.
29. The court therefore had an option to exercise its discretion in the manner that it did. The decisions by Ogola, Mabeya and Dulu JJ were issued by courts of equal and competent jurisdiction such as this one and they also had discretion to award interest from the date of the Ruling of the Taxing Master for the reason that under Section 51(2) of the Advocates Act, they could make such order in relation to the Certificate of Costs as they thought fit. Appreciably, their decisions are persuasive in nature and cannot bind this court.
30. Having considered the pleadings, affidavit evidence, written submissions and case law in support of the respective parties' cases, the court finds and holds that there was no error apparent on the face of the court record as was rightly submitted by the Client herein.
31. The court's ruling on the issue of interest was as follows:-

"For the foregoing reasons, this court finds that the Applicant's Notice of Motion application is merited and the same is hereby allowed as prayed save that the interest on Kshs 1,442,726/= will be simple interest at 14% from 19th June 2013 till payment." (emphasis court)

32. The court was indeed very clear in its mind that although the Advocate had sought interest to run from 6th May 2010, it held that interest ought to run with effect from 19th June 2013 till payment for the reason that it is the Certificate of Costs that is final as to the amount of costs awarded by the Taxing Master.

DISPOSITION

33. Accordingly, the upshot of this court's ruling is that the Advocate's Notice of Motion application dated and filed 8th April 2014 was not merited and the same is hereby dismissed with costs to the Client.
34. It is so ordered.

DATED and DELIVERED at NAIROBI this 26th day of January, 2015

J. KAMAU

JUDGE