



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 544 OF 2007

MEREKA & COMPANY ADVOCATES.....APPLICANT/ADVOCATE

VERSUS

INVESCO ASSURANCE CO. LTD.....RESPONDENT/CLIENT

RULING

1. Before me is the Applicant's Notice of Motion dated 28th October, 2014 brought under Section 51 (2) of the Advocates Act, Cap 16 (*the Act*) seeking judgment for KShs. 39,205/00 in terms of the certificate of costs dated 5th February, 2008 together with interest at 14% from the date of the Certificate and that pursuant to the judgment, a decree be issued for enforcement or execution.
2. The application is premised on the grounds on the body of the application and the supporting affidavit of David Mukii Mereka sworn on 29th October, 2014. Following the taxation of the Applicant's bill of costs dated 20th August, 2007 at KShs. 39,205/00, the Applicant and the Respondent in a meeting held on 16th November, 2012 entered into an agreement on how outstanding fees would be paid by the Respondent. His gravamen is that despite the said agreement the Respondent has not furnished any payment. He stated that the Respondent having not filed any reference against the taxation, it is just and fair that judgment be entered in terms of the certificate of costs issued on 5th February, 2008.
3. The Respondent filed grounds in opposition to the application dated 26th February, 2015. The grounds are that the applicant's motion seeks interest at 14% from the date of certificate of taxation despite the fact that Section 51 (2) of the Act makes no express provision on interest; that if there is any entitlement on interest under Section 51 (2), the same should be from the date of filing the motion and not from the date of the certificate of taxation and that the Applicant has not proved retainer under Section 51 (2) of the Act.
4. Submissions to this application were tendered orally. Ms. Abok learned counsel for the Applicant submitted that the certificate of costs dated 18th December, 2007 has not been set aside or varied. She submitted that the application had not effectively opposed. Counsel left the issue of interest to court for determination. On the issue of retainer, Ms. Abok submitted that the averments in the affidavit had not been contradicted and there the issue remained uncontested.
5. Ms. Makuyu opposing the application submitted that Section 51 of the Act does not provide for interest. That interest is calculated from the date of the motion and that interest of 14% is illegal and not provided for. She submitted that retainer as provided for under Section 51 of the Act had not been proved.
6. I have considered the depositions and the submissions tendered by both parties. Section 51(2) of the 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...”

Under the above provision, the Advocate is entitled to judgment on the sum certified to be due by the taxing officer as their costs against the Client so long as the conditions set out in that section are established. The conditions are that:-

- a. a certificate of the taxing officer by whom the bill has been taxed has been issued;
- b. the said certificate has not been set aside or altered by the court; and
- c. the retainer is not disputed.

7. The pertinent issues remaining for this court's determination are:-

- a. *Whether, there was a retainer agreement between the Applicant and the Respondent;*
- b. *If (b) above is answered in the affirmative, at what rate of interest is to be applied to the Judgment and what date should it be calculated?*

8. Despite merely disputing the Applicant's retainer in the grounds of opposition, the Respondent did not deny on oath the Advocates averments. The failure to file a replying affidavit in contention of a fact amounts to an admission of facts on the Applicant's application. See the case of **Kennedy Otieno Odiyo & 12 Others Vs Kenya Electricity Generating Company Limited [2010] Eklr** wherein the court held:-

“The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the application in its supporting affidavit. Thus what was deponed to was not entered nor rebutted by the Respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant's supporting affidavit, means that the respondents have no claim against the applicant.

*In this regard, the court held in **Kipyator Nicholas Kiprono Biwott Vs George Mbuguss and Kalamka Ltd Civil Case No. 2143 of 1999***

..... From the facts and the law I have analyzed in this case, I do find the Defendants have no defence to this suit..... having filed no replying affidavit to rebut the averments in the plaintiffs affidavit in support of the application. I, therefore have no alternative but to strike out paragraphs 3, 4, 5, 6 and 10 of the defence and enter judgment for the plaintiffs on liability....”

9. There having been no denial of retainer, I hold that Section 51 (2) of the Advocates Act applies. Rule 7 of the Advocates (Remuneration) Order (***the order***) provides as follows:-

“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.”

10. The said Rule 7 deals with interest charged by an advocate on his costs which is chargeable from the expiration of one (1) month from the date of his delivery of his bill to his client. The Applicant herein has raised the issue of interest before the bill has been paid and is thereby entitled to interest at 14% in the wording of Rule 7 of the Order. Since the Applicant prayed for interest from the date of the Certificate and not 30 days after delivery of the bill, I will allow the interest to run from that date.

11. The upshot is that this application is merited and is allowed as prayed.

Dated, Signed and Delivered at Nairobi this 13th day of March, 2015.

A MABEYA

JUDGE