



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**MISCELLANEOUS APPLICATION NO 151 OF 2001**

MACHIRA & CO ADVOCATES.....ADVOCATE

VERSUS

ARTHUR K. MAGUGU&

MARGARET WAIRIMU MAGUGU .....CLIENTS

**RULING**

**INTRODUCTION**

1. The Advocates' Notice of Motion application dated 5<sup>th</sup> April 2012 and filed on 18<sup>th</sup> February 2013 was brought pursuant to the provisions of Section 51(2) of the Advocate Act Cap 16 Laws of Kenya, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 3A and 26 of the Civil Procedure Act Cap 21 Laws of Kenya and all other enabling provisions of the law. It sought the following orders:-
  1. **THAT Judgment be entered for the Advocate/Applicant against the Clients/Respondents in the sum of Kshs 4,500,000/= being the costs certified by the Deputy Registrar as costs on 1<sup>st</sup> August, 2001.**
  2. **THAT the said sum of Kshs 4,500,000/= be paid with interest at the rate of 14% per annum from 4<sup>th</sup> April 2001 i.e. the date of filing the Bill of Costs, until payment in full pursuant to Rule 7 of the Advocates Remuneration Order.**
  3. **THAT the costs of this Application be awarded to the Advocates.**

**THE ADVOCATES' CASE**

2. The application was supported by the Affidavit of John Patrick Machira that was sworn on 5<sup>th</sup> April 2012. The Advocates' List of Authorities were dated and filed on 19<sup>th</sup> April 2013. Their Supplementary List of Authorities were dated 19<sup>th</sup> November 2014 and filed on 27<sup>th</sup> November 2014 while the Further Supplementary List of Authorities and Written Submissions were both dated 9<sup>th</sup> March 2015 and filed on 10<sup>th</sup> March 2015.
3. The Advocates stated that the Clients retained them to act for him in **HCCC No 749 of 1998 Milimani Commercial Courts Deposit Protection Fund ( In Liquidation) vs Arthur K. Magugu & Margaret Wairimu Magugu**. After they ceased acting for the Client, they filed their Bill of Costs on 4<sup>th</sup> April 2001 for a sum of Kshs 4,500,000/=. The same was taxed for the said

amount on 30<sup>th</sup> July 2001. Subsequently, a Certificate of Taxation for the said sum was issued on 1<sup>st</sup> August 2001.

4. They stated that the Respondent filed a reference challenging the decision of the Taxing Master and the same was upheld by the High Court on 7<sup>th</sup> February 2002. However, the same was overturned by the Court of Appeal on 2<sup>nd</sup> March 2012, the effect of which was that the sum that was taxed by the Taxing Master in the sum of Kshs. 4,500,000/= was restored.
5. As the said sum was undisputed, the Advocates therefore urged the court to allow their application as prayed.

### **THE CLIENTS' CASE**

6. Arthur K. Magugu, hereinafter referred to as the 1<sup>st</sup> Client is deceased. Margaret Wairimu Magugu is hereinafter referred to as the 2<sup>nd</sup> Client. There was no Replying Affidavit that was filed in opposition to the said application. However, on 12<sup>th</sup> April 2013, the deceased's advocates on record filed Grounds of Opposition dated 11<sup>th</sup> April 2013 which was as follows:-

**THAT the Respondent Arthur Kinyanjui Magugu had already passed on and an Application for substitution with the legal representative of the deceased estate had to be filed first before the Applicant could proceed with its Application.**

7. The said Clients' advocates therefore urged the court to dismiss the Advocates' application.

### **LEGAL ANALYSIS**

8. It was not in dispute that the Certificate of Taxation dated 1<sup>st</sup> August 2001 by the Taxing Master remained unaltered following the aforesaid Court of Appeal decision and that the Advocates were thus entitled to the said sum of Kshs 4,500,000/=. The court was in agreement with the holdings in the several cases that were relied upon by the Advocates to buttress their argument in this regard- **See Muri Mwaniki Muriuki & Wamiti Advocates vs Wilson Kinyanjui Kuria [2011] eKLR, Ogonji & Tiego Advocates vs Samuel Kinyua Mutugi & Another [2006] eKLR** amongst other cases.
9. What was in dispute, however, was whether or not the Advocates' application could be allowed in view of the fact that the Client had since passed away. It did therefore appear to the court that the issues for determination by the court were as follows:-
  - a. **Had the Advocates' cause of action against the 1<sup>st</sup> Client abated?**
  - b. **Could judgment for taxed costs be entered in full when a Client was deceased and there was another surviving Client?**

10. The Advocates were emphatic that the cause of action did not abate and that the same survived against the 2<sup>nd</sup> Client who was the deceased's wife. They relied on the provisions of Order 24 Rule 1 of the Civil Procedure Rules, 2010 that provides as follows:-

**“The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.”**

11. In the case of **Said Marlo Mungai & 2 Others vs Jane Richter & Another [2002] eKLR** that the said Advocates relied upon, Hayanga J (as he then was) had the following to say regarding abatement and surviving of a cause of action:-

**“...The term “survives” in Order 23 Rule (1) has been said to include not only cases or survivorship in a strict sense but also cases of devolution by succession and inheritance...”**

12. On the other hand, the Clients' Advocates were categorical that as the 1<sup>st</sup> Client died on 15<sup>th</sup> September 2012 and two (2) years had passed since his death and letters of administration had not been issued, the suit herein had abated. They referred the court to the provisions of Order 24 Rule 4(3) of the Civil Procedure Rules that stipulated as follows:-

**“Where within one year no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.”**

13. The said Clients' advocates averred that since no application to revive the suit had been made under Order 24 Rule 7 (2), the suit herein was dead and non-existent. They referred the court to the case of John Chege Mwangi & 3 Others vs Obadiah Kiritu Methu [2012] eKLR to buttress their argument in this respect.

14. The court was not in agreement with the Advocates' contentions that the application herein was execution proceedings against the Clients herein for the reason that, execution proceedings can only commence once judgment is entered. Indeed, the Certificate of Taxation could not be executed in its own right until after entry of judgment in accordance with Section 51 (2) of the Advocates Act Cap 16 (Laws of Kenya).

15. Having said so, the said Certificate of Taxation conclusively determined the rights of Advocates as against the Clients long before the 1<sup>st</sup> Client passed away and all that was pending was the entry of judgment as aforesaid. It could therefore be deemed to have been a preliminary decree within the meaning of a “decree” under Section 2 of the Civil Procedure Act. The explanation in Section 2 is clear that a decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of.

16. The Certificate of Taxation was thus an order to execution proceedings within the meaning of Order 24 Rule 10 of the Civil Procedure Rules for which the provisions relating to abatement of suits were not applicable. The same provides as follows:-

**“Nothing in rules 3, 4 and 7 shall apply to proceedings in execution of a decree or order.”**

17. Be that as it may, it was the view of this court that the provisions for execution proceedings under the Civil Procedure Rules are not applicable until such time that judgment has been entered. In the case of Lubulellah & Associates Advocates vs N.K. Brothers [2015] eKLR, this very court held as follows:-

**“For the reason that the procedure of advocates costs is well captured in the Advocates Act and the Advocates Remuneration Order which is a complete code in itself and the Civil Procedure Rules would not be applicable unless as had been provided therein and for purposes of enforcement of judgment..”**

18. It therefore follows that once a reference is determined under Paragraph 11 of the Advocates Remuneration Order and the certificate of taxation is not set aside and/or altered, the next step is for the court to enter judgment under the provisions of Section 51 (2) of the Advocates Act. The same provides as follows:-

**“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 taxed amount of the costs recovered 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.”**

19. As the Certificate of Taxation in this matter thus remained unaltered when the Court of Appeal upheld the taxation of the Advocates' Bill of Costs in the sum of Kshs 4,500,000/=, judgment could be entered as aforesaid

20. Notably, the court found that the case of Mwangi M' Mabuanga vs Festus Muriungi [1994] eKLR that was relied upon by the Advocates on the issue of personal representatives of a

- deceased's estate was distinguishable from the facts of this case in that the dispute therein was whether the person who had been appointed as a legal representative of the deceased's estate therein could receive the proceeds of the decree instead of the deceased's wife who was still alive and ought to have been appointed as the legal representative.
21. Similarly, the case of **Julius M. Mugo Muchiri vs Wanjoka Njagi [2009] eKLR** that was also relied upon by the Advocates was also not relevant as the Makhandia J (as he then was) declined to allow an application for substitution on the ground that there was in place, an order for stay of execution pending appeal.
  22. Having said so, there was no apportionment of how the costs were to be paid by the Clients. The court was thus not persuaded by the Clients' submissions that the orders that had been sought by the Advocates would not only affect her but also the 1<sup>st</sup> Client's estate and therefore ought not to be granted. It was, however, the view of the court that while the 1<sup>st</sup> Client passed away before the said judgment was entered herein, the 2<sup>nd</sup> Client was still alive and the cause of action against her remained unaltered in full.
  23. Indeed, Section 51(2) of the Advocates Act gives the court discretion to make such order in relation to the judgment as it deems fit. The 2<sup>nd</sup> Client failed to furnish the court with evidence to explain why the beneficiaries had failed to take out letters of administration knowing very well there were pending cases against the 1<sup>st</sup> Client whose estate remained unrepresented herein. Having been a co-defendant in the case of **Deposit Protection Fund (In Liquidation) vs Arthur K. Magugu & Margaret Wairimu Magugu** (Supra), her liability for the taxed costs would therefore have to be on a hundred (100%) per cent basis bearing in mind that she had also benefitted from the services of the Advocates in the aforementioned suit.
  24. Turning to the issue of interest, the Advocates submitted that they were entitled to interest at the rate of fourteen (14%) per cent pursuant to Rule 7 of the Advocates Remuneration Order. Rule 7 of the Advocates Remuneration Order stipulates as follows:-

**“ An advocate may charge interest at 14 per centum on his disbursements and costs, whether by scale 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.”**

25. This very court dealt with the issue of payment of interest at fourteen (14%) per cent in the case of **Lubullelah & Associates Advocates vs N.K. Brothers [2014] eKLR** when it stated as follows:-

**“It is clear that the said Rule 7 deals with interest charged by an advocate of its claim for disbursements and costs which is chargeable from the expiration of one (1) month from the date of his delivery of its bill to its client. This interest is distinguishable from the interest that this court can award. As this court held in the cases of HC Misc No 486 and 487 of 2012 E.W. Njeru & Co Advocates (Supra), if an advocate files his Bill of Costs without raising the issue of interest, then he forfeits interest as provided for under Rule 7 of the Advocates Remuneration Order. The court can only award the interest at court rates.”**

26. The award of interest after taxation of costs was also considered in the case of **Kantai & Co Advocates vs Kenya Bus Services [2006] eKLR** where Ochieng J stated as follows:-

**“As regards the applicant's prayer for interest, I note that the affidavit of service of James A. Abushila, which was sworn on 26<sup>th</sup> January 2006, states that the Bill of Costs was served upon the respondent on 19<sup>th</sup> January 2006. Even though the applicant may have served the respondent with a fee note prior to 19<sup>th</sup> January 2006, there is no evidence before me to prove it. Therefore, I am prepared to accept the date when the respondent was served with the Advocate/Client Bill of Costs, as the date when the applicant demanded payment for their fees. In the circumstances, I order that the taxed costs shall attract interest at 9% per annum from 20<sup>th</sup> February 2006, which would be a date that is more than one month from the date when the bill was delivered to the client. This award of interest is made pursuant to the provisions of Rule 7 of The**

## **Advocates (Remuneration) Order.”**

27. The key words were “**...provided that such claim for interest is raised before the amount of the bill shall have been paid or tendered in full.**” The Advocates did not furnish the court with any evidence that they had claimed interest at fourteen (14%) per cent at least one (1) month before they filed their Bills of Costs. They therefore forfeited the interest they had sought.
28. Accordingly, having considered the pleadings, the affidavit evidence and the written submissions by the respective parties, the court found and held that the Advocates were entitled to entry of judgment with interest at court rates and from the date of judgment as the court has discretion to order from when and at what rates interest would be payable on the principle sum. The said Advocates offered no explanation by way of affidavit evidence why they did not file their present application in 2001 when the Taxing master issued the Certificate of Taxation. What was however, discernible was that there was an appeal that was lodged in 2002 and a determination made in 2012.
29. Ordinarily, it would be punitive and unconscionable for an advocate to obtain a certificate of taxation and fail to seek judgment immediately as it would increase the interest that a client would eventually have to pay if an application for entry of judgment was made many years after the issuance of a certificate of taxation. In this case, it took almost twelve (12) years before the said Advocates filed the present application. Interest from the year 2001 was therefore unconscionable and unjustifiable bearing in mind the court’s discretion to award interest at such rates and from such periods and with such rests as it would deem reasonable to grant and that the appeal that was lodged in 2002 was only disposed of in 2012.

### **DISPOSITION**

30. For the aforesaid reasons, the court found that the Advocates’ Notice of Motion application dated 5<sup>th</sup> April 2012 and filed on 18<sup>th</sup> February 2013 was merited only to the extent that judgment is hereby entered in their favour against the 2<sup>nd</sup> Client for the sum of Kshs 4,500,000/= together with interest thereon at court rates from the date of this Ruling until payment in full. The 2<sup>nd</sup> Client will also pay the costs of this application.
31. It is so ordered.

**DATED and DELIVERED at NAIROBI this 26<sup>th</sup> day of May 2015**

**J. KAMAU**

**JUDGE**