



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS

MISC. 934 OF 2011

FRANCIS MWANZA MULWA.....APPLICANT

Versus

AFRISONS EXPORT IMPORT LIMITED.....1ST RESPONDENT

HUELANDS LIMITED.....2ND RESPONDENT

RULING

1. The Applicant is an Advocate practicing under the title of F. M. Mulwa and Associates. The Respondents were his Clients between 2008 and 2011.

2. When it came to payment, Applicant Offered the Respondents a compromise arrangement by Letter and Fee Note dated 12 September 2011. The Respondents argue they entered into a compromise arrangement. Since that was not the end of the matter, it is fair to assume that either they did not conclude an agreement or the Respondents failed to uphold their part of the bargain forcing the Advocate to apply for Taxation of his Bill of Costs. The Taxing Officer held there was no compromise agreement. Then followed, the original Bill of Costs which was dated 28 November 2011 and meant to be heard on 15 December 2011. An Amended Bill of Costs dated 27th April 2012 was filed subsequently and served on 11 May 2012. The Ruling in the Taxation was to be delivered on 4th December 2012 but was delayed, it seems because, the “parent file” was moved to the Environment and Lands Court (ELC), probably because that was when that Court was established and the underlying dispute related to land. The underlying suit is said to relate to 96 acres of land on Thika Road and the Respondents herein were Defendants in that suit. It seems that as a consequence of the creation of the Environment and Lands Court meant the parent file was sent to the ELC causing some delay.

Background to the Application

3. The fees claimed per the amended pleaded case was KShs99,283,087.63. The Respondents argued that the Advocate and Clients came to a compromise agreement whereby the Clients would pay KShs.45,000,000/= . On 12th September 2011 the Applicant sent his Fee Note to the Respondent for payment. They did not pay. No payment was made therefore the consideration for that reduction was not provided. Since compromise is firmly founded on consensus non-payment suggests that such consensus did not exist. The Applicant also put forward the argument (in taxation) that in fact the compromise was not signed by the Respondents nor their duly authorised agents. **Section 45(1) of the Advocates Act Cap 16 Laws of Kenya (Cap 16)** provides that a compromise is only enforceable if it is signed by the Client or his duly authorised agent. In this case it was not. I also note that the failure to pay means that

consideration for the compromise and/or the reduction was not provided. These are matters of fact that were known to the Respondents and dealt with in the taxation.

4. As a consequence the Advocate filed and served its Bill of Costs on 28 November 2011 and the Amended Bill on 27th April 2012 and sought taxation. The Respondents sought to rely on the “compromise” fee note of KShs45,000,000.00 on 12th October, 2011. a copy of the covering letter is exhibited to the Supporting Affidavit and also the Respondents’ Affidavit (“GM1”). The Applicant then filed a Bill of Costs for KShs236,917,104/=. The amount assessed as payable to the Applicant following taxation was KShs54,822,920/=.

5. The taxation was contested and the Respondents argued for an interpretation of the Rules that would provide the lowest outcome for the Advocate, notwithstanding that it was inconsistent with their pleaded case (see Reasons given by the Taxing Registrar). At the very least that was inconsistent and at worst it is contrary to **Section 120 of the Evidence Act (Cap 80, Laws of Kenya) (Estoppel)**.

6. The Respondents had also argued against the individual items as well as the scale fees applied. At one stage they had also argued that there was a compromise agreement (still) in place. Twelve months after it had resiled from the compromise agreement, by failing to pay, the Respondent sought to then rely on it in opposition to the taxation. The Deputy Registrar did not accept that argument and went on to tax the amended Bill of Costs. The Taxing Officer dealt with each argument as he thought fit and his Ruling has not been challenged.

7. The Ruling on the Taxation was delivered on 30th September 2014 and there is a Certificate of the dated 21 October 2014.

8. However, as no payment was forthcoming and the Applicant had to make an application for the Ruling and Certificate to be adopted as a Judgment of this Court so that the decree could be enforced.

9. Again, the Respondents did not pay and the Applicant was forced to issue an Application on 6th November 2014 for judgment to be entered for the full taxed amount. The second prayer asked for costs.

10. The matter came before me on 26th November 2014 six years after the suit and three years after the so called compromise agreement and Bill of Costs, and fourteen months after the Ruling in the taxation. In view of the lapse of time and delay, interest is a significant issue.

11. The Parties entered “A Consent” on 26 November 2014 that judgment be entered for the Taxed sum but the Respondents did not agree the issue of the payment of interest. That is what now needs to be resolved.

12. The Applicant filed its submission on 5th December 2014 and the Respondents on 10th December 2014 (the Date of the Second Mention). In brief, the Applicant is seeking interest at a rate of 14% per annum on his disbursements and costs. Relying on **Rule 7 of the Advocates (Remuneration) (Amendment) Order 2009** which states: “*an advocate may charge interest at 14% per annum on his disbursements and costs, whether by scale or otherwise from 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.*”.

13. The Applicant relies on the following authorities:

(1) ***Misc Case No.178 of 2013*** where Gikonyo held:

“my understanding of Rule 7 of the Advocates Remuneration Order is that interest is chargeable from the expiration of one month from delivery of the bill of costs by the advocate to the client but before the amount of the bill has been paid or tendered in full. The reference point is delivery of the bill. Evidence of delivery is necessary. In the present case delivery was done on 8th April

2013. The amount of costs was not paid within a month from delivery of bill. Therefore and I hereby order that interest will be charged on the sum of KShs12,732.00 from expiration of one month from delivery of his bill to the client ie from 8th May 2013 until the time the costs were paid. The amount of the bill may be different from the taxed costs. But for all purposes of Rule 7 of the Advocates Remuneration Order, interest should be on the amount in the Certificate of Costs as those are the costs which are payable.”

(ii) **Misc Application 222 of 2005 - Wainaina Ileri & Co. Advocates –v- Kenya Ltd** where Ochieng J set out the relevant provision and his decision thus:

“The Applicant has asked for interest at a rate of 9% per annum accordance with Rule 7 of the Advocates (Remuneration) Order, that rule provides as follows:-“An Advocate may charge interest at 14% per annum on his disbursement 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.

I am afraid that interest is not payable from the date when the bill is tendered, but from a month thereafter. Accordingly, the Applicant is awarded interest on the taxed costs from 25 December 2002 until payment in full.”.

14. The principles that are discernible from that argument are:-

1. Unless there is no dispute or an application to set aside or vary the taxation, judgment for the taxed costs should be entered. In this case that was done by consent.
2. Interest is due and payable on disbursements and costs.
3. The appropriate rate is 14% per annum.
4. Under Rule 7 of the Advocates (Remuneration) Rules 2009 interest is charged from the expiration of one month from delivery of his Bill to be raised in or before the Bill is paid.

15. It is those principles that the Respondents challenge. Although they consented to Judgment for the taxed sum, the Respondents now argue that no interest is due or chargeable because it was not raised in or before the Bill of Costs. It is also argued, one assumes, in the alternative, that interest should run only from the Certificate of Taxation. In closing it is said, “we submit that the Applicant is entitled to interest on the taxed amount at Court rates from the date the Certificate of Costs was issued on 30th September, 2014”.

16. In Paragraph 2 of their Submissions, the Respondents argue that:-

- i. The claim for interest must be raised before the bill has been paid.
- ii. Where the issue of interest payable is not raised in the bill of costs the interest cannot be claimed as interest due after taxation. It is said “the only interest that is payable is interest at Court rates”. For that proposition the Respondents rely upon the authority of **Labulella & Associates Advocates Vs NK Brothers Ltd 2014 eKLR** which is purported to have said, “If an advocate files his Bill of Costs without raising the issue of interest as provided for under **Rule 7** ... the Court can only award the interest at Court rates.” In fact that quote came from the decision in **HC Misc 486 and 487 of 2012 E W Njeru & Co Advocates v Zakhem Construction (K) Ltd** thus “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 interest at court rates.”
- iii. Interest can therefore only accrue on the amount held to be due from the date of such an order or judgment. The Respondents say, “This principle was well enunciated by the Court in **Kagwimi**

Kang’ethe & Company Advocates Vs Penelope Combos & Another (2014) eKLR. In fact what the Respondents are actually relying on is the earlier authority of the Court of Appeal of East Africa, in **Prem Lata V Peter Musa Mbiyu [1965] E.A 592** for “... *The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing suit. Where, however, damages have to be assessed by the Court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of judgment...*”

iv. The Respondents also quote an authority from “Across the border” being, of the High Court of Uganda in the case of **Pan African Insurance Company (U) Ltd. V International Air Transport Assoc. (HCT-00-CC-CS-0667 of 2003)** that, “As regarded interest, the principle is that where a party is entitled to a liquidated amount or specific goods and has been deprived of them through the wrongful act of another, he should be awarded interest from the date of filing the suit. However, damages does not arise until they are assessed, in such event, interest is only given from the date of judgment...” The Respondents place great reliance on the last sentence and quantum of that quote. That was a High Court case. The Respondent’s did not, however, put forward any evidence to show that in Uganda there exists the equivalent of ***Rule 7 of the Advocates (Remuneration) Order 2009*** and/or ***the Advocates Act***. No copy of that authority is attached to the Submission. The Court cannot assume that the law is the same.

17. The Court also held the same in **William Kinyanyi Onyango Vs Independent Electoral and Boundaries Commission & 2 Others (2013) eKLR at page 20** of the bundle of authorities thus:-

“I draw support here from Halsbury’s Laws of England 4th edition paragraphs 545 and 546. It is stated at paragraph 546 as follows;

“The date of the judgment or order is important in that the judgment or order generally takes effect from that date. Interest on the judgment debt runs from the date of entry of the judgment, although interest on costs runs from the date of the taxing master’s certificate”.

18. In order to give due regard to the Respondents’ arguments, their authorities need to be given further consideration. In the main they do not enunciate principles but merely repeat principles enunciated elsewhere. For example, in **Lubulellah v NK Brothers** the Court referred to **Njeru & Co Advocates v Zakhem Construction (K) Ltd** which said at paragraph 19, “*The Law is very clear that once a taxing master has taxed the costs, issued a Certificate of costs and there is no reference against his ruling or there has been a ruling and determination made and not set aside and/or altered, no other action would be required from the court save to enter judgment...*”

19. Also in **Lubulellah v NK Brothers [2014]**, in relation to the application for interest the Court also dealt with the Advocate’s application for costs at the rate of 14% from one month after the Bill of Costs. The Court again turned to (only) **Njeru** and held that “... *if an advocate files his Bill of Costs without raising the issue of interest, then he foreits interest as provided for in Rule 7...*” The Court their failed to deal with the second part of the Rule which states, “... *provided such claim for interest is raised before the amount of the bill has been paid or tendered in full.*”. Whether that omission is deliberate or inadvertent, it matters not.

20. The Respondents also rely on **Kangwimi Kang’ethe & Company Advocates v Penelope Combos & Another [2014] eKLR** In his ruling Gikonyo J referred to **Prem Lata v Peter Musa Mbiyu** for 592, in relation to the principle in relation to a finding of damages for a liquidated sum.

Applicable Principles

21. Dealing first with the Application. Prayer 1 of the Application is made under ***Section 51 of the Advocates Act (Cap 16 Laws of Kenya)***. It is noteworthy that the Respondents agreed to the making of that Order, but only after the Application was filed and before the Court.

22. That leaves only the issue of Interest. The Respondents argue that the Certificate of Costs and the process of taxation is again to an assessment of damages upon the wrongdoing of a defendant. If that is a correct analysis, what is the wrongdoing to which the Defendants are admitting? Not only is that argument fallacious, it is contrary to what ***Prem Lata***, in fact decided. That case drew the distinction between personal injury cases and other case. It also drew the distinction between special damages and general damages and then applied the principles enunciated specifically to a personal injury case. It is of benefit for the exact words of Laws JA to be understood, so I set them out here; “

23. The Respondents argue that the Court “can only” award interest from the date of the Ruling/Certificate. In fact the Court’s jurisdiction to award interest emanates from the ***Civil Procedure Act (Cap 21, Laws of Kenya)*** which predates ***Prem Lata*** and is relied upon in that authority. In particular ***Section 26 provides:***

“(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.” (emphasis added).

24. In the main the authorities the Parties rely upon are High Court authorities and therefore persuasive rather than binding. The Respondents did not produce the authority where the principle was set out but where it was applied, I therefore prefer the Applicant’s Authorities and the source, namely the ***Advocates Act (Cap) 16 of laws of Kenya and the Advocates (Remuneration) Order 2009.***

25. Going to the source of the principle means the full text of ***Prem Lata v Mbiyu***, on the point, must be considered rather than abstracts from other Rulings applied to the fact of those particular cases. In that case it Laws JA said: ***“The only point remaining for decision is that contained in ground 2 of the appeal:***

*‘That the learned Chief Justice misdirected himself in failing to order interest in favour of the successful party at court rates from the date of filing of the action to the date of recovery of the amount due under the judgment or decree of the court.....It is also agreed that the Chief Justice rejected this application. Nothing appears on the record as to the reasons for which the application was rejected. The award of interest on a decree for the payment of money for the period from the date of the suit to the date of the decree is a matter entirely within the court’s discretion, (by ***Section 26 of the Civil Procedure Act.***) Such discretion must of course be judicially exercised.....). In both these cases the successful party was deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest. But suits for damages for personal injuries are in a different category. It cannot be said that, at the date of filing suit, the plaintiff is entitled to any particular amount. This depends on the decision of a number of factors, including liability, contributory negligence, and the assessment of the damages which may include, as in this case, a considerable element in respect of future disability. In these circumstances, we do not consider that the Chief Justice wrongly exercised his discretion in refusing to award interest from the date filing suit in respect of the general damages, as the infant plaintiff cannot have been said to have been deprived of the money represented by these damages from any particular date before judgment. Counsel for the respondent does not, however, oppose an order for the payment of interest on the special damages awarded to the next friend, as these represent out a pocket expenses actually paid or incurred at the date of filing suit. We agree....’....”.*

26. Therefore it is clear from that quote, that the rule about interest not being applicable to a judgment for general damages from the date of the suit, is limited to personal injuries cases due to the number of variables that need to be taken into account in deciding the award. Indeed ***Section 26*** expressly extends the Court’s jurisdiction to award interest for the period between the suit and the judgment as well as any other period and gives the Court a wide discretion in that respect.

27. That is the first aspect in which the Respondent's argument is flawed. Secondly, the taxation of a Bill of Costs, is not an award of "damages" for "a wrong" perpetrated by the Respondent. It is an assessment of what is fair payment for professional services already rendered. The **Advocates Act (Cap 16)** and the Rules thereunder provide for the protection of the Client. If there was ever a time that such fairness included unfair treatment of the Advocate, that should no longer be the case as the **Constitution of Kenya 2010** provides for equality before the law. If the Respondent's argument was correct, this Court would have very wide discretion under **Section 26** to order interest from the dates when the work was carried out. Clearly, that is not a scheme envisaged by the **Advocates Remuneration Rules**.

28. The Applicant had not received any payment at the time the Application was filed (6 November 2014). Therefore, **Rule 7** applies and interest is payable. Rule 7 also provides that interest is payable from a date 30 days after the Bill of Costs was served (see also Ochieng J supra). The Respondents admit service under cover of the Letter dated 12 September 2011. Therefore interest is payable from 12 October 2011 until date of payment. The Applicable rate is 14% per annum.

29. I therefore allow the Application with Costs to be taxed if not agreed. For the avoidance of doubt, the Respondent shall pay the Applicant interest on the taxed costs at a rate of 14% per annum from the 12 October 2011 to the date of payment.

Order accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF SEPTEMBER, 2015.

FARAH S. M. AMIN

JUDGE

Coram:

Clerk: Joseph Kabugi

Mr. Oduor HB Mr. Onyancha for Applicant

N/A for Respondent

FARAH S. M. AMIN

JUDGE