



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL COURT**

**CIVIL SUIT NO 868 OF 2009**

**JAMES SINGH GITAU**

**(T/A SINGH GITAU & ADVOCATES).....PLAINITFF**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED.....DEFENDANT**

**RULING**

1. The Plaintiff's Notice of Motion application dated 22<sup>nd</sup> February 2010 and filed on 24<sup>th</sup> February 2010 was brought under the provisions of Order 35 Rule 1 and Order 6 Rule 13(b) of the Civil Procedure Rules, the Advocates Act, Advocates Remuneration Order and under the Inherent Powers of the Honourable court. Order 35 and Order 6 were replaced by Order 36 and Order 15 Rule 2 of the Civil Procedure Rules, 2010.
2. The said application prayed that the defence herein be struck out and judgment be entered in its favour against the Defendant as prayed in the Plaint and that credit be given to the Defendant for the sum of Kshs 14,068,148.25 which the Defendant paid the Plaintiff on 12<sup>th</sup> January 2010.
3. The Plaintiff's said application was premised on the ground that the defence was frivolous and that there were no issues to go to trial. The Plaintiff demanded for payment of interest pursuant to the Advocates Act and pointed out that the delay in payment of its fees was occasioned by the frivolous applications that were being filed by the Defendant.
4. In his affidavit sworn on 18<sup>th</sup> February 2010, James Gitau Singh stated that his firm was properly instructed by the Defendant although at one time there was a change of advocates before his firm was re-instructed. He averred that the Defendant declined to pay its taxed costs on the ground that the taxing master had not given any reasons for her decision. The Defendant's application to review the taxing master's ruling was dismissed by Kimaru J who also ordered that an ordinary suit be instituted for the recovery of the taxed amount. The Plaintiff was therefore seeking interest on the taxed costs.
5. Damaris Gitonga, a Manager in charge of Legal Services in the Defendant bank swore a Replying Affidavit on 20<sup>th</sup> April 2010. She admitted that the Defendant duly instructed the Plaintiff but that the said appointment was subject to a retainer not exceeding Kshs 200,000/= plus VAT and disbursements. She averred that the scale fees were not applicable herein as parties had agreed on the fees.
6. She also deposed that the Defendant could not file the Reference in the High Court without the Taxing Officer giving reasons. She added that the Defendant opted to pay the taxed amount but that while it was processing the cheque, the Plaintiff herein filed the suit which the Defendant contended had caused it to incur unnecessary attendant costs. It was the Defendant's contention

that the suit herein was brought in bad faith and in fact, that the Plaintiff never made any demand for the payment of the taxed sum. The Defendant's case was that it had fully paid the amount in the Certificate of Taxation dated 6<sup>th</sup> May 2009 as no interest was awarded to the Plaintiff as per the said Certificate of Taxation.

7. In its written submissions dated 22<sup>nd</sup> July 2010 and filed on 23<sup>rd</sup> July 2010, the Plaintiff contended that it submitted a fee note for the sum of Kshs 13,140,525/= after the Defendant requested it to withhold further action as the debtor had approached the Defendant with a proposal to liquidate a sum of Kshs 87,706,350/=. The Plaintiff's Bill of Costs was taxed at a sum of Kshs 13,998,298/= and upon paying further court fees in the sum of Kshs 69,847.25, the court issued a Certificate of Taxation in the sum of Kshs 14,068,145.25. The Plaintiff admitted that this sum was duly paid on 11<sup>th</sup> January 2010 but argued that this was unacceptable as the same did not include interest from the time the Bill of Costs was taxed on 4<sup>th</sup> February 2009 and costs of the suit herein.
8. It was the Plaintiff's case that the unexplained delay in payment of the said sum caused it to file suit on 27<sup>th</sup> November 2009 and the present application. It submitted that the suit was not premature as the Defendant failed to pay the Plaintiff's fees despite having been served with a demand of payment of the same. It was its contention that the suit herein was therefore necessary for recovery of its said fees.
9. It argued that this court had power to enter summary judgment where the Defence was merely a sham. It cited several cases where the common thread was that the court had power to enter summary judgment, to strike out any pleadings which disclosed no reasonable cause of action or defence or was scandalous, frivolous and vexatious.
10. The Plaintiff argued that Paragraph 7 of the Advocates (Remuneration) Order entitled the Advocate to 14% per annum from the time of delivery of the bill to the client and that under Rule 7 of the Advocates Remuneration Order, the taxed costs would attract interest at the rate of 9% per annum, from a date that was one month from the date the bill was presented for payment. It relied on the case of **HC Misc Appl No 104 of 2005 S G Mbaabu & Co Advocates vs Hon Tola Kofa (2006) eKLR** where the court stated as follows:-

**“An advocate may charge interest at 9% 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, provided such claim for interest is raised before the amount of the bill has been paid or tendered in full.”**

11. The Defendant filed its written submissions dated 27<sup>th</sup> July 2010 on the same date. It submitted that the provisions of the Civil Procedure Act and Civil Procedure Rules, 2010 do not apply to a suit for recovery of costs between an advocate and his client. It relied on the case of **Machira & Co Advocates vs Magugu (2002) E.A. 428** where the court held that:-

**“ The Advocates Remuneration Order is a complete code and there is no provision for the invocation of the Civil Procedure Rules.”**

12. The Defendant therefore argued that Order 35 Rule 1 and Order 6 of the Civil Procedure Rules did not apply in a claim for recovery of costs. It was its further contention that an application for summary judgment ought to disclose the amount due because “liquidated demand” referred to monies due and owing and not money which had been paid and acknowledged and a receipt thereof issued.
13. It stated that in view of the fact that the Plaintiff had acknowledged receipt of the sum of Kshs 14,068,148.26, there was no liquidated sum left to be the subject of an application for summary judgment. In addition, it submitted that no interest was payable on the Certificate of costs under Section 51 as the said certificate was not a judgment in itself and that the Plaintiff had not provided the court with any proof that it had claimed interest on the Bill of costs.
14. The Defendant cited the case of **HCCC No 813 of 2004 Joseph Gitau & other members of Milimani Mitumba Women Group vs Ukay Estate Limited** (unreported) when the court held that a pleading is frivolous when it is without substance or is unarguable. It was vexatious when it lacks *bona fides*. It was the Defendant's case that it had pleaded triable issues in its Defence and

that its Defence was not one that fouled the provisions of Order 6 Rule 13 (1) (b) of the Civil Procedure Rules.

15. The Defendant also contended that the Plaintiff did not serve it with the notice as was required. It referred the court to the case of **Wambugu vs Public Service Commission (1972) E.A. 296** in which it was held that:-

**“ Notice of Intention to sue should be given in all cases unless the Plaintiff’s interests are likely to be harmed by it.”**

16. Further, the Defendant averred that the Plaintiff had misconducted itself by appointing an advocate from Nakuru to circumvent the provision that the Plaintiff would not have been entitled to costs if it had acted by itself. The Plaintiff had responded to this by stating that it was its constitutional right to be represented by an advocate of its choice and it was irrespective that the advocates representing it were based in Nakuru.

17. The court has carefully analysed the parties submissions and pleadings and wishes to point out right at the onset that it was not clear to the court what Rule 7 of the Advocates (Remuneration) Order, on page 9 of its submissions, the Plaintiff was referring to. The court did, however, consider Paragraph 7 of the said Order as it had relied upon the same.

18. The Defendant herein contended that the amount in the Certificate of Costs was fully paid. This was admitted by the Plaintiff. Under Order 35 (now replaced by Order 36), there must be a liquidated amount which has remained unpaid. An applicant may opt to seek orders for summary judgment for the said sum with or without interest. A reading of the said Order does not appear to cover a situation where a party can apply for summary judgment for interest unless of course, that interest was part of the decretal sum. The Defendant’s denial of the debt on the ground that the Plaintiff acknowledged receipt of the same cannot be said to be frivolous.

19. In this regard, the court is in agreement with the Defendant’s submissions that the effect of payment of the fees acknowledged by the Plaintiff is a pertinent issue for trial and associates itself with the holding of the court in the case of **Muguga General Stores vs Pepco Distributors Ltd [1987] KLR at page 4** in which it was held that:-

**“First of all a mere denial is not a sufficient defence in this type of case. There must be some reason why the Defendant does not owe the money. Either there was no contract or it was carried out and it failed. It could also be that payment had been made and could be proved.”**

20. The question of whether or not interest could be charged on the Certificate of costs is also a triable issue. Paragraph 11 of the Advocates (Remuneration) Order stipulates as follows:-

**“An advocate may charge interest at 14% 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, provided such claim for interest is raised before the amount of the bill has been paid or tendered in full.”**

21. It would be necessary for the court to establish whether or not the aforesaid Paragraph was relevant in the circumstances of this case. It would be important to establish whether or not the issue of interest had been raised before the amount in the Bill was paid or tendered in full. Both parties have taken complete divergent positions on this issue making it necessary for the facts of the case to be tendered in a full trial and a determination by the court be made. It would also be important to ascertain whether or not the Defendant was liable to pay interest from the date the Certificate of Costs was issued or whether it was liable to pay any interest or at all, bearing in mind that it did not pay the taxed costs immediately the Plaintiff demanded payment of the same. The question of whether the Plaintiff could claim interest only, the liquidated sum having been paid before the filing of this application is also a triable issue.

22. The court does not find the arguments relating to instruction fee to be relevant in the determination of this application as the same was decided when the taxing master awarded the Plaintiff costs as per the Certificate of Costs. Similarly, the issue of whether the Plaintiff was entitled to instruct an advocate to act for it will be one the parties will wish to address during the

- taxation of the costs in this matter, which taxation will arise, in the event the Plaintiff was to succeed in this suit. The court will therefore not say more regarding this issue but suffice it to state that any person is entitled to his own choice of legal representation.
23. It is trite law that a party must be given a fair and reasonable opportunity to present its case. In fact Article 50 of the Constitution of Kenya, 2010 protects the constitutional right of every individual to be accorded fair trial. In view of the fact that striking out of a party's pleadings is a draconian step, it should be used sparingly and very cautiously. This is to afford such party that fair and reasonable opportunity to ventilate its case.
24. This is a position that has been adopted by many courts. This court associates itself with the holding of the case of **Geminia Insurance Co Limited vs Kennedy Otieno Onyango [2005] eKLR** the court had the following to say:-

**“It is trite law that striking out pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that the suit is beyond redemption.”**

25. The court has perused its Defence and considered the parties' submissions and finds that it has not been persuaded by the Plaintiff's submissions that this is one of the clear cases where the court would exercise its discretion to strike out the Defence and enter judgment in its favour as the sum of Kshs 14,068,148.26 in Prayer (1) of the Plaint had since been paid. Conversely, the court finds itself in agreement with the Defendant's submissions that the Defendant's Defence raises triable issues which need to be fully ventilated in a full trial.
26. The upshot of this court's ruling therefore is that the Plaintiff's Notice of Motion application dated 23<sup>rd</sup> February 2013 and filed on 24<sup>th</sup> February 2010 is not merited. The same is hereby dismissed. Costs in the cause.
27. Orders accordingly.

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of August 2013**

**J. KAMAU**

**JUDGE**