



**REPUBLIC OF KENYA**

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

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO. 687 OF 2000**

**PRUDENTIAL BUILDING SOCIETY ..... PLAINTIFF**

**(IN LIQUIDATION)**

**VERSUS**

**HUNJAN MOTORS LIMITED .....1<sup>ST</sup> DEFENDANT**

**SURJEET SINGH HUNJAN .....2<sup>ND</sup> DEFENDANT**

**RULING**

By an application dated 16<sup>th</sup> December, 2009 the defendants (applicants) sought an order of committal against Doris Mugambi, Mr. Karanja and Mr. Hamilton, the liquidation agents of the plaintiff for failure to comply with the order of taxation made herein on 9<sup>th</sup> March, 2009. The defendants further sought an order to compel the said persons to pay to them a sum of **Kshs. 484,008/=** being the taxed costs together with interest at court rates from 9<sup>th</sup> October, 2009 until payment in full.

When the application came up for hearing on 25<sup>th</sup> January 2012, **Mr. Odhiambo** for the plaintiff told the court that his client was not opposed to paying the taxed costs. The only issue in dispute was whether interest ought to be paid in the circumstances of the matter as shall be highlighted shortly hereunder.

The court directed that the sum of Kshs.484,008/= be paid to the applicant's advocates within seven days from the aforesaid date and thereafter the application be listed for hearing of any outstanding issue. Counsel filed their respective submissions on the issue of interest and highlighted the submissions on 15<sup>th</sup> March, 2012.

The brief background to this application is that the defendants herein succeeded in their defence against a suit that had been filed by the plaintiff and were awarded costs of the suit. The defendants proceeded to file a bill of costs and the costs were taxed in the sum of Kshs.484,008/=. A certificate of costs was issued on 9<sup>th</sup> March, 2009. After obtaining the certificate of costs the defendants did not seek to have judgment

entered in terms of the said certificate but proceeded to file an application dated 16<sup>th</sup> September, 2009 seeking leave to commence contempt of court proceedings against the plaintiff's liquidation agents as aforesaid for their failure to pay the taxed costs. The defendants were granted leave as sought.

The application was opposed by the plaintiff who argued that the same was improper in law. Subsequently, the plaintiff filed an application to set aside the ex parte leave that had been granted to the defendants to commence contempt proceedings against the liquidation agents. The hearing of the two applications was adjourned severally due to various reasons.

The issue for determination is whether the defendants are entitled to interest on the taxed costs. **Mr. Esuchi** for the defendants/applicants submitted that his clients are entitled to interest on the taxed costs from the date of taxation of the bill until payment in full. He said that after the costs were taxed on 9<sup>th</sup> March, 2009 a certificate of costs was extracted and served upon the plaintiff sometimes in March 2009. The plaintiff kept on promising to settle the costs but never did so and as such the defendants were compelled to file the application seeking leave to commence contempt of court proceedings. Counsel further submitted that under **Section 27 (2) of the Civil Procedure Act** the court has power to order payment of interest on costs at a rate of 14% per annum.

**Mr. Odhiambo** for the plaintiff submitted that the defendants had not followed the laid down procedure in seeking recovery of their costs. Counsel referred to the provisions of **Section 51 of the Advocates Act** which stipulates as hereunder:

**“51 (1) Every application for an order for the taxation of an advocates bill or for the delivery of such a bill and the delivering up of any deeds, documents and papers by an advocate shall be made in the matter of that advocate.**

**(2) 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 amount of the costs covered 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.”**

Mr. Odhiambo further submitted that had the defendants' counsel followed the right procedure in pursuing payment of the taxed costs the same would have been settled long ago but the plaintiff was prevented from so doing because of the pending applications.

What is the procedure of recovering costs after issuance of a certificate of costs by a taxing officer? There are several decisions that have dealt with this issue. In **JOHN MARK NYAGA KAMUNYORI t/a KAMUNYORI & CO. ADVOCATES vs. DEVELOPMENT BANK OF KENYA [2007] eKLR**, Khamoni J. stated as follows:

**“...It appears to me that even after taxation of an advocate bill of costs and possession of the certificate of taxation thereof, an application by Notice of Motion (as it is always done) for judgment for payment of costs based on the taxed costs should be made under Section 51 (2), without filing suit by plaint pursuant to Section 59, only where there is no dispute over that payment so that Section 51 (2) is used for the sole purpose of obtaining an executable court order. In my view, that procedure is in itself, summary enough and therefore when adopted, no other application for summary judgment is properly available to the same applicant. That is because he will have filed his Notice of Motion under Section 51 (2) in the miscellaneous application case file where the taxation was done.”**

In **A.N. GEKE & CO. ADVOCATES vs. MUNICIPAL COUNCIL OF NAKURU [2004] eKLR**, this court held that a party cannot proceed to execute for his costs based on a certificate of costs only as that is

contrary to the provisions of **Section 51 (2)** of the **Advocates Act**. The court held:

**“Where costs have been taxed and certified and subsequently a suit has been filed for recovery of the same, the court may enter judgment by consent. There cannot be a judgment debtor and a decree holder unless there is first a judgment that has been entered. Having stated as above I conclude that the purported actions by the applicant to execute a non-existent decree were null and void and the notice to show cause and the several warrants of arrest issued thereafter were all unprocedural and consequently any warrant of arrest as against the affected party that may be in force is hereby cancelled.”**

I agree with the plaintiff’s counsel that the applicants did not follow the right procedure in their effort to recover the taxed costs. I must reiterate that taxation of costs under **Rule 13** of the **Advocates (Remuneration) Order** does not by itself amount to a judgment from which a decree can be extracted. A party who has obtained certificate of costs is mandated to comply with the provisions of **Section 51 (2)** of the **Advocates Act** before he can enforce payment of his costs.

**Section 27 (2)** of the **Civil Procedure Act** gives a court the discretion to award interest on costs at any rate not exceeding 14% per annum. The subsection states as follows:

**“The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”**

In the certificate of taxation issued on 9<sup>th</sup> March, 2009 the taxing officer did not award any interest to the defendants. The certificate was not a decree for payment of money. **Section 26 (1)** gives the court power to award interest in a monetary decree but there was no decree in this case.

In this application, I do not think that the court ought to award any interest to the defendants in view of the fact that the defendants acted improperly in their pursuit for payment of costs and due to their impropriety delayed payment of the taxed costs. If the defendants had followed the right procedure the court would have had no hesitation in holding that the plaintiffs were guilty of delay in paying the taxed costs and would have thus ordered them to pay interest on the same in terms of **rule 7** of the **Advocates (Remuneration) Order**.

In exercising its discretion in favour of the plaintiff, the court has taken into consideration the procedure that was adopted by the defendants as highlighted hereinabove. I am satisfied that the plaintiff was rightly entitled to resist payment of interest and consequently find and hold that no interest is payable to the defendants.

As regards the costs of the application dated 16<sup>th</sup> December, 2009 I direct that each party bears its own costs. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF APRIL, 2012.**

**D. MUSINGA**

**JUDGE**

**In the presence of:**

**Alex – Court Clerk**

**Mr. Odhiambo for Mr. Odhiambo for Plaintiff**

**No appearance for Defendant**