



REPUBLIC OF KENYA



**Mwangi & another v Mwangi (Environment & Land Miscellaneous Case 42 of 2017) [2022] KEELC 12736 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12736 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND MISCELLANEOUS CASE 42 OF 2017  
LN GACHERU, J  
SEPTEMBER 29, 2022**

**BETWEEN**

**JOTHAM KAMAU MWANGI ..... 1<sup>ST</sup> APPLICANT**

**ESTATE OF THE LATE WINNIE WAIYEGO MWANGI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JANE WAKARINDI MWANGI ..... RESPONDENT**

**RULING**

- 1 By a Notice of Motion Application dated September 16, 2021, the 1<sup>st</sup> Respondent/Applicant moved the Court for Orders that:
  - i. That the Certificate of Taxation dated June 17, 2021, be converted into a Judgment and Decree for the sum of Kshs 99,780/= together with interest at 14% p.a from June 17, 2021, until payment in full
  - ii. That costs be awarded to the Applicant.
- 2 The application is anchored on the Grounds stated on the face of the said application and the Supporting Affidavit of Jotham Kamau Mwangi, sworn on the September 16, 2021.
- 3 The Applicant contends that by a Ruling delivered on the April 12, 2021, the Court allowed his Bill of Costs dated September 20, 2019, for Kshs 99,780/=. He depones that no Reference has been filed challenging the Certificate of Costs and therefore, it is just that the same be allowed with interest from September 24, 2019<sup>{^}</sup>, when Applicant/Respondent was served with the Certificate of Costs.
- 4 The Motion is opposed by the Applicant/Respondent vide a Replying Affidavit of Wangui Kathryn Kimani, sworn on the January 25, 2022. She depones that the 1<sup>st</sup> Respondent/Applicant is not entitled to the orders sought in light of the Orders of costs awarded to the Applicant/Respondent by this Court on February 1, 1985. Additionally, the 1<sup>st</sup> Respondent/Applicant owes the Applicant/Respondent



costs awarded in Civil Suit No 2461 of 1979, which remains unpaid to date. The Applicant/Respondent's claim is for a set off against the 1<sup>st</sup> Respondent/Applicant. He further contends that the 1<sup>st</sup> Respondent/Applicant claim for interest is punitive and should not be allowed.

- 5 The application was dispensed with by way of Written Submissions. The Respondents/Applicants filed their submissions dated April 20, 2022, wherein they reiterated the contents of the application and urged this Court to allow the same.
- 6 The Applicant/Respondent on the other hand filed her written submissions dated March 14, 2022<sup>{^}</sup>, wherein she raised two issues for determination by this Court. On whether the Applicant/Respondent is entitled to offset, the Applicant/Respondent invited this Court to the meaning of set off as was set out under Order 7 Rule 3, of the Civil Procedure Rules on set off and the meaning of it as was defined by the authors of Atkin's Encyclopedia of Court forms in Civil Proceedings. It is the Applicant/Respondent's submission that an issue of set off raises triable issues as was held by the Courts in *Twiga Chemicals Industries Limited vs Rotam Agrochemical Co Ltd* and *Souza Figuerido & Co Ltd vs Mooring Hotel Limited*. It is thus the Applicant/Respondent's submissions that she be allowed to set off the amounts claimed by the 1<sup>st</sup> Respondent/Applicant in the application.
- 7 The Applicant/Respondent further submitted that this Court be guided by the principles of overriding objectives and enunciated that the purposes of these principles is to ensure the process is fair, fast and inexpensive. She invited this Court to the intent of overriding objectives as set out by the Court of Appeal in the case of *Harit Sheth Advocate VS Shamas Charania* where the Court found that the purpose of overriding objectives is to put parties on equal footing.
- 8 This Court has carefully considered the application, the response thereto and the rival Written Submissions by parties and the issues for determination are
  - i. Whether an order of set off can issue
  - ii. Whether the Certificate of Costs dated June 17, 2021 should be adopted as the judgment and decree of this Court
  - iii. Whether the Applicant is entitled to the interest as prayed
  - iv. Who should bear cost for the application

#### **i. Whether an Order of Set Off Can Issue**

- 9 This Court has perused a copy of a Certificate of Costs issued on the June 17, 2021, for Kshs 99,780/= . Evident from the Certificate of Costs, the same was a culmination of a Bill of Costs dated 20<sup>th</sup> September 2019, which was drawn in favor of the Respondents as against the Applicant/Respondent therein.
- 10 The Applicants who were the Respondents therein have moved this Court to have the Certificate of Costs adopted as a judgment of this Court. In a rebuttal, the Applicant/Respondent herein contends that the amount owing can be set off on the basis that the Respondents/Applicants owe her monies, being costs awarded by this Court on the 1<sup>st</sup> February, 1985, in her favor.
- 11 The law on set off is laid down under Order 7 Rule 3 of the Civil Procedure Rules which provides as follows;

A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such setoff or counterclaim



shall have the same effect as a cross-suit, so as to enable the Court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the Court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof.”

12 A reading of Order 22 rules 14 & 15 of the Civil Procedure Rules contemplates a set off in execution of decrees. For instance, Rule 15 provides:

15. Where application is made to a Court for the execution of a decree under which two parties are entitled to recover sums of money from each other, then—

(a) If the two sums are equal, satisfaction for both shall be entered upon the decree; and

(b) If the two sums are unequal, execution may be taken out only by the party entitled to the larger sum, and for so much only as remains after deducting the smaller sum, and satisfaction of the smaller sum shall be entered upon the decree.”

13 The Court in *Kenya Oil Company Ltd Vs Kenya Ports Authority* [2009] eKLR, when determining whether to allow a defence of set off considered the meaning of set off laid out by the Authors in Atkin’s *Encyclopaedia of Court Forms in Civil Proceedings, 2nd Edition volume I, 1978* Issue, where they stated:

A set-off is in its nature a defence rather than a cross-claim (j). A right of set-off normally arises where the plaintiff’s claim is a debt or liquidated demand and the defendant has cross-claim for a debt or liquidated demand which, if established, will extinguish or reduce the plaintiff’s money claim (k), and should be pleaded as such.”

14 It is the Applicant/Respondent’s contestation in paragraphs 4 & 6 of her Replying Affidavit that there was an Order for costs issued to her against the Respondents/Applicants, which sums the above Respondents/Applicants have only paid Kshs. 1,000/=.

15 It is trite law that he who alleges must prove. See Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

Whoever desires any Court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”

16 Similarly, Sections 109 and 112 provides:

109. The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.”



17 The Court of Appeal in *Anne Wambui Ndiritu –VS- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, held that:

As a general proposition under Section 107 (1) of the Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

18 The Applicant/Respondent only made averments without attaching any documents in the form of proceedings of the Court on the demised dates of 1<sup>st</sup> February, 1985 and 30<sup>th</sup> September, 2014. Without evidence as to the said orders of the Court, this Court cannot establish the amounts awarded or the veracity of the Applicant/ Respondent’s averments. While the Respondents/Applicants have not controverted the averments, it is not automatic that the same will succeed. In concluding that the Applicant/Respondent’s claim for set off has not been proved, this Court is guided by determination of the Court of Appeal in the case of *Ouma Njoga & Company Advocates VS Kisumu Teachers Co-operative Savings & Credit Society Ltd* [2016] eKLR, where the Court allowed an appeal on the basis that a claim for set off had not been proved. To this, end this Court finds and holds that an order for set off cannot issue.

**ii. Whether the Certificate of Costs dated 17 June, 2021 should be adopted as the judgment and decree of this Court**

19 Section 52(2) of the Civil Procedure Act provides:

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”.

20 The Section is instructive of the fact that the amount contained in Certificate of costs is final, and the Court has the power thereof to enter judgment for the amount. This costs may only be altered by Court since at the signing of the Certificate of costs, the taxing master becomes *functus officio*. The powers of the Registrar as espoused in Order 49 of the *Civil Procedure Rules* and such powers do not involve entering judgment on the Certificate of costs. As stated above, there is no evidence that the same has been set aside or altered and it means therefore that the same is final.

21 This Court associates itself fully with the observation of the Court in Nairobi Misc. No 52 of 2012 *Lubulellah & Associates Advocates vs NK Brothers Limited* [2014] eKLR, that:

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 a determination made and not to set aside and/or altered, no other action would be required from the Court save to enter judgment”.

22 Guided by the above provisions, this Court proceeds to adopt the Certificate of costs dated 17<sup>th</sup> June 2021, as the Judgment and Decree of this Court.

**iii**

Whether the Applicants/Respondents are entitled to the interest as prayed



23 The Respondents/Applicants deponed that they are entitled to interest compounded at 14% per annum from 17<sup>th</sup> June, 2021, until payment is full. In paragraph 5 of the Affidavit in support of the Motion, the 1<sup>st</sup> Respondents/Applicants deponed that interest be charged from 24<sup>th</sup> September 2019, when the Bill of Costs was delivered to the Applicant/Respondent.

24 Rule 7 of the [Advocates Remuneration Order](#) provides

An advocate may charge interests 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, such claim for interests is raised before the amount of the bill has been paid or tendered in full.”

25 A clear reading of the foregoing provisions gives power to an advocate to charge interest at 14%, which is only chargeable after one month of delivery of bill to client, implying there must be evidence of service of bill to the client. There have been a number of cases on when time begins to run. In [Muri Mwaniki & Wamiti Advocates v John Ngigi Nganga & another \[2014\]](#), eKLR the Court observed:

There are two inextricable conditions here; that the bill should have been delivered and not paid within one month thereof. That means that if the amount of the bill is paid before expiry of one month from its delivery, no interest shall be payable under the bill. To my mind, Rule 7 of the Advocates Remuneration Order does not refer to the Certificate of Costs but the bill of costs. However, each case should be decided on its merits and circumstances. In the present case delivery was done on 8<sup>th</sup> 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 Kshs. 127,320 from expiration of one month from delivery of his bill to the client, i.e. from May 8, 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”.

26 This Court has not had the chance to peruse a copy of a served Bill of costs referenced to by the Respondents/Applicants herein for purposes of computing time. As rightly stated by the Court above, time will be computed from the period when the Bill of Costs was served on the Applicant/Respondent, while the amount useable will be a contained in the Certificate of Costs. There is no evidence that the Applicant/Respondent was served with the Bill of Costs. However, the Applicant/Respondent did not dispute such service.

27 However, this Court takes cue from the holding of the Court in [Otieno, Ragot & Company Advocates v Kenya Airports Authority \[2021\]](#) eKLR where Court of Appeal when deciding whether to disturb the discretion of the High Court when it awarded interest on the premise of rule 7 and held as follows:

Additionally, it is distinctive that a review of the applicant’s Bill of Costs does not disclose that the applicant included a charge for “...interest at 14% per annum on his (her) disbursements and cost...” in the Bill of Costs. As the sole basis upon which computations of amounts due to an applicant are determined by the taxing officer, the element of interest defined by rule 7 ought to have been included in the Bill of Costs, but it was not. This omission would thereby negate the application of rule 7, and instead render the bill liable to an exercise by the Court of its discretion under section 26 of the [Civil Procedure Act](#). Though the judge was entitled to exercise his discretion to award interest, there was no basis established for awarding the appellant interest at 14% per annum from the date of the bill



of costs until payment in full. For this reason, I consider it necessary to interfere with the award of interest.”

28 Similarly, the Court in *Independent Electoral and Boundaries Commission & another VS Richard Nchapi Leiyagu [2019]* eKLR when declining to allow an order for interest held;

.....secondly that there was no award for interest made in the judgment and neither did the Deputy Registrar award any interest in the Certificate; and for these reasons this Court finds that this is not an appropriate case in which it should exercise its discretion in favor of the applicants in making an award for interest on the costs;”

29 Having been so guided, this Court finds and holds that the Respondents/Applicants have not demonstrated why this Court should exercise the discretion and award interest and proceeds to deny it. It follows therefore that the prayer on interest at 14% p.a from 17<sup>th</sup> June 2021, until payment in full cannot issue.

**iv.**

Who should bear costs for the application

30 It is trite that costs shall follow the events and that the successful party be awarded costs. This is a discretionary right which is a preserve of this Court granted by Section 27 of the *Civil Procedure Act*. The application having partially succeeded, this Court directs each party to bear their own costs.

31 To this end this Court finds and holds that the Certificate of Costs issued on the 17<sup>th</sup> June 2021, be and is hereby adopted as a Judgment and Decree of this Court, but declines to award interest of 14% from 17<sup>th</sup> June 2021, until payment in full. Each party to bear its own costs.

32 It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 29TH DAY OF SEPTEMBER 2022**

**L. GACHERU**

**JUDGE**

**Delivered virtually in the presence of:**

**Joel Njonjo- Court Assistant**

**Mr Onchuru H/B Mr Kimani for the Applicant/Respondent**

**Ms Waitere for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents/Applicants**

**L. GACHERU**

**JUDGE**

**29/9/2027**

