



Opar t/a Odhiambo Opar & Co Advocates v Mutai (Environment and Land Miscellaneous Application 1A of 2020) [2023] KEELC 17306 (KLR) (10 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17306 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 1A OF 2020
FM NJOROGE, J
MAY 10, 2023**

BETWEEN

**STEVE ODHIAMBO OPAR T/A ODHIAMBO OPAR & CO
ADVOCATES APPLICANT**

AND

JANE CHEROTICH MUTAI RESPONDENT

RULING

1. The background to the present application dated September 21, 2021 is as follows: the applicant rendered legal services to the respondent in Nakuru ELC No 379 of 2013 consolidated with Nakuru ELC No 381 of 2013 between Samson Njuguna Mwaura v Jane Cherotich Mutai; that the civil case was concluded and payment of legal services was not forthcoming and so he filed his bill of costs in the present miscellaneous application; that the Deputy Registrar issued a Certificate of Costs on October 2, 2021 which he is now seeking to be adopted as the judgement of the court; that the applicant issued a Notice to Show Cause against the respondent for her to show cause why she should not be committed to civil jail for non-payment of costs as per the certificate of costs dated February 10, 2021; that the same was issued before the adoption of the certificate of costs as the judgement of the court and it is necessary for the certificate of costs to be adopted as judgment by the court before execution can issue. The application was filed on September 21, 2021 about two and a half months after the respondent filed the notice of objection dated June 2, 2021 objecting to the applicant's notice to show cause, stating as follows:
 - a. The document the applicant seeks to execute is not a decree.
 - b. The applicant has not complied with the statutory provisions which require that a ruling pursuant to taxation should be adopted as a judgment.



- c. The Taxing Officer/High Court Registrar did not have jurisdiction to tax a bill of costs in a matter emanating from the Environment and Land Court.
 - d. The certificate of costs issued pursuant to taxation by the High Court Registrar is not valid by reason of lack of jurisdiction.
 - e. The warrants of attachment issued on the basis of a certificate of costs is not valid.
2. It is clear therefore that the filing of the instant application is a response to the above grounds of opposition and seeks to have a decree in place for execution before the execution process is commenced. The respondent had earlier on filed a reference against the decision of the taxing master which was struck out with costs on October 3, 2022.
 3. Now the applicant's instant Chamber Summons application dated September 21, 2021 is expressed to be brought under Order 22 Rule 22, Order 49 Rule 5 of the Civil Procedure Rules and Section 51(2) of the Advocates Act which sought the following orders:
 1. Spent
 2. Spent
 3. That this honorable court be pleased to adopt the sum Kenya Shillings Two Hundred and Sixty Nine Thousand Eight Hundred and Fifty (269,850/=) taxed by Hon N Makau, the Deputy Registrar on the 2nd February, 2021 as a judgement of this honorable court.
 4. That this honorable court be pleased to order that the sum Kenya Shillings Two Hundred and Sixty Nine Thousand Eight Hundred and Fifty (Kshs 269,850/=) do accrue interest at the court rates from the date of taxation by Hon N Makau, the Deputy Registrar on the February 2, 2021 until payment in full.
 5. That the honorable court do give the applicant leave to enforce the certificate of costs as a decree of this honorable court.
 6. That the costs of this application be payable by the respondent.
 4. The application is supported by the affidavit sworn by Steve Odhiambo Opar on September 21, 2021. In response to the application, the respondent filed a Notice of Objection dated December 17, 2021 on the following grounds:
 - a. The application is incurably defective.
 - b. The honorable court lacks jurisdiction to hear and determine the applicant's Chamber Summons dated September 21, 2021 as this is not a reference.
 - c. This honorable court lacks jurisdiction to arrest the delivery of a ruling on a Notice to Show Cause canvassed by the parties before the Deputy Registrar on July 7, 2021 as it will interfere with the taxing master's jurisdiction.
 - d. The notice to show cause whose ruling the applicant seeks to arrest was issued by the Deputy Registrar on May 21, 2021 at the instance of the applicant who seeks to commit the respondent to civil jail in execution of the certificate of costs dated February 10, 2021.
 - e. The application has not stated the prejudice he is likely to suffer if a ruling arising from a process he initiated is delivered.



- f. The certificate of costs sought to be adopted as a judgement is the subject of a reference dated 5/03/2021 which is pending hearing and determination before this honorable court.
- g. The honorable court granted the respondent orders restraining the applicant from carrying on with any execution against the respondent.
5. It is also clear that all the grounds save ground no (f) are not relevant to prayers no's (3), (4), (5) and (6) of the motion they were filed in opposition of since the reference was struck out by the court.
6. The application was canvassed through oral submissions. The applicant sought that his application be allowed in terms of prayers 3 to 6.
7. In response, counsel for the respondent submitted that the application is incurably defective because this court lacks jurisdiction to entertain the said application. He also submitted that prayer No 3 ought to have been brought under a separate application as it seeks for the adoption of a certificate of costs as judgement. Counsel then addressed the provisions cited in support of the application which were Order 22 Rule 22 and Order 49 of the Civil Procedure Rules and submitted that they are in respect of stay of a decree and execution of a decree respectively which does not relate to the prayers sought in the application. He relied on Order 51 Rule 1 which provides that all the applications shall be by way of a Notice of Motion and since the present application was filed under Chamber Summons he sought that it be struck out.
8. In response to the submissions by counsel for the respondent, the applicant submitted that ground (f) of the respondent's Notice of Objection was made on the basis that a reference was pending which reference has already been disposed of. He also submitted that Order 22 and Order 49 of the Civil Procedure Rules related to prayer No 2 which has been abandoned as the certificate of costs was awarded by the Deputy Registrar. The applicant further submitted that there is no prejudice at all if the application has been brought by Chamber Summons and reiterated that he seeks that the application be allowed as prayed.

Analysis and Determination

9. After considering the application, notice of objection and the submissions, the only issue that arises for determination is whether the applicant is entitled to the orders sought in his application.
10. The applicant sought that the court adopts the sum of Kshs 269,850/= taxed by the Deputy Registrar on February 2, 2021 as a judgement of the court, that the said amount do accrue interest at court rates from the date of taxation until payment in full and that the court allows the applicant to enforce the certificate of costs as a decree of the court. The respondent on the other hand argued that the applicant's application is defective and the orders sought should have ideally been sought by filing a Notice of Motion application.
11. It is not disputed that the applicant filed his bill of costs dated September 22, 2020 on September 23, 2020. The Deputy Registrar taxed the said bill of costs at Kshs 266, 800/= on February 2, 2021. A certificate of costs was given on February 10, 2021 for a sum of Kshs 266, 800. The respondent then filed a reference against the said taxation through the chamber summons application dated December 17, 2021 which was struck out by the court on October 3, 2021. There is nothing substantive to bar the grant of the orders sought by the applicant. Regarding the objection to the effect that the application is defective for having been brought as a chamber summons rather than as a notice of motion, I am of the view that it amounts to a mere technicality. This court is enjoined by the provisions of Article 159(2) (d) of the constitution to avoid sacrificing substantive justice at the altar of technicalities. It is



therefore my view that given the circumstances of the instant application disregard of that requirement for a notice of motion would not occasion the respondent any prejudice.

12. The applicant is also seeking that the taxed bill of costs of Kshs 269,850/= do accrue interest from the date of taxation until payment in full. The respondent did not respond to this particular prayer. Rule 7 of the [Advocates Remuneration Order](#) provides as follows:

“An advocate may charge interest at 14 per cent per annum 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 that such claim for interest is raised before the amount of the bill shall have been paid or tendered in full.” (emphasis mine)

13. The Court of Appeal in the case of Otieno, [Ragot & Company Advocates v Kenya Airports Authority](#) [2021] eKLR held as follows:

“Relying on the case of D Njogu and Company Advocates v Kenya National Capital Corporation (supra), the respondent’s response was that the period from when interest will accrue is a matter to be left to the discretion of the court.

Rule 7 provides;

“An advocate may charge interest at 14% per annum on his disbursements and cost, 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 it raised before the amount of the bill has been paid or tendered in full”.

As such, the rule deals with interest chargeable by an advocate in respect of its claim for disbursements and costs following submission of a fee note. It is patently clear from the rule that interest begins to accrue from the expiry of one month from the date of delivery of the bill or fee note. The learned judge’s reasoning that the rule does not specify the date from which time begins to run was therefore a misdirection.

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. 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.”(Emphasis mine)

14. In the present matter, a review of the applicant’s bill of costs dated September 22, 2020 indicates that he did not include a charge for interest and therefore the Deputy Registrar did not award the same. Rule 7 provides that interest is claimable “provided that such claim for interest is raised before the amount of the bill shall have been paid or tendered in full.” It is clear in the present case that the respondent is yet to pay the applicant the amount of money taxed and the only forum upon which the applicant can raise the issue of payment of interest is before this court.



15. Considering the Court of Appeal dicta in the case of *Otieno, Ragot & Company Advocates v Kenya Airports Authority* (supra) and upon the plain reading of Rule 7 of the [Advocates Remuneration Order](#), this court has the jurisdiction to award interest. The only issue that arose in the above-mentioned case was whether the learned Judge was correct in awarding 14% interest from the date of the bill of costs until payment in full. In the circumstances of the present case the advocate would only be able to request for settlement of the owed sum once the bill has been taxed. This being an advocate-client bill of costs, interest should therefore begin to run at the expiry of one month from the date of delivery of the certificate of taxed costs upon the respondent.
16. Consequently, the applicant's application dated September 21, 2021 is hereby allowed in terms of prayers 3, 4, 5 and 6 subject to the condition that execution and interest on the principal will be restricted to the amount taxed by the Deputy Registrar on February 2, 2021 which was Kshs 266,800/= and not the amount sought in the said prayers is Kshs 269,850/=, and that interest, hereby awarded at 14% pa, shall be deemed to have begun to run at the expiry of one month from the date of delivery of the certificate of costs upon the respondent until payment of the costs sum in full. The certificate of costs given on February 10, 2021 is therefore adopted as a judgment of this court as prayed and therefore a decree may be extracted and enforced by the applicant.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 10TH DAY OF MAY, 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

