



**Maina Murage & Co Advocates v Mae Properties Limited (Civil Suit
1269 of 2002) [2025] KEHC 3533 (KLR) (Civ) (24 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3533 (KLR)

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

**CIVIL
CIVIL SUIT 1269 OF 2002**

**TW OUYA, J
MARCH 24, 2025**

BETWEEN

MAINA MURAGE & CO ADVOCATES APPLICANT

AND

MAE PROPERTIES LIMITED RESPONDENT

RULING

1. This ruling is in respect of two (2) applications filed by the plaintiff. The first application is a Notice of Motion dated the 15th of March, 2022 brought under the provisions of Sections 51 (2), 49 (a) of the *Advocates Act*, and rule 7 of the Advocates Remuneration Order. The 2nd application dated the 29th of February 2024, is brought under the provisions of Order 8 rules 3, 5, 7 and 8 of the Civil Procedure Rules and Section 1A, 1B and 3A of the *Civil Procedure Act*.
2. When this matter came up for directions on the 15th of May 2024, this court directed that both of the applications would be heard simultaneously. I will however proceed to analyse each application separately for the sake of clarity.
3. The first Notice of Motion dated the 15th of March, 2022, sought the following orders:
 - i. That this suit be consolidated with the taxation proceedings in Nbi HC Misc Civil Application No. 1519 of 2001 and the two matters be heard and disposed off together;
 - ii. That judgement be entered for the plaintiff on the certificate of costs issued to him by the court on the 28th of January, 2019 in the said taxation proceedings for the taxed amount of Kshs. 6, 270, 542.40 together with interest thereon at court rate of 14% from the date this suit was filed on the 29th of July, 2002, until the 6th of December, 2018;



- iii. That the defendant do pay further interest on the reducing balances of the decretal amount (of Kshs. 20, 641, 251. 20 as of the 6th of December, 2018, at the court rate of 14% per annum from 6th December, 2018, until the date of full payment of the decretal amount;
 - iv. That in the alternative and without prejudice to the above, judgement be entered for the plaintiff on the certificate of costs issued to him by the court on 28th January, 2019, in the said taxation proceedings for the taxed amount of Kshs. 6, 270, 542.40 together with interest thereon under rule 7 of the Advocates Remuneration Order as follows:
 - a. Interest at 9% p.a on taxed amount of Kshs. 6, 270, 542.40 from 4th November 2001 to 17th November 2006 and thereafter;
 - b. Interest at 14% p.a on taxed amount of Kshs. 6, 270, 542.40 from 18th November 2006 to 6th December, 2018.
 - v. That the defendant do pay further interest on the reducing balances of the decretal amount which stood at Kshs. 19, 702. 903. 20 on 6th December, 2018, at the rate of 14% p.a from the 6th of December 2018 until the date of full payment of the decretal amount
 - vi. That the defendant do pay costs for this suit and application.
4. The application is anchored on the grounds stated on its face and on the depositions made in the supporting affidavit sworn by Mr. Maina Murage on the 15th of March, 2022. In brief, the applicant contended that this suit was filed to ensure that the applicant's claims for his fees, which were being assessed in Nairobi. HCC Misc. Civil Application no. 1519 of 2001, is not time barred by limitation; and further that this suit was dependent on the outcome of the taxation proceedings and could not proceed until those proceedings were concluded and a certificate of costs issued to him.
 5. He averred that on the 6th of December, his bill of costs was finally taxed in the sum of Kshs. 6,270,542.40 inclusive of V.A.T and thereafter a certificate of costs was issued on the 28th of January, 2019 by the court in those proceedings; as such, he is entitled to judgement on that certificate of costs under section 51 (2) and 49 (a) of the *Advocates Act* together with interest.
 6. The application was opposed by the Respondent vide a replying affidavit sworn on the 13th of January, 2023, by Ms. Gladys Muema, the Senior Legal Officer at Sanlam Kenya Plc, which is the holding company of the respondent.
 7. Ms. Muema contended that the prayer for consolidation must first be determined, before any other relief arising from the application can be considered by this court.
 8. She averred that the prayer for consolidation of this suit with ELC Miscellaneous Civil Application 1519 of 2001 is untenable given that the ELC miscellaneous civil application 1519 of 2001 was concluded after the respondent paid the applicant the taxed amount of Kshs.6, 270, 542.40, following the issuance of the certificate of costs dated the 28th of January, 2019, by the Deputy Registrar of the Environment and Land court, after his bill of costs was re-taxed by Hon. Justice Bor.
 9. She further averred that the court in ELC miscellaneous civil application 1519 of 2001 is functus officio with respect to that case, and the matter should be deemed as closed.
 10. Ms. Muema contended that the respondent will be unduly prejudiced if the concluded ELC Civil application 1519 of 2001 is re-opened for purposes of consolidation; and that the same will not be an efficient use of the country's limited judicial resources.



11. She further contended that the applicant has not demonstrated how an order for consolidation is necessary for the determination of his claim for interest in the instant suit. She averred that the present suit was filed in the civil division of the high court, whereas the taxation matter was filed in the Environment and Land Court, which courts are distinct from each other with different jurisdictions under the Kenyan Constitution and their enabling statutes, as such, the consolidation of the two matters would be illegal and unprocedural, and likely to cause confusion and embarrassment.
12. Ms. Muema contended that the reliefs sought in the present application are not grounded in the applicant's plaint, as such, the same cannot be issued as prayed. She averred that if the reliefs sought in this application are granted, the same will render the main suit nugatory and will be tantamount to pulling the rug from the respondent's feet without having the case tried on merit.
13. As regards interest, Ms. Muema averred that the claim for interest was misconceived given that the amount of interest payable can only be determined after a full trial; and that the applicant did not raise the issue of interest in his fee note, bill of costs or during the taxation proceedings, as such, he is not entitled to any interest on the taxed amount.
14. She further averred that the applicant first raised the issue of interest in an email dated the 14th of December, 2018, to the respondent's advocate, which is a period of about 12 days after Lady Justice Bor delivered her ruling on the 6th of December, 2018.
15. Ms. Muema also alleged in her replying affidavit, that where an advocate files a bill of costs without raising the issue of interest, then the said advocate is deemed as having forfeited a claim for interest as provided under rule 7 of the Advocates Remuneration Order; and he cannot therefore invoke rule 7 to aid his application for an award of interest.
16. She averred that before the bill of costs was re-taxed on the 6th of December, 2018, the respondent did not have any legal basis for paying the taxed amount, given that the same was disputed; and that the respondent promptly paid the taxed amount after a certificate of taxation was issued. She further averred that where costs are yet to be determined by way of taxation by the court, interest payable should accrue from the date of taxation of such costs, as such, the only legitimate claim for interest that the plaintiff may have is for the period between the service of the certificate of taxation and full settlement of the taxed amount.
17. The respondent contended that the exorbitant interest sought by the plaintiff should not be allowed, as the delay in the determination of the taxation proceedings is not attributed to the respondent, but that the bulk of the delay is attributed to factors that are beyond its control, and it would therefore be unjust for this court to punish the respondent by subjecting it to payment of exorbitant interest which accrued as a result of extraneous factors.
18. It was the respondent's case that the award of interest in the manner sought by the applicant would escalate the taxed amount to disproportionate levels and unjustly enrich the applicant at the expense of the respondent. Ms. Muema contended that the application is unmerited and an abuse of the court's process, and she urged this court to dismiss the application with costs to the respondent.
19. In the second Notice of Motion dated the 29th of February, 2024, the applicant sought leave to amend his plaint in the suit, and if the prayer for leave is granted that the draft plaint attached to his application be deemed to have been duly filed. The applicant also prayed for costs of the application.
20. The application was anchored in the grounds stated in the face of the motion and in the depositions made in the supporting affidavit sworn by the applicant on the 29th of February, 2024. In brief, the applicant alleged that the prayer for the amendment of his plaint, was necessary as he wanted to remove



- matters pleaded in the body of the plaint as well as some of the reliefs sought in the said plaint, given that the said matters and reliefs sought have become absolute and have been rendered irrelevant by the passage of time. He further alleged that the amendment of his plaint was necessitated by the fact that the only outstanding issue in the main suit is the issue of interest payable to him and from what date.
21. He contended that he wanted to amend the prayer for compound interest sought as part of his reliefs in the plaint and replace the same with a prayer for simple interest, as the practice of compounding interest, which was popular in the 1990's and early 2000's was abandoned and discontinued after many years of disapproval and reversals by the Court of Appeal.
 22. The application was opposed by the respondent, vide a replying affidavit sworn by Ms. Gladys Muema, the respondent's senior legal officer, on the 8th of April, 2024. In the affidavit, Ms. Muema averred that the applicant is seeking an award of interest using two (2) parallel avenues, being the main suit and his first application dated the 15th of March, 2022, which is an application for judgement. She further averred that the applicant has not explained the fate that will befall the main suit in the event that the application for judgement is allowed as prayed and vice versa.
 23. It was Ms. Muema's contention that the application for amendment is intended to defeat its objection to the application for judgement; and that the application for amendment cannot exist with that for judgement as both applications seek an award of interest.
 24. Ms. Muema averred that the application for amendment is unmerited, as the plaintiff has delayed in bringing the application, in contravention to the cardinal rule that applications for amendments must be made at the earliest stage of the proceedings. She further averred that the application for amendment has not been made in good faith; and that the same is highly prejudicial to the respondent as the said application seeks to expose the respondent to payment of interest on the underlying suit and on the application for judgement, which prejudice cannot be compensated by an award of damages.
 25. The respondent contended that the proposed amendments will not aid in determining the real issue in controversy between the parties, rather, the same will muddy the waters by providing a parallel avenue for the plaintiff to claim interest from the defendant.
 26. The respondent further contended that the applicant, through the draft amended plaint, is seeking to introduce a new cause of action and prayer for interest in the alternative; and that the same is also meant to patch the holes in the plaintiff's case, following various defences and objections that have been taken by the defendant during the lifetime of the matter.
 27. In response to the averments made by the respondent, the applicant swore a further affidavit on the 28th of October, 2024, wherein he abandoned his prayer for the consolidation of this suit and ELC Misc. civil application 1519 of 2001, on grounds that he wanted to focus on the only outstanding issue between the parties in these proceedings, which is the question of interest that he is entitled to on the costs of Kshs. 6, 270, 642.40 that were taxed in his favour by Lady Justice Bor.
 28. The applicant, in the affidavit also reiterated his position that the application for amendment was necessary so as to remove the prayer for injunction that he had sought against the respondent, when he first filed the suit, together with all the averments that he had made in support of his prayer for injunctions, which averments are contained in paragraphs 8, 9 and 10 of the said plaint; as this prayer for an injunction order was overtaken by events and is of no relevant consequence today.
 29. The applicant alleged that he wanted to abandon his prayer for interest at a monthly compounded rate of 20% from the date of filing the suit until payment in full and downgrade it to simple interest at the normal court rate of 14% from the date of filing this suit until 6th of December, 2018, and thereafter the



same rate on the reducing balance of the decretal amount until payment in full. The applicant further alleged that he has not introduced a new cause of action through his proposed amendments, as all he has done is to abandon and remove one part of his case which is no longer relevant and leave his claim for fees and interest.

30. Both applications were canvassed by way of written submissions, following the directions issued by this court on the 15th of May, 2024. The applicant's submissions in support of both applications were filed by his learned counsel, Maina Murage & Company Advocates; whereas those by the respondent were filed by its learned counsel Muthaura Mugambi Ayugi & Njonjo Advocates.
31. In his written submissions, the applicant supported his claim for two different kinds of interest, being the interest at court rates stipulated under section 26 of the *Civil Procedure Act* and special interest under rule 7 of the Advocates Remuneration Order, on grounds that as a normal litigant for a money judgement, he is entitled to normal interest at court rates under section 26 of the *Civil Procedure Act*; and as an Advocate of the high court of Kenya, he is also entitled to the special interest provided for under rule 7 of the Advocates Remuneration Order. The applicant submitted that the respondent's allegations that it will be prejudiced if he maintains his claim for interest at normal court rates and his alternative claim of interest under rule 7 of the Advocate Remuneration Order is false, given that where claims have been pleaded for in the alternative, one can only be granted relief for his main claim, and it is only when the main claim fails that the court can give him relief on his alternative claim.
32. It was the applicant's submissions that section 26 of the *Civil Procedure Act*, empowers the court to give interest at three different levels, the first being from the date when the suit was filed to the date of the decree, the second being from the period before the institution of the suit and third being an aggregate sum from the date of judgement to the date of payment.
33. He submitted that since his certificate of costs has not been altered or set aside, he is entitled to judgement for Kshs. 6, 270, 542.40 under section 51(2) of the *Advocates Act*, together with interest at normal court rates of 14% under section 26 of the *Civil Procedure Act*, from the date that this suit was filed to the 6th of December, 2018, when his costs were taxed. He further submitted that he is entitled to further interest at the same rate on reducing balances of the decretal amount from 6th December, 2018, until the date of payment of the decretal amount.
34. The applicant contended that the claim for interest under Section 26 of the *Civil Procedure Act* and rule 7 of the Advocate Remuneration Order are very distinct and separate kinds of interest and there can be no conflict between the two as long as they are claimed and pleaded in the alternative. The applicant further contended that following a long line of decisions by the high court and court of appeal, the de facto court rate interest has always been 14%, as such, a judge will need to have very good reasons of departing from the said rate.
35. Regarding his alternative claim for interest under rule 7 of the Advocate Remuneration Order, the applicant contended that the said interest is available to advocates only if they claim the same after the expiration of one month from the date when the advocate delivered his bill to his client, and only if the claim for that interest is raised before the amount of his bill has been paid or tendered in full
36. As regards the issue of when interest becomes payable, it was the applicant's contention that interest becomes payable one month after the advocates bill is delivered to his client. The applicant also submitted that the respondent should be held responsible for the delay of 20years, which would not have occurred had it not to filed its preliminary objection.
37. Regarding his application to amend his plaint, the applicant submitted that applications for amendment of pleadings should be freely allowed at any stage of the proceedings unless such an



- amendment would cause grave injustice to the other party which cannot be compensated by way of costs. He contended that the amendments sought are minor and designed to shed light on the claim as originally pleaded; and that there is nothing new sought to be introduced that will change the case.
38. The applicant further contended that the respondent's claim that it will be prejudiced if the amendment is allowed, as it will be exposed to interest on two separate fronts is false, given that where claims are pleaded in the alternative, the court does not award the plaintiff relief for both his primary and alternative claims at the same time.
 39. In its submissions in opposition to the applicant's application for judgement and amendment of plaint dated the 15th of March, 2022, and 29th of February, 2024, respectively, the respondent basically reiterated and expounded on the averments made in his replying affidavit sworn on the 13th of January, 2023.
 40. I have duly considered the applications together with the affidavits in support of and in opposition to the applications. I have also considered the rival written submissions filed by both parties and having done so, I find that the main issue for determination before this court is whether the applications dated the 15th of March, 2022 and 29th of February, 2024, are merited.
 41. Starting with the first application, the applicant in his further affidavit dated the 28th of October, 2024, abandoned his first prayer for consolidation of this suit with ELC Misc. Civil Application no. 1519 of 2001; as such, what is pending this court's determination on the said application is the prayer that judgement be entered on the certificate of costs issued to the applicant on the 28th of January, 2019, as well as the interest payable on the said costs.
 42. In this case, it is not disputed that the applicant and the respondent had an advocate-client relationship. It is also not disputed that following a disagreement between the parties on the fees payable to the applicant for the services rendered by him in his capacity as an advocate in a sale transaction over a property located in Runda, Nairobi, the applicant was forced to file a bill of costs against the respondent in order to recover fees relating the said transaction.
 43. The taxation on the applicant's bill of costs was concluded on the 15th of February, 2017, where Hon. S. Mwayuli, taxed his bill of costs in the sum of Kshs. 5,800, 000 inclusive of V.A.T. However, both parties were dissatisfied with the decision of the taxing officer and filed their references to challenge the ruling on taxation, and on the 6th of December, 2018. The court in ELC Misc. 1519 of 2001, re-taxed the applicants bill of costs at Kshs. 6,270. 542.40, inclusive of V.A.T.
 44. Thereafter the applicant was issued with a certificate of costs by the said court on the 28th of January, 2019. Given that the applicant's bill of costs had been taxed by the ELC court in Miscellaneous application no. 1519 of 2001, all that the applicant needed to do after he was issued with the certificate of costs from the said court, was to make an application under Section 51 (2) of the *Advocates Act* to have the said certificate of costs entered as a judgement of the said court, as that was the court that taxed his bill of costs.
 45. Section 51 (2) of the *Advocates Act* states as follows: "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."



46. It is therefore not clear why, the applicant failed to make an application before the ELC court to have the said certificate of costs entered as the judgement of the court immediately after he was issued with the certificate of costs on the 28th of January, 2019. The said court would have also determined the issue of interest payable to the applicant on the taxed costs. Given that this court did not tax the applicant's bill of costs, I am of the considered view that the that the application dated the 15th of March, 2022, lacks in merit and is hereby dismissed with costs to the respondent.
47. Turning now to the 2nd application for amendment of plaint, the law governing amendment of pleadings is provided for in Section 100 of the *Civil Procedure Act*, and Order 8 of the Civil Procedure Rules. Section 100 of the *Civil Procedure Act*, stipulates as follows: "The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding."
48. Order 8 rule 3 (1) and rule 5 (1) of the Civil Procedure Rules also speak on the same subject as follows: Order 8 rule 3(1), states that:
- "Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings."
- Whereas Order 8 rule 5 (1) stipulates thus: "For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and, on such terms, as to costs or otherwise as are just."
49. It is therefore clear from the above provisions of the *Civil Procedure Act* and Rules, that this court has wide and unfettered discretion to order for amendment of pleadings at any stage of the proceedings and in such a manner as it directs, for the purpose of determining the real question in controversy between the parties.
50. That being said, the Court of Appeal in *George Gikubu Mbuthia v Consolidated Bank of Kenya Ltd & Another* (2016) eKLR, gave guidelines on the factors which a court should consider when making a determination on whether or not to allow an application of this nature. Such factors include:
- i. Where a new or inconsistent cause of action is introduced;
 - ii. Where vested interests or accrued legal rights will be adversely affected;
 - iii. Where prejudice or injustice which cannot be properly compensated in costs is occasioned to the other party; and
 - iv. Where the applicant is guilty of inordinate delay.
51. I am also guided by the decision of the Court of Appeal in *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR; wherein the court stated as follows:
- "The law on amendment of pleading in terms of section 100 of the *Civil Procedure Act* and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob's *Precedents of Pleading - 12th Edition*, in the case of *Joseph Ochieng & 2 others vs. First*



National Bank of Chicago, Civil Appeal No. 149 of 1991 as follows:- “The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.”

52. Having stated that, the question that now begs to be answered, is whether this court should allow the application by the plaintiff to amend its plaint dated 26th July, 2002.
53. In this case, the applicant is seeking to amend his plaint by deleting paragraphs 8, 9, 10 and prayer (b) of the said plaint, so as to remove averments and reliefs, which in his view have been overtaken by events and are therefore obsolete. From the application of amendment, the applicant is also seeking to amend his claim for costs from Kshs. 16, 840, 900. 25 to Kshs. 6, 270, 642.40 that was taxed in his favour; to change his claim for interest from compound interest to simple interest; and to introduce an alternative claim for interest under rule 7 of the Advocates Remuneration Order, which he is entitled to as an advocate, and which is an alternative to his claim for interest at court rates.
54. I have considered the amendments sought by the applicant, and in my view, the same does not seek to introduce a new cause of action as alleged by the respondent. Rather, the amendment sought by the applicant, are in my view, necessary for purposes of clarifying the real issues that are in dispute between the parties, by deleting the issues that have been overtaken by events and introducing issues that are relevant to the suit; so as to allow the court determine the said issues on merit.
55. Furthermore, I am of the considered view that the respondents will not be prejudiced or that any injustice will be occasioned to them, considering that they will also be allowed to amend their defence, to answer to the allegations made by the plaintiff in their amended plaint if they so wish.
56. Although the application for amendment was brought five years after the applicant’s bill of costs was taxed, given that the same was made before the suit had been set down for hearing, I am of the considered view that the application should be allowed.
57. I find the case of Court of Appeal case of Eastern Bakery v Castellino (1958) EA 461 relevant. In this case the Court of Appeal for Eastern Africa held that:
- “ Amendments to pleadings sought before hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other side can be compensated by costs.”
58. That being said, I am of the considered view that the application by the applicant dated the 29th of February, 2024, has merit and should therefore be allowed.

Determination.

59. The application dated the 15th of March, 2022, lacks in merit and is hereby dismissed with costs to the respondent.



60. The application dated the 29th of February 2024 is hereby allowed with costs to the appellant.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF MARCH, 2025.

HON. T. W. Ouya

JUDGE

For Plaintiff/applicant.....Maina Murage

For Defendant/respondent.....Vincent Oloo

Court Assistant.....Jackline

