



Shah & Parekh v Kenindia Assurance Company Limited (Miscellaneous Civil Application 405 of 2017) [2024] KEHC 12603 (KLR) (Civ) (17 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12603 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION 405 OF 2017**

**CW MEOLI, J
OCTOBER 17, 2024**

BETWEEN

SHAH & PAREKH APPLICANT

AND

KENINDIA ASSURANCE COMPANY LIMITED RESPONDENT

RULING

1. What is for determination, as agreed upon by consent of the parties, is the question of awardable interest on the settled principal sum in the motion dated 04.09.2023. Nevertheless, before addressing the issue, it would be apposite to set out the relevant background events. The instant proceedings (Nairobi HC Misc. Application No. 405 of 2017) were at the outset commenced by way of an Advocate-Client Bill of Costs dated 19.09.2017 filed by Shah and Parekh Advocates (hereafter the Applicant), that was taxed on 31.05.2019 in the sum of Kshs. 1,721,992/-. Apparently aggrieved with the decision of the taxing master, Kenindia Assurance Company Limited (hereafter the Respondent) moved the Court seeking inter alia for enlargement of time within which to lodge a reference and leave to file a notice of objection against the decision. The Respondent's motion was allowed with costs vide a ruling delivered on 14.05.2020.
2. However, due to the Respondent's non-compliance with the latter ruling, the Applicant moved this Court vide the motion dated 07.10.2021 seeking inter alia that the Respondent be deemed to have abandoned its right to file a reference and the Applicant be allowed to proceed to recover their costs as taxed on 31.05.2019. Subsequently, via a ruling delivered on 11.10.2022, this Court allowed the Applicant's motion with costs. The Applicant thereafter proceeded to file a Party and Party Bill of Costs dated 05.12.2022 on the premise of this Court's earlier rulings awarding costs. The said Bill of Costs was eventually taxed on 25.07.2023 to the tune of Kshs.249,584.84/-.



3. On the premise of the forestated proceedings, the Applicant further moved the Court by an application dated 04.09.2023 brought primarily pursuant to Section 51(1) & (2) of the Advocates Act. Seeking essentially that the Court be pleased to enter judgment in terms the Certificate of Taxation dated 24.06.2019 issued in the sum of Kshs.1,721,992/- and the Certificate of Taxation dated 22.08.2023 issued in the sum of Kshs.249,584.84, hence in the aggregate sum of Kshs.1,971,576.84/-; that the Court be pleased to grant interest at 14% per annum on the sum of Kshs.1,721,992/- amounting to Kshs. 1,422,035.15/- calculated up to and including 31.08.2023 and thereafter 14% per annum on the said sum of Kshs.1,721,992/- until payment in full; that the Court be pleased to grant interest at 14% per annum on the sum of Kshs.249,584.84/- amounting to Kshs.25,714.68/- calculated from 05.12.2022 to 31.08.2023 and thereafter 14% per annum on the said sum of Kshs.249,584.84/- until payment in full; and costs of the motion. On grounds on the face of the motion as amplified in the supporting affidavit deposed by Hasmukhrai Manilal Parekh.
4. In response, the Respondent filed a Preliminary Objection (PO) dated 28.11.2023, objecting to the motion. On grounds that the application was bad in law and an abuse of the Court process; the application was based on a provision of the law which is not applicable; that the Court upon delivering its ruling on 31.05.2019 and 25.07.2023, became functus officio in the matter; and that the matter before this Court is for taxation of an Advocate-Client Bill of Costs and no judgment can therefore be entered in the file after taxation.
5. By way of rejoinder, the Applicant filed Grounds of Objection dated 04.04.2024 in response to the Respondent's PO.
6. Directions had been given on 14.12.2023, for the contemporaneous hearing of the Applicant's motion dated 04.09.2023 and the Respondent's PO dated 28.11.2023. When parties subsequently appeared before the Court on 20.06.2024 and upon hearing representation by respective counsel, it was agreed that the principal sum having been settled, the only issue left for consideration at that juncture was the question of interest. The Court proceeded to give directions as follows: -

“The parties agree that the principal sums in the motion dated 04.09.2023 have been paid and the only outstanding question is interest and costs. Parties encouraged to attempt out of Court settlement or orally canvass these issues on 22.07.2024, if no settlement is reached.”
7. As of 22.07.2024, when parties appeared before the Court, no settlement had been reached on the question of interest and costs thus necessitating the instant proceedings. Only the Applicant had filed submissions by the latter date which in part, addressed the solitary issue of interest awardable. Counsel for the Applicant submitted that the claim for interest at the rate of 14% pursuant to Paragraph 7 of the Advocates Remuneration Order is grounded on the Certificate of Taxation dated 24.06.2019 issued in the sum of Kshs.1,721,992/- and the Certificate of Taxation dated 22.08.2023 issued in the sum of Kshs.249,584.84/-. That the Applicant served a demand letter dated 12.10.2022 upon the Respondent claiming interest to the tune of Kshs. 1,194,855.53/- from 27.10.2017 to 12.10.2022. It was further submitted that this Court has jurisdiction pursuant to Section 26(1) of the Civil Procedure Act to award interest on the principle sum prior to the period before institution of the suit. Hence judgment ought to be entered as sought in the Applicant's motion inclusive of the attendant costs.
8. For whatever reason, the Respondent failed and or opted not to submit on the sole question for consideration before the Court either by filing written submissions or addressing the same orally as directed.
9. That said, on account of representations made to the Court on 20.06.2024, parties principally conceded that both the Applicant's motion and the Respondent's PO had been overtaken by events



save for the sole question of interest awardable on the principal sums adjudged/taxed. Accordingly, the Court has considered the record and the material canvassed in respect of the sole issue for determination herein.

10. The Court has been called upon to determine whether the Applicant is entitled to interest on the respective taxed costs of Kshs.1,721,992/- and Kshs.249,584.84/-, respectively. Here, it would be important to note that the Applicant's prayer seeking that judgment be entered on the aggregate sum of Kshs.1,971,576.84/- would equally appear to have been overtaken by events on accord of the representation earlier made to the Court by counsel that the Respondent had since settled the principal sum in the motion dated 04.09.2023. Therefore, what this Court ought to consider is whether the Applicant is entitled to interest at 14% per annum on the costs adjudged in the Certificate of Costs dated 24.06.2019 and 22.08.2023 respectively.

11. Relevant to the question at hand is Rule 7 of the Advocates Remuneration Order (ARO) which provides that: -

“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”.

12. Concerning the application of Rule 7 of the Advocates Remuneration Order the Court of Appeal in Otieno, Ragot & Company Advocates v Kenindia Assurance Co Ltd [2023] KECA 1443 (KLR) observed that:-

23. I have read and taken cognizance of the cases relied on by the appellant in which the different superior courts allowed the sought orders of either 9% interest p.a. or 14% interest p.a. as contemplated under Rule 7 of the Advocates Remuneration Order, to run after the expiration of one month from the date of delivery of the Advocate/Client Bill of Costs, even after the courts have concluded that the Certificate of Costs represented the final costs between the Advocate and Client. I also take note that the appellant pointed out the fact that these cases seem to be divided on both the interest rate and from when it should be applied. All I can point out is that the conflicting decisions of the High Court reflect the need for clarification and clear guidance from this Court on this issue.

24. I believe that this decision and its companion one in Kisumu Civil Appeal No. 129 of 2018 will remove the cobwebs of confusion reigning in this area. It comes down to a salutary advice for advocates: if one hopes to claim the 14% p.a. interest under Rule 7 of the Advocates Remuneration Order on a fee note or Bill of Costs, one must make the claim in the fee note and/or Bill of Costs. If the interest is not claimed in the fee note or Bill of Costs, an advocate loses his right to claim for it subsequently. Similarly, if the interest of 14% under Rule 7 of the Advocates Remuneration Order is not specifically awarded during the taxation proceedings, the advocate must invoke Rule 11 of the Advocates Remuneration Order and file a reference to protest the omission. The advocate cannot wait to introduce the interest during enforcement proceedings under section 51(2) of the Advocates Act. If the advocate demands interest at that late stage, he will likely suffer two potential perils: the court can only award interest at earliest from the date of lodging the Bill of Costs; and the interest is at the discretion of the court. However, where the interest of 14% p.a. under Rule 7 of the Advocates Remuneration Order is specifically claimed in the Bill of Costs and awarded during the taxation proceedings, the interest will apply to the taxed amount until it is fully paid. An application under 51(2) of the



Advocates Act will not act to reduce the interest rate or otherwise create a reservoir of discretion for the judge to change the interest rate.”

See also: - *Machira & Co. Advocates v Arthur K. Magugu & Margaret Wairimu Magugu* [2019] KECA 867 (KLR) and *Otieno, Ragot & Company Advocates v Kenya Airports Authority* [2021] KECA 587 (KLR)

13. In *Otieno, Ragot & Company Advocates v Kenindia Assurance Co. Ltd* [2023] KECA 1398 (KLR) quoted in *Otieno, Ragot & Company Advocates* [2023] KECA 1443 (KLR) (*supra*) the Court succinctly addressed itself to the issues as follows:-
 31. As should be obvious from the unbundling of Rule 7 of the Advocates Remuneration Order and section 51(2) of the Advocates Act above, it was not open to the appellant to claim the potentially permissible interest rate of 14% for the first-time during adoption proceedings under section 51(2). This is because it was incumbent upon the advocate to put the client on notice that he intended to claim the interest at the point at which he drew the Bill of Costs. He did not. If an advocate is interested in claiming the potentially allowable interest at 14% p.a., he must make the claim in the Bill of Costs.
 32. Once the advocate includes the claim of interest, it must be litigated before the Taxing Master in the taxation proceedings. If it is awarded by the Taxing Master, it would be well and good for the advocate. However, if it is not awarded in the taxation proceedings and included in the Certificate of Costs, the advocate must challenge the omission in a reference to the Court under Rule 11 of the Advocates Remuneration Order. It is not open to the advocate to spring the claim of interest for the first time at the enforcement proceedings under section 51 of the Advocates Act.
 33. To reiterate, the policy rationale for this interpretation is that the advocate should put the client on notice about the totality of the claim he has against the client at the earliest instance. There is a policy preference against an advocate making piecemeal claims against the client. Requiring an advocate to raise the claim for interest at the earliest instance gives the client an opportunity to object to any delays by the advocate in raising the Bill of Costs. This, in turn, acts as a disincentive for advocates to needlessly delay raising a Bill of Costs with the sole objective of increasing the amounts due through the allowable interests under Rule 7 of the Advocates Remuneration Order. Conversely, it incentivizes clients to promptly pay the amounts due to the advocate as claimed in the Bill of Rights or raise an objection promptly.”
14. The claim on interest at the rate of 14% in the motion dated 4.09.2023 was predicated on Rule 7 of the ARO in respect of the amounts taxed on 31.05.2019 to the tune of Kshs. 1,721,992/- and 25.07.2023 to the tune of Kshs.249,584.84/-. Evidently, the former taxed amount was as result of a successfully litigated Advocate-Client Bill of Costs and the latter a Party and Party Bill of Costs. Taking due guidance from the dicta in *Otieno, Ragot & Company Advocates* (*supra*), it was obligatory of the Applicant to claim 14% p.a interest under Rule 7 in its fee note or bill of costs thereto. From a perfunctory review of the latter, there was no claim for such interest made in bill of costs or fee note. Further, in her brief ruling rendered by the taxing officer on 31.05.2019, she did not award any interest on the taxed sum meanwhile no reference no lodged by the Applicant.
15. As further observed in *Otieno, Ragot & Company Advocates* (*supra*), the Applicant cannot at this late stage, pursuant to a motion brought under Section 51(1) & (2) of the Advocates Act, seek to claim interest at 14% that was not a priori demanded from the Respondent either by way of fee note or bill of costs. The Applicant’s attempt to justify an award of interest at 14% through annexure marked HMP2,



being a letter dated 12.10.2022 does not aid his cause; the said demand for interest was only made after taxation of the Applicant's Advocate-Client Bill of Costs on 31.05.2019.

16. In the circumstances, no award on interest in respect of the settled principal sum can be made as sought in the motion dated 4.09.2023. Consequently, the Applicant's claim on interest fails. The motion dated 04.09.2023 is now marked as fully determined as the principal sum claimed therein has already been settled. Each party will bear their own costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 17TH DAY OF OCTOBER 2024.

C. MEOLI

JUDGE

In the presence of:

For the Applicant: Mr. Parekh

For the Respondent: N/A

C/A: Erick

