



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISCELLANEOUS APPLICATION NO. 195 OF 2019

OTIENO RAGOT & CO.ADVOCATES.....APPLICANT/ADVOCATE

VERSUS

KENINDIA ASS. CO. LTD.RESPONDENT/CLIENT

RULING

The application before me was brought pursuant to **Section 51** of the **Advocates Act**. It is an application that the Court should enter Judgment in favour of the Applicant, **OTIENO RAGOT & CO. ADVOCATES**, for the sum awarded by the Taxing Officer.

1. It is common ground that on 25th June 2020 the learned Taxing Officer, Hon. Lina Akoth, taxed the Advocate/Client Bill of Costs in the sum of Kshs 129,993/=. Following the said taxation, a Certificate of Costs was issued.
2. As there had been no setting aside or review of the Certificate of Costs, it is deemed to be final as to the amounts awarded to the Applicant (hereinafter "*the Advocate*").
3. Accordingly, the Advocate is entitled to Judgment for the sum of Kshs 129,993/=.
4. Over and above the taxed costs, the Advocate has asked the Court to award Interest on the said costs, at the rate of 14% per annum, from 10th August 2019.
5. Finally, the Advocate asked for costs of the application.
6. The Respondent, **KENINDIA ASSURANCE CO. LTD.** (hereinafter "*the Client*") opposed the claim for Interest.
7. Both parties appreciate that the claim for Interest either succeeds or fails depending upon the interpretation of the provisions of **Rule 7** of the **Advocates Remuneration Order**. The said Rule stipulates 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 such claim for interest is raised before the amount of the bill has been paid or tendered in full.”

8. The Advocate asserted that on 9th July 2019, it delivered to the Client "*an itemized bill.*"
9. The Advocate urged me to concur with the following words of Maina J. in **OTIENO RAGOT & COMPANY ADVOCATES Vs KENINDIA ASSURANCE CO. LTD. (2016) eKLR;**

“In my view the bill referred to in this rule is the Advocate’s final bill setting out his disbursements and costs which he then requires the client to pay but not a bill which he intends to file for taxation.

Thus the fee note dated 24th April 2005, under cover of their letter of even date was sufficient to satisfy the provision of Rule 7 of the Order.”

- Emphasis is mine.

10. The learned Judge made reference to "*the Advocate’s Final Bill*", as well as "*the fee note*"; as satisfying the provisions of **Rule 7** of the **Advocates Remuneration Order**.

11. Similarly, in the case of WAINAINA IRERI & COMPANY ADVOCATES Vs KENYA BUS SERVICES LIMITED, MISC. APPLICATION NO. 222 OF 2005, the Court awarded interest from a date which was after the expiration of one month, from the date when the Advocate had delivered his fee note to the Client.

12. I note that even in the case of A. M. KIMANI & COMPANY ADVOCATES Vs KENINDIA ASSURANCE COMPANY LTD, MISC. APPLICATION NO. 680 OF 2006 the Court ordered thus;

“The said sum will attract interest at the rate of 9% per annum from 22nd July 2006, which is a date that is more than a month from the time the applicant’s bill was delivered to the respondent for payment.”

13. Even in KITHI & COMPANY ADVOCATES Vs MENENGAI DOWNS LIMITED, MISC. APPLICATION NO. 1069 OF 2013, Mabeya J. held as follows, when giving effect to **Rule 7** of the **Advocates Remuneration Order**;

“In view of the foregoing, once a judgement is entered on a certificate of costs, the decretal amount is liable to attract interest of 14% per annum from 30 days after the service of the bill and not the date of taxation. For the Advocate to be able to recover this, there must be evidence on record, on the date when the bill was served upon the client.”

14. All those authorities which were cited by the Advocate consistently make reference to either a Bill or a Fee note.

15. However, the Advocate has submitted that;

“By whatever name it may be called nor entitled, whether as a fee note or a final Proforma invoice; It is sufficient that the document delivered by the Advocate to the client constitutes a final breakdown or tabulation of the costs sought by the Advocate from the client and that it is delivered to the client, and it is understood by the parties as such, unless there is a contrary view expressed by evidence, by the client to allege that when he received the Final Proforma Invoice, he understood it to mean a different thing or misconstrued it not to be a demand for the final fees due to the Advocate for the work undertaken.”

16. I am not persuaded that the Advocate should impose an obligation upon his client, by sending a Proforma Invoice and then saying to him that if you understand this document to be anything other than my final fee note, you must provide evidence of what you understood it to mean.

17. **Rule 7** imposes the obligation upon the Advocate, to deliver a Bill. When Advocate discharges that onus, and makes available evidence to demonstrate that he had done so, the court would award him interest as provided for.

18. I agree with the following words of the Advocate;

“Rule 7 was not plucked from the air, so to speak. It is a corollary of Section 48 of the Advocates Act. The general legal position on this matter of delivery of a bill prior to the institution of proceedings is in Section 48. It bars the commencement of proceedings for the recovery of fees unless a bill has been first delivered.”

19. The Advocate clearly appreciated that all he was required to deliver to the client was a Bill. However, for some reason, which has not yet been provided to the court, the advocate made a conscious decision to deliver a Proforma Invoice.

20. I hold the considered view that the onus was on the advocate to satisfy the court that the said proforma invoice was the same as the bill contemplated under **Rule 7** of the **Advocates**

Remuneration Order.

21. In the case of OTIENO RAGOT & CO. ADVOCATES Vs WINAM CHEMISTS LIMITED, MSIC. CIVIL CASE NO. 54 OF 2019, I expressed myself thus;

“Black’s Law Dictionary defines the word “Proforma” as follows;

‘Latin for form’

1. Made or done as a formality and not involving any actual choice or decision.

2. (Of an invoice or financial statement) provided in advance to describe items, predict results, or secure approval.”

22. Although the Advocate is convinced that;

“..... if it quacks and walks like a duck, then it is definitely a duck by whatever name called”,

the definition above puts paid to that submission. When the word “proforma” is used in relation to an invoice, it constitutes that which is

provided in advance. Therefore, it may describe the items or even predict the results, but it is not an invoice.

23. The Black's Law Dictionary gives the following definition of "Proforma Invoice";

"A bill-like document that is sent to a customer to show what the price would be if the customer placed an order."

24. So, the document may look like a bill but it is not one.

25. In real life, Proforma Invoices are usually obtained from several potential suppliers of goods or services. The potential customer would normally have spelt-out the specifications of the goods or services which the said potential customer was interested in.

26. The potential suppliers would give particulars of their prices or charge-rates, which would then be placed before the potential customer's relevant organ, that has the requisite mandate to give approval.

27. When an approval was given, the customer would place an order to the supplier. It is the issuance of an order which triggers the commencement of contractual obligations.

28. However, a potential customer does not have any obligation to place an order for goods or services, just because one of his officers or employees had sought a proforma invoice.

29. The potential customer does not become indebted to the potential supplier just because he had been given a proforma invoice.

30. It is within that context that I fail to understand why the advocate presented a proforma invoice to the client, after the advocate had rendered services.

31. On the other hand, if the advocate had raised a bill, after he had rendered the services, the client would have become indebted to the advocate.

32. I find that the Advocate did not become entitled to charge interest from 10th August 2019, as he had not complied with **Rule 7** of the **Advocates Remuneration Order**.

33. The Ruling by the Taxing Officer was delivered on 25th June 2020. From that date, the Client became aware of the costs it owed the Advocate.

34. In line with the 30 days' grace period given to the client after being given the Advocate's Bill, I hold the view that fairness demands that the client be accorded a 30 days' grace period from 25th June 2020 when the Ruling on Taxation was delivered.

35. In the result I now order that the Client shall pay Interest at 14% per annum from 25th July 2020 until 10th September 2020 when the Client settled the taxed costs.

36. Finally, as the Client has successfully fended-off the Advocates claim for substantial interest, I order that each party will meet his own costs of the application dated 15th August 2020.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 6TH DAY OF MAY 2021.

FRED A. OCHIENG

JUDGE