



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CIVIL APPLICATION NO. 2 OF 2019

OTIENO RAGOT & COMPANY ADVOCATES...ADVOCATE/APPLICANT

-VERSUS-

KENINDIA ASSURANCE CO. LTD.CLIENT/RESPONDENT

RULING

The Law Firm of **OTIENO, RAGOT & COMPANY ADVOCATES** have asked the Court to adopt the Certificate of Costs issued on 17th October 2019, as a Judgment and Decree of the Court. The Law Firm has also asked the Court to award it interest at 14% per annum from 1st December 2018.

1. The Applicant's Advocate/Client Bill of Costs was taxed in the sum of Kshs 127,463.60.
2. The basis for the claim for interest is that on 30th October 2018, the Applicant delivered its proforma invoice to the Client, **KENINDIA ASSURANCE CO. LIMITED**.
3. As the Client failed to settle the amount cited in the proforma invoice, the Advocate believes that, pursuant to **Rule 7 of the Advocates Remuneration Order**, they are entitled to recover interest from a date which falls 30 days after the proforma invoice was delivered to the Client.
4. On the other hand, the Client said that the advocate was not entitled to charge any interest on the taxed costs because the costs were paid in full before the advocate made a demand for the same.
5. It is common ground that the client paid the taxed costs on 19th December 2019.
6. When canvassing the application the advocate cited the decision of Majanja J. in the case of **OTIENO, RAGOT & CO. ADVOCATES Vs NATIONAL BANK OF KENYA (2016) eKLR**, wherein the learned Judge said;

“My understanding of Rule 7 of the Advocates Remuneration Order is that interest is chargeable from the expiration of one month from delivery of the bill of costs by the advocate to the client. Evidence of delivery is necessary. To my mind, Rule 7 of the Advocates Remuneration Order does not refer to the certificate of costs, but the bill of costs.....”

“The amount of the bill may be different from the taxed costs. But for all purposes of Rule 7, interest should be on the amount in the certificate of costs as those are the costs which are payable.”

7. On her part, Maina J. stated as follows, 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”

8. The advocate also noted that Kasango J. had held in **MUTUGI, UMARA & MUZNA CO. ADVOCATES (formerly known as JOSEPH MUNYITHYA & CO. ADVOCATES) Vs ELSEK & ELSEK CONSTRUCTION LIMITED (2015) eKLR** that interest is chargeable after the lapse of 30 days from the date of the delivery of the bill.
9. A further authority cited by the advocate was that of **WANAINA IRERI & CO. ADVOCATES Vs KENYA BUS SERVICES LIMITED (2005) Eklr**, in which I had held that interest was payable after the lapse of a month from the date when the fee note was tendered to the client.

10. In the case of A. M. KIMANI & COMPANY ADVOCATES Vs KENINDIA ASSURANCE CO. LTD. (2006) Eklr, I held that interest would be payable from 22nd July 2006, which was 30 days after the date when the advocate delivered his fee note to the client.

11. In the light of those authorities, the advocate submitted that;

“What comes out from the foregoing decisions is that under Rule 7 of the Advocates Remuneration Order, the computation of interest is to begin after one month has lapsed from the date when the document described therein as “bill” constituting the Advocate’s tabulation of his costs in terms of fees and disbursements is delivered to the client for settlement.”

12. It was the understanding of the advocate that the;

“..... document described thereon as a bill is definitely a fee note, whether entitled as “Proforma Invoice” or otherwise.”

13. Whilst I agree with the advocate that the document referred to in **Rule 7** of the **Advocates Remuneration Order** is definitely a fee note, I do not share the view that a Proforma Invoice is a bill.

14. In the case of ODHIAMBO OWITI & CO. ADVOCATES Vs DOMINION FARMS LIMITED, MISC. CIVIL CASE NO. 36 OF 2019 I noted thus;

“The ‘Black’s Law Dictionary’ defines Proforma as;

1. Made or done as a formality and not involving any actual choice or decision. 2. (Of an invoice) or Proforma Bill would thus constitute an advance to describe items, predict results or secure approval.

A Proforma Invoice or Proforma Bill would thus constitute an advance document upon which no obligation attaches. It is the precursor of the actual Invoice or Bill.”

15. It would therefore follow that that which is an advance document upon which the actual Invoice or Bill will be derived, cannot also be the final Bill.

16. In OTIENO RAGOT & CO. ADVOCATES Vs WINAM CHEMISTS LTD MISC. CIVIL CASE NO. 54 OF 2019, I held as follows;

“In so far as the document which was sent by the Applicant was a Proforma Invoice, it can be deemed to be an advance description of what the Applicant intended to charge.

A proforma invoice does not give rise to any legal upon the person who sent it.

In contrast, an Invoice is deemed to be an asset for the person who sent it. On the basis of invoice, the tax authority becomes entitled to demand payment of tax.”

17. I reiterate what I said in that case; that;

“The Proforma Invoice may look like an invoice or a bill, but it is not.”

18. I conclude by going back to the basics, which is the letter of the law. **Rule 7** of the **Advocates Remuneration Order** provides that;

“An advocate may charge interest at 14% 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, providing such claim for interest is raised before the amount of the bill has been paid or tendered in full.”

19. The Rule specifically talks about the advocate’s Bill; but not a proforma invoice or any other document howsoever described.

20. In the result, I enter judgment in favour of the advocate for the sum of Kshs 127,463.60, in accordance with the certificate of costs.

21. The said sum will attract Interest at 14% per annum from 18th November 2019 (which is 30 days from the date when the Taxing Officer delivered her Ruling, in the presence of both parties), until 19th December 2019, when the costs were paid in full.

22. As the client has successfully fought-off the bigger claim for interest, I order that each party will meet their own costs of the application dated 19th February 2020.

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

FRED A. OCHIENG

JUDGE