



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

MISCELLANEOUS APPLICATION REF NO. 1 OF 2021

NJUGUNA & PARTNERS ADVOCATES....ADVOCATE/RESPONDENT/APPLICANT

VERSUS

WOOD CREST INVESTMENT CO. LTD....1<sup>ST</sup> CLIENT/APPLICANT/RESPONDENT

MAWA FAMILY LIMITED.....2<sup>ND</sup> CLIENT/ APPLICANT/RESPONDENT

PATRICK WAWERU MAINA.....3<sup>RD</sup> CLIENT/ APPLICANT/RESPONDENT

RULING

By a **Notice of Motion Application** dated **18th of June 2021**, brought under the **Advocates Act**, Cap 16 Laws of Kenya, and the **Advocates Remuneration Order**, the Clients/Applicants sought for orders;

- a. That the taxed bill of costs and the certificate thereof taxed in favour of the applicant/advocate be removed to this court by way of reference.
- b. That the taxed bill of costs amounting to Kshs. 2,209,353.40 and the certificate thereof be quashed, set aside and vacated and the bill of costs dated 3/2/2020 be retaxed
- c. That the costs of the application be borne by the Applicant/Advocate in the bill of costs.

The Application is premised on the grounds set out on the face of the Application and on the Supporting Affidavit of **PATRICK WAWERU MAINA**. The Applicant contends that he engaged the Law Firm of **Njuguna & Partners Advocates** to handle a matter on his behalf and on the behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Clients/Applicants. That he paid the said advocates more than **Kshs. 400,000/=** which evidence he attached. That he was surprised when the said advocates filed **an advocate client bill of costs**, in the same matter. He further averred that he engaged another advocate to file submissions in response to the **bill of costs**, and the same was taxed at **Ksh. 2,209,352.40**. That the bill was taxed on the higher side and was above the sums allowed in the **Advocates Remuneration Order**, and the **Advocates Act**. He prayed that the taxed bill be quashed, vacated and set aside so that the ends of justice can be met.

The Application is opposed through Grounds of Opposition dated **19th of July 2021**, filed in Court on **28th July 2021**. In the said grounds of opposition, the Respondent/Advocate contended that the Application is incompetent and is an abuse of process and ought to be dismissed with costs for reasons that; it failed to comply with **Order 11** of the **Advocates Remuneration Order 2014**, and the Taxing Master's Ruling was not attached to the instant application and the said application was filed way outside the prescribed timelines.

Further, the Respondent/Advocate contended that the Applicant only disputes the quantum of costs awarded and failed to demonstrate the error made by the Taxing Master. That the **Bill of Costs** gave credit to all the payments made by the Respondents and the Taxing Master considered the same in the taxation of the Bill of Costs.

The Advocate, Njuguna & Partners also filed, by a **Notice of Motion Application** dated **17<sup>th</sup> August 2021**, brought under **Order 51 Rule 1** of the **Civil Procedure Rules**, and **Section 51(2)** of the **Advocates Act**, Cap 16 Laws of Kenya, and sought for Orders that;

1. Judgment be and is hereby entered in favor of the Applicant against the Respondents jointly and severally in the sum of **Kshs. 2,209,351.40**.
2. Interest be granted on prayer (1) hereinabove at the rate of **14% per annum** from expiration of one month from the date

of delivery of the bill to the Respondent on 27<sup>th</sup> September 2020, until payment in full.

**3. Costs of the application be awarded to the Applicant and the same be assessed and included in the decree.**

The Application is founded on the grounds set out on the face of the Application and on the Supporting Affidavit sworn by **ABEL GITHIRI KIMANI**, Advocate. The Applicant contends that the bill of costs dated **3<sup>rd</sup> February 2020** was taxed on **24<sup>th</sup> May 2021**, at **Kshs 2,209,351.40** in favor of the **Applicant Law Firm** and a Certificate of taxation to that effect was issued **12<sup>th</sup> August 2021**. That the certificate of taxation contains a bonafide debt and there is no dispute as to the existence of a retainer. That it was in the interest of Justice that judgment be entered in favor of the Applicant for the sum certified to be due together with interest and costs.

The Application dated **17<sup>th</sup> August 2021**, is opposed through a Replying Affidavit dated the **7<sup>th</sup> October 2021**, sworn by **Patrick Waweru Maina**. The Respondents/Clients averred that the Application is bad in law and an abuse of the court process. That the Applicant is jumping the gun instead of waiting for the Application dated **18<sup>th</sup> June 2021**, to be determined. That the application seeks orders that are alien to the law governing matters of this nature and therefore goes against the tenets of established jurisprudence. That the Application is vexatious and an abuse of the court process and the reliefs sought cannot be granted by the Instant Court and judgment in favor of the Applicant cannot be entered in this matter.

The two Applications were canvassed by way of written submissions. The Advocate filed his written submissions dated **19<sup>th</sup> November 2021**, through the **Law Firm of Njuguna & Partners Advocates**. Subsequently, the 1st, 2nd, and 3rd Clients filed their written submissions dated **18<sup>th</sup> October 2021**, through the **Law Firm of T. M. Njorge Advocate**.

The Court has considered the two Applications, the rival written submissions, the cited authorities and the relevant provisions of law and finds the main issues for determination are; -

- i. Whether the application dated 18th June 2021 is merited?**
- ii. Whether the Application dated 17th August 2021 is merited?**
- iii. Who shall bear the costs of the applications?**

**1. Whether the application dated 18th June 2021 is merited?**

The Advocate filed an **Advocate Client Bill of Costs** in accordance with the provisions **Schedule 6A** of the **Advocates (Remuneration) (Amendment) Order, 2014**. The **Advocate Client Bill of Costs** was taxed off to **Kshs. 2,209,351.40** as is evident by the **Certificate of Taxation** dated **12<sup>th</sup> August 2021**. The Clients being dissatisfied with the decision of the taxing master appealed against the entire decision for being on the higher side contrary to the provisions of the **Advocates Remuneration Order** and the **Advocates Act**. The impugned ruling and reasons thereof was delivered on **24<sup>th</sup> May, 2021**, in the presence of Advocates for both parties. The instant application was filed on **21<sup>st</sup> June 2021**, (28) twenty eight days after the ruling.

**Rule 11** of the **Advocates Remuneration Order** makes provision for the procedure an aggrieved party must adopt. It provides:

- (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.**
- (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.**
- (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.**
- (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.**

The procedure contemplated above is

- a. The aggrieved party issues a notice within 14 days on the items objected**
- b. The Taxing Officer shall forthwith give reasons for his decision**
- c. Upon receipt of the reason, the objector shall within 14 days file an application to the High Court setting out grounds for objection**
- d. If dissatisfied with the High Court, the objector shall with leave of court appeal to the Court of Appeal.**

The procedure stated above carries a mandatory requirement. Undoubtedly, the Applicant did not comply, and what stands out is that the Applicants failed to file a **Notice of Objection** as contemplated in **Section 11** of the **Advocates Remuneration Order** above cited. It is trite law that rules of procedure are handmaidens and not mistresses of justice, and they are meant to aid in the administration of justice and not to cause injustice. (See **Nairobi Civ No. 810 of 2001 Microsoft Corporation v Mitsumi Computer Garage Ltd & another [2001] eKLR Article 159(2) (d)** of the Constitution and the oxygen principles as drafted were meant to cure technicalities in the process of administration of justice. Even so, the Court of Appeal in **Application No. 228 of 2013 Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR** held:

**“I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules.”**

The Applicants did not advance any plausible reasons for non-compliance. The Court of Appeal in **Nairobi CoA Appeal No. 199 of 2002:- Machira & Co. Advocates v Arthur K. Magugu & another [2012] eKLR**, held that the purpose filing of references is for expeditious disposal of cases and if notices as required by procedure are vague, the same defeats the purpose of procedure.

The Applicants herein had **14 days** after delivery of the ruling to file the present reference. However, the Applicants/Clients filed a reference **28 days** after the ruling was delivered. Further, the Court notes that no plausible reason has been advanced by the Applicants for the delay occasioned. (See **Supreme Court Civ Application No. 4 of 2020 Charles Karathe Kiarie & 2 others v Administrator of the Estate of John Wallace Mathare (Deceased) & 2 others [2020] eKLR**)

Even if the Court was to overlook the delay and consider the substantive application, the Court finds that the Applicants are seeking an order to set aside the Ruling of the taxing master. The principles of setting aside the decisions of Taxing Master were well established in the cases of **Premchand Raichand Limited & Another vs Quarry Services of East Africa Limited and Another [1972] E.A 162, First American Bank of Kenya vs Shah and Others (2002) EA 64 and Joreth Ltd vs Kigano and Associates (2002) 1 EA 92. These include**

- a. That there was an error of principle
- b. The fee awarded was manifestly excessive or is so high as to confine access to the court to the wealthy
- c. That the successful litigant ought to be fairly reimbursed for the costs he has incurred
- d. That so far as practicable there should be consistency in the award.

It is the Applicant's contention that the Taxing Master taxed the bill on the higher side and way for above the sums allowed in the **Advocates Remuneration Order**.

*The Taxing Master has to consider the following factors as settled in **First American Bank of Kenya (supra)**:- the nature and importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any directions by the trial judge.*

The Applicants failed to substantiate their claim save for stating and annexing evidence to the effect that they had on various occasions made payments to the Advocate amounting to about **Kshs.400,000/=**. The burden of proof was on the applicants to prove and substantiate the excessive amounts awarded by the Taxing Master and or present a retainer agreement to the Court. **[Section 109 of the Evidence Act]**, which provides that the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. Further in the case of **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR**, it was held that:

**“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore the evidential burden...is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...”**

Having perused the instant Application dated **18<sup>th</sup> June 2021**, the Court notes that the Applicants have not pointed out the specific items in the Taxing Master's ruling that they wish to object. Further, the Court notes that the parties failed to attach any pleadings which resulted in the **Bill of Costs** or the **Bill of Costs** itself, making it difficult for the court to re-evaluate the bill that was taxed by the Deputy Registrar.

The upshot of the above is that the Applicants have not demonstrated that this Application meets the principles of setting aside the decision of the Taxing Master. To this end, the Court holds and finds that the application dated **18<sup>th</sup> June 2021**, lacks merits and the same is dismissed entirely with costs to the Respondent.

## **2. Whether the Application dated 17th August 2021 is merited?**

The applicant's present application is predicated under **Section 51 of the Advocates Act, Cap 16 Laws of Kenya. Section 51(2) of the Advocates Act** provides as follows: -

**51 (2) The certificate of the taxing officer by whom any bills has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount 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”.**

Based on the above provision, it is clear that the only instances where a Court may not enter judgment on a certificate of costs is where the certificate has been set aside, varied and/or altered or the retainer is disputed. See **Republic -vs- City Council of Nairobi Ivyland Park Ltd (interested party) Exparte Inderpal Singh & 2 others (2021) eKLR**, where the Court held: -

**“It is an established position of law that the only reason a court of law cannot enter judgment on a certificate of costs is if the same has been set aside or altered, or where there is an issue of retainer.”**

*In the instant application, it is not in doubt that there existed no retainer agreement between the parties. Further, the Court notes that the Respondents disputed the costs between themselves and the Applicant herein which was taxed on 24<sup>th</sup> May 2021 at Kshs.2,209,351.40 and a Certificate of taxation issued. However, the Court has herein considered the said reference dated 18<sup>th</sup> June 2021, seeking to set aside the decision of the Tax Master and has found and held that the same lacks merit and the same has been dismissed with costs.*

The Clients/Respondents herein have contended that the reliefs sought in the Application dated **17th August 2021**, cannot be entertained by this Court. This Court has jurisdiction to set aside or alter the Certificate or enter judgment for the amount ascertained by the Taxing Master and contained in the certificate of costs.

The Jurisdiction of this court is found in the Civil Procedure Rules, which provide for the powers of Deputy Registrars to hear some applications. Order 49 Rule 2, provides the circumstances under which a Deputy Registrar may enter judgment in a certain matter. It states:

**“Judgment may, on application in writing, be entered by the registrar or, in a subordinate court, by an executive officer generally or specially thereunto empowered by the Chief Justice by writing under his hand, in the following cases:**

- (a) under Order 10: (consequence of non-appearance, default of defence and failure to serve);**
- (b) in all other cases in which the parties consent to judgment being entered in agreed terms; or**
- (c) under Order 25, rule 3 (costs, where suit withdrawn or discontinued).**

*Rule 7(1) thereof provides for the sort of applications the Deputy Registrars may hear, stating:*

*(1) The Registrar may -*

- (a) give directions under Order 42 rule 12 and Order 51 rule8;*
- (b) hear and determine an application made under the following Orders and rules —*
  - (i) Order 1, rules 2, 8, 10, 17 and 22;*
  - (ii) Order 2, rules 1 and 10;*
  - (iii) Order 3,5 and 9;*
  - (iv) Order 6;*
  - (v) Order 7, rules 16 and 17 (2);*
  - (vi) Order 8;*
  - (vii) Order 10, rules 1 and 8;*
  - (viii) Order 20;*
  - (ix) Order 21, rule 12;*
  - (x) Order 22 other than under rules 28, and 75;*
  - (xi) Order 23, 24, 25, 26, 27, 28, 30,31 and 33; and*

(xii) Order 42, rule 14.

The applications listed above are routine; and are mainly administrative in nature and are not substantive in effect and, therefore, Deputy Registrars have jurisdiction to hear them and give directions as the case may be. The rules do not give the Deputy Registrars power or jurisdiction to hear any other applications including those brought under section 51(2) of the **Advocates Act**.

From the above exposition of the law, it is evident that the Deputy Registrar does not have jurisdiction to hear an Application brought under Section 51(2) of the **Advocates Act** and judgment in such an application can only be entered by a judge.

Having found as the above, the Court holds and finds that an application brought under **Section 51(2)** of the **Advocates Act** is not merely administrative as submitted by the Clients/Respondents, but the same is a substantive application which falls under the jurisdiction of the court.

The upshot of the foregoing is that the Court finds and holds that application dated **18th June 2021**, is **merited** in terms of prayer 1 and proceeds to grant the same.

**(3) Whether Interest is payable on the taxed costs.**

Rule 7 of the Advocates Remuneration Order provides when interest may be paid on costs as follows:-

**“7. An advocate may charge interest at 14% per annum on his disbursements and costs, whether by scale or otherwise 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.”**

*This 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.*

*In the case of **Otieno Ragot and Co. Advocates Vs Kenindia Assurance Co. Limited, Misc. Cause No. 78 of 2015**, the Court dealt with the question about whether interest was calculable from the date when the Judge delivers a Ruling on application under **Section 51 (2)** of the **Advocates Act**, or if it is calculable from the date when the Bill of Costs was filed in court. The Court defined the word “Bill” stating to wit as follow;*

**“Each case is to be decided on its own, and I must reiterate that my interpretation of the “bill” referred to in paragraph 7 of the Advocates (Remuneration) Order is one that the Advocate intends that the client should settle, but not the bill of costs served on the client for purposes of taxation.”**

*The court has discretion to determine when interest becomes calculable. In the case of **D. Njogu & Company Advocates Vs Kenya National Capital Corporation NRB High Court Misc. No. 21 of 2005** the Court stated as follows;*

**“In my considered view, it would be wrong to calculate interest from the date when the bill was sent to the client, regardless of the fact that such a bill was then watered down through taxation. If clients had to pay interest regardless of subsequent reductions on their bill, advocates would not have the incentive to charge the correct fee notes on the first occasion. It is for that reason that I hold that the date from when interest should be calculable should be pegged to the date when the advocate sends the correct fee note. And by the ‘correct fee note’ I mean the bill which is in accordance with the terms upon which the advocate had contracted with the client, or the bill which the client does not dispute, or the bill which is in accordance with the sums awarded by either the taxing officer or by the deputy registrar in a certificate of costs.”**

*It is clear from the above, that **Rule 7** stipulates that interest is chargeable at 14% per annum, from the expiration of one month from the delivery of the bill to the client. It therefore follows that there is a reference point, from when interest is calculable. It cannot accrue before one month has expired, from the time when the bill is delivered to the client.*

*On the other hand, interest does not have to be charged, nor does it become automatically chargeable after the lapse of the one month from the date when the bill was served. Pursuant to **Rule 7**, interest is chargeable provided that such claim for interest was raised before the amount of the bill is tendered in full.*

In **Jackson Omwenga & Co. Advocates Vs Everest Enterprises Ltd, Nbi Misc. Application No. 96 of 1996**, the Court pronounced thus;

**“I have perused the Advocates Remuneration (Amendment) Order, Rule 7. Under the said rule, an advocate can only charge interest from the expiration of one month from the delivery of the bill to the client, providing such claim for interest is raised before the amount of the bill has been paid or tendered in full.**

To comply with that provision, the applicant must prove two things:

(a) That one month has expired from the time he delivered his bill to the client;

(b) He has raised his ‘claim’ for interest before the amount of the bill has been paid or tendered in full.”

In the instant Application, the Applicant has not provided proof that he had raised the issue of interest in the Bill of costs dated **3rd February 2020**.

The Court however notes that the said **Certificate of Costs** has not been set aside, varied and the reference filed by the Clients/Respondents herein has been dismissed. Therefore, the Court finds and holds that the Applicant is eligible to interest at Court rates (**14% p.a**) from the date which the Certificate of Taxation was issued,

Consequently, the Court finds and holds that the **Notice of Motion** Application dated **17<sup>th</sup> August 2021**, succeeds and is allowed in the following terms:

- a) Judgment is hereby entered for the Applicant against the Respondents for Kshs. 2,209,351/40/=**
- b) Interest shall be paid at 14% p.a from 12th August 2021 till payment in full**
- c) The Advocate will also have the costs of this application.**

It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MURANG'A THIS 2<sup>ND</sup> DAY OF DECEMBER, 2021**

**L. GACHERU**

**JUDGE**

In the presence of

Kuiyaki & Alex Mugo -Court Assistant

Mr. Bett for Advocate/Respondent/Applicant

1st Client/Applicant/Respondent

No Appearance 2nd Client/Applicant/Respondent

3rd Client/Applicant/Respondent

**L. GACHERU**

**JUDGE**