



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLICATION NO. 63 OF 2018 &

MISC. APPLICATION NO. 64 OF 2018

MUEMA KITULU T/A MUEMA KITULU & CO.....APPLICANT

VERSUS

KENYA DEPOSIT INSURANCE CORPORATION.....RESPONDENT

RULING

The Advocate for the Applicant approached this court with a Notice of Motion Application dated 8th November 2018 and amended on 22nd July 2019, pursuant to **Section 51(2) of the Advocates Act Cap 16 Laws of Kenya, Section 3 & 3A of the Civil procedure Act Cap 21 Laws of Kenya, order 51 Rules 1 of the Civil procedure Rules** and all their enabling Provisions of the Law. He sought orders:

- a. That this court be pleased to enter judgment against the Respondent for the sum of Kenya Shillings Seven Hundred and Four Thousand and eight only (Ksh 704,080/-) being the taxed and certified costs;
- b. That this court be pleased to award interest at 14% from 12th April 2018 till payment in full;
- c. That the costs of this application be done by the Respondent.

The Application is supported by an affidavit dated 22nd July 2019 sworn by Muema Kitulu the Applicant Advocate herein. He avers that in or about October 2015 the Respondent herein instructed him to act for it and file a suit on behalf of their insured, Dubai Bank of Kenya in liquidation dispute.

That Consequently on 16th February 2018 the Applicant lodged an Advocate/Client Bill of Costs which bill was subsequently taxed and award made on 25th September 2018 in favour of the Applicant for a sum of Kenya Shillings Seven Hundred and Four Thousand and eighty only (Kshs 704,080/-).

That subsequently the Applicant wrote to the Respondent seeking payment of the taxed costs but the Respondent failed refused or neglected to settle the said amount.

REPLYING AFFIDAVIT

The Application is opposed vide a replying affidavit dated 5th February 2019, sworn by Adam M. Boru the Liquidation Agent of Dubai Bank (K) Limited. He stated that the averments at paragraph 4 of the Affidavit are denied to the extent that the Respondent never received any demand for payment from the Advocate/Applicant. That had such demand for payment been received, the Respondent would have responded to the same without fail.

That without prejudice to the contents of paragraph 4 of this Replying affidavit, he was aware that once the Advocate/Applicant's costs were taxed, the Respondent immediately got into the processing of the same for payment and therefore the present application was filed prematurely by the Advocate.

That the taxed costs for this matter together with the costs of a related matter being **HC Misc. Appl. No. 64 of 2018** have now been settled by the Respondent. As evidenced by document marked "A" a copy of the RTGS transfer payment for Ksh 4,032,497.85 which was effected by the Respondent on 13th December 2018 in favour of the Advocate/Applicant herein.

FURTHER AFFIDAVIT

The Application is further opposed by affidavit dated 11th July 2019, sworn by Adam M. Boru, the Liquidation Agent of Dubai Bank (K) Limited (in liquidation). He asserts that the taxed cost of Ksh 4,032,497.85 was net of taxes as follows;

| | |
|----------------------|------------------------------|
| a. 6% VAT | Ksh 230,428.45 |
| b. 15% W/Holding Tax | Ksh 192,023.70 |
| Total | <u>Ksh 422,452.15</u> |

That further to paragraph 3 and 4 of this affidavit, he confirmed that the amount the Client /Respondent paid inclusive of tax was **Ksh 4,454,950.00** which amounts adds upto the taxed costs for this matter and **H. C. Misc. Appl. No. 64 of 2018** as follows;

APPLICANT'S/ADVOCATES SUBMISSIONS

In its submissions the Applicant admitted that on 13th December 2018 the client/Respondent secretly deposited the sum of **Ksh 4,032,497.85** into the Advocate/Applicant's account. This payment was treated as made on account. That, no prior or subsequent correspondence had ever been served upon the Advocate/Applicant by the Client/Respondent to explain what this payment was for.

That assuming the client/Respondent was paying for costs awarded in this cause as well as in **HC Misc Appl. No. 64 of 2018, Muema Kitulu T/A Muema Kitulu & Co. -vs- Kenya Deposit Insurance Company** where Kshs 3,750,870/- was awarded, the total owing would have been Ksh 4,454,870/- and not the amount deposited the Applicants' account.

The Applicant submitted that there exists several bills of Costs before court between the parties herein, whereby some have been taxed while other are in various stages of the process; therefore it is impossible for the Advocate/Applicant to assume or to attribute the deposit made to any particular cause.

That the Provisions of **Section 52(2) of the Advocates Act** make it a necessity for the successful advocate to apply for adoption of taxed cost as judgment of the court. In any event, upon judgment being entered a decree will be drawn and credit given for any amounts paid on account.

Whether the Applicant is entitled to 14% interest on the taxed cost

The Applicant submitted that they are entitled to **14%** interest on the taxed cost which is a statutory provision for all award on costs. **Rule 7** of the **Advocates Remuneration Order** clearly stipulates that;

“An advocate may charge interest at 14 per cent per annum on his disbursements and cost. 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.”

It was their submission that the Applicant filled the bill on the 19th February 2018 and served the Client/Respondent on 13th March 2018. Consequently, the Applicant is entitled to charge interest at **14%** from 14th April 2018 until payment in full.

In **Otieno Ragot & Company Advocates -vs- Kenindia Assurance Company Limited [2018]eKLR** the court stated the following;

“Under Rule 7 an Advocate is entitled to charge interest once the client is duly notified of this intention when the bill has been delivered. A client may avoid interest by selling the bill immediately otherwise the claim for interest accrues for keeping the advocate out of its money. On the other hand, the client should not be penalized by interest if there is delay in prosecuting the bill of cost.”

The Applicant submitted that assuming the deposit made was coupled with the alleged withholding tax pleaded by the Respondent in the further affidavit of Adam M. Boru sworn on 11th July 2019, it was evident that the Respondent kept the Advocate/Applicant out of his money between 25th September 2018 until 13th December 2018. Further that the Advocate/Applicant did not delay in prosecuting the bill of costs and was therefore entitled to charge the 14% interest from 12th April 2018 when the Advocate/Client bill was served until 13th December 2018 when the deposit was made into the Applicants account.

ADVOCATE/APPLICANTS TABULATIONS

Costs and interest due therefore is as follows:

| | |
|---------------------------------------|------------|
| A. Principal amount awarded | 704,080.00 |
| B. Add interest between 12/4/2018 and | |

13/12/2018 at 14% 65,714.00

C. Add cost of application

i. Advocates costs para 6 (viii) remuneration

order 15,000.00

ii. Court attendances before Judge 27/6/2019,

8/7/2019 and 22/7/2019 @ 1 hr 9,000.00

iii. Filing fees 1,535.00

iv. Drawing Application 12 folios 2,300.00

v. Service at Nairobi 1,400.00

29,235.00

Total **Ksh 799,029.00**

ANALYSIS

a. (i) Decretal sum HC Misc 64 of 2018

plus costs and interest 4,130,186.00

(ii) Decretal sum HC Misc 64 of 2018

Plus costs and interest 799,029.00

Sub total 1 4,929,215.00

b. Less compound withholding tax 422,452.15 **Subtotal 2 4,506,762.85**

c. Less paid on account 4,032,265.00

Aggregate balance due 474,265.00

Therefore, both the Replying Affidavit and the further Affidavit sworn by Adam M. Boru are therefore without a legal foundation, are spurious and vexatious as they seek to challenge clear statutory provisions under which the present applications is anchored.

RESPONDENT'S SUBMISSIONS

The Respondent submitted that the payment was made net of taxes which was deducted and duly remitted to the relevant authorities as is required of the Respondent. This has been confirmed by Mr. Muema Kitulu in his 2nd Supplementary affidavit at paragraph [4] wherein he admits that withholding taxes were remitted by the Respondent with respect to the legal fees due to him (as had been stated in Mr. Boru's Replying affidavit). This is a complete volte face from the earlier position where he had categorically denied having received payment of any duly taxed and certified legal fees from the Respondent.

THE LAW

Section 51(2) of the Advocates Act provides 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.”

Rule 7 of the Advocates (Remuneration) Order 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.”

On the issue that payment was made as afterthought an explanation has been offered by the Respondent to the effect that they were processing the payment once the Applicant’s Bill was taxed. The application was therefore filed prematurely and even before any demand for payment was made by the Applicant.

The Respondent further submitted on the issue that payment **“was made on account”**, this is denied and the Respondent confirmed that they effected payment in relation to the taxed costs. That is admitted by the Applicant/Advocate in his 2nd Supplementary affidavit at paragraph (4) that withholding Taxes were remitted with respect to the legal fees paid to the Applicant and a certificate of Withholding issued. The Applicant never also sought clarification from the Respondent on the file or files for the deposit of the funds and neither did he return the money. Therefore the Applicant is not being honest in stating that the money was paid on account.

On the issue that the Applicant is entitled to interest, **Rule 7** is clear that interest can only be charged provided that the claim is raised before the amount has been paid and therefore there can be no claim for interest.

DETERMINATION

- 1. The issue of instruction is not denied by Respondent, the Bill was taxed on 25th September 2018. The Bill has not been varied set aside or successfully appealed against and is final by virtue of Section 51 of Advocates Act.**
- 2. The issue of interest at 14% is prescribed by law under Rule 7 the Advocates Act.**
- 3. If the amount is paid it shall be taken into account at the point of executing the decree.**
- 5. The judgment is entered for Ksh 474,265/- with interest and cost until payment in full the balance after pay off of Ksh 4.032.265/- by the Respondent**
- 5. Stay of execution granted for 30days from the date of Ruling.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 4th MARCH 2020.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

OMONDI H/B MR. MBINDYO FOR THE APPLICANT

KARAJI H/B MUCHIRI FOR THE RESPONDENT

COURT ASSSITANT- TUPETA