



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

MISC. CAUSE NO. 181 OF 2006

BEHAN & OKERO ADVOCATES.....APPLICANT/ADVOCATE

VERSUS

NATIONAL OIL CORPORATION.....RESPONDENT/CLIENT

RULING

1. By a notice of motion dated 15th January, 2019 and filed on 21st January, 2019, brought under Section 51 of the Advocates Act Cap 16 Laws of Kenya (**hereinafter referred to as the Act**), the Advocate prays for orders: THAT

1) The certificate of costs dated 16.11.18 in respect of taxation order made on 09.08.18 for Kshs. 650,172.20 be adopted as the judgment and decree of this Honourable Court

2) The Applicant be awarded interest at 14% per annum from 07.05.03 until payment in full

2. The client by a notice of preliminary objection (P.O) dated 16.05.19 opposed the application on the ground that it was premature as the taxing master was yet to supply the reasons for taxation for the bill of costs. The P.O was reiterated in the replying affidavit sworn on 16.05.19 by Pauline Kamotho who describes herself as the client's legal officer. The affidavit purported to annex a letter dated 20.11.18 filed on 22.11.18 requesting for the reasons for taxation for the bill of costs. Although I can't find the letter in the file, the advocate does not deny that such a letter was filed.

3. The Application was argued by way of written submission which both parties dutifully filed.

Applicant's submissions

4. The advocate holds the view that the P.O does not raise a pure point of law but factual information and thus does not meet the threshold set in the leading case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors (1969) EA 696**.

5. It was further argued that the letter dated 20.11.18 requesting for the reasons for taxation of the bill of costs by a ruling delivered on 09.08.18 was filed on 22.11.18 which is more than the statutory 14 days' period prescribed by Rule 11 (1) of the Advocates Remuneration Order. Reliance was placed on **Republic V Ikutha Land Dispute Tribunal [2006] eKLR**.

Respondent's submissions

6. The Respondent reiterated that the application was premature for the reason that it was yet to be supplied with the reasons for taxation for the bill of costs as requested by its advocate's letter dated 20.11.18 filed on 22.11.18.

7. Reliance was placed on **Muriu Mungai & Co. Advocates vs. New Kenya Co-Operative Creameries Ltd Nairobi (Milimani) HCMC No. 692 of 2007** and **Paul Gicheru T/A Gicheru & Co. Advocates V Kargua (K) Construction Co. Ltd [2008] eKLR**.

8. I have carefully considered the application in the light of the P.O and submission on behalf of both parties. Concerning the P.O, "a **preliminary objection is a point of law when if taken would dispose of the suit. It is what was formerly called a "demurrer"**". The locus classicus on Preliminary Objection is the celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd (Supra)** where Law J.A. stated:

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear

implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

9. Sir Charles Newbold, President stated in the same judgment as follows: -

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

10. The provisions of paragraph 11 (1) **provides that:**

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

11. The letter dated 20.11.18 requesting for the reasons for taxation of the bill of costs by a ruling delivered on 09.08.18 was filed on 22.11.18 which is more than the statutory 14 days' period prescribed by Rule 11 (1) of the Advocates Remuneration Order. The more than 3 months' delay has not been explained.

12. Whereas the delay on the part of the client does not give the taxing master the liberty to choose whether or not to comply with the mandatory provisions to give reasons imposed by Rule 11 (2), the client cannot by its inaction since November, 2018 be heard to claim that the current application was filed prematurely. Consequently, the P.O raised in this case is unmerited and a waste of time and funds and ends up achieving little and ought to be disallowed.

13. Section 51 of the Advocates Act makes general provisions as to taxation and provides that the court has discretion to enter judgment on a Certificate of Taxation which has not been set aside or altered, where there is no dispute as to retainer.

14. The fact that the client concedes that it made part payment when the bill was raised in 2003 is an admission on its part that retainer is not denied. The Certificate of Taxation has neither been set aside nor altered and I see no reason to deny the Advocate judgment as sought.

15. The client submitted that Rule 7 does not expressly state when interest is to be charged where the advocate's bill is disputed and placed reliance on **Elias Ngugi Ng'ang'a V National Irrigation Board [2012] eKLR** and **D Njogu & Company Advocates V Kenya National Capital Corporation [2006] eKLR** .

15. I however beg to differ with that assertion for the reason that 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.”

18. The rate of interest awardable is 14% per annum applicable from 30 days after the date of service of either the Bill of Costs. The bill of costs was served on 30.8.17 and thirty (30) days therefore expired on 30.9.17.

19. The file does not contain evidence of the bill of costs dated 15.06.17 but there is evidence that the parties' advocate appeared before the Taxing Master for taxation on 20.07.17. Interest shall therefore be calculated at 14% per annum from 20.08.17 which is 30 days from the presumed date of service of the Bill.

20. The upshot of this is that notice of motion dated 15th January, 2019 and filed on 21st January, 2019 succeeds and is allowed in the following terms:

a) Judgment is hereby entered for the advocate against the Respondent for Kshs. 650,172.20

b) Interest shall accrue on the taxed costs at 14% per annum from 30.9.17 until payment in full

c) The Advocate will also have the costs of this application.

DATED, DELIVERED AND SIGNED ON THIS 03rd DAY OF October, 2019

T.W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Amondi/Okodoi

For Advocate - Mr Okero

For Client - N/A