



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISCELLANEOUS APPLICATION NO. 315 OF 2017

IN THE MATTER OF THE ADVOCATES ACT CAP 16

AND IN THE MATTER OF ADVOCATE – CLIENT BILL OF COSTS

BETWEEN

NYAUNDI TUIYOTT & CO.ADVOCATES.....ADVOCATES/APPLICANT

VERSUS

AFRICA MERCHANT

ASSURANCE COMPANY LIMITED.....CLIENT/RESPONDENT

MATTER ARISING FROM MAKINDU PMCC 254 OF 2013

FLORENCE WAENI KYALO.....PLAINTIFF

VERSUS

MOHAMED NASIR.....1ST DEFENDANT

SHREEJI ENTERPRISES (K) LIMITED.....2ND DEFENDANT

RULING

1. By a Notice of Motion dated 23/1/2018 the Applicant herein sought for the following reliefs:-

- a. That judgment be entered for the Applicant against the Respondent for the sum of Kshs.274,711/= being the Advocates taxed and certified costs in Machakos Misc. Application No.315/2017.
- b. That the Applicant be awarded interest at the rate of 14% p.a. from 3/8/2017 (being the 30th date from the date on which the Bill of Costs was served upon the Respondent) as provided for at Part 1 (Paragraph 7) of the Advocates (Remuneration) Order and Rules.
- c. That the Respondent to pay the costs of the Application.

2. The Application is supported by several grounds on the face thereof as well as the Affidavit of **Thomas Onyambu** sworn on even date which raised the following grounds:-

- i. The costs between the Applicant and Respondent were taxed and certified on the 18/1/2018 at Kshs. 274,711/=.
- ii. There is no dispute as regards the Advocate's retainer.
- iii. The Advocate's costs attract interest at the rate of 14% p.a. 30 days from the date of service of the Bill of costs upon the Respondent in accordance with the Advocates Remuneration order.

iv. The Respondent has refused or failed to settle the costs.

v. There is no appeal or review pending in respect of the taxation of the costs herein.

3. The Application was opposed by the Respondent's legal officer Moses Mwariri who deposed *inter alia*: that the Application is scandalous, frivolous and an abuse of the court process; that the Respondent was never served with the Bill of Costs as well as a hearing notice; that the Respondent had made payments to the Applicant over the retainer fees which should have been excluded from the Bill of Costs and which has led to double payments warranting a reimbursement of the excess sums to the Respondent and finally the taxation process was flawed.

4. Learned counsels for the parties agreed to canvass the Application by way of written submissions. However, it is only the Applicant's Counsel who filed submissions while Counsel for the Respondent did not. I have considered the said submissions and the cases cited. I find the following issues necessary for determination namely:-

i. Whether the Respondent was served with the Bill of Costs and the hearing notice for the taxation.

ii. Whether there was an Advocate/Client retainer.

iii. Whether the Applicant is entitled to interest on the taxed costs at 14% p.a. as proposed by the Applicant.

iv. Whether the Applicant's Application has merit.

5. As regards the first issue, it is noted that the Applicant has presented an affidavit of service sworn by one **John Angwa** dated 14/11/2017 which clearly shows that the Respondent was duly served with the Bill of Costs. The said Bill of Costs was not opposed by the Respondent and thus when it was due for taxation on the 15/11/2017 before the Deputy Registrar, there was no representation by the Respondent. The Deputy Registrar duly proceeded to tax the said Bill of Costs in the sum of Kshs.274,711/= vide her ruling dated 17/1/2018. There is enough evidence that the Respondent was served with the Bill of Costs as well as the hearing notice. As such, the Respondent's allegations that it has been condemned unheard has no basis whatsoever. The Applicant was entitled to proceed with the taxation exercise as same remained unopposed. The Respondent's turn around that it was not served even with clear evidence of service smacks of bad faith on its part and its actions are only meant to derail the Applicant's quest to enjoy the fruits of the decree. Indeed a certificate of taxation dated 18/1/2018 has since been issued in favour of the Applicant. The Respondent has not filed a reference over the same or even sought to have the same reviewed on grounds that it was not served with the Bill of Costs together with the hearing notice. Again the Respondent has not lodged an appeal against the said taxation of the Bill of Costs. I find the Respondent's claims of non-service not merited in the circumstances. Neither the Applicant nor the Deputy Registrar could be responsible for the absence of the Respondent during the taxation since the Respondent did not file any response to the Bill of Costs and failed to attend court. The Respondent should blame itself for the turn of events.

6. As regards the second issue, it is not in doubt that there was indeed an Advocate's retainer as between the Applicant and Respondent. The Respondent vide paragraph 6 of its replying affidavit alludes to the fact that some retainer fee had been made. The Applicant has also annexed a letter dated 4/4/2014 addressed to it by the Respondent in which it had given express instructions to the Applicant to represent the Respondent in the **Makindu PMCC No. 254 of 2013**. As to the amount of fees paid by the Respondent to the Applicant, the same has not been disclosed by either party and same is also silent on the Bill of Costs. Even though the Respondent claims that any fees paid upfront to the Applicant should have been factored in the Bill of Costs so as to give the Respondent some credit, I find that the Respondent has not even shown the exact amount paid and also failed to respond to the Bill of Costs when it was served with the same. Hence as matters stand, the Deputy Registrar had no option but to tax the items as per the provisions of the Advocate's Remuneration Order without the benefit of any rejoinder from the Respondent. It was upto the Respondent to seek for a review or file a reference if it was dissatisfied by the taxation. None has been made so far and this court deems that the Respondent was satisfied with the Applicant's Bill of Costs as well as the Costs taxed by the Deputy Registrar.

7. As regards the third issue, it is noted that the Applicant has sought for interest on the taxed costs at 14% p.a. Rule 7 of the Advocates Remuneration Order provides as follows:-

“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 lended in full.”

It is noted that the Applicant duly served the Respondent with the Bill in time. However the Bill of Costs dated 25/5/2017 is silent on a claim for interest at 14% p. a and that the Deputy Registrar vide her Ruling dated 17/1/2018 did not factor the aspect of interest at 14% p. a or even at court rates. As the Applicant had not expressly indicated the 14% in its Bill of Costs, I find it is only entitled to interest at court rates. As the disbursements had been properly incurred and allowed by the Deputy Registrar, I am satisfied that the Applicant should be granted interest on the taxed costs at court rates.

8. As regards the last issue, it is noted that the Applicant's Bill of Costs was not opposed by the Respondent. The Bill was duly taxed and a certificate of taxation issued. To date there is no reference or review lodged against the said taxation by the Respondent. The Respondent's allegations in the replying affidavit have not raised sufficient grounds to warrant this court to interfere with the taxed costs. The Respondent's claim that it had earlier paid some fees to the Applicant as part of retainer but which was not factored in the taxation of the Bill of Costs is not supported by any evidence at all. However, I note that the Respondent has not presented any document to that effect and further it is noted that the Respondent failed to file a response to the Bill of costs upon being served. Already the Bill has been taxed and a certificate of taxation issued yet there is no reference or revision lodged by the Respondent. I find there is no other option for the Respondent in the circumstances but to accept the turn of events. I find the Applicant's Application merited.

9. In view of the foregoing observations, the Applicant's Application dated 23/1/2018 is allowed in terms of prayers (a) and (c). The

interest on the taxed cost shall be at court rates from the 18/1/2018.

Orders accordingly.

Dated and delivered at **MACHAKOS** this **11th** day of **October**, 2018.

D. K. KEMEI

JUDGE