



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 545 OF 2007

MEREKA & COMPANY ADVOCATES.....APPLICANT/ADVOCATE

VERSUS

INVESCO ASSURANCE CO. LTD.....RESPONDENT/CLIENT

RULING

1. The Applicant defended the Respondent in Kangema SRMCC No. 73 of 2007. The Applicant thereafter lodged a bill of costs which was taxed at KShs. 50,720.50/=. The bill has not been settled by the Respondent occasioning the filing of the Applicant's Notice of Motion dated 28th October, 2014. The said motion is brought under Section 51 (2) of the Advocates Act, Cap 16 (*'the Act'*) seeking that this court enters judgment for KShs. 50,720/00 in terms of the certificate of costs dated 5th February, 2008 together with interest at 14% from the said date and that pursuant to the judgment, a decree be issued for enforcement or execution.
2. The application is based on the grounds on the body of the application and the supporting affidavit of David Mukii Mereka sworn on 29th October, 2014. Following the taxation of the Applicant's bill of costs dated 20th August, 2007 at KShs. 50,720/00, the Applicant and the Respondent in a meeting held on 16th November, 2012 entered into an agreement on how outstanding fees would be paid by the Respondent. His gravamen is that despite the said agreement the Respondent has not furnished any payment. It was stated that the Respondent having not filed any reference to the taxation, it is just and fair that judgment be entered in terms of the certificate of costs issued on 5th February, 2008.
3. The Respondent filed ground in opposition to the application dated 26th February, 2015. The grounds are that the applicant's motion seeks interest at 14% from the date of certificate of taxation despite the fact that Section 51 (2) of the Act makes no express provision on interest; that if there is any entitlement on interest under Section 51 (2), the same should be from the date of filing the motion and not from the date of the certificate of taxation and that the Applicant has not proved retainer under Section 51 (2) of the Act.
4. Submissions to this application were tendered orally. Ms. Abok learned counsel for the Applicant submitted that the certificate of costs dated 18th December, 2007 has not been set aside or varied. She stated that this application has not effectively opposed. Counsel left the issue of interest to court for determination. On the issue of retainer it was submitted that the averments in the affidavit have not been contradicted.
5. Ms. Makuyu opposing the application submitted that Section 51 of the Act does not provide for interest. That interest is calculated from the date of the motion and that an interest of 14% is illegal and not provided for. It was contended that retainer as provided for under Section 51 of the Act was not proved.
6. I have considered the depositions and the submissions tendered by both parties. Section 51(2) of the Act provides as follows:-

“The certificate of the taxing master 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 costs covered thereby...”

In light of the above provision, this court can award interest from the date of entry of judgment pursuant to the certificate of costs envisaged in Section 51 (2) of the Act considering that a certificate of costs is final and binding. Under Section 51(2) of the Act the Advocate is entitled to judgment in the sum certified to be due to them by the taxing officer as their costs against the Client so long as the conditions set out in that section are established. The conditions are that:-

- a. A certificate of the taxing officer by whom their bill was taxed has been raised;
 - b. the said certificate has not been set aside or altered by the court; and
 - c. the retainer is not disputed.
7. It is clear that the Respondent does not contend entry of judgment in terms of the certificate of costs and it has not been established that the certificate of costs has been set aside or varied rather the only issue in contention is that of interest. Prayer 1 of the application is thereby granted.
8. The pertinent issues remaining for this court's determination are:-
- a. *Whether, there was a retainer agreement between the Applicant and the Respondent;*
 - b. *If (b) above is answered in the affirmative at what rate is it payable and from what date should it be calculated.*
9. Despite merely disputing the Applicant's retainer in the grounds of opposition, the Respondent failed to adduce rebutting evidence and its contention fails. The failure to file a replying affidavit in contention of a fact amounts to an admission of facts on the Applicant's application as was the holding in the case of **Crown Berger Kenya Ltd v. Kalpech Vasuder Devan and Another Civil Case No. 246 of 2006 (UR)**.
10. Rule 7 of the Advocates (Remuneration) Order (*'the 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 tendered in full.”

11. The said Rule 7 deals with interest charged by an advocate of its claim for disbursements and costs which is chargeable from the expiration of one (1) month from the date of his delivery of its bill to its client. The Applicant herein has raised the issue of interest before the bill has been paid and is thereby entitled to interest at 14% in the wording of Rule 7 of the Order. The upshot is that this application is merited and is allowed as prayed. Orders accordingly.

Dated, Signed and Delivered in open court this 8th day of May, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent

