



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Civil Suit 555 of 2006

ELIAS NGUGI NG'ANG'A..... PLAINTIFF

VERSUS

NATIONAL IRRIGATION BOARD..... DEFENDANT

JUDGMENT

By a Plaint dated 5th October, 2006, the Plaintiff pleaded that he had rendered legal services to the Defendant in HCCC Nos. 2790 and 2670 of 1998 whereby a bill of costs in respect of those cases was taxed on 18th May, 2001 at Kshs.15,125,000/-, that the said sum was agreed to be paid in installments until payment in full, that the Defendant commenced payment on 27th August, 2002 upon agreement, that it was an implied term of that agreement that the taxed costs were to attract interest at court rate until payment in full, that the costs were paid for a period of five (5) years but the Defendant had refused to pay the interest on the said costs. The Plaintiff contended that interest is payable on a reducing balance at court rate on compound basis from the date of taxation until payment in full. The Plaintiff therefore prayed for a declaration that he was entitled to interest at court rate on taxed costs from the date of taxation until payment in full. He also prayed that the accrued interest be computed by the court.

By a Defence dated 26th October, 2006, the Defendant contended that the Plaintiff lacked capacity to institute the suit on the ground that the Defendant had at all times dealt with him in the firm name of E.N Ng'ang'a & Company Advocates and not in his personal capacity. In the alternative, the Defendant admitted that legal costs had been taxed in HCCC Nos.2780 and 2790 of 1998 as claimed by the Plaintiff but that the same had been paid in full and the Plaintiff had been overpaid in the sum of Kshs.115.000/-. The Defendant denied any agreement to pay interest on the taxed costs, prayed for the dismissal of the suit and counterclaimed the said sum of Kshs.115,000/- together with costs and interest.

The parties decided that the only issue to be decided is whether interest is payable to the Plaintiff on his taxed costs. The parties also decided to argue the suit by way of written submissions. They filed their respective bundle of documents as follows; the Defendants Bundle was filed on 4th March, 2010, the Plaintiff bundle and Supplementary Bundle of documents filed on 23rd February, and 6th March, 2012 respectively. The Plaintiff filed his submissions on 16th March, 2012 while the Defendant filed its submissions on 28th March, 2012. The Plaintiff finally filed a Reply to the Defendant's submissions on

12th April, 2012.

The facts of this are that the Plaintiff is an Advocate of the High Court of Kenya, he practices under the firm name and style of Elias Ngugi Ng'ang'a & Company Advocates alias E.N Ng'ang'a & Co. Advocates. A certificate of registration dated 24th May, 1989 was produced in support thereof thereby discharging the issue of locus standi of the Plaintiff to bring this suit. The Plaintiff was awarded costs in HCCC Misc No. 177 of 2001 against the Defendant in the sum of Kshs.15,125,000/- in a taxation made on 18th May, 2001. After various aborted execution attempts, on 25th July, 2003, the parties executed a consent filed in court on 1st August 2003 in the following terms.

“by consent:-

- (i) There be a stay of execution of the orders made on 18th May, 2001.**
- (ii) The warrants of attachment of the defendant's immoveable property issued on 7th July, 2003 be waived, cancelled and declared null and void.**
- (iii) The Defendant pay Kshs.500,000/- forthwith and thereafter to pay Kshs.300,000 per month with effect from 20th August, 2003 and a similar amount on the 20th of each succeeding month until payment in full.**
- (iv) In default of any instalment the Plaintiff/Respondent be at liberty to file suit for any sum due.**

Dated at Nairobi this 25th day of July, 2003”

From the record, it would seem that payments were made until 23rd May, 2006 when the last instalment of Kshs.300,000/- was made. This is contained in a document produced by consent identified as **“National Irrigation Board, E.N. Ng'ang'a & Co. Advocates Statement of Account.”**

The Plaintiff has contended that since the Defendant had an obligation to pay the debt rightly owing, the indulgence extended to the Defendant to settle the sum in installment must attract a consideration for the delay in payment in the form of interest, that under Rule 7 of the Advocates (Remuneration) Order interest at the rate of 9% per annum is payable when a bill is presented to a client and is not paid, that the Plaintiff had presented its bill to the Defendant before the same was taxed and the Defendant failed to pay. The Plaintiff likened a Certificate of Costs to a decree under Section 26 of the Civil Procedure Act whereon interest must always be awarded.

The Plaintiff relied on the cases of **Mamicha & Co –vs- Motex Knitwear HCCC Misc application No. 426 of 2004 (UR), Mohamed & Kinyanjui Advocates –vs- M.C of Thika HCC Misc appl. No. 443 of 2007 (UR)** and **S. Gichuki Waigwa –vs- Nina Marte Ltd HCCC Misc Civil Case No. 862 of 2003(UR)** on the proposition that courts have always awarded interest on Advocate/Client cost.

On its part the Defendant contended that the consent entered on 25th July, 2003 was clear in its terms, the monies due were payable by installments, that there was no agreement whatsoever to pay interest on the monies, that under Rule 7 of the Advocates (Remuneration) Order interest can only be ordered when the two conditions thereon are met, that is when the bill is presented to the client and the claim is made before the monies due has been paid in full, the Defendant relied on the case of **S.G Mbaaabu & Co. Advocates –vs- Hon. Tola Kofa (2006) e KLR** for this proposition.

The Defendant finally contended that the Plaintiff's claim was in the nature of a special damage claim and that the same should have therefore been specifically pleaded and claimed.

I have carefully considered the pleadings, the documents produced, the written submissions and the

authorities relied.

The Plaintiff's claim as pleaded in paragraphs 4 and 5 of the Plaint is quite clear. That there was an agreement between the parties for the payment of the costs awarded to be paid in installments and that it was an implied term of the said agreement that the taxed costs were to attract interest. I have perused the agreement between the parties as expressed in the consent of 25th July, 2003 which I have set out above but I cannot see the implied term alluded to. The Plaintiff submitted that the obligation to pay interest is to be implied from the fact that the Defendant was given time to pay its debt by installment and that the payment of interest was the consideration. To my mind, such an obligation cannot be implied in an express agreement such as the consent order of 25th July, 2003. My view is, if it was in the contemplation of the parties that interest was payable on the amount, nothing would have been easier than to expressly state so in the consent. This is so because the parties knew very well the amount outstanding and the amount of installments agreed. It was known to them that it would take a longtime for the full amount to be finally settled in view of the amount of monthly instalment payable. I would think the default clause, the threat of filing suit for the outstanding sum, was the consideration and not the interest. To that end the Plaintiff's claim as pleaded fails.

The plaintiff contended that the Certificate of Costs dated 4th May, 2001 is akin to a decree which under Section 26 of the Civil Procedure Act attracts interest as a matter of course.

I do not agree with this submission. A Certificate of Costs is not a decree in itself. If it were a decree, Section 51(2) of the Advocates Act Chapter 16, Laws of Kenya would not have required that the court make an order that judgment be entered for the sum certified to be due. Advocates would otherwise be allowed to proceed and execute on the Certificate of Costs without first having the same to be certified and/or entered by the court as a judgment under Section 51(2) or Section 48 of the Advocates Act. A certificate of costs is just that, a certification as to the costs due to an Advocate. To enforce the same, an Advocate has to take other legal steps either under Section 51(2) or Section 48 of the Advocates Act before he can execute for such costs as a decree of the court. Accordingly, I hold that interest is not payable as a matter of course in a certificate of costs unless it is so specifically ordered.

An Advocate is entitled to charge interest on his costs. That is a statutory right. That right cannot be taken away if claimed in accordance with the law.

Rule 7 of the Advocates (Remuneration) Order provide:-

“An Advocate may charge interest at 9 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, providing such claim for interest is raised before the amount of the bill has been paid or tendered in full.”

My undertaking of this rule is that interest is payable to an Advocate on his costs if:-

- (a) a bill is delivered to the client;***
- (b) the advocate raises the claim of interest before the amount in the bill is paid in full or is tendered in full; and***
- (c) the rate of interest at 9% per annum starts to run immediately after one month of tendering the bill and not after taxation. Once taxed, interest shall run from 30 days after the bill was served upon the client.***

In the present case, although there was no evidence to show that the Plaintiff tendered the bill to his client, I am prepared to accept that since the bill of costs was taxed interpartes as the ruling of Hon. C.K Njai S.P. Deputy Registrar of the 18th May, 2001 will show, the bill must have been served upon the Defendant.

I have perused the Plaintiff's bundle of documents filed on 23rd February, 2012 as well as his Supplementary Bundle filed on 6th March, 2012. I did not see any document whatsoever that would show that interest was claimed or demanded before the last installment of Ksh. 300,000/- was made on 23rd May, 2006. What the Plaintiff exhibited were the various applications that have been filed and orders made in this matter in his attempt to execute for the said costs. What was required, in my view, was for the Plaintiff to simply show and establish that before the Defendant paid the costs in full, he made a claim for interest on the sum. To my mind, that is only when the court could legally order interest in his favour under Rule 7 of the Advocates (remuneration) order. Having failed to do so, I am afraid this court cannot give him any helping hand.

I have examined the cases cited by the Plaintiff and in my view, they are all distinguishable with his case. In the case of **Mamicha & Co. Advocates –vs- Motex Knitwear Mills Ltd (Supra)**, the application was under Section 51(2) of the Advocates Act and the court did not consider Rule 7 of the Advocates (Remuneration) order as in this case. In the case of **Mohammed & Kinyanjui Advocates –vs- Municipal council of Thika (Supra)**, the interest was claimed before the costs were paid and/or tendered. In **S. Gichuki Waigwa case (Supra)**, the Plaintiff specifically claimed for judgment on his costs together with interest of 9% per annum in terms of Rule 7 of the Advocates (Remuneration) Order. In the present case, the Plaintiff did not claim interest on his costs until after his costs had been fully paid. Had the Plaintiff filed this suit before May, 2006, probably and in my view he may have been entitled to the declaration he has now sought.

The other issue the Defendant raised was that the issue of interest on the costs should have been pleaded as a specific sum and claimed specifically. I think I agree with the Defendant. The Plaintiff knew the specific amount of costs he was awarded, he knew that he was entitled to interest at 9% per annum under Rule 7 of the Advocates (Remuneration) Order, or any other rate of interest he wished to apply, he should have calculated the same and claimed it as a special damage in his plaint.

For the foregoing reasons, I am not satisfied that the Plaintiff has proved his case on a balance of probability and I dismiss the same with costs.

On the counterclaim, the Defendant relies on a document at page 4 of its bundle entitled "National Irrigation Board E.N. Ng'ang'a & Co. Advocates Statement of Account." The document, as all others in this case, was agreed by consent. The same gives details of payments made to the Plaintiff by the Defendant for the period of 12th December, 1998 to 23rd May, 2006. The total payment is shown to be Kshs.15,240,000/-. The Defendant has subtracted the amount of Kshs.15,125,000/- awarded as costs to the Plaintiff and has claimed the balance of Kshs.115,000/- as an over payment to the Plaintiff. The Plaintiff contended this was part of interest. I have already declined the claim for interest and in any event, there was no evidence that the amount was paid as interest.

I have examined the documents produced by the parties. The ruling of C.K Njai, Principal Deputy Registrar made on 18th May, 2001 in **HC Misc. Appln. No.177 of 2001** relate to a bill of costs on HCCC Nos.2760/98 and 2790/98, respectively. The bill of costs in respect of which the ruling was delivered does not form part of either the record in this suit or the documents produced by the parties. I do not know for what period those costs covered. Since there was no evidence of that aspect the court cannot speculate.

Turning to the document relied on, i.e. "Statement of Account," the same has entries for 12/12/98, 17/12/98, 14/01/99, 02/02/99, 26/02/99, 03/06/99, 21/07/99 and 14/04/2000. All these entries were before the ruling of the taxing officer on 18th May, 2001. What is not clear is whether the bill of costs that was presented to the taxing officer, took into consideration the amounts already paid on the above dates as it should. Further, the ruling of the taxing officer does not refer to the issue of the monies already received by the Advocate. In any event, the Defendant did not properly address this issue.

Although the Plaintiff has not denied receiving the total sum of Kshs.15,240,000/- as contended by the Defendant, I am unable to enter judgment for the said sum against the Plaintiff for the reason that the parties did not address the court on the issues I have raised.

That is, whether the amounts paid prior to May, 2001 formed part of the ruling of the taxing master, or whether the bill of costs that was the subject of the Ruling of 18th May, 2001 did or did not address the amounts already paid. The Defendant did not explain how it could overpay the Plaintiff in May, 2006 yet it knew of the exact amount due to the Plaintiff as costs way in May, 2001. In my view, it is not for the court to speculate and make inferences on what was or was not the position of a particular fact. Once a party has made a special claim, it must specifically prove the same.

For the foregoing reasons, I am not satisfied that the Defendant has proved its counterclaim for Kshs.115,000/- against the Plaintiff on a balance of probability and I dismiss the same with costs.

DATED and DELIVERED at Nairobi this 4th day of June, 2012.

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A. MABEYA

JUDGE