



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC MISC APP NO. 24 OF 2016**

**IN THE MATTER OF THE ADVOCATES ACT**

**AND**

**IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER**

**AND**

**IN THE MATTER OF THE ADVOCATE-CLIENT BILL OF COSTS**

**SINGH GITAU ADVOCATES.....ADVOCATE/APPLICANT**

**VERSUS**

**CITY FINANCE BANK LIMITED.....CLIENG/RESPONDENT**

**RULING**

1. This is the notice of motion dated 26<sup>th</sup> August 2019 brought under section 7 of the Advocates Remuneration Order 200; Section 1A, 1B, 3A, 26 and 80 of the Civil Procedure Act, order 45 rule 1, and 2 and order 51 rule 1 and all other enabling provisions of the law

2. It seeks orders:-

*(1) Spent.*

*(2) That the Judgment of 18<sup>th</sup> July 2019 be reviewed so that the awarded costs attract interest from 25<sup>th</sup> March 2013.*

*(3) That this court do grant any other orders as it sees fit.*

*(4) That the costs be in the cause.*

3. The grounds are on the face of the application and are set out in paragraphs 1 to 8.

4. The application is supported by the affidavit of James Gitau Singh Advocate/applicant, sworn on the 26<sup>th</sup> August 2019.

5. The application is opposed. There is a replying affidavit sworn by Christine Wahome, Head of Legal of the client/respondent sworn on the 25<sup>th</sup> February 2020.

6. On the 18<sup>th</sup> February 2020, the court with the consent of the parties directed that the notice of motion be canvassed by way of written submissions.

**The Applicant's submissions**

7. They are dated 30<sup>th</sup> July 2020. They raise three issues for determination;

**1. Has the applicant met the threshold to warrant review?**

**2. Is the applicant entitled to prayer no 2 in their application dated 26<sup>th</sup> August 2019?**

**3. The issue of setoff.**

8. The application is brought under section 80 of the Civil Procedure Act as well as order 45 of the Civil Procedure Rules. The application is not contesting the principal sum awarded rather the interest thereon and when it should run. The applicant's view is that it should run from the date of filing the bill of costs being 25<sup>th</sup> March 2013.

9. In the application dated 2<sup>nd</sup> March 2017, the advocate erroneously indicated that interest ought to run from 12<sup>th</sup> January 2017 as opposed to 25<sup>th</sup> March 2013. They have put forward the case of **Belinda Murai & 6 Others vs Amos Wainaina [1976] KLR**; as quoted in the case of **Africa Kenya Ltd vs Put Sarajevo General Engineering Co Ltd & 2 Others [2018] eKLR**; **Paul Asin t/a Asin Supermarket vs Peter Mukembi [2013] eKLR**; **Philip Keipto Chemwolo & Another vs Augustine Kubende [1986] Eklr**.

10. Mistakes committed by counsel fall within the ambit of 'any sufficient reason' as envisaged under order 45 rule 1. They have put forward the case of **Mburu Muthoka vs Chairman Kinangop Land Control Board Secretary LCB, Attorney General, Njunge Njenga [2004] eKLR**.

11. From the reading of rule 7 of the Advocates Remuneration Order, it is clear that so long as a party brings a claim for interest before the amount in the bill has been tendered in full, that party can apply for interest. There is no requirement that a demand for interest has to be issued. They have put forward the case of **Njeri Onyango & Co. Advocates vs Ufundi Cooperative Society [2016] eKLR**.

12. This application was filed on 10<sup>th</sup> September 2019, a month before the last instalment was paid by the respondent. The respondent knew that bills were being raised. They have put forward the cases of **Jackson Omwenga & Co. Advooates vs Everest Enterprises Ltd [2017] eKLR**.

13. The respondent was fully aware that it was indebted to the firm for work done in ELC 894 of 2007. However, upon presentation of the bill they failed to pay what was due and owing and instead frustrated the applicant's efforts by prolonging the matter in court. Interest ought to run from the date of filing the bill rather than the date of the initial ruling of the bill.

14. The bank has also filed a suit HCCC No. 279 of 2013 seeking to recover outstanding rent. Judgment was entered for the respondent for Kshs.5,233,150/94 together with interest from 1<sup>st</sup> May 2013 when the suit was filed. The circumstances that led to the respective judgments arose from the same transaction bearing in mind that it was an agreement between the applicant and the respondent, that fees would be offset from the rent due.

15. The applicant wishes to offset his decree against that in favor of the bank, it is only just and fair that interest runs from the date of presentation.

16. The applicant has met the grounds for review as there is an error apparent as to when interest should start running. The claim for interest was made before full payment of the decretal amount due to the applicant. They pray that the application be allowed.

#### **The Respondent's Submissions**

17. They are dated 23<sup>rd</sup> June 2020 and filed on 26<sup>th</sup> June 2020. On the issue of error apparent on the face of the record it has put forward the case of **Francis Njoroge vs Stephen Maina Kamere [2018] eKLR** which quoted with approval the case of **Muyodi vs Industrial and Commercial Development Corporation & Another [2006] IEA 243**. The advocate/applicant has not shown that the impugned judgment contains an error on the face of the record. The advocate has conceded that they sought interest for 12<sup>th</sup> January 2017 and not 25<sup>th</sup> March 2013. This does not constitute an error on the face of the record.

18. On the issue of discovery of new evidence and important matter which was not within the knowledge of the advocate, they have put forward the case of **Pancras T. Swai vs Kenya Breweries Limited [2014] Eklr**. The client/respondent instituted **HCCC 279 of 2013 Jamii Bora Bank vs James Gitau Singh** against the advocate for rental arrears together with interest from 1<sup>st</sup> May 2013. This was well known to the advocate since 2013. The taxation in this case proceeded and at no point did the advocate raise issues of set off. There is no discovery of new and important matter.

19. To establish a claim for interest, the advocate must notify the client by making the appropriate demand. It has put forward the case of **D. Njogu vs Kenya National Capital Corporation [2006] eKLR**. The correct fee note was the amount certified by the Deputy Registrar after taxation. Failure to award interest would not be an error on the face of the record.

20. The advocate has not placed any evidence to the effect that there was an error on the face of the record for failure to award interest as of 25<sup>th</sup> March 2013. The taxed amount together with interest therein from 12<sup>th</sup> January 2017 has since been settled in full in three instalments.

21. It prays that the application be dismissed with costs to the client/respondent.

22. I have considered the notice of motion, the affidavit in support and the affidavit in response. I have also considered the written submissions filed on behalf of the parties and the authorities cited. The issue for determination is whether the application is merited.

23. Order 45 rule 1 of the Civil Procedure Act provides that;

*(1) Any person considering himself aggrieved—*

*(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*

*(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.*

24. It is the advocates/applicant's case that this court has wide discretion to grant the orders sought. That interest ought to accrue from the date of filing the bill of costs being 25<sup>th</sup> March 2013. The client/respondent on the other hand contends that the application does not meet the requirements of order 45 rule 1 of the Civil Procedure Rules.

25. I agree with the client's/respondent's submissions that there is no error apparent on the face of the record. The advocate/applicant's submitted a bill of cost which was taxed and interest awarded on the date the deputy registrar certified the costs. I rely on the case of **Francis Njoroge vs Stephen Maina Kamore** which was cited with approval of the case of **Muyodi vs Industrial and Commercial Development Corporation & Another [2006] 1EA 243**. The correct fee note has been certified by the Deputy Registrar after taxation.

26. It is clear that awarding interest from the date of taxation was not an error to warrant a review. I find no merit in this application and the same is dismissed. I order each party to bear its own costs.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 19<sup>th</sup> day of November 2020.**

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

No appearance for advocate/Applicant

No appearance Client/Respondent

Phyllis - Court Assistant