



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC MISC. APP. NO 163 OF 2017

IN THE MATTER OF THE ADVOCATES ACT CAP 16 LAWS OF KENYA

IN THE MATTER OF TAXATION OF COSTS BETWEEN THE CLIENT AND THE ADVOCATE

BETWEEN

ODERA OBAR & CO. ADVOCATES.....APPLICANT

=VERSUS=

JAMES OUDIA.....RESPONDENT

RULING

1. This is the Notice of Motion dated 7th February 2018 brought pursuant to Section 51(2) of the Advocates Act, paragraph 7 of the Advocates Remuneration Order Chapter 6 of the Laws of Kenya and all enabling provisions of the law.

2. It seeks order:-

(1) That this honourable court be pleased to enter judgment in favour of Odera Obar & Co. Advocates against the respondent for the sum of Kshs 536,426/99 together with interest at the rate of 14% per annum from 5/10/2017 until payment in full.

(2) That the costs of this application be borne by the respondent.

3. The grounds are on the face of the application and are set out in paragraphs 1 to 5.

4. The application is supported by the affidavit of Maria Migiro, Managing Partner in the applicant firm sworn on the 7th February 2018.

5. The application is opposed. There is a replying affidavit sworn by James Oudia, the respondent herein sworn on the 28th November 2018.

6. On the 20th September 2018, the court directed that the application be canvassed by way of written submissions. It was not until 5th December 2018 that the respondent was able to file his written submissions.

7. It is the advocates/applicant's submissions that the respondent has not disputed that he instructed the applicant to represent him in the proceedings between him and Andrew Ndandong in CMCC 4844 of 2011. Further, that following the taxation of the advocate-client bill of costs dated 31st August 2017, the taxation officer issued a certificate of taxation on 29th January 2018 certifying the sum of Ksh.536,426.99 as due to the applicant.

8. The said certificate has neither been set aside nor altered. The respondent is yet to file a reference. They have put forward the case of **Gichuki Kingara & Co. Advocates vs Mugoya Construction & Engineering Ltd Misc Civil Application No.624 of 2009**. The respondent has not laid any or any sufficient credible basis for the stay of these proceedings pending the intended reference.

9. The applicants claim for interest at the rate of 14% p.a from 5th October 2017 is informed by the statutory provisions of Rule 7 of the Advocates Remuneration Order. They have put forward the cases of **Kithi & Co. Advocates vs Menengai Downs Ltd Misc Application No 1069 of 2013; Muri Mwaniki Advocates vs John Ngige Nganga Misc. Case No 178 of 2013**. The applicant has satisfied the threshold under section 51 of the Advocates Act to warrant the entry of judgment on the certified costs with interest.

10. It is the respondent's submissions that the sum of Kshs 536,426.99 stated in the certificate of costs is not properly computed. That the

proper amount ought to be Kshs.533,226.88.

11. That under Section 51 (2) of the Advocates Act, the court has power to set aside or alter a certificate of costs. This court should proceed to alter the certificate of costs and direct a fresh certificate of costs to be issued in the sum of Kshs.533,226.88. It is only after this that judgment can be entered.

12. The applicant does not deserve an award of interest at 14% as it did not raise it at the time of filing its Bill of Costs. He has put forward the case of **E. W. Njeru & Co. Advocates vs Zakhem Construction (K) Ltd [2013] eKLR**. He prays that the court do direct that a fresh certificate of costs be issued for Kshs.533,226.88.

13. I have considered the notice of motion, the affidavit in support. I have also considered the replying affidavit, the rival submissions and the authorities cited. The issues for determination are :-

(i) Whether the certificate of taxation has been set aside and or altered.

(ii) Whether the application is merited.

14. There is no doubt that the respondent instructed the applicant to represent him in CMCC 4844 of 2011 Section 51 (2) of the Advocates Act provides that:-

“The certificate of the taxing officer 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 the costs covered thereby, and the court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs”.

It is clear that a certificate of taxation was issued on 29th January 2018. The same has neither been set aside nor altered.

15. The respondent has not filed a reference against the said decision by the taxing officer. In any case *“the pendency of a reference challenging the decision by the taxing officer cannot be a bar to the determination of the applicant’s application. The court cannot speculate on the outcome of the respondent’s application and must therefore determine the application on its merit”*. It was held so by Justice **D Musinga** in the case of **Gichuki Kingara & Co. Advocates vs Mugoya Construction & Engineering Limited [2012] eKLR**. I am guided by the above authority. In the instance case a reference by the respondent against the decision of the taxing officer is yet to be filed.

16. On the issue of the interest on the certified amount, it is clear from Rule 7 of the Advocates (Remuneration) Order that an Advocate is entitled to interest at the rate of 14%. I am guided by the case of **Munyithya Mutugi Umara & Muzna Co. Advocates vs Elsek & Elsek Construction Ltd, Mombas HC Misc Application No 151 of 2012** where Kasango J held that:-

“.....the interest should be charged after expiration of one month from the time the advocate delivers his bill to the client.....”

The learned judge referred to the case of **Muri Mwaniki & Wamito Advocates vs John Ngigi & Another [2014] eKLR** where it was held by J Gikonyo that:-

“My understanding of rule 7 of the Advocate’s Remuneration order is that interest is chargeable from the expiration of one month from delivery of the bill of costs by the advocate..... Evidence of delivery is necessary. To my mind Rule 7, of the Advocates Remuneration Order does not refer to the certificate of costs but the bill of costs.....The amount of the bill may be different from the taxed costs. But for all purposes of Rule 7, interest should be on the amount in the certificate of costs as those are the costs which are payable.”

17. In my view this settles the issue of interest as the applicant did not have to raise the issue of interest at the time of filing the bill of costs as claimed by the respondent. I am also guided by the case of **Kithi & Co. Advocates vs Menengai Downs Limited Misc. App. No. 1069 of 2013** where Mabeya J held that:-

“In view of the foregoing, once a judgment is entered on a certificate of costs, the decretal amount is liable to attract interest at 14% p.a from 30 days after the service of the bill and not the date of taxation. For an advocate to be able to recover this, there must be evidence on record on the date when the bill was served upon the client”.

18. In the instant case there is evidence that the bill of costs was delivered to the respondent on 5th September 2017. The affidavit of service of Joel Mwanzia filed on 8th September 2017 is annexed to the supporting affidavit of Maria Migiro Advocate. This confirms that the interest would become chargeable from 5th October 2017, 30 days after the date of delivery of the bill of costs. The respondent has not disputed the date of delivery of the bill of costs.

19. In conclusion, I find merit in this application and the orders sought namely:-

(a) That judgment is hereby entered in favour of Odera Obar & Co. Advocates against the respondent in the sum of Kshs.536,426.99 together with interest at 14% p.a from 5th October until payment in full.

(b) That costs of this application be borne by the Respondent.

It is so ordered.

Dated, signed and delivered in Nairobi on this 26TH day of MARCH 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the applicant

.....Advocate for the Respondent

.....Court Assistant