



REPUBLIC OF KENYA



**KENYA LAW**  
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**Anthony Thuo Kanai t/a A.Thuo Kanai Advocates v Talwar (Civil Appeal  
226 of 2018) [2023] KECA 151 (KLR) (17 February 2023) (Judgment)**

Neutral citation: [2023] KECA 151 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 226 OF 2018  
K M'INOTI, KI LAIBUTA & PM GACHOKA, JJA  
FEBRUARY 17, 2023**

**BETWEEN**

**ANTHONY THUO KANAI T/A A.THUO KANAI ADVOCATES ... APPELLANT**

**AND**

**VISHISHT TALWAR ..... RESPONDENT**

*(Being an appeal from the Ruling and Orders of the Environment and Land Court of Kenya at Nairobi (J. L. Onguto, J.) delivered on 13th November, 2014 in ELC Misc. App. No. 7 Of 2014)*

**JUDGMENT**

1. In or about the month of August 2011, the respondent, Vishisht Talwar, instructed the appellant, Antony Thuo Kanai T/A A. Thuo Kanai Advocates, to act for him in relation to an Agreement for Sale and Transfer of the property known as LR No. 214/543 Nairobi valued at KShs. 287,500,000.
2. On April 10, 2014, the appellant raised a fee note in the sum of KShs. 5,002,500 on account of instructions fees, preparation and completion of the Sale Agreement and Transfer of the property aforesaid, pursuing the consent to Transfer, clearance (rates and rents), attending to the respondent, preparing a letter of indemnity, engrossing the Novation Agreement, and advising generally.
3. The appellant's fee note was endorsed with a note that read:

“...in default of payment, the fees will attract interest at 14% per annum under the provisions of the Advocates Remuneration Order and a detailed itemised Bill of Costs filed in court against you in which event the fees will not be limited to the amounts stated above.”
4. On January 13, 2014, the appellant filed his Bill of Costs in the Environment and Land Court at Nairobi Miscellaneous Application No. 7 of 2014 claiming KShs. 8,401,913/20. His Bill was subsequently taxed and allowed as against the respondent in the sum of KShs. 4,213,136/60 as stated in the Certificate of Taxation dated May 22, 2014.



5. Following the decision of the Taxing Officer, the appellant filed a notice of motion dated May 17, 2014 under section 51(2) of the *Advocates Act*, rule 7 of the *Advocates (Remuneration) Order*, 2009 and order 51 rule 1 of the *Civil Procedure Rules*, 2010 praying: that judgment be entered against the respondent in the sum of KShs. 4,213,136/60 on account of costs as certified by the Deputy Registrar on 22<sup>nd</sup> May 2014; that the sum aforesaid be paid with interest at the rate of 14% per annum from May 10, 2014, being 1 month after serving the demand letter and fee note; and that the costs of the application be provided for.
6. The appellant's Motion was supported by his affidavit sworn on May 27, 2014, and was made on the grounds that the Deputy Registrar taxed the advocates costs at KShs. 4,213,136/60 on May 21, 2014, and that the same was duly certified; that the respondent was yet to settle the said amount; that the appellant wished to commence execution proceedings against the respondent; that the respondent was served with the fee note on April 10, 2014, and advised that the fees would attract interest at 14% per annum in default of payment; and that the retainer was not in dispute.
7. The respondent opposed the Motion vide his replying affidavit sworn on November 3, 2014 contending, inter alia: that the appellant had not served him with a demand to pay, or with a certificate of Taxation; that he had paid a total sum of KShs. 3,300,000 without either the prompting of the court or of the appellant; that he, the respondent, had not failed, refused or neglected to pay the said sum of KShs. 4,213,136/60 as taxed; that the taxing officer had taxed and allowed the appellant's fees in the above-stated amount without any award on interest at 14%. According to him, he had an outstanding balance of KShs. 913,136/60 only, which he undertook to pay as soon as was practicable.
8. By a ruling dated November 13, 2014, J. L. Onguto, J. allowed the appellant's motion in the following terms: that judgment be entered in favour of the appellant in the sum of KShs. 4,213,136/60; that any decree to be extracted be adjusted to take account of the amounts already paid; that there be no orders on interest; and that the costs of the application be borne by the respondent.
9. Aggrieved by the ruling of the learned Judge, the appellant moved on appeal to this court on 7 grounds set out in his memorandum of appeal dated July 9, 2018, most of which are argumentative, and which we need not replicate, but which we take the liberty to summarise and reframe as follows, namely that: the learned Judge erred in law and fact in failing to award the appellant interest on taxed costs; the learned Judge misdirected himself in fact by making an erroneous and prejudicial finding that the appellant took a long time to have the Taxing Officer assess the amount payable with a view to earn interest during the long period; the learned Judge erred in failing to find that the appellant was entitled to an award of interest on the taxed costs, having served the fee note, and 1 month having lapsed after service; that the learned Judge erred in failing to take into account the delay and failure by the respondent to pay the appellant's fees; and misdirected himself by rendering a contradictory ruling in comparison to his decision in High Court Miscellaneous Application No. 11 of 2014 between the same parties, and in which the Judge awarded interest.
10. The respondent filed a notice of grounds for affirming the ruling of the High Court delivered on November 13, 2014 pursuant to rule 94 (now rule 96 of the *Court of Appeal Rules*, 2022). In his Notice dated July 12, 2021, the respondent advances the following grounds set out in his Notice:
  - “ 1. That the learned Judge properly and judiciously applied the honourable court's discretion in making the finding that the appellant/applicant was not entitled to interest.
  2. That the learned judge in his wisdom properly and judiciously reached his decision based on the facts and merits of the case in the lower court having



taken into account the client/advocate relationship that subsisted between the parties herein.

3. That under paragraph 7 of the *Advocates Remuneration Order* 2014, as read with section 51(2) of the *Advocates Act* cap 16 Laws of Kenya, the award of interest is discretionary in nature and as such the honourable court duly exercised its discretion judiciously in denying the appellant interest.
  4. That the appellant's appeal raises no points of law that can be considered by this honourable court and as such the appeal ought to be dismissed with costs to the respondents.
  5. That the exercise of discretion as granted by various statutes cannot be guided by parties' interests, otherwise doing so would amount to usurping and/or abrogating their judicial authority on disputes in discharge of discretion granted to Courts.
  6. That in exercise of the discretion granted by statutes, courts should be guided only by the unique facts of each case as presented before it and in accordance with the requisite law. As such, the honourable court cannot and ought not to be bound by previous decisions where facts were fundamentally different.
  7. That through this appeal the appellant seeks to unjustifiably enrich himself.
  8. That in prior court decisions, courts have time and again materially differed on the subject of interest in exercise of their discretion as granted by law."
11. In support of his appeal, the appellant filed written submissions dated January 27, 2021. Citing this Court's decision in *Henry Njagi Muruariua v A. O. Okello, District Commissioner Mbere District and Another* [2014] eKLR, he contended: that denial by the learned Judge of the interest claimed was founded on reasons neither pleaded nor supported by facts; that the learned Judge denied him the right to be heard on the issues raised by the Judge suo moto; and that he was thereby denied the right to fair hearing.
  12. On the authority of this court's decision in *Patriotic Guards Ltd v James Kipchirchir Sambu* [2018] eKLR, the appellant submitted that "... whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes."
  13. In addition to the foregoing, the appellant submitted that he had complied with the provisions of rule 7 of the *Advocates Remuneration Order* to which we will shortly return, and urged us to allow his appeal.
  14. In his written submissions dated October 13, 2022, learned counsel for the respondent M/s. Z. Achoki Hussein Advocates urged us to dismiss the appeal and affirm the decision of Onguto, J. on the grounds set out in the respondent's Notice of Grounds of Affirmation.
  15. Our mandate on a first appeal as set out in rule 29(1) of the *Court of Appeal Rules*, 2022 requires us to reappraise the evidence and to draw our own conclusions. In *Peters v Sunday Post Limited* [1958] EA 424, the predecessor of this Court, the Court of Appeal for Eastern Africa, stated:  
  
"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial Judge has



failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide.”

16. Having considered the record of appeal, the grounds on which it is anchored, the written and oral submissions of the appellant and of learned counsel for the respondent, statute and judicial decisions cited, we form the view that the appeal before us turns on our finding on the determinant issue as to whether the learned Judge erred in law or in fact in failing to award the appellant interest on the amount taxed and allowed on account of his fees.
17. The appellant’s case is that he was entitled to recover interest on his taxed costs. In principle, an award of interest in such a case is, in the absence of express terms of a binding contract in that regard, a matter of discretion in respect of which relevant factors must be considered in exercising that discretion. In effect, each application ought to be considered on its own peculiar circumstances.
18. The appellant’s claim is mainly anchored on rule 7 of the *Advocates (Remuneration) Order*, which reads:

“7. Interest may be charged An advocate may charge interest at 14 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, provided that such claim for interest is raised before the amount of the bill shall have been paid or tendered in full.”

19. It is noteworthy that interest on costs is chargeable under section 7 of the Act in circumstances where the Bill is served on the client, but remains unpaid after 30 days of such service. In this case, the respondent commenced and continued to make payment without being prompted by either the appellant’s demand or any court process.

According to him, he paid a substantial amount prior to taxation and issuance of the certificate of taxation. Moreover, the appellant claims interest on the full amount as taxed without giving credit for the substantial sums paid prior to the Reference leading to the impugned ruling.

20. By so concluding, we take to mind the provision of section 51(2) of the *Advocates Act*, which does not require that sums taxed and allowed on account of costs attract interest as a matter of course. That sub-section reads:

“ 51. General provisions as to taxation (1) ... ..

- (2) 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.”

21. We concur with the learned Judge that the actual relationship of the parties, the demand for payment, and the behaviour of the parties after such demand, were relevant factors for consideration in determining whether to allow a claim for interest on taxed costs. As the learned Judge correctly observed, this case involved a casual advocate/client relationship under which the appellant rendered legal services in 2011 after which he raised a fee note in the sum of KShs. 5,002,500 in 2013. Soon thereafter, he filed a Bill of Costs requesting that his Bill of Costs be taxed in the sum of KShs. 8,401,913.20. One or so months later, the respondent commenced payment. By the time the



appellant's Bill was taxed and allowed in the sum of KShs. 4,213,136/60, the respondent had paid a substantial sum of KShs. 3,300,000, leaving an outstanding balance of KShs. 913,136/60.

22. The question is, did the learned Judge properly exercise his discretion in declining the appellant's claim on interest at 14% per annum on the amount taxed at KShs. 4,213,136/60? This court had this to say in *Patriotic Guards Ltd v James Kipchirchir Sambu* (supra) with regard to exercise by a court of its discretion:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

23. In view of the foregoing, we are not persuaded that there is basis to interfere with the discretionary decision of the learned Judge. We take to mind the decision in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] KLR 898 where this court laid down the factors that an appellant must establish for the court to interfere with the discretionary decision of the Judge appealed from in the following words:

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

24. We find nothing to fault the decision of the learned Judge, or to suggest that he acted capriciously, whimsically, or in accord with his private affection or will. The Judge was correct in finding that the mere fact that a fee note was served with a demand endorsed thereon to the effect that delayed settlement would attract interest was not of itself a determinant factor in awarding interest as a matter of course. Moreover, the respondent had made substantial payments by the time the Taxing Officer issued the Certificate of Taxation dated May 22, 2014. In our considered view, it would have been unjust to award interest on the entire amount as taxed and allowed in total disregard of substantial payments made in reduction thereof.
25. Having carefully considered the record of appeal as put to us, the grounds on which the appeal is anchored, the respective written and oral submissions of the parties, the statutory and judicial authorities cited, we find that the appellant's appeal lacks merit. In conclusion, we hereby order and direct that:
- a. The appellant's appeal be and is hereby dismissed;
  - b. The ruling and order of the ELC at Nairobi (J. L. Onguto, J.) dated November 13, 2014 in ELC Misc. App. No. 7 of 2014 be and is hereby upheld; and
  - c. Each party do bear their own costs.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2023.**



**K. M'INOTI**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

**M. GACHOKA – CI Arb, FCIARB**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

