



Otieno, Ragot & Company Advocates v Kenindia Assurance Co. Ltd (Civil Appeal 129 of 2019) [2023] KECA 1398 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1398 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 129 OF 2019
PO KIAGE, M NGUGI & JM NGUGI, JJA
NOVEMBER 24, 2023

BETWEEN

OTIENO, RAGOT & COMPANY ADVOCATES APPELLANT

AND

KENINDIA ASSURANCE CO. LTD RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Kisumu (Ochieng, J.) dated 20th November, 2018 in Misc. Civil Case No. 63 of 2018)

An advocate cannot not charge the 14% p.a. interest on his costs under rule 7 of the Advocates Remuneration Order without notification to the client

The issue before the court was whether an advocate could charge the potentially allowable interest of 14% p.a. under rule 7 of the Advocates Remuneration Order on a taxed bill of costs when the interest was not in the bill of costs served on the client and taxed by a taxing master. The court held that it was not open to the advocate to claim the potentially permissible interest rate of 14% for the first time during adoption proceedings under section 51(2) of the Advocates Act. That was because it was incumbent upon the advocate to put the client on notice that he intended to claim the interest at the point at which he drew the bill of costs.

Reported by Kakai Toili

Civil Practice and Procedure – bill of costs – advocate/client bill of costs – charging of an interest of 14% under rule 7 of the Advocates Remuneration Order - whether an advocate could charge an interest of 14% under rule 7 of the Advocates Remuneration Order after the bill of costs had been taxed and certificate of costs issued - Advocates Remuneration Order, rule 7; Advocates Act (cap 16) section 51(2).

Brief facts

The appellant was instructed by the respondent to represent them in a suit. Upon conclusion of the matter, the appellant lodged its advocates/client bill of costs against the respondent. The bill of costs was dated May 23, 2017 and was served upon the respondent on May 29, 2017. Thereafter, it was filed before the High Court on the same day, May 29, 2017. Service of the bill of costs on the client was never disputed. The bill of costs was taxed on July 14, 2018 in the sum of Kshs. 57,161 and a certificate of costs was subsequently issued.



Later, the appellant lodged an application under section 51 of the Advocates Act seeking to have the certificate of costs adopted as the judgment and decree of the trial court. Additionally, the appellant also sought an award of interest on the taxed costs at the rate of 14% p.a. from June 29, 2017 until payment in full, being one month from the date the advocate/client bill of costs was delivered to the respondent. The High Court adopted the certificate of costs as a judgment of the court but declined to award the interest as prayed. The appellant was aggrieved by that ruling of the High Court and thus filed the instant appeal.

Issues

Whether an advocate could charge an interest of 14% under rule 7 of the Advocates Remuneration Order after the bill of costs had been taxed and certificate of costs issued?

Relevant provisions of the Law

Advocates Act (cap 16)

Section 51 - General provisions as to taxation

(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.

Advocates Remuneration Order

Rule 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.

Held

1. A taxing officer had judicial discretion with regard to quantum of taxation and the trial court or appellate court would not normally interfere with the same unless there was an error in principle or such discretion was improperly exercised.
2. A contextual reading of rule 7 of the Advocates Remuneration Order, section 51 of the Advocates Act and decided cases, yielded the following six propositions:
 1. An advocate was required to serve his client with the totality of the claims he had against the client in a bill of costs. That bill served the purpose of notifying the client what claims the advocate had against the client; and the basis for the claim. It was, therefore, incumbent upon the advocate to include the totality of his claim in the bill of costs so that the client could determine whether to contest it or not; and if the client contested it, what aspects of it to contest.
 2. When a bill of costs had been served on the client and the amount was disputed or the client otherwise failed to pay, it proceeded to taxation. The bill of costs provided the only basis upon which taxation proceeded.
 3. Once a bill of costs was taxed by a taxing master and a ruling arrived at, the door was closed on the advocate to add any further claims against the client based on their representation of the client in the underlying matter from the date the bill of costs was served on the client.
 4. After the taxation, the total amount owing to the advocate was included in a certificate of costs. That amount was the totality of the indebtedness of the client to the advocate. The only other amount the advocate could charge from that date were interests on the taxed amounts; and costs for the taxation or adoption proceedings.
 5. If the advocate (or the client) was dissatisfied with the ruling of the taxing master and the amount payable as contained in the certificate of costs, the only recourse allowed in law was to file a reference under rule 11 of the Advocates Remuneration Order.



6. If such a reference was not filed, the amount reflected in the certificate of costs was the final amount payable to the advocate only subject to interest at court rates which was at the discretion of the court that adopted the certificate of costs as a judgment.
3. The appellant did not, in its bill of costs drawn and served on the respondent, include the potentially allowable interest of 14% p.a. The advocate only claimed the interest, for the first time, in the adoption proceedings under section 51(2) of the Advocates Act. From rule 7 of the Advocates Remuneration Order and section 51(2) of the Advocates Act, it was not open to the appellant to claim the potentially permissible interest rate of 14% for the first time during adoption proceedings under section 51(2). That was because it was incumbent upon the advocate to put the client on notice that he intended to claim the interest at the point at which he drew the bill of costs. He did not. If an advocate was interested in claiming the potentially allowable interest at 14% p.a., he must make the claim in the bill of costs.
4. Once the advocate included the claim of interest, it must be litigated before the taxing master in the taxation proceedings. If it was awarded by the taxing master, it would be well and good for the advocate. However, if it was not awarded in the taxation proceedings and included in the certificate of costs, the advocate must challenge the omission in a reference to the court under rule 11 of the Advocates Remuneration Order. It was not open to the advocate to spring the claim of interest for the first time at the enforcement proceedings under section 51 of the Advocates Act.
5. The advocate should put the client on notice about the totality of the claim he had against the client at the earliest instance. There was a policy preference against an advocate making piecemeal claims against the client. Requiring an advocate to raise the claim for interest at the earliest instance gave the client an opportunity to object to any delays by the advocate in raising the bill of costs. That, in turn, acted as a disincentive for advocates to needlessly delay raising a bill of costs with the sole objective of increasing the amounts due through the allowable interests under rule 7 of the Advocates Remuneration Order. Conversely, it incentivized clients to promptly pay the amounts due to the advocate as claimed in the bill of rights or raise an objection promptly.
6. The appellant neither claimed the interest at 14% p.a. in his bill of costs nor filed a reference under rule 11 of the Advocates Remuneration Order. Consequently, it was improper for the appellant to raise the claim for the first time in the section 51(2) proceedings. The High Court did not misapprehend the law or abuse discretion in disallowing the claim.

Per Kiage, JA (concurring)

7. An advocate had the right to claim interest on his disbursements and costs at 14% p.a. under rule 7 of the Advocates Remuneration Order. The interest at that rate became payable from one month after the bill was delivered to the client. In order for the advocate to claim such interest, he needed to have raised it before the amount in the bill had been paid or tendered in full. That much should be clear from the wording of rule 7.
8. The last phrase of rule 7 of the Advocates Remuneration Order, in the nature of a proviso, spoke to an important policy consideration: the claim must be made in timely fashion. In case the client decided to pay the bill, it was not open to the advocate to thereafter have a eureka moment, recall the existence of the right, and claim interest at 14% p.a. That was consistent with the unarguable need for a client to be notified in advance of the advocate's intent to claim the higher interest from the expiry of one month after delivery of the bill. It was a plain prerequisite of essential fairness.
9. It was not be open to the advocate to conjure up the 14% p.a. interest on his costs if he never notified the client in like timely fashion. An advocate intent on exercising the right should place a cautionary notice on the bill he delivered, potentially and ultimately useful to himself: "Take notice that should this amount or any part thereof remain unpaid at the expiry of 30 days from the date hereof, such outstanding sum shall thereafter attract, and I shall claim, interest at the rate of 14% p.a. until payment in full as provided under rule 7 of the Advocates Remuneration Order" or words to such effect.



10. Having failed to give notice at delivery of its bill to the client and not having included the claim for such interest at such rate in the bill of costs it filed before the High Court on May 29, 2017, with the effect that it was not included in the certificate of costs dated July 4, 2018 for Kshs.57,161 upon taxation, it was not open to the appellant to claim it when seeking adoption of the certificate of costs as a judgment of the court in a subsequent application. The 14% interest p.a. claim was thus ill-fated for self-inflicted laches and default, and was destined for rejection by the High Court. There was no reason to fault the High Court or interfere with its decision.

Appeal dismissed.

Orders

Each party bears its own costs.

Citations

Cases

Kenya

1. *Aoko, Richard Oketch v Everlyne Auma Oliech (Suing as the administrator and the legal representative of the estate of Solomon Oliech Miyawa)* Civil Appeal No 93 of 2011 — (Mentioned)
2. *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* Civil Appeal 220 of 2004; [2005] KECA 325 (KLR) — (Explained)
3. *Lubulellah & Associates Advocates v NK Brothers Limited* Miscellaneous Civil Application 52 of 2012; [2014] KEHC 8685 (KLR) — (Explained)
4. *Otieno, Ragot & Company Advocates v Kenya Airports Authority* Civil Appeal 39 of 2017; [2021] KECA 587 (KLR) — (Explained)

Statutes

Kenya

1. Advocates Act (cap 16) sections 48(3); 51 ; 51(2) — (Interpreted)
2. Advocates Remuneration Order, 2014 (cap 16, Sub Leg) rules 7, 11, 13(3) — (Interpreted)
3. Civil Procedure Act (cap 21) section 26(1)(2) — (Interpreted)

Advocates

None mentioned

JUDGMENT

Judgment of Joel Ngugi, JA

1. The singular issue for determination in this appeal is whether an advocate can charge the potentially allowable interest of 14% pa. under rule 7 of the [Advocates Remuneration Order](#) on a taxed Bill of Costs when the advocate did not include the interest in the original Bill of Costs served on the client and taxed by a Taxing Master. Differently put, can an advocate retroactively charge the allowable interest of 14% in rule 7 of the [Advocates Remuneration Order](#) after the advocate's Bill of Costs has been taxed and certificate of costs issued?
2. The facts of the case are as follows. The appellant was instructed by the respondent to represent it in Kisumu HCCA No 93 of 2011, *Richard Oketch Aoko v Everlyne Auma Oliech (Suing as the administrator and the legal representative of the estate of Solomon Oliech Miyawa)*. The client-advocate relationship was never disputed. Upon conclusion of the matter, the appellant lodged its Advocates/ Client Bill of Costs against the respondent in Kisumu HC Misc No 63 of 2017, *Otieno, Ragot & Company Advocates v Kenindia Assurance Company Limited*. The Bill of Costs was dated May 23, 2017 and was served upon the respondent on May 29, 2017. Thereafter, it was filed before the High



Court on the same day, May 29, 2017. Service of the Bill of Costs on the client was never disputed. The Bill of Costs was taxed on July 14, 2018 in the sum of Kshs 57,161. A Certificate of Costs dated July 4, 2018 was subsequently issued.

3. Afterwards, the appellant lodged an application under section 51 of the *Advocates Act*, to wit, Kisumu High Court Misc Application No 63 of 2018, seeking to have the Certificate of Costs adopted as the judgment and decree of the trial court. Additionally, the appellant also sought an award of interest on the taxed costs at the rate of 14% pa from June 29, 2017 until payment in full, being one month from the date the Advocate/Client Bill of Costs was delivered to the respondent. The appellant's application was not resisted by the respondent.
4. In a short ruling dated November 20, 2018, the High Court (Ochieng, J (as he then was)) adopted the Certificate of Costs as a judgment of the court but declined to award the interest as prayed. The learned judge ruled that:

As a certificate of taxation is deemed to be final about the contents thereof unless the certificate has been set aside or varied; and because the certificate of taxation herein has not been challenged, I now enter judgment in favour of the applicant for Ksh 51,161. The said sum shall attract interest at court rates from today.

5. It would appear that the ruling, as reproduced in the Record of Appeal has a typographical error on the amount. It should read Kshs 57,161. The correct amount, however, appears in the decree as extracted.
6. The appellant is aggrieved by that ruling of the High Court. The grievance is very specific: the appellant believes that the High Court should have acquiesced to his prayer for interest of 14% pa to be calculated on the sum of Kshs 57,161 from June 29, 2017, being one month from the date of service of the appellant's Bill of Costs on the respondent.
7. The appellant filed a notice of appeal dated July 10, 2019, and a memorandum of appeal of even date, in which it raised four (4) grounds of appeal. These are that the learned trial judge:
 - i. Erred in both law and fact when he failed to properly apply rule 7 of the *Advocates Remuneration Order*, which entitles an advocate to earn interest at the rate of 14% p.a. on his costs one month from the time of service of his bill to the client, when he awarded interests on costs from November 20, 2018, being the date of adoption of the Certificate of Costs as the judgment of the court, as opposed to awarding the same from June 29, 2017, being one month from the date of service of the appellant's Bill of Costs.
 - ii. Erred in law and fact in failing to consider the evidence before him as a whole.
 - iii. Erred in law and fact on otherwise failing to exercise his discretion in the proper manner resulting in injustice to the appellant.
 - iv. Decision was not supported in law and in fact.
8. Consequently, the appellant prayed that: the ruling of the trial court be set aside and in its place, the notice of motion dated August 2, 2018, be allowed with costs.
9. During the virtual hearing of the appeal, learned counsel, Ms Anyango, appeared for the appellant and learned counsel, Ms. Twena, appeared for the respondent. Both parties filed written submissions and relied entirely on them.
10. In its submissions, the appellant contended that rule 7 of the *Advocates Remuneration Order* allows an advocate to charge an interest rate of 14% pa from the expiration of one month from the delivery



- of its Bill to the client. Therefore, according to the appellant, once a Certificate of Costs is adopted as a judgment of the court pursuant to section 51(2) of the *Advocates Act*, the decretal amount is liable to attract an interest of 14% pa, one month after service of the Bill, and not from the date of taxation or date of delivery of the ruling adopting the Certificate of Costs as a decree.
11. The appellant further contended that for an advocate to successfully claim interest under rule 7 of *Advocates Remuneration Order*, there must be evidence on record of the date the Bill was served upon the client. In this regard, the appellant argued that the record shows that it forwarded its Bill of Costs to the respondent on May 29, 2017, a fact not in dispute. The appellant submitted that this was all it was required to prove to be entitled to claim the interest of 14% p.a from one month after the delivery of the Bill of Costs.
 12. The appellant complained that the learned judge did not identify any basis of making an award of interest at court rates, or its application from the date of judgment. In this regard, the appellant argued that the learned judge appeared to have exercised general discretion vested in the court as contemplated under section 26(1) of the *Civil Procedure Act*, which gives courts the judicial discretion as to the amount of interest to award and the date of commencement of such award, hence the learned judge's reference to the rate of interest as "court rates". This, according to the appellant, constituted a misdirection and/or misapprehension of the applicable law, as the appellant's understanding of the law is that where there is a specific statutory or legal provision dealing with a specific area of law, then the general provisions of law guiding the general exercise of discretion on the same subject would not apply.
 13. The appellant argued that its application was premised on section 51 of the *Advocates Act* and rule 7 of the *Advocates Remuneration Order*, which allow proceedings to be commenced as a Miscellaneous Cause in which the Advocate/Client Bill of Costs is taxed and the Certificate of Costs extracted thereon adopted as a judgment within the same Miscellaneous Cause, as provided for under section 48(3) of the *Advocates Act*, as read with rule 13(3) of the *Advocates Remuneration Order*. Thus, since rule 7 of the *Advocates Remuneration Order* specifically provides for interest rates to be computed at 14% p.a. from the expiry of one month from the date of service of the Advocates Bill to the client; and not interest at court rates which is sometimes interpreted as being 12% as per Practice Note No 1 of 1982 by Hon. Chief Justice Simpson under section 26(1) of the *Civil Procedure Act* or as 6% as contemplated under section 26(2) thereof, the general exercise of discretion on interest would bring ambiguity to the subject, to which there are special and specific provisions of law. Therefore, the appellant contends, failure by the learned judge to consider the effect of the special and specific provisions of law cited in the application and apply the same constituted a failure to consider important factors which ought to have been considered.
 14. In this regard, the appellant opined that a proper consideration of the special and specific provisions cited in the application would have led the learned judge to a different conclusion from the one that he reached in his impugned ruling, since the record shows that the appellant served its Bill of Costs to the respondent on 29th May, 2017. Thus, under rule 7 of the *Advocates Remuneration Order* the appellant was entitled to an award of interest at the rate of 14% p.a. from the expiry of one month from the date of service of the Bill.
 15. Lastly, the appellant argued that our jurisprudence has determined what constitutes the "Bill" referred to in rule 7 of the *Advocates Remuneration Order* to be the Advocates final Bill setting out its disbursements and costs which he then requires the client to pay but not a Bill which he intends to file for taxation. In any event, the appellant contended that this question was not raised for determination by either party before the trial court and neither was it raised by the learned judge in his ruling.



16. Opposing the appeal, the respondent conceded that while rule 7 of the [Advocates Remuneration Order](#) allows an Advocate to charge interest on his or her fees and disbursements, such claim must first be made with the client who is liable to pay it. The respondent argued that the interest payable under rule 7 of the [Advocates Remuneration Order](#) must first be claimed as one of the items in the Advocate/Client Bill of Costs and presented for taxation. However, the appellant did not claim for such interest in his Bill of Costs.
17. The respondent contended that the claim for interest was made for the first time before the learned judge in an application which sought adoption of the Certificate of Costs as judgement; to which judgment was entered in terms of the Certificate of Costs issued by the taxing officer and which had not been set aside or altered.
18. The respondent further contended that the appellant anchored its application on section 51 of the [Advocates Act](#), which gives the court jurisdiction to enter judgment provided that the Advocate/Client Bill of Costs has been taxed and the taxing officer has issued a Certificate of Costs. It was the respondent's case that the trial court was satisfied that the material placed before it adhered to all the conditions set out in section 51(2) of the [Advocates Act](#), thus giving it discretion to enter judgment partly in favour of the appellant.
19. The respondent argued that since the appellant did not claim the 14% interest p.a. as one of the items in its Bill of Costs, section 51 of the [Advocates Act](#) could not allow the court jurisdiction to award that interest. Rather, it gave the court jurisdiction to enter judgment and exercise discretion to award interest on the Advocate/Client Bill of Costs, specify the rate, and give orders with regard to which date such interest could be calculated from. Thus, the learned judge could not alter the amount in the Certificate of Costs and award a sum beyond what was stated therein. The respondent argued that this would not have been the case if the appellant anchored its application on rule 11 of the [Advocates Remuneration Order](#).
20. The respondent further argued that the learned judge properly exercised his discretion in the circumstances and the appellant failed to show the existence of any evidence that would compel this court to overturn and negate such obvious discretion. The respondent submitted that there was no need to burden it with further costs in respect of instructions which were given over two decades ago. Ultimately, the respondent submitted that no legal provision conferred the learned judge with jurisdiction to award interest from the date of Certificate of Costs to the date of determining the application before him. Thus, the learned judge's decision in the circumstances was sound and there is no basis for this court to interfere with it. The respondent urged this court to dismiss the appeal with costs as it lacks merit.
21. As earlier phrased, the primary question for consideration is whether the appellant was entitled to impose an interest of 14% p.a. on the taxed Bill of Costs as contained in the Certificate of Costs when he did not include it in the Bill of Costs served on the client.
22. I have carefully considered the pleadings in the record of appeal, the ruling of the trial court, the appellant's grounds of appeal and the rival submissions of the parties.
23. As a starting point, I recognize that a taxing officer has judicial discretion with regard to quantum of taxation and the trial court or appellate court will not normally interfere with the same unless there was



an error in principle or such discretion was improperly exercised. In *Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR, the court held that: -

“On reference to a Judge from the Taxation by the Taxing officer, the Judge will not normally interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer, erred in principle in assessing the costs.” See also *Arthur v Nyeri Electricity Undertaking* [1961] EA 492 and *Premchand Raichand Limited & another vs. Quarry Services of East Africa Limited and Another* [1972] EA 162

24. Rule 7 of the *Advocates Remuneration Order* provides that: -

“An advocate may charge interest at 14% per annum on his disbursements and cost, 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.”

25. On the other hand, 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.”

26. In *Lubulellah & Associates Advocates v NK Brothers Limited* [2014] eKLR this court explained the import of section 51(2) of the *Advocates Act* thus: -

“The law is very clear that once a taxing master has taxed the costs, issued a Certificate of Costs and there is no reference against his ruling or there has been a ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter judgment. An applicant is not required to file suit for the recovery of costs.” See also *Musyoka & Wambua Advocates v Rustam Hira Advocate* [2006] eKLR.

27. In *Orieno, Ragot & Company Advocates v Kenya Airports Authority* [2021] eKLR, Murgor, JA, dealt with a matter that is somewhat analogous to the case at bar and held thus: -

“Relying on the case of *D Njogu and Company Advocates vs Kenya National Capital Corporation* (supra), the respondent’s response was that the period from when interest will accrue is a matter to be left to the discretion of the court....

As such [Rule 7] deals with interest chargeable by an advocate in respect of its claim for disbursements and costs following submission of a fee note. It is patently clear from the rule that interest begins to accrue from the expiry of one month from the date of delivery of the bill or fee note.

.....

Additionally, it is distinctive that a review of the applicant’s Bill of Costs does not disclose that the applicant included a charge for “...interest at 14% per annum on his (her) disbursements and cost...” in the Bill of Costs. As the sole basis upon which computations of amounts due to an applicant are determined by the taxing officer, the element of interest



defined by rule 7 ought to have been included in the Bill of Costs, but it was not. This omission would thereby negate the application of rule 7, and instead render the bill liable to an exercise by the court of its discretion under section 26 of the *Civil Procedure*. Though the judge was entitled to exercise his discretion to award interest, there was no basis established for awarding the appellant interest at 14% per annum from the date of the Bill of Costs until payment in full.”

28. A contextual reading of rule 7 of the *Advocates Remuneration Order*, section 51 of the *Advocates Act* and our decided cases, in my view, yields the following six propositions as a starting point for analysis:
- a. An advocate is required to serve his client with the totality of the claims he has against the client in a Bill of Costs. That Bill serves the purpose of notifying the client what claims the advocates has against the client; and the basis for the claim. It is, therefore, incumbent upon the advocate to include the totality of his claim in the Bill of Costs so that the client can determine whether to contest it or not; and if to contest, what aspects of it to contest.
 - b. When a Bill of Costs has been served on the client and the amount is disputed or the client otherwise fails to pay, it proceeds to taxation. The Bill of Costs provides the only basis upon which taxation proceeds.
 - c. Once a Bill of Costs is taxed by a taxing master and a ruling arrived at, the door is closed on the advocate to add any further claims against the client based on their representation of the client in the underlying matter from the date the Bill of Costs was served on the client.
 - d. After the taxation, the total amount owing to the advocate is included in a Certificate of Costs. That amount is the totality of the indebtedness of the client to the advocate. The only other amount the advocate can charge from that date are interests on the taxed amounts; and costs for the taxation or adoption proceedings.
 - e. If the advocate (or the client) is dissatisfied with the ruling of the taxing master and the amount payable as contained in the Certificate of Costs, the only recourse allowed in law is to file a reference under rule 11 of the *Advocates Remuneration Order*.
 - f. If such a reference is not filed, the amount reflected in the Certificate of Costs is the final amount payable to the advocate only subject to interest at court rates which is at the discretion of the court that adopts the Certificate of Costs as a judgment.
29. I will now turn to the case at hand. It is undisputed that:
- a. The advocate served the client with a Bill of Costs dated May 23, 2018 on May 29, 2018. The total amount claimed under that Bill was Kshs. 182,745.50
 - b. The advocate’s Bill of Costs as drawn, served and filed in court, did not include the permissible interest of 14% p.a.
 - c. The advocate’s Bill of Costs was taxed to Kshs 57,161 on July 14, 2018.
 - d. A Certificate of Costs dated July 23, 2018 was issued to the advocate.
 - e. The advocate did not file any reference under rule 11 of the *Advocates Remuneration Order* to dispute any amounts taxed or the total amount included in the Certificate of Costs. The client, also, did not file a reference.



- f. The advocate filed an application under section 51(2) of the *Advocates Act* for the Certificate of Costs to be adopted as a judgment. The High Court so adopted the Certificate of Costs as a judgment in its ruling dated November 20, 2018.
30. The crux of the matter is that the appellant/advocate did not, in its Bill of Costs drawn and served on the client/respondent, include the potentially allowable interest of 14% p.a. The advocate only claimed the interest, for the first time, in the adoption proceedings under section 51(2) of the *Advocates Act*. The appellant insists that he was allowed to do so and that, conversely, the Court was obligated to award them the interest.
31. As should be obvious from the unbundling of rule 7 of the *Advocates Remuneration Order* and section 51(2) of the *Advocates Act* above, it was not open to the appellant to claim the potentially permissible interest rate of 14% for the first time during adoption proceedings under section 51(2). This is because it was incumbent upon the advocate to put the client on notice that he intended to claim the interest at the point at which he drew the Bill of Costs. He did not. If an advocate is interested in claiming the potentially allowable interest at 14% p.a., he must make the claim in the Bill of Costs.
32. Once the advocate includes the claim of interest, it must be litigated before the Taxing Master in the taxation proceedings. If it is awarded by the Taxing Master, it would be well and good for the advocate. However, if it is not awarded in the taxation proceedings and included in the Certificate of Costs, the advocate must challenge the omission in a reference to the court under rule 11 of the *Advocates Remuneration Order*. It is not open to the advocate to spring the claim of interest for the first time at the enforcement proceedings under section 51 of the *Advocates Act*.
33. To reiterate, the policy rationale for this interpretation is that the advocate should put the client on notice about the totality of the claim he has against the client at the earliest instance. There is a policy preference against an advocate making piecemeal claims against the client. Requiring an advocate to raise the claim for interest at the earliest instance gives the client an opportunity to object to any delays by the advocate in raising the Bill of Costs. This, in turn, acts as a disincentive for advocates to needlessly delay raising a Bill of Costs with the sole objective of increasing the amounts due through the allowable interests under rule 7 of the *Advocates Remuneration Order*. Conversely, it incentivizes clients to promptly pay the amounts due to the advocate as claimed in the Bill of Rights or raise an objection promptly.
34. In the present case, the appellant neither claimed the interest at 14% p.a. in his Bill of Costs nor filed a reference under rule 11 of the *Advocates Remuneration Order*. Consequently, it was improper for the appellant to raise the claim for the first time in the section 51(2) proceedings. It follows that the learned judge did not misapprehend the law or abuse his discretion in disallowing the claim.
35. The upshot is that the appeal lacks merit. I propose that it be dismissed. Noting some of the conflicting High Court decisions on the topic, however, I would propose that each party bears its own costs.

Judgment of Kiage, JA

36. I am in full agreement with the judgment of my brother Joel Ngugi, JA, which I had the benefit of reading in draft.
37. Indubitably, an advocate does have the right to claim interest on his disbursements and costs at 14% per annum, under rule 7 of the *Advocates Remuneration Order*. The interest at that rate becomes payable from one month after the bill is delivered to the client.



38. My understanding of the rule is that in order for the advocate to claim such interest, he needs to have raised it before the amount in the bill has been paid or tendered in full. That much should be clear from the wording of the rule itself;

“An advocate may charge interest at 14% per annum on his disbursements and cost, 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 it raised before the amount of the bill has been paid or tendered in full.”

39. That last phrase of the rule, in the nature of a proviso, speaks to an important policy consideration: the claim must be made in timely fashion. In case the client decides to pay the bill, it is not open to the Advocate to thereafter have a Eureka Moment, recall the existence of the right, and claim interest at 14% per annum.

40. This understanding is consistent with the unarguable need for a client to be notified in advance of the advocate’s intent to claim the higher interest from the expiry of one month after delivery of the bill. Thus is a client forewarned to pay up, and speedily so, or else. And it is a plain prerequisite of essential fairness.

41. By the same token, it cannot be open to the advocate to conjure up the 14% per annum interest on his costs if he never notified the client in like timely fashion. I would go as far as to say that an advocate intent on exercising the right should place a cautionary notice on the bill he delivers, potentially and ultimately useful to himself: “Take notice that should this amount or any part thereof remain unpaid at the expiry of 30 days from the date hereof, such outstanding sum shall thereafter attract, and I shall claim, interest at the rate of 14% per annum until payment in full as provided under rule 7 of the *Advocates Remuneration Order*.” Or words to such effect.

42. Having failed to give such notice at delivery of its bill to the client and not having included the claim for such interest at such rate in the Bill of Costs it filed before the High Court on May 29, 2017, with the effect that it was not included in the certificate of costs dated July 4, 2018 for Kshs 57,161 upon taxation, it was not open to the appellant to claim it when seeking adoption of the Certificate of Costs as a judgment of the court in a subsequent application.

43. The 14% interest PA claim was thus ill-fated for self-inflicted laches and default, and was destined for rejection by Ochieng, J (as he then was), and rightly so. We would have no reason to fault the learned judge or interfere with his decision.

44. Like my learned brother Joel Ngugi, JA, I find no merit in this appeal and would dismiss it on the terms as to costs that he proposes.

45. As Mumbi Ngugi, JA also agrees, it is so ordered.

JUDGMENT OF MUMBI NGUGI, JA

46. I have had the benefit of reading in draft the judgment of my brother, Joel Ngugi, JA which I entirely agree with and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF NOVEMBER, 2023.

JOEL NGUGI

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JUDGE OF APPEAL



P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar

