



REPUBLIC OF KENYA



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Otieno, Ragot & Company Advocates v Kenindia Assurance Co Ltd (Civil Appeal 165 of 2019) [2023] KECA 1443 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1443 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 165 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 12th March, 2019 in Misc. Civil Case No. 249 of 2014)

JUDGMENT

Judgment of Joel Ngugi, JA

1. In a companion appeal to this one, to wit, Kisumu Civil Appeal No. 129 of 2018 (companion appeal), the parties are the same as in the present appeal and the main issue for determination is the same: under what conditions is an advocate permitted to recover the allowable interest of 14% p.a. under Rule 7 of the *Advocates Remuneration Order*? In that companion appeal whose decision this Court has issued today, the Court reached several consequential conclusions respecting the interpretation of Rules 7 and 11 of the *Advocates Remuneration Order* and section 51(2) of the *Advocates Act* as follows:
 - a. First, that an advocate can only claim the allowable interest of 14% under Rule 7 of the *Advocates Remuneration Order* if the advocate included that claim in the original fee note/bill presented to the client; and/or the same was taxed and allowed by the Taxing Master;
 - b. Second, that, conversely, an advocate who did not claim the interest in his Bill of Costs and who did not benefit from a favourable ruling by the Taxing Master on the issue of interest at 14% p.a. under Rule 7 of the *Advocates Remuneration Order* can only challenge the non-award by invoking Rule 11 of the *Advocates Remuneration Order* and filing a reference to the court.



- c. Third, that, consequently, an advocate cannot claim, for the first time, in his attempt to enforce the Certificate of Costs issued by the Taxing Master, the potentially allowable claim of 14% p.a. interest vide an application under section 51(2) of the [Advocates Act](#). A section 51(2) motion can only enforce the Certificate of Costs as issued but cannot vary it or add a new claim to the award therein.
2. In the companion appeal, these consequential holdings were sufficient to render the appellant's appeal still-born: he had not made the claim in his fee note delivered to the client; he had not included it in his Bill of Costs as filed and taxed by the Taxing Master; and he had not invoked Rule 11 to file a reference to protest the non-award of the interest under Rule 7 of the [Advocates Remuneration Order](#). We explained the rationale for the interpretation of the relevant legal provisions thus:
 30. 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](#).
 31. 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.
3. The present appeal is almost on all-fours with the companion appeal but with a twist. The relevant legal question is whether the twist permits a different outcome than the companion case.
4. First, a little bit of background on the facts. Like in the companion, the appellant in this appeal was instructed by the respondent to represent it in Kisii CMCC. No. 209 of 2003, *James Ayiega Morabe v South Nyanza Sugar Company Limited*. Upon conclusion of the matter, the appellant sent its fee note with a forwarding letter dated 21st August, 2012, to the respondent. Both were delivered on 23rd August, 2012. The respondent did not make the payment. The appellant reacted by lodging its Advocate/Client Bill of Costs for taxation in Kisumu HC. Misc. Civil Case No. 249 of 2014, *Otieno, Ragot & Company Advocates v. Kenindia Assurance Company Limited*. The Bill of Costs was dated 14th November, 2014, lodged in court on 18th November, 2014, and was served upon the respondent on 25th November, 2014. It was then taxed and by a Certificate of Costs dated 15th December, 2014 and issued on 23rd December, 2014, the same was allowed in the sum of Kshs. 216,158.03.
5. Afterwards, the appellant lodged a Notice of Motion Application dated 6th August, 2015, to wit, Kisumu Miscellaneous Civil Case No. 249 of 2014 under section 51(2) of the [Advocates Act](#), seeking to have the Certificate of Costs adopted as the judgment and decree of the High Court. Additionally, the appellant also sought an award of interest on the taxed costs at the rate of 14% p.a. from 25th December, 2014, until payment in full, in accordance with Rule 7 of the [Advocates Remuneration Order](#). The



prayer in the Notice of Motion talked of 25th December, 2014 as the start date for the application of the interest rate because this was

“one month from the date of presentation of its bill of costs to the respondent.”

This is because the Bill of Costs was served on 25th November, 2014 before it was taxed on 15th December, 2014.

6. These facts are not disputed. Indeed, at the High Court, the respondent did not oppose the application. However, the High Court entered judgment in favour of the appellant in the sum of Kshs. 216,158.03/ = as prayed (and as reflected in the Certificate of Costs) but with interest at court rates from the date of delivery of the ruling (12th March, 2019), as opposed to awarding 14% interest p.a. from 15th December, 2014 when the Certificate of Costs was issued and when, the appellant argues, the interest was last calculated.
7. Aggrieved by the decision of the High Court, the appellant filed a Memorandum of Appeal dated 6th August, 2019, in which it raised two (2) grounds of appeal. These are that the learned Judge of the High Court erred in both law and fact in:
 - i. Failing to appreciate that the application for adoption of the Certificate for Costs upon taxation of an Advocate/Client Bill of Costs, as a judgment and decree of the court, under section 51(2) of the *Advocates Act*, the court was entitled upon application, to award interest at 14% p.a. on the judgment under Rule 7 of the *Advocates Remuneration Order*, to apply after the expiry of one month from the time of service of the Advocates Bill upon the Client.
 - ii. Failing to appreciate that the effective date of application of the claim for interest was applicable from one month from the expiry of the date of service or delivery of the Advocate’s original Bill to the Client, not the date of adoption of the Certificate of Costs as judgment and decree in the manner that he did, being 12th March, 2019, despite the undisputed evidence having been availed before the court showing that the appellant’s Bill had been delivered to the respondent on 23rd August, 2012, and the latter had not made payment of the same.
8. Consequently, the appellant prayed that: part judgment of the trial court which ordered for interest to be applicable from 12th March, 2019, be set aside and in its place, the appellant’s Notice of Motion dated 6th August, 2018, adopting the Certificate of Costs dated 15th December, 2014, as the judgment and decree of the court with interest thereon from 23rd September, 2014 till payment in full, be allowed with costs of both the proceedings in the High Court and the costs of this appeal.
9. During the virtual hearing of the appeal, learned counsel, Mr. Ragot, appeared for the appellant and learned counsel, Ms. Twena, appeared for the respondent. Both parties filed written submissions and relied entirely on them.
10. While the written submissions by the appellant are identical to the ones filed in Kisumu Civil Appeal No. 129 of 2018, during the oral highlighting, Mr. Ragot sought to distinguish the present appeal in one way he thought was crucial: this was that, he said, the appellant had claimed interest of 14% p.a. before the Taxing Master and had been so awarded but that the amount reflected in the Certificate of Costs was the taxed amount plus the interest up to the date the Bill of Costs was filed, to wit, 18th November, 2014. He argued, therefore, that in the present case, the arguments the Court has deployed in the companion appeal (Kisumu Civil Appeal No. 129 of 2018) did not apply. He, however, pointed out that it was necessary to reverse the High Court decision because it failed to award interest at 14% p.a. from 18th November, 2014 until the amount was paid in full.



11. In addition to the written submissions, learned counsel argued that the correct reading of Rule 7 of the *Advocates Remuneration Order* is that it does not prescribe when an advocate can claim the allowable interest at 14% p.a. According to him, an advocate can claim it at the onset of the dispute or at the point of enforcement via a section 51(2) motion. The intent of Rule 7 of the *Advocates Remuneration Order*, Mr. Ragot argued, is to encourage advocates and their clients to resolve any disputes within a month, and before any claim is lodged in court – hence the absolution of the accrual of interest for the first 30 days. Given this objective, it was therefore in-built in the rule that an advocate can claim the interest of 14% p.a. at any time after a month after the delivery of the bill or fee note to the client. The appellant contended that the law provides for a one-month period to encourage parties to settle disputes over fees without recourse to the court. So that an advocate who sues a client without first demanding payment would be denied interest for any period before the proceedings were filed and would only get interest from the time the costs are determined through taxation. Similarly, a client who does nothing to resolve a dispute over fees and allows a matter to go to court would be charged or penalized in interest on the amount that the court at taxation finds to be due, from the time the demand was delivered to it (and therefore became aware of the demand) to the time payment was made.
12. In the present case, the appellant argued, the record shows that the appellant sent the respondent a pro forma invoice of its final fee note and a forwarding letter thereof dated 21st August, 2012, detailing the various heads of items of service it offered and the fees charged for the work it undertook; and demanded payment for the same from its client. Thus, the respondent not having disputed the receipt of the final fee note and the forwarding letter thereof demanding its payment, the appellant argued that it was justified to have the orders it sought for interest at 14% p.a. as contemplated under Rule 7 of the *Advocates Remuneration Order*; and for the same to apply from 21st September, 2012, as evidenced in paragraph 8 of the Affidavit in support of the application at page 14 of the record of appeal. The appellant further argued that since the respondent expressly informed the court that it was not objecting to the application, and in the absence of any disclosed reason for not granting the interest as sought, this Court would be entitled to set aside the award of interest and replace it with the one sought by the appellant, and which would be a substantial interest of 7 years, between 2012 and 2019, that was taken away from a reading of the judgment of the trial court.
13. Opposing the appeal, the respondent rehashed the same arguments it raised in the companion case: In the main, it 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. According to the respondent, the learned judge was not dealing with an application on taxation, and there is no provision for an award of interest while dealing with an application premised on the provision of section 51(1) of the *Advocates Act*. As such, the appellant was only entitled to the sum stated in the Certificate of Costs which included interest that it specifically claimed and was awarded by the taxing officer under Rule 7 of the *Advocates Remuneration Order* in the sum of Kshs. 50,189.03/=; and which sum the respondent paid as was specified therein. Therefore, this meant that any further interest on judgment entered on account of the Certificate of Costs and in terms of the application before the learned judge could only be awarded in the exercise of discretion, and was not anchored on any legal provision other than the one that allows a court to enter judgment. Put differently, the respondent argued that the learned judge could only award interest based on the Certificate of Costs and from the date of judgment, despite the appellant claiming an award of 14% interest p.a. in the application, which was not a matter of right but as per the discretion of the learned judge.



14. The respondent further argued that the appellant wants this Court to award what it sought but failed to get from the learned judge, which is “further interest” on inter alia interest that had already been awarded by the taxing officer during taxation and was included in the Certificate of Costs. Further, the respondent argued that section 51(1) of the *Advocates Act* allowed the learned judge to enter judgment in respect of the amount stated in the Certificate of Costs, which he did, as he entered judgment and awarded interest from the date of judgment.
15. The respondent contended that the learned judge properly exercised his discretion under section 51(2) of the *Advocates Act*, as the appellant did not establish any basis before him for an award of the interest claimed, or from the date of taxation as was specified in the Certificate of Costs. Further, the respondent argued that nothing compelling has been shown to exist by the appellant in the instant appeal, to overturn and negate such obvious exercise of discretion on the part of the learned judge.

Therefore, there is no need to burden the client with further costs in respect of instructions which were given over two decades ago, and litigation must come to an end.

16. As aforesaid, having decided the companion case as I did, the only question in this appeal is whether it is sufficiently different to yield different results. The starting point is whether the appellant itemized the request for interest at 14% under Rule 7 of the *Advocates Remuneration Order* and whether the Taxing Master awarded the interest at 14% p.a. as prayed in the Bill of Costs.
17. Perusing the Bill of Costs dated 14th November, 2014 and filed in court on 18th November, 2018, the last item reads:

“ Add interest thereon @14% from 23rd September, 2012 to date as per rule 9 of the *Amended Advocates Remuneration Rules* (3 years 5 months..”

The total cost indicated for that particularized item is Kshs. 50,189.03. The appellant has shown the workings that led to that figure. It is readily obvious that that amount was allowed by the Taxing Master in the Certificate of Costs issued.

18. The response to the question posed, then, is that the appellant made an itemized claim for interest under Rule 7 of the *Advocates Remuneration Order* in the Bill of Costs lodged in court which was subsequently taxed by the Taxing Master even though the appellant did not include it in the fee note/bill delivered to the client on 21st August, 2012. It is unclear why the appellant cited “rule 9 of the *Amended Advocates Remuneration Rules*” in the lodged Bill of Costs but I think it is clear that the rule in question is Rule 7 of the *Advocates Remuneration Order*. As aforesaid, it is obvious that the Taxing Master, in issuing the Certificate of Costs, included the interest as prayed. This is because the initial fee note/Bill of Costs delivered to the client was for Kshs. 129,172 while the Certificate of Costs ultimately issued was for Kshs. 216,158.03. The appellant explains, plausibly (and the arithmetic bears them out) that the extra amount was interest calculated at 14% p.a. between 21st September, 2012 (which is one month after the delivery of the fee note/bill to the client) and 18th November, 2014 (which is the date the appellant lodged the Bill of Costs for taxation).
19. Though the Taxing Master did not issue any reasoned ruling because neither party requested for one, it is fair to say that the appellant itemized the claim for interest under Rule 7 of the *Advocates Remuneration Order* in the Bill of Costs that was taxed. That Bill of Costs was served on the client. The client did not dispute the Bill of Costs or contest it before the Taxing Master. The Taxing Master allowed the claim as drawn – including the interest of 14% p.a. by dint of Rule 7 of the *Advocates Remuneration Order*- and issued a Certificate of Costs. The respondent did not file a reference under Rule 11 of the *Advocates Remuneration Order* to challenge the Certificate of Costs. The question then



- becomes, does the fact that the Taxing Master awarded interest rate of 14% p.a. as prayed mean that is the interest rate which the learned Judge of the High Court was bound to use retroactively from 18th November, 2014 to the date the amount would be fully settled by the respondent?
20. With respect, in the circumstances of this case, I think the learned Judge was obliged to utilize the awarded interest rate of 14% p.a. This is because in this case, the appellant put the client on notice about his claim for interest at 14% p.a. under Rule 7 of the [Advocates Remuneration Order](#). The client, then, specifically litigated the interest in the taxation proceedings – and was awarded the interest by the Taxing Master. The appellant, therefore, made this claim to the client a priori so as to notify the client he would be demanding interest. The Certificate of Costs could, at the time it was issued, only reflect the interest as it stood on the date it was issued. However, having lawfully and procedurally awarded the appellant the interest at 14% p.a. by dint of Rule 7 of the [Advocates Remuneration Order](#), it would be absurd to hold that the rate could be changed at the discretion of the High Court if the client failed to settle the amounts claimed necessitating the appellant to lodge section 51(2) enforcement proceedings. In the present case, the appellant claimed and was awarded interest at 14% p.a. during taxation and, therefore, had no need to invoke Rule 11 of the [Advocates Remuneration Order](#) to challenge it.
 21. Having been awarded the interest at 14% p.a. as allowed by Rule 7 of the [Advocates Remuneration Order](#) by the Taxing Master, the appellant was entitled to that same rate during the enforcement proceedings under section 51(2) of the [Advocates Act](#). This is because the respondent did not invoke Rule 11 of the [Advocates Remuneration Order](#) to challenge the taxation. In this regard, the learned judge erred in awarding interest at court rates; and then in restricting the interest from the date of his ruling.
 22. To reiterate, the rule of law announced in the companion case, Kisumu Civil Appeal No. 129 of 2018, to the effect that an advocate is not permitted to surcharge a client interest at the rate of 14% p.a. under Rule 7 of the [Advocates Remuneration Order](#) unless he notified the client of that charge in his fee note/ bill to the client and in his Bill of Costs as lodged in Court has no application in this case. This is because, here, the advocate included the interest in the Bill of Costs and benefitted from a favourable award by the Taxing Master. It was incumbent upon the respondent, if dissatisfied with the award, to challenge it by invoking Rule 11 of the [Advocates Remuneration Order](#); and it did not do so.
 23. I have read and taken cognizance of the cases relied on by the appellant in which the different superior courts allowed the sought orders of either 9% interest p.a. or 14% interest p.a. as contemplated under Rule 7 of the [Advocates Remuneration Order](#), to run after the expiration of one month from the date of delivery of the Advocate/Client Bill of Costs, even after the courts have concluded that the Certificate of Costs represented the final costs between the Advocate and Client. I also take note that the appellant pointed out the fact that these cases seem to be divided on both the interest rate and from when it should be applied. All I can point out is that the conflicting decisions of the High Court reflect the need for clarification and clear guidance from this Court on this issue.
 24. I believe that this decision and its companion one in Kisumu Civil Appeal No. 129 of 2018 will remove the cobwebs of confusion reigning in this area. It comes down to a salutary advice for advocates: if one hopes to claim the 14% p.a. interest under Rule 7 of the [Advocates Remuneration Order](#) on a fee note or Bill of Costs, one must make the claim in the fee note and/or Bill of Costs. If the interest is not claimed in the fee note or Bill of Costs, an advocate loses his right to claim for it subsequently. Similarly, if the interest of 14% under Rule 7 of the [Advocates Remuneration Order](#) is not specifically awarded during the taxation proceedings, the advocate must invoke Rule 11 of the [Advocates Remuneration Order](#) and file a reference to protest the omission. The advocate cannot wait to introduce the interest during enforcement proceedings under section 51(2) of the [Advocates Act](#). If the advocate demands interest at that late stage, he will likely suffer two potential perils: the court can only award interest at earliest from



the date of lodging the Bill of Costs; and the interest is at the discretion of the court. However, where the interest of 14% p.a. under Rule 7 of the [Advocates Remuneration Order](#) is specifically claimed in the Bill of Costs and awarded during the taxation proceedings, the interest will apply to the taxed amount until it is fully paid. An application under 51(2) of the [Advocates Act](#) will not act to reduce the interest rate or otherwise create a reservoir of discretion for the judge to change the interest rate.

25. The upshot is that, in my view, the appeal herein succeeds. The appellant is entitled to interest rate at 14% p.a. as allowed by Rule 7 of the [Advocates Remuneration Order](#) on the taxed amount from 18th November, 2014 (when interest was last calculated) until the amount is fully paid. However, due to the nature of the controversy and the roaring waves of confusion that have attended to this arcane aspect of the law which the appellant, through this judgment, has helped clarify, I would propose that each party bears its own costs.

Judgment of Kiage, JA

1. I have read in draft the judgment of learned brother Joel Ngugi, JA and am in full concurrence with nothing useful to add.
2. Mumbi Ngugi, JA being also agreed, this appeal be and is hereby dismissed along the lines proposed by Joel Ngugi, JA.
3. Order accordingly.

Judgment Of Mumbi Ngugi, JA

1. 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.

P.O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR

