



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: E. M. GITHINJI, H. OKWENGU & J. MOHAMMED JJ.A)

CIVIL APPEAL NO. 30 OF 2016

BETWEEN

MACHIRA & CO. ADVOCATES.....APPELLANT

AND

ARTHUR K. MAGUGU.....1ST RESPONDENT

MARGARET WAIRIMU MAGUGU.....2ND RESPONDENT

*(Being an appeal from part of the Ruling/Decree of the High Court of Kenya at Nairobi, (Kamau, J.) delivered on 26th May, 2015*

in

**H.C. MISC. APPLICATION NO. 151 OF 2001)**

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JUDGMENT OF THE COURT

**Background**

[1] This is an appeal against part of the Judgment of **Kamau, J.** who entered judgment in favour of the appellant for Kshs. 4,500,000/= together with interest thereon at court rates from the date of her ruling. The appeal relates to the decision that the interest on the taxed amount shall be at Court rates from the date of the impugned ruling that is 26th May, 2015, as opposed to the rate of interest of 14% p.a. from the date of filing the Bill of Costs 4th April, 2001, until payment in full as pleaded.

[2] The background of the appeal is that the firm of **Machira & Co. Advocates** (the appellant) was retained to act for **Arthur K. Magugu** (the 1st respondent) and **Margaret W. Magugu** (the 2nd respondent) in **HCCC No. 749 of 1998** where the Deposit Protection Fund as Liquidator of International Finance Company Ltd claimed a sum of Kshs.225,045,085.71 against the respondents.

[3] At some stage, the respondents withdrew instructions from the appellant and instructed another firm of Advocates. Consequent upon that withdrawal, the appellant filed their client/advocate bill of costs on 4th April, 2001. On 30th July, 2001, The Deputy Registrar taxed the bill of costs at Kshs.4,500,000/=.

[4] Aggrieved by that taxation the respondents filed an application in the High Court on 9th September, 2001 under sections 44 and 51 of the Advocates Act (the Act) and Rules 11 (1) & (2) and 13(1) of the Advocates Remuneration Order (the Rules), seeking to have that taxation set aside and varied by reducing the sum payable to the appellant. The learned Judge (**Mwera, J** as he then was) in a ruling delivered on 15th November, 2001, allowed the application to be argued and agreed with the appellant that the application was “*in essence ... incompetent*” for being grounded on the taxing master’s ruling and not on the reasons for his decision.

[5] Aggrieved by that decision, the respondents filed an application for review. **Mwera, J.** (as he then was) in a ruling dated 7th February, 2002 allowed the application for review on the ground that the appellant’s bill of costs had been taxed prematurely, and not by the last advocate on record.

[6] Aggrieved by this decision, the appellant appealed to this Court which, in a judgment dated 2nd March, 2012, upheld the bill of costs taxed at Kshs.4,500,000/=. This Court stated as follows:-

***“17.An advocate whose instructions have been terminated is entitled to immediate payment of his fees for the services rendered. If upon demand the client refuses to pay, he is entitled to file his bill and have it taxed immediately. He does not have to wait until the matter is concluded. He also does not have to depend on the advocate on record to recover his fees for him. The client might compromise with his current advocate on his fees and no bill is filed.***

***18.For these reasons, we allow this appeal, set aside the ruling of the High Court dated 7th February, 2002 and substitute it with an order dismissing the Respondents’ reference with costs with the result that the order of the taxing master dated 20th July, 2001 taxing the appellant’s bill of costs at Kshs.4,500,000/= is restored. The Appellant shall have the costs of this appeal with interest thereon at court rates from the date of taxation.”***

[7] The appellant filed a notice of motion on 18th February, 2013 seeking judgment for Kshs. 4,500,000/= as certified by the Deputy Registrar; and for the said sum to be paid with interest at the rate of 14% p.a. from 4th April, 2001 (the date of filing the Bill of costs) until payment in full pursuant to Rule 7 of the Advocates’ Remuneration Order.

[8] The respondent opposed the application on the ground that the 1st respondent had died on 15th September, 2012 and an application for substitution by his estate had not been filed. Relying on Order Rule 4(3) of the Civil Procedure Rules, it was the respondents’ case that the suit had abated since two years had passed since the death of the 1st respondent and letters of administration in respect of his estate had not been issued.

[9] **Kamau, J** heard the application and determined that while the 1st respondent had died before judgment was entered, the 2nd respondent was still alive and the cause of action against her remained unaltered with 100% liability. The learned Judge found that the appellant offered no explanation for the delay in filing their application and stated as follows:

***“29. Ordinarily, it would be punitive and unconscionable for an advocate to obtain a certificate of taxation and fail to seek judgment immediately as it would increase the interest that a client would eventually have to pay if an application for entry of judgment was made many years after the issuance of a certificate of taxation. In this case, it took almost twelve (12) years before the said Advocates filed the present application. Interest from the year 2001 was therefore unconscionable and unjustifiable bearing in mind the court’s discretion to award interest at such rates and from such periods and with such rates as it would deem reasonable to grant and that the appeal that was lodged in 2002 was only disposed of in 2012.”***

[10] The learned Judge declined to grant the 14% interest per annum sought as the appellant had failed to give evidence that it had claimed the said interest at least one month prior to filing its bill of costs as required under Rule 7 of the Advocates Remuneration Order. The learned Judge found as follows:-

***“...that the Advocates’ Notice of Motion application dated 5th April, 2012 and filed on 18th February, 2013 was merited only to the extent that judgment is hereby entered in their favour against the 2<sup>nd</sup> client (the 2nd respondent herein) for the sum of Kshs.4,500,000/= together with interest thereon at court rates from the date of this Ruling (26th May, 2015) until payment in full. The 2nd client will also pay the costs of this application”.***

[11] Aggrieved by that decision, the appellant filed this appeal based on 13 grounds contained in its memorandum of appeal that the learned trial Judge erred in both law and fact in: awarding the appellant interest rate at 12% p.a. on the principal sum of Kshs 4,500,000/= from 26th May, 2015 which was contrary to the Court of Appeal Judgment in Civil Appeal No. 199 of 2002 which awarded the appellant interest on the said sum at the rate of 12% p.a from the date of taxation, that is 1st August, 2001; in failing to abide by the Court of Appeal decision, the learned Judge breached the doctrine and principles of precedent and *stare decisis*; and in heaping blame on the appellant to justify her refusal to award interest at 14% p.a. from 4th April, 2001 until payment in full.

The appellant seeks the following orders:

**(a) The appeal be allowed;**

**(b) The part of the Decree/Decision of the impugned ruling delivered on 26<sup>th</sup> May, 2015 be set aside and the same be substituted with a judgment of this Court awarding interest at the rate of 14% p.a on the principal sum of Kshs 4,500,000/= from 1<sup>st</sup> April, 2001 and /or such other date as the Court may deem fair and just;**

(c) That costs of this appeal be awarded to the appellant;

(d) That such other and/or further relief be granted as this Court may deem fit and just to grant.

[12] The appeal was heard by way of written submissions with oral highlighting before the court. The appellant was represented by **Mr. J.P. Machira** whereas the respondent was represented by **Ms. Nyamwata Atieno**.

### **Submissions by Counsel**

[13] **Mr. Machira** submitted that for Sixteen (16) years the respondents had failed to pay the taxed sum as a result of which he had suffered prejudice; and that the trial judge erred in failing to award the appellant interest from the date of taxation (30th July 2001) as determined by the Court of Appeal in its judgment dated 2nd March, 2012; that the ten year delay attributed by the learned judge to the appellant was through no fault of his own, but by the unfortunate circumstances that delayed the hearing and determination of the appeal; that denying the appellant interest at 14% from the date of filing the bill of costs, (4th April, 2001) on account of delay was prejudicial and against the interest of justice. The appellant faulted the determination of the learned judge as a wrongful exercise of discretionary power donated by Section 26 of the **Civil Procedure Act**; that neither Section 51 of the Advocates Act nor Section 26 of the Civil Procedure Act gives conditions or restrictions regarding the date interest should be awarded and the provisions of law empower the court to award such interest retrospectively. The appellant urged the court to allow the appeal with costs.

[14] The respondent opposed the appeal through **Ms. Atieno** on the grounds that the award of interest by the learned judge is an exercise in discretion which was exercised fairly and in accordance with Section 26 of the Civil Procedure Act, and that the appellant had failed to prove that it was entitled to 14% interest rate as per Rule 7 of the Advocates Remuneration Order; that despite protests by the appellant, the decision of the Court of Appeal was not final as evidenced by its application to enter judgment for Kshs.4,500,000/= with interest; that the award of costs by the Court of Appeal was in regard to the appeal itself in which the appellant had already prepared a bill of costs awaiting taxation.

[15] It was the respondent's further contention that the delay in filing the application the subject of this appeal was done close to a year after delivery of judgment, that is on 18th February 2013 after judgment was delivered on 2nd May 2012; that the objective of the delay was for the accrual of further interest on the decretal sum to the detriment of the respondent. The respondent supported the reasoning of the learned judge that it would be unconscionable and punitive to award interest given the conduct of the appellant who failed to seek judgment immediately after the certificate of taxation was obtained; that the absence of the 1st respondent could not be the reason for the appeal to remain unprosecuted for twelve (12) years since it was possible for the same to be heard in his absence. Counsel urged the court to dismiss the appeal with costs.

### **Determination**

[16] We have considered the appeal, submissions by the respective parties, the record, the authorities cited and the law. From the record, the main issue for determination is whether the appellant is entitled to interest of 14% per annum from the date of filing the bill of costs, (4th April, 2001). The appellant maintained that the learned Judge erred in awarding interest at court rates from the date of the ruling, (26th May, 2015) as opposed to at 14% from the date of filing the bill of costs, (4th April 2001).

[17] We take cognisance of the fact that an award of interest is an exercise of the learned judge's discretion as donated by Section 26 of Civil Procedure Act. This court in **Mbogo & Another V Shah [1968] EA 93** set down the principles that guide this court before interfering with a learned judge's exercise of discretion:

**“An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion...”**

[18] The judgment for the principal sum of Kshs.4.500,000/= against the respondent has not been appealed against. What is in dispute is the applicable date and interest rate. The appellant urged the court to allow an interest rate of 14% p.a. in accordance with Rule 7 of the Advocates' Remuneration Order which stipulates that:

***“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.”***[Emphasis added).

[19] This being a first appeal, we are entitled to reconsider the evidence, evaluate it and draw our own conclusions but making allowance for the fact that we have not seen or heard the witnesses. (**See Selle V. Associated Motor Boat Company Ltd, [1968] E.A 123, 126 paras. H-I , Kenya Ports Authority V Kunston (Kenya) Ltd, (2009) 2 EA 212 and PIL Kenya Ltd V. Oppong, (2009) KLR 442.**)

[20] The learned Judge entered Judgment against the 2nd respondent for the sum of Kshs 4,500,000/= together with interest thereon at Court rates from the date of her ruling on 26th May, 2015 until payment in full. The learned Judge also ordered the 2nd respondent to pay costs of the application.

[21] This Court, in its Judgment dated 2nd March, 2012 had restored the appellant’s bill of costs at Kshs 4,500,000/= with costs and interest thereon at Court rates from the date of taxation and held as follows:

***“For these reasons, we allow the appeal, set aside the ruling of the High Court dated 7th February, 2002 and substitute it with an order dismissing the respondent’s reference with costs with the result that the order of the taxing master dated 20th July, 2001 taxing the appellant’s bill of costs of Kshs. 4,500,000/= is restored. The appellant shall have the costs of this appeal with interest thereon at court rates from the date of taxation.”***

[22] On the rate of interest payable, Section 26 of the Civil Procedure Act provides as follows:-

***“(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.***

***(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.”***

Section 51 of the Advocates Act provides as follows:-

***“(1) Every application for an order for the taxation of an advocate’s bill or for the delivery of such a bill and the delivering up of any deeds, documents and papers by an advocate shall be made in the matter of that advocate.”***

[23] Section 26 of the Civil Procedure Act and Section 51 of the Advocates Act empower a Judge or Judicial Officer to award any rate of interest retrospectively and/or from any date that the Court may consider fair and just in the circumstances of the particular case.

[24] The learned judge found correctly in our view that the appellant did not furnish the court with any evidence that they had claimed interest at fourteen (14%) per annum at least one(1) month before filing the Bill of Costs.

The appellant relied on a letter from counsel for the respondent to justify his position that the learned judge should have awarded him interest at 14% from the date of taxation. We note that the said letter refers to the decretal sum claimed while the issue of interest has not been addressed. The appellant did not produce a copy of his firm’s letter of 9th August, 2001 referred to in the respondents’ counsels letter of 20th September, 2001 to support his claim.

[25] Accordingly, we find that the learned judge did not err in finding that the appellant did not furnish the court with any evidence that they had claimed interest at fourteen (14%) per cent at least one (1) month before they filed their Bill of Costs. They were therefore not entitled to interest at 14%.

[26] Regarding the effective date when interest would be payable, on the principal sum, the learned judge found that the appellant offered no explanation by way of affidavit evidence why they did not file their application for entry of judgment in 2001 when the Taxing Master issued the Certificate of Taxation.

[27] The Certificate of Taxation was issued on 1st August, 2001. We note that an application to set it aside was filed and allowed by Mwera, J. (as he then was) on 15th November, 2001. Subsequently an application for review was filed before Mwera, J (as he then was). In a ruling dated 7th February, 2002, the learned Judge allowed the application for review and held that the taxation of the appellant's bill of costs was premature. The learned judge agreed with the appellants that the application was "in essence... incompetent" for being grounded on the taxing master's ruling and not on the reasons for his decision, he nevertheless allowed it to be argued.

[28] Thereafter, the appellant filed an appeal to this Court in 2002 which was determined in favour of the appellant in 2012. This Court restored the order of the taxing master dated 20th July, 2001 taxing the appellant's bill of costs at Kshs.4,500,000/= is restored. The appellant was awarded costs of the appeal with interest at court rates from the date of taxation. It was the appellant's claim that he was unable to file the application for entry of judgment until the applications before the High Court and the appeal before this Court were determine. The judgment by this Court was delivered on 2nd March, 2012. The application for entry of judgment was filed on 5th April, 2012.

[29] We find that in the circumstances of this case the appellant was not dilatory in filing their application for entry of judgment, and was therefore entitled to interest from the date of taxation.

[30] In the circumstances, we find that the learned judge erred in awarding interest from the date of her ruling (26th May, 2015) and not the date of taxation (30th July, 2001). We are therefore entitled to interfere with the learned Judge's discretion.

[31] Accordingly, we allow the appeal and order as follows:-

**a) The part of the Decree/Decision of the High Court in Misc. Civil Application No. 151 of 2001 made on 26<sup>th</sup> May, 2015 be and is hereby set aside and the same is substituted with Judgment of this Court awarding interest at court rates on the principal sum of Kshs.4,500,000/= from 30<sup>th</sup> July, 2001.**

**b) The appellant shall have costs of this appeal. Dated and Delivered at Nairobi this 8<sup>th</sup> day of March, 2019.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**