



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KOOME, OKWENGU & KANTAL, J.J.A.)**

**CIVIL APPEAL NO. 45 OF 2016**

**BETWEEN**

**NJAGI WANJERU & COMPANY ADVOCATES.....APPELLANT**

**AND**

**NAIROBI CITY COUNTY.....RESPONDENT**

*(Appeal from the ruling of the High Court of Kenya at Nairobi (Abuili, J.)*

*dated 14th October, 2015*

**in**

**HC. Misc. Civil Application No. 216 of 2015)**

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*As Consolidated With*

**CIVIL APPEAL NO. 46 OF 2016**

**BETWEEN**

**NJAGI WANJERU & COMPANY ADVOCATES.....APPELLANT**

**AND**

**NAIROBI CITY COUNTY.....RESPONDENT**

*(An appeal from the Ruling of the High Court of Kenya at Nairobi (Aburili, J.)*

*dated 14th October, 2015*

**in**

**HC. Misc. Civil Application No. 217 of 2015)**

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**JUDGMENT OF THE COURT**

This appeal and Civil Appeal No. 46 of 2016 which we consolidated at the hearing arise from the same subject matter and a ruling of the High Court delivered on 15th December, 2015. In motions filed before Aburili, J. the appellant, **Njagi Wanjeru and Company Advocates**, applied for leave to appeal to this Court from the said ruling. The appellant informed the judge of the High Court in a supporting affidavit

and in submissions captured at paragraphs 3 and 4 of an affidavit sworn on 15th October, 2015 that:

***“3. I sincerely intend to appeal against the said refusal to allow the pre – taxation interest sought.***

***4. Indeed I am professionally curious to have the question, that is to say, whether the right to charge interest under paragraph 7 of the Advocates (Remuneration) Order is impugnable where the appropriate notice has been issued, clarified by the Court of Appeal.”***

The judge allowed the appellant to come to this Court for an answer to that question.

The **Advocates Act Chapter 16 Laws of Kenya** provides for the manner in which advocates may charge fees for work undertaken for clients and if fees is not paid the Act provides how the same is to be taxed and paid. The provisions of **section 51** of the said **Act** are clear enough. The advocate whose fees have not been paid may deliver a bill in the name of that advocate and the taxing officer will then tax the bill and unless the bill is set aside or altered by the Court, it shall be final as to the amount of the costs covered 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 sums certified to be due with costs is made.

Under paragraph 7 of the Advocates (Remuneration) Order the advocate is allowed to charge interest at a stated per centum on costs and disbursements from the expiration of one month from the delivery of his bill to his client provided that such claim for interest is raised before the amount of the bill has been paid or tendered in full.

All these provisions and procedures are clear and there is no argument on the same. The applicable interest under the Civil Procedure Act is provided in the Act and is awardable at the discretion of the Court and the Court may order when interest will apply.

So in welcoming the invitation by the appellant to pronounce on the issue of interest the position is that the lawyer is allowed to charge interest if his bill remains unpaid for one month after delivering a bill to his client.

What is the position in relation to these two appeals?

There is no question that the appellant acted as advocate for the respondent (Nairobi City County) in various litigation filed against the respondent. The appellant delivered advocate/client bills of costs in High Court of Kenya at **Nairobi Miscellaneous Civil Application No. 217 of 2015** and **Miscellaneous Civil Application No. 216 of 2015**. These were itemised bills of costs. The two bills came up for taxation before the Taxing Master of the High Court and in Miscellaneous Civil Application No. 217 Of 2015 a Certificate of Taxation was issued on 17th August, 2015 to the effect that the bill of costs by the appellant was taxed **by consent** in the suit between the advocate and the client and allowed in the sum of **Kshs.8,654,362** all inclusive. (our emphasis).

In Miscellaneous Civil Application No. 216 of 2015 the Certificate of Taxation (issued on 17th August, 2015) is to the effect that the bill of costs by the appellant was on 11th August, 2015 taxed **by consent** as between the advocate and the client in the sum of **Shs.2,328,978 all inclusive** (again our emphasis).

Following those certificates of taxation the appellant filed before the High Court two Notices of Motion both dated 19th August, 2015 praying in the main that judgment be entered for the appellant for the sums taxed with interest at 14% per annum from date stated in the motions.

The motions were heard by Aburili, J. who with no objection by the respondent entered judgment on 14th October, 2015 for the sums taxed and interest at 14% per annum from 10th February, 2010 in respect of Miscellaneous Civil Application No. 216 of 2015 and from 11th August, 2015 in respect of Miscellaneous Civil Application No. 217 of 2015. The matters should have ended there as decrees were duly drawn and issued by the Court.

The appellant was not satisfied and filed applications for leave to appeal to this Court to answer the question which we have already answered in this appeal.

When the appeals came up for hearing before us on 10th July, 2019 Mr. Njagi Wanjeru learned counsel, appeared for the firm of Njagi Wanjeru and Company Advocates (the appellant) and submitted that taxation had been by consent; that the law firm had asked for pre-taxation interest; that there was no retainer; that the appellant had delivered bills to the respondent which had not been settled; and that the appellant had given notice to charge interest under paragraph 7 of the Advocates Remuneration Order. According to counsel, since the respondent did not settle or challenge the notice to charge interest the judge was wrong for not awarding interest from the date when the bills were delivered to the respondent. He made heavy weather in the oral argument and in written submissions of the fact that notices had been served on the respondent under paragraph 7 of the Advocates Remuneration Order and thus the appellant was entitled to pre-taxation interest.

**Miss E.B. Arati** learned counsel for the respondent in opposing the appeal No. 45 of 2016 submitted that taxation of the bills of costs was done by consent of the parties and that the respondent had agreed to pay the sum taxed by the taxing master. According to her interest could not be charged for an earlier period as the parties had agreed when they were in court and entered into a consent.

**Mr. Onsongo** for the respondent in Civil Appeal No. 46 of 2016 in opposing the appeal submitted that there had been negotiations between

the parties that led to the consent. According to counsel, that consent was for an all inclusive sum.

Mr. Njagi Wanjeru in reply insisted that the appellant was entitled to pre-taxation interest.

We have considered the records and are not in agreement with the appellant that the central issue in these appeals is the issue of pre-taxation interest. Although the appellant had served notices in accordance with paragraph 7 of the Advocates Remuneration Order, those notices were of no moment in the circumstances prevailing in the case before the judge of the High Court. The central issue here is that the appellant and the respondent upon the appellant filing advocate/client bills of costs entered into a consent that was recorded by the Deputy Registrar as the judgment of the court.

It has been the law in this country for many years that a consent entered by parties is binding on them and can only be set aside, varied or altered if the conditions that apply to nullification of a contract apply. In the oft-cited case of **Flora N. Wasike v Destimo Wamboko [1982-88] 1 KAR 625** it was held by this Court that a consent order has contractual effect and can only be set aside on those grounds which would justify the setting aside of a contract such as fraud, mistake or misrepresentation. The court in that case cited with approval a passage from **Setton on Judgments and Orders (7th Edition) volume 1 page 124** that:

***“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court..., or if the consent was given without sufficient material fact or in general for a reason which would enable the court to set aside an agreement.”***

This position has been restated by this Court in many other cases such as the case of **Brooke Bond Liebig Limited v Mallya [1975] EA 266**.

In the instant appeals the advocate drew itemised bills of costs and when the parties appeared before the taxing master of the High Court the advocate/client bills were taxed by consent and the net sums arrived at were stated to be all inclusive. The appellant entered into those consents after due consideration and we note in any event that the appellant is a law firm which should be well grounded on the law. The appellant cannot turn around to claim pre-taxation interest when it entered into the consent for all inclusive sums. Although we found that an advocate is entitled to pre-taxation interest if he follows the procedure set out in the Advocates Act and the Advocates Remuneration Order made thereto, in the instant appeals the consents entered were binding and the appellant is not entitled to anything more. The consolidated appeal has no merit and we dismiss it with costs to the respondent.

**Dated and delivered at Nairobi this 22nd Day of November, 2019.**

**M.K. KOOME**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**