



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**MISCELLANEOUS APPLICATION NO. 7 OF 2018**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF THE ADVOCATES ACT, CHAPTER 16 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATES AND CLIENT**

***BETWEEN***

**GITHINJI, KIMAMO AND COMPANY ADVOCATES.....ADVOCATE/APPLICANT**

***VERSUS***

**ENDMORE STEEL MILLERS LIMITED.....RESPONDENT**

**JUDGMENT**

The application before me is the Advocate/Applicant's Notice of Motion dated 6<sup>th</sup> February 2019 (**the Application**). Therein, the Applicant seeks the following orders -

1. THAT Judgment be entered for the Applicant against the Respondent for the sum of Kshs.120,815 together with interest thereon at 14% per annum from 5<sup>th</sup> July 2018 until payment in full.
2. THAT the Applicant be at liberty to execute against the Respondent.
3. THAT costs of this application be borne by the Respondent.

The application is made under Section 51(2) of the Advocates Act, Cap 16 of the Laws of Kenya and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. The Application is supported by the affidavit of HIRAM THIMBA sworn on 6<sup>th</sup> February 2019.

The Applicant further filed written submissions dated 7<sup>th</sup> October 2020 in support of its Application.

It is the Applicant's case that there was never a dispute as to retainer as the Applicant acted for the Client/Respondent in Employment and Labour Relations Cause No. 436 of 2014. The Applicant states and submits that it acted for the Client/Respondent in the matter until its conclusion and upon the Respondent's failure to settle its fees, the Applicant filed an Advocate-Client Bill of Costs which was duly served on the Respondent and taxed at KES 120,815. A certificate of taxation was thereafter issued on 7<sup>th</sup> August 2018, the same of which has been annexed in the application and is part of the Court record.

It is the Applicant's submission that the said certificate of costs has not been set aside and/or altered thus the Client/Respondent is liable to pay the sum of KES 120,815 together with interest from 5<sup>th</sup> July 2018. Further, the Applicant submits that a certificate for costs cannot be set aside or reopened through a Replying Affidavit and/or grounds of opposition as filed by the Client/Respondent. In support of its submission, the Applicant relied on the case of **Muema Kitulu & Company Advocates v Obadiah Kivuvya (2011) eKLR**.

The Client/Respondent opposed the Application by way of grounds of opposition dated 26<sup>th</sup> February 2019. The grounds therein being that: -

1. The application is a blatant and egregious abuse of the Court process and is only meant to circumvent justice.
2. The Applicant's motion seeks interest at 14% from the date of taxation despite the fact that Section 51(2) of the Act makes express provision on interest; that if there is any entitlement on interest under Section 51(2) of the Act makes express provisions on interest; that if there is any entitlement on interest under Section 51(2) the same should be at the expiration of 30 days from the date of delivery of the taxed Bill to the client.
3. The application is devoid of any merit and misconceived.
4. The applicant ought to file a fresh suit if at all since retainer has always been disputed.
5. The application is frivolous, vexatious and fatally defective.
6. That the application has no legal basis.
7. The application is fundamentally and incurably defective.

The Client/Respondent further in opposition to the Application filed written submissions dated 3 June 2019. Therein, the Respondent submits that since the issue of retainer has always been disputed, the Applicant ought to have filed a fresh suit. That, the Application could not seek a Judgment on taxed amounts by way of a miscellaneous application and that a proper suit ought to have been filed so that parties could ventilate the issues that had arisen.

Further, the Respondent submits that the Applicant seeks interest of 14% from the date of taxation despite the fact that Section 51(2) of the Act provides that if there is any entitlement of interest, the same should be at the expiration of 30 days for the date of delivery of the taxed bill to the Client.

It is the Respondent's submission that it has never been served with a certificate of taxation but a copy of the draft certificate of taxation which was annexed to the Application. That, it would therefore be punitive and unfair to allow the Applicant to earn interest at 14% dating back to July 2018.

In support of its submissions, the Respondent relied on the case of **Machira & Company Advocates v Arthur K Magugu & Another [2015] eKLR** where the Court held as follows: -

*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.*

### **Analysis and Determination**

I have carefully considered the Application and the rival submissions by the parties. The underlying issues for this Court's determination are whether the application is competent; whether Judgment should be entered on the amount sought in the Certificate of Taxation; and whether the Applicant is entitled to interest from the date the Certificate of taxation is the application of Section 51(2) of the Advocates Act.

Section 51(2) of the Advocates Act provides as follows:

**The certificate of a taxing officer by whom it 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."**

It is clear from the provision that once a Certificate of Costs has been issued, the Court has the discretion make any order it deems fit including entering Judgment for the amount in the Certificate of Costs as long as the same has not been altered or set aside and the retainer is not disputed.

In the case of **Lubulellah & Associates Advocates v N K Brothers Limited [2014] eKLR** it was the Court's finding that: -

*"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. The certificate of costs is final as to the amounts of the costs and the court would be quite in order to enter judgment in favour of the Applicant against the Respondent herein for the taxed sum indicated in the Certificate of Taxation that was issued on 25<sup>th</sup> November 2012."*

I agree with the finding of the Court and add that the procedure in Section 51(2) aids in the expeditious disposal of cases in relation to the recovery of Advocate-Client costs. As such, once an Advocate-Client Bill of Costs has been taxed by and certified under the hand of the taxing master by a Certificate of Costs; the Certificate of Costs has not been set aside or stayed or appealed against on a reference filed upon it; and there is no dispute on retainer, then the Court can proceed to enter Judgment.

From the Court record it is apparent that a Certificate of Taxation was issued on 7 August 2018. There is no record that the same has been set

aside, stayed or appealed against by way of a reference. The retainer of the Advocate/Applicant was not opposed at the point of the taxation of the Bill of Costs. Indeed, the Client/Respondent in its written submissions dated 21<sup>st</sup> May 2018 in opposition to Item 1 on instruction fees, submitted that KES 30,000 paid to the Applicant was sufficient for instruction fees. There was thus a retainer of the Advocate/Applicant by the Respondent.

I therefore exercise my discretion under Section 51(2) of the Advocates Act and consequently enter Judgment for the sum of KES.120,815.

As regards the interest, Rule 7 of the Advocates (Remuneration) Order entitles the Advocate/Applicant to interest at the rate of 14% as in this case, when the Certificate of Taxation was issued. The Applicant prays for interest to be awarded from the date of the Ruling of the Taxing Master. However, owing to the delay occasioned from the initial dismissal of the present application for non-attendance and its subsequent re-instatement, I find that the imposing of interest from July 2018 would be punitive and exorbitant.

In conclusion I order as follows: -

**1. Judgment is entered for the Advocate/Applicant in the +sum of KES 120,815 pursuant to the Certificate of Taxation dated 7<sup>th</sup> August 2018.**

**2. I also award costs to the Applicant and interest on the Judgment sum at the rate of 14% per annum from the date of the re-instatement of the instant application.**

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9<sup>TH</sup> DAY OF JULY 2021**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**