



George Miyare t/a Miyare & Company Advocates v Farah (Miscellaneous Application E102 of 2021) [2023] KEELC 289 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELC 289 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS APPLICATION E102 OF 2021**

**JO MBOYA, J
JANUARY 26, 2023**

BETWEEN
GEORGE MIYARE T/A MIYARE & COMPANY ADVOCATES ADVOCATE
AND
WARSAME OMAR FARAH CLIENT

RULING

1. *Vide* notice of motion application dated the 4th of May 2022, the Advocate/Applicant herein has approached the Honourable court seeking for the following Reliefs;
 - i. The honourable court be pleased to enter Judgment for the Advocate/Applicant against the Client/Respondent in the sum of Kshs.3,840,282.70 only, as appears in the certificate of taxation dated May 4, 2022, together with Interest at 14% per annum from 26th June 2021 until payment in full.
 - ii. Costs.
2. The instant application is premised and anchored on the various grounds that have been alluded to and enumerated at the foot of the Application. Besides, the application is supported by the affidavit of one Esther Mwikali sworn on the May 4, 2022 and in respect of which the deponent has attached a copy of the certificate of taxation issued by the taxing master on the May 4, 2022.
3. Upon being served with the instant application, the Respondent herein filed and lodged Grounds of opposition dated the January 23, 2023 and in respect of which the Respondent/Client has raised various/ a number of issues. In any event, the Respondent has thereafter implored the court to dismiss the application with costs.



4. Suffice it to point out that the instant application came up for hearing on the January 24, 2023, when same was canvassed and disposed of vide oral submissions. However, the Applicant had also filed short written submissions, which same also adopted.

Submissions by the parties

a. Applicants submissions

5. The Applicant herein has raised, highlighted and amplified three salient and pertinent issues for consideration by the court. Firstly, learned counsel for the Applicant has submitted that the Applicant herein had been instructed, engaged and retained by the Respondent to render legal services pertaining to and concerning conveyance in respect of L.R No. 37/714 (Original Number 37/367/3) situated off Mombasa Road.
6. Additionally, learned counsel has contended that upon the retention by and at the instance of the Respondent, same proceeded to and executed the instructions on behalf of the Respondents.
7. Nevertheless, counsel has submitted that despite effectively executing the terms of the instructions, the Respondent failed and neglected to pay/settled the requisite Professional charges.
8. Arising from the failure and or neglect to settle the professional fees, learned counsel has submitted that the Applicant was constrained to and indeed filed advocate/client bill of costs for taxation by the taxing officer of the court.
9. Furthermore, learned counsel has submitted that upon the filing of the advocate/client bill of costs, same was thereafter listed for taxation. In this regard, counsel added that the bill of costs under reference was ultimately taxed and certified by the taxing mistress vide ruling rendered on the March 24, 2022.
10. On the other hand, counsel has further submitted that upon the taxation of the advocate/client bill of costs, same proceeded to and extracted a certificate of taxation. For clarity, counsel has added that the certificate of taxation was signed and sealed on the May 24, 2022.
11. Secondly, learned counsel for the Applicant has submitted the certificate of taxation issued by the mistress, has neither been challenged, varied nor rescinded, in any manner whatsoever.
12. Additionally, counsel has also submitted that the Respondent herein has neither challenged nor disputed retainership of the Applicant. In this regard, counsel has invited the court to find and hold that retainership is not in dispute.
13. Lastly, counsel has invited the court to apply the provisions of rule 7 of the [Advocates Remuneration Order](#) and to decree payment of Interests at 14% per annum, from the date when the bill of costs was delivered to or served upon the Respondent.

b. The respondent's submissions

14. Learned counsel for the Respondent herein has relied on the Grounds of opposition dated the January 23, 2023 and same has submitted that indeed the Applicant was duly instructed, engaged and retained by the Respondent in respect of the named assignment.
15. Premised on the submissions of counsel for the Respondent, it is evident and apparent that same is not disputing retainership or otherwise.



16. Secondly, counsel has submitted that though the provisions of Rule 7 of the [Advocates Remuneration Order](#) allows the court to decree and award interests at 14% per annum, the award used *vide* rule 7 (*supra*) does not make it obligatory that the court must award interest.
17. Put differently, learned counsel has submitted that the court has a discretion as to whether or not to award interests at 14% per annum. Besides, counsel appears to suggest that the court similarly has discretion to decree an Interests rate other than the one prescribed *vide* rule 7 of the [Advocates Remuneration Order](#).
18. In addition, counsel has further submitted that the award of Interests should also commence or start running 30 days after (sic) the delivery and entry of Judgment and not otherwise.
19. Based on the foregoing submissions, counsel for the Respondent has implored the Honourable court to exercise its discretion and to excuse the Respondent from the payment of interests pertaining to and concerning the costs, which were awarded to and in favor of the Applicant.

Issues for determination

20. Having reviewed the Application dated the May 4, 2022, the supporting affidavit thereto and the Grounds of opposition filed by the Respondent; and upon considering the submissions tendered on behalf of the respective Parties, the following issues do arise and are worthy of determination;
 - i. Whether the Applicant herein is entitled to Judgment in terms of section 51(2) of the [Advocates Act](#), Chapter 16, Laws of Kenya.
 - ii. Whether the Applicant is entitled to Interests and if so, the rate of Interests to be applied.

Analysis and determination

Issue number 1- Whether the Applicant herein is entitled to Judgment in terms of Section 51(2) of the [Advocates Act](#), Chapter 16, Laws of Kenya.

21. It is common ground that the Respondent herein indeed instructed, engaged and retained the Applicant to offer certain professional/ Legal services to and in favor of the Respondent.
22. Indeed, the Respondent has neither contested nor disputed the fact of such instructions or engagement. Consequently, it is safe and sound to hold that there is no dispute as pertains to retainership.
23. On the other hand, there is also no gainsaying that upon the execution and discharge of the instructions which were given to the Applicant herein, the Applicant proceeded to and raised fee note pertaining to the professional services rendered.
24. However, it appears that the Respondent failed and or neglected to settle the fee note which was rendered by the Applicant. In this regard, the Applicant was constrained to and indeed filed an advocate/client bill of costs for taxation.
25. Suffice it to point out that the Advocate/Client bill of costs was thereafter taxed and certified in the sum of Kes.3, 840, 287.70 Only, vide ruling rendered by the Honourable Taxing Officer on the 24th March 2022.
26. Upon the delivery of the ruling, (details in terms of the preceding paragraph), the Applicant proceeded to and extracted a certificate of taxation, which was eventually signed and issued on the May 4, 2022.



27. Following the issuance of the certificate of taxation, the Respondent/client was at liberty to mount or file the requisite reference, (sic) if same was aggrieved or dissatisfied. See rule 11 of the *Advocates Remuneration Order*.
28. Nevertheless, it is evident and apparent that no such reference was ever filed or lodged, whatsoever.
29. From the foregoing observation, what comes out clear is that the certificate of taxation which was issued on the May 4, 2022, has neither been challenged, varied or rescinded whatsoever.
30. On the other hand, it is not lost on the court that the issue of retainership is not in dispute. For the avoidance of doubt, the Respondent herein has not impugned or impeached the existence of retainership.
31. Premised on the foregoing, the critical question that does arise is whether the Applicant has satisfied the requisite provisions of section 51(2) of the *Advocates Act*, Chapter 16 Laws of Kenya, to warrant entry of Judgment in terms of the certificate of taxation.
32. Given the significance of the provisions of section 51(2) of the *Advocates Act*, (supra) it is important to reproduce same.
33. In this regard, the provisions of section 51(2) of the Act are reproduced as hereunder;

“The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the court shall 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”.
34. My reading and understanding of the said provisions drives me to the conclusion that there are two hurdles that must be surmounted by an Applicant before Judgment can be entered in terms of the certificate of taxation.
35. Firstly, the Applicant is obliged and obligated to satisfy the Honourable court that there was indeed retainership. In this regard, proof of retainership is paramount and significant.
36. Nevertheless, as pertains to the subject matter, I have already observed that there is no dispute as pertains to retainership. Consequently and in the absence of such dispute, the first hurdle has been surmounted.
37. To vindicate the foregoing observation, it is imperative to take cognizance of the holding of the court in the case of *Ochieng, Onyango, Kibet & Obaga Advocates v Adopt a Light Limited* [2007] eKLR, where the court observed and stated as hereunder;

There is no doubt that the applicant was instructed by the respondent and in furtherance of that instructions offered some services to the respondent. I am therefore in agreement with the applicant that there is no requirement under section 51(2) of the *Advocates Act* that a retainer ought to be in writing and that it must be exhibited in an application like the present one before the Advocate can be entitled to judgement. The only hurdle under section 51(2) of the *Advocates Act* is whether there is proof of retainer by the Advocate and whether retainer is disputed.



In the case before court, retainer is not disputed by the respondent, therefore the applicant has comfortably passed the pre-requisite test imposed by the statute in order to grant judgement in favour of an Advocate.

38. Secondly, an Applicant is enjoined to prove that the certificate of taxation upon which Judgment is sought, has neither been reviewed, varied or otherwise rescinded.
39. Suffice it to point out that in respect of the subject matter, the certificate of taxation issued on the May 4, 2022, has not been varied or rescinded, in accordance with the law or at all. Indeed, the Respondent conceded as much.
40. To the extent that the certificate of taxation has not been reviewed, varied and or otherwise rescinded, I come to the conclusion that the Applicant has similarly satisfied the second limb/hurdle underscored vide the provisions of section 51(2) of the *Advocates Act*.
41. In this respect, I beg to adopt, restate and reiterate the holding of the court in the decision of *Ochieng, Onyango, Kibet & Ohaga Advocates v Adopt a Light Limited* [2007] eKLR, where the court observed and stated as hereunder;

Section 51(2) of the *Advocates Act* gives an Advocate the opportunity to benefit from the discretionary powers of the court where he has satisfied the requirement and precedent conditions set out in that section. In my view an Advocate who has passed the hurdle provided under Section 51(2) is automatically entitled to judgement. In this case the certificate of costs obtained by the applicant is final since the respondent was unsuccessful in its challenge to set aside or vary the amount contained in the said certificate. Secondly there is no dispute as to retainer, therefore in my judgement, the applicant has fulfilled the conditions set out under section 51(2) of the *Advocates Act*, hence it is incumbent upon this court to do the necessary.

In my view where an Advocate has fulfilled the conditions set out under Section 51(2) of the *Advocates Act*, the court has no discretion but an obligation to enter judgement as prayed. It is therefore my judgement that this court has no discretion since the applicant has brought itself within the clear and express provisions of the said section. In the premises I am persuaded to enter judgement as prayed in the application.

42. In the circumstances, I come to the conclusion that the Applicant herein has surmounted the two named hurdles and hence same is entitled to Judgment on the certificate of taxation issued and signed on the 4th May 2022, by the Taxing Officer.

Issue Number 2- Whether the Applicant is entitled to Interests and if so, the rate of Interests to be applied.

43. In respect of the second issue herein, it is appropriate to recall and to take cognizance of the provisions of rule 7 of the Advocate Remuneration Order. For coherence, it is the said Rule that underscores the mandate and competence of the court to decree and award Interest in respect of costs.
44. To this end, it is important to reproduce the said provisions, for the sake of clarity and ease of reference.
45. For coherence, rule 7 of the *Advocates Remuneration Order* provides as hereunder;

“ An Advocate may charge interest at 14% 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 such a claim for interest is raised before the amount of the bill has been paid or tendered in full.”

46. My understanding of the said rule denotes that the Advocate is at liberty to charge Interest at the named rate per annum on costs and disbursement, provided however that such a claim for Interests is raised before the amount of the bill has been paid or tendered in full.
47. In addition, the timeline upon which the advocate is at liberty to commence and charge interests on the costs is well delineated. For clarity, it is expressly provided that such interests is only chargeable after the expiration of one month from the date of the delivery of the bill to the client.
48. Premised on the express wordings of rule 7 of the *Advocates Remuneration Order*, the court confronted with an issue as to whether or not interest ought to be charged and if so, the timeline upon which same ought to be charged is called upon to give the provisions of rule 7 (*supra*) its clear and grammatical meaning.
49. To my mind, the provisions of Rule 7 of the *Advocates Remuneration Order*, clearly provides and stipulates that an advocate is entitled to charge interests at 14% per annum. Clearly, the person upon whom the discretion to charge Interest is bestowed is the Advocate and not otherwise.
50. On the other hand, it is also important to underscore that the law has also prescribed and stipulated the applicable rate of interests to levied or charged, that is, if the Advocate elects to levy Interest on his/her costs.
51. In my humble view, the rate of interests to be charged or levied having been expressly and explicitly provided under the law, the honourable court cannot therefore purport to decree any rate other than the prescribed one.
52. Futhermore, even where the Honourable Court is vested with discretion to deal with an issue, or matter,(in this case payment of Interests), the discretion ought to be exercised in accordance with the law. Consequently, I Wish to add that Discretion must accord with and abide by the law and not otherwise.
53. Secondly, the provisions of rule 7 (*supra*) have also gone ahead to stipulate the time line from which the requisite Interests shall apply. For clarity, Interests is chargeable upon expiration of one month upon the delivery of the bill.
54. Consequently and in respect of the foregoing stipulation, what becomes important to determine and ascertain, is when the impugned bill was served upon or availed to the Client/Respondent.
55. Nevertheless, as pertains to the subject matter, the record of the court shows that the Advocate bill of costs dated the 20th May 2021, was duly served upon the Respondent on the 26th May 2021. For the avoidance of doubt, an affidavit of service was duly filed.
56. However, it is also important to point out and to underscore that the the issue(s) as pertains to when the advocates/client bill was served upon the Respondent, has neither been disputed nor impugned.
57. In the premises, it is my finding and holding that indeed the impugned bill was served upon the Respondent on the 26th May 2022, in the manner alluded to in the affidavit of service on record
58. Having found and held that the rate of Interests is stipulated and prescribed vide Rule 7 of the Advocates Remuneration Order; and having similarly found and held that the timeline for reckoning of Interests is also explicit, I come to the conclusion that the Applicant is entitled to Interests in the manner sought at the foot of the Application.



59. For coherence, it is important to reiterate that the Advocate herein, has exercised the right/ freedom bestowed upon same to charge Interests and hence, the Honourable Court cannot stand on his right of election, subject only to ensuring that the election does not go beyond the borders set vide the named law, to wit, Rule 7 Supra.

Final Disposition:

60. In the course of evaluating and analyzing the itemized and highlighted issues for determination, it must have become evident and apparent that indeed the instant application satisfies the pre-requisite conditions envisaged *vide* the Provisions of section 51(2) of the *Advocates Act*, Chapter 16, Laws of Kenya and hence same is meritorious.

61. Consequently and in the premises, I come to the conclusion that the Application dated the May 4, 2022, ought to be granted.

62. In a nutshell, I proceed to and hereby make the following orders;

- i. Judgment be and is hereby entered in terms of the certificate of taxation dated the May 4, 2022 in the sum of Kes.3, 840, 282.70/= only.
- ii. Interests be and is hereby awarded at 14% per annum w.e.f June 26, 2021 until payment in full.
- iii. Costs of the application be and are hereby awarded to the applicant. For completeness, the said costs be and are hereby certified in the sum of Kes.25, 000/= only.

63. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of;

Benson - Court Assistant.

Ms. Mutuku for the Advocate/Applicant.

Mr. Aluoch h/b for Mr. Munene for the Respondent.

