



REPUBLIC OF KENYA



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Odhiambo Owiti & Company Advocates v UAP Insurance Limited (Miscellaneous Civil Case 7 of 2021) [2024] KEHC 623 (KLR) (30 January 2024) (Ruling)

Neutral citation: [2024] KEHC 623 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
MISCELLANEOUS CIVIL CASE 7 OF 2021**

JN KAMAU, J

JANUARY 30, 2024

BETWEEN

ODHIAMBO OWITI & COMPANY ADVOCATES ADVOCATE

AND

UAP INSURANCE LIMITED CLIENT

RULING

1. In their Notice of Motion dated 16th December 2021 and filed on 17th March 2022, the Advocates herein sought orders that this court adopt the Certificate of Costs issued herein in the sum of Kshs 142,254.50 in respect of its Advocate's Bill of Costs dated 27th January 2021, as judgment and decree of this court together with interest thereon at fourteen (14%) per cent per annum from 27th September 2019 being one month from the date of delivery of their Pro forma invoice to the Client till payment in full, in accordance with the provisions of Rule 7 of the [Advocates \(Remuneration\) Order](#).
2. On 16th December 2021, Faustine Osewe, an Advocate practicing as an associate in the firm of Odhiambo Owiti & Company Advocates swore an Affidavit in support of the said application herein on behalf of the Advocates.
3. It was the Advocates' case that the Client instructed and retained them to act on its behalf in Vihiga PMCC No 109 of 2015 Mat Naliaka Mwanja v Saulo Omondi Imbeo & Others and that they did in fact represent it in the said suit. They asserted that there was no dispute that they were retained in the said matter and presented their Pro forma invoice dated 24th August 2019 on 28th August 2019 as aforesaid.
4. They averred that the Client failed to settle the amount in the said Pro forma invoice as a result of which they filed their Advocate-Client Bill of Costs dated 27th January 2021 which was taxed in the sum of Kshs 142,254.50. They stated that a Certificate of Costs was issued to that effect and the same had not been altered or set aside by the court. They added that no Reference was pending before this court.



5. They pointed out that they were entitled to interest on costs at the rate of fourteen (14%) per cent per annum from 27th September 2019 being one (1) month from the date of delivery of its Pro forma invoice to the Client till payment in full as was contemplated in Rule 7 of the amended Advocates Remuneration Order.
6. They averred that they would not be able to enforce payment of the said sum of Kshs 142,254.50 unless the Certificate of Costs was adopted as a judgment of this court and thus urged this court to allow the orders they had sought in their application.
7. In opposition to the said application, the Client's advocate, Catherine Owiti, swore a Replying Affidavit on its behalf on 17th August 2023. The same was filed on 24th August 2023.
8. The Client admitted that it retained the Advocates herein in the aforesaid case Vihiga PMCC No 109 of 2015 Mary Naliaka Mwanja v Saulo Omondi Imbeo & Others and that the Advocate- Client Bill of Costs dated 27th January 2021 was taxed in the sum of Kshs 142,252.50.
9. However, it asserted that on 15th December 2021, it remitted to the Advocates the said sum of money in settlement of the taxed costs. It was its contention that despite having pointed out that fact to the Advocates, they nonetheless fixed their present application for hearing.
10. It was emphatic that the present application was an afterthought, frivolous, misconceived, incompetent and an abuse of the court process and urged this court not to adopt the Certificate of Costs as a judgment of this court or to award interest as the Advocates had sought and dismiss the said application with costs to it.
11. In their Further Affidavit that was sworn by Caren Chuchu, an associate in the Advocates firm on their behalf on 18th October 2023 and filed on 26th October 2023, the Advocates asserted that they presented the Client with a Request Note in the sum of Kshs 60,700/= and that when it refused to settle the said sum, they filed the Advocate - Client Bill of Costs in the sum of Kshs 142,254.50.
12. They pointed out that the said sum of Kshs 142,254.50 was paid long after service of the Pro forma invoice and that it was only fair that the present application be allowed so that they could recover costs of the suit and interest that had been accruing from 29th September 2019 until payment in full. They averred that the rest was a matter of conciliation at the time of execution as they did not dispute part payment of the decree.
13. The Advocate's Written Submissions were dated 25th October 2023 and filed on 26th October 2023 while those of the Client were dated 9th November 2023 and filed on 17th November 2023. The Ruling herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

14. The Advocates pointed out that they presented the present application under the provisions of Section 51 of the *Advocates Act* Cap 16. They submitted that as the Client had not provided proof to show that the Certificate of Costs dated 24th November 2021 had been altered and/or set aside, this court had power to order the judgment be entered for the certified amount together with costs.
15. They added that the Client had not also challenged the certified costs in a reference as was envisaged in Rule 11 of the *Advocates Remuneration Order*, 2014. It was their assertion that the Client could not therefore invite the court to look at the said Certificate of Costs in the absence of a formal application.
16. In this regard, they placed reliance on the case of *Jane Njeri Wanjiru Kibara v Christopher L. Ajele & 2 Others* [2019] eKLR which cited with authority the case of *Machira & Co Advocates v Magugu*



- [2002] 2 EA 428 at 433 where it was held that a party who was aggrieved by the decision of a taxing officer could only ventilate her grievance through a reference that had to be filed within fourteen (14) days of the said decision.
17. They were emphatic that the issue that had been raised by the Client herein was a matter of reconciliation as the Certificate of Costs was undisputed, there being no reference that had been filed herein.
 18. They were categorical that they were entitled to interest at fourteen (14%) per cent from 27th September 2019 which was a month after they served the Client with the Pro forma invoice. They asserted that they sent the Client the Final Fee Note on 28th August 2021 (sic) and that it paid the taxed costs on 15th December 2021 which was long after the Certificate of Costs was issued.
 19. They relied on the case of *Francis Mwanza Mulwa v Afrisons Export Import Limited & Another* [2015] eKLR where the court therein held that unless a certificate of costs had been set aside and/or varied, judgment on the taxed costs would be entered, that interest was due and payable on disbursements and costs at the rate of fourteen (14%) per cent and that the interest was chargeable after the expiration of one (1) month from delivery of the bill as provided in Rule 7 of the Advocates Remuneration Order.
 20. They added that the interest would accrue from the date of termination of the advocate-client relationship as was held in the cases of *Otieno Ragot & Co Advocates v Kenindia Assurance Co Limited* [2016] eKLR and *Wainaina Ileri & Co Advocates v Kenya Bus Services Limited* [2005] eKLR.
 21. On its part, the Client submitted that the aspect of fourteen (14%) per cent ought to have been included in the Fee Note as required by Rule 7 of the Advocates Remuneration Order and that having failed to include the said amount, the court could only exercise its discretion to award interest under Section 26 of the *Civil Procedure Act* as was held in the case of *Otieno Ragot & Co Advocates v Kenya Airport Authority* [2021] eKLR. It therefore argued that there was no basis for awarding interest at the rate of fourteen (14%) per cent from 29th September 2021 (sic).
 22. It asked this court to award it costs on the general principle that costs follow the event as provided in Section 27(1) of the *Civil Procedure Act*, Cap 21 of the laws of Kenya.
 23. This court considered the cases that the parties herein had relied upon and the cases of *Republic v City Council of Nairobi; Ivyland Park Ltd (Interested Party) Ex parte Inderpal Singh & 2 Others Suing as Officials of Convent Drive South Residents' Association* [2021] eKLR where the common thread was that judgment could be entered on a certificate of costs if the same had not been set aside or altered or where there was an issue with retainer.
 24. Notably, Section 51(2) of the *Advocates Act* Cap 16 (Laws of Kenya) provides as follows:-

“The certificate of the taxing officer by whom any bill 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.”
 25. Further, Rule 7 of the *Advocates (Remuneration) Order* 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.”

26. It was not in dispute that the Certificate of Costs that was issued by the Taxing Officer had not been set aside and/or altered. Further, the Client did not appear to have filed any Reference to challenge her decision as provided in Paragraph 11 of the Advocates Remuneration Order. In an instance such as this, the court had no other option but to adopt the Certificate of Costs as a judgment.
27. Several courts have held that the court has the discretion to determine when interest ought to run. In the case of *Otieno Ragot & Company Advocates v Kenya Ports Authority* [2017] eKLR, it was held that although Rule 7 entitled an advocate to claim interest, the time from when interest would run was not stipulated and was therefore left to the discretion of the court.
28. In the case of *D. Njogu & Company Advocates v Kenya National Capital Corporation* [2006] eKLR, the court held that interest ought to run from the date the correct fee note was sent to the client irrespective of whether the bill of costs was subsequently reduced on taxation. The court therein explained that the “correct fee note” meant a bill that was in accordance with the terms upon which the advocate had contracted with the client or the bill which the client did not dispute or the bill which was in accordance with the sums awarded by either the taxing officer or by the deputy registrar in a certificate of costs.
29. This court took the view that Rule 7 of the *Advocates Remuneration Rules* was clear that interest was chargeable at fourteen (14%) per cent per annum from the expiration of one (1) month from the delivery of the bill to the client. There was therefore a reference point, from when interest would be calculable. It could not accrue before one month had expired from the time when the bill was delivered to the client.
30. However, interest did not become automatically chargeable after the lapse of the one (1) month from the date when the bill was served. Rule 7 of the Advocates Remuneration Rules was clear that interest was only chargeable provided that such claim for interest was raised before the amount of the bill was tendered in full.
31. As this court also held in the case of *Odhiambo Owiti & Company Advocates v Equator Bottlers Limited* [2023] eKLR, a pro forma invoice and/or a request note was not a bill within the meaning of Rule 7 of the Advocates Remuneration Order. Indeed, the Pro Forma invoice that the Advocates forwarded to the Client contained different figures from the Bill that was subsequently filed and taxed by the Taxing Officer. The Pro forma invoice had a figure of Kshs 60,700/= while the Advocate- Client Bill of Costs dated 27th January 2021 contained a figure of Kshs 142,254.50/=.
32. If the said Pro forma Invoice had been identical to the said bill and the warning of fourteen (14%) per cent was contained in both documents, this court would have found the same to have been adequate notification of the amounts due and owing to the Advocates by the Client herein and deemed it to have provided sufficient information as contemplated in Rule 7 of the *Advocates Remuneration Order*.
33. Having said so, it was not clear to this court when the correct Bill was submitted to the Client for settlement before it was filed because the Advocate mainly focused on the said Final Pro forma Request Note which was allegedly served on 24th August 2019.
34. Be that as it may, this court noted from the proceedings of the Taxing Officer on 24th June 2021 which was the first time that the Advocate- Client Bill of Costs dated 27th January 2021 came up for hearing, the Client’s advocates were present. In the absence of any evidence of when the Bill of Costs was first delivered to the Client, this court took the firm view that the Client was certainly aware of the Advocate-Client Bill of Costs as at 24th June 2021.



35. The above notwithstanding, the claim for payment of fourteen (14%) per cent per annum was first raised in the present application and not in the said Bill of Costs and the Pro forma invoice. There was no indication of when the said application was served upon the Client herein because there was no Affidavit of Service in the court file evidencing such service. However, it could not be disputed that the Client was aware of the said application by 17th August 2023 when it filed its Replying Affidavit.
36. Bearing in mind the holding of *D. Njogu & Company Advocates v Kenya National Capital Corporation (Supra)* which this court fully associated itself with and in the absence of any other evidence to the contrary, this court came to the firm conclusion that the one (1) month envisaged in Rule 7 of the *Advocates Remuneration Order* lapsed on 17th September 2023. Interest would thus accrue on the certified costs from 18th September 2023.
37. Even so, it was evident that the Client paid the taxed sum of Kshs 142,254.50 on 15th December 2021. This was way before the claim for interest envisaged in Rule 7 of the *Advocates Remuneration Order* was raised. No interest was therefore chargeable herein.
38. Notably, as there was no dispute on the Advocates' retainer by the Client herein and the certificate of costs had not been altered or set aside, there was nothing that restrained this court from entering judgment on the certified costs merely because the Client had settled the decretal sum. The Client, however, had a recourse to court in the event the Advocates executed against it beyond what they were entitled to.

Disposition

39. The upshot of this court's decision was that the Advocate's Notice of Motion application dated 16th December 2021 and filed on 17th March 2022 was partially merited and the same be and is hereby allowed in the following terms:-
 - a. Judgment be and is hereby entered in favour of the Advocate against the Client herein for the sum of Kenya Shillings One Hundred and Forty Two Thousand Two Hundred and Fifty Four and fifty cents (Kshs 142,254.50).
 - b. As the Advocates were partly successful in their present application, each party will bear its on costs of this application.
40. It is so ordered.

DATED and DELIVERED at VIHIGA this 30th day of January 2024

J. KAMAU

JUDGE

