



Giro Commercial Bank Limited v Benlucks (K) Limited & 2 others (Commercial Civil Case 478 of 2004) [2022] KEHC 45 (KLR) (Commercial and Tax) (31 January 2022) (Ruling)

Neutral citation: [2022] KEHC 45 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE 478 OF 2004
DAS MAJANJA, J
JANUARY 31, 2022**

BETWEEN

GIRO COMMERCIAL BANK LIMITED PLAINTIFF

AND

BENLUCKS (K) LIMITED 1ST DEFENDANT

AMRITLAL BHANJI LAXMAN 2ND DEFENDANT

MRS INDU LAXMAN 3RD DEFENDANT

RULING

1. Introduction and background

Before the court for determination is the Plaintiff's Notice of Motion dated 21st June 2021 ("the Reference") filed, inter alia, under Rule 11(2) of the *Advocates Remuneration Order* ("the Order") seeking to set aside the decision of the Deputy Registrar dated 18th February 2020 ("the Ruling") in respect of the Defendant's Party and Party Bill of Costs dated 1st October 2019 ("the Bill of Costs") arising out of the instant suit ("the suit").

2. The reference is supported by the affidavit of Andrew K. Muchina, the Plaintiff's Senior Legal Manager in its Legal Department, sworn on 21st June 2021. It is opposed by the Defendants through the replying affidavit of Leeroy Misaro, an advocate practising in the firm of Amin & Company Advocates which has the conduct of this matter on behalf of the Defendants, sworn on 9th November 2021. The parties have also filed written submissions in support of their respective positions.

3. The facts giving rise to the reference are common ground as they are a matter of record. The Plaintiff commenced this suit by the Plaint dated 18th August 2004 seeking to recover KES 20,341,614.37 from the Defendants. Before the suit was set down for hearing, it was dismissed for want of prosecution



with costs to the Defendants on 17th June 2015. Thereafter, the Plaintiff filed the Notice of Motion dated 12th October 2015 seeking to set aside the said dismissal order. The application was allowed and the suit was reinstated. Aggrieved by this decision, the Defendants lodged an appeal against the order reinstating the Suit. On 19th July 2019, the Court of Appeal set aside the order reinstating the suit resulting in the suit being dismissed with costs. The Defendants thereafter filed the Bill of Costs claiming KES 2,090,845.00 with the instructions fees being pegged at KES 2,000,000.00 for taking instructions, researching on the relevant law, considering relevant facts and evidence and preparing and drafting the Defence.

4. After considering the Bill of Costs, the Deputy Registrar held that since it was not opposed despite service on the Defendants, he taxed and certified it as drawn thus precipitating this Reference.

The Reference and submissions

5. The Plaintiff contends that the Deputy Registrar failed to take into account the fact that the subject matter of the dispute, that is, the sum of KES 20,341,614.37 could be ascertained from the pleadings and that the award of KES. 2,000,000.00 as instructions fees was inordinately high. It further contends that the Deputy Registrar proceeded to tax the Bill of Costs as drawn without interrogating it in order to satisfy himself that it was properly drawn.
6. The Plaintiff further faults the Deputy Registrar for failing to tax the Bill of Costs in conformity with the 1997 Order because pursuant to schedule VI of the 1997 Order the basic instruction fee ought to have been KES 345,124.21 and that the instructions fees awarded is not reflective of the value of the work done by the Defendants as the matter was dismissed for want of prosecution before it was set down for hearing of the main suit.
7. The Defendants oppose the Reference. They point out that both parties were represented by counsel in court on 12th November 2019 for the taxation of the Bill of Costs and in the absence of any submissions on the part of the Plaintiff, the Deputy Registrar lawfully proceeded to tax the Bill of Costs. They further submit that the Bill of Costs dated was drawn in accordance with the provisions of the Order and the instructions fees was lawfully assessed and taxed and that the Plaintiff has not demonstrated any grounds for this court to interfere with the discretion of the Deputy Registrar.

Analysis and Determination

8. The main issue for determination is whether the court is to set aside the Deputy Registrar's award of instructions fees. It is now trite law that the Court will only interfere with the decision of a taxing officer in cases where there has been shown to be an error of principle. In *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR the Court of Appeal asserted this position as follows:

On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs. In *Arthur v Nyeri Electricity Undertaking* [1961] EA 497, the predecessor of this Court said at page 492 paragraph I: "where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases".

9. It is common ground that the Bill of Costs was not substantively opposed. The Plaintiff has also not denied the averment by the Defendants that when the Bill of Costs came up for hearing before the Deputy Registrar, the Plaintiff was represented by counsel who also offered no opposition by way of



submissions to the Bill of Costs. It is also apparent from the Ruling that the Deputy Registrar did not give reasons as to why and how he decided to tax the Bill of Costs as drawn save for the fact that it was unopposed.

10. I am persuaded by the court's decisions in *Peter Kamau Ikigu v Barclays Bank of Kenya Limited & another* ML HCCC No. 719 of 2003 [2020] eKLR and *Issa and Company Advocates v Anbui Construction Engineering Group Co. & another* ML HC Misc. Application No. 88 of 2015 [2019] eKLR cited by the Plaintiff where it was held that a taxing officer ought to tax a bill of costs taking into account relevant factors like pleadings, nature of the suit and value of the subject matter and give reasons as to how he arrived at his decision.
 11. Taxation of a bill of costs ought not be equated with an ex parte judgment which is given in absence of one of the parties and that a taxing officer has a duty to interrogate a bill of costs notwithstanding either non-attendance by a party or lack of opposition to the bill of costs. The Court in *Labh Singh Harman Singh Limited v Attorney General of the Republic of Kenya & 2 others* MKS HC Misc. Civil Application No. 83 of 2015 [2016] eKLR also stated as follows:
 9. I am not saying that the learned Taxing Officer could not summarily allow the application. What I am saying is that a taxation is a process. Whether it is opposed or not, and whether the respondent is in court or not, the Taxing Officer is obligated to consider each and every item, and to tax each item separately by ensuring it is taxed per scale. The absence of a respondent to a taxing process does not mean that the applicant can get its Bill taxed as drawn without any comment from the Taxing Master. Indeed, the reason why the Taxing Master is normally required to give reasons for arriving at a particular sum is based on the expectation that the Taxing Master interrogated the Bill of Costs, and weighed each against the scale, and stated her finding.
 12. I hold that in as much as the Bill of Costs was not substantively opposed, the Deputy Registrar had a duty to properly interrogate the Bill of Costs in order to satisfy himself that it was properly drawn. By allowing the Bill of Costs as drawn without giving reasons or ascertaining whether the same was proper under the applicable Order or whether the value of the subject matter could be ascertained from the pleadings, the Deputy Registrar fell in error and this warrants the interference of this court.
- Disposition**
13. It is for the above reasons that I set aside the Ruling of the Deputy Registrar dated 18th February 2020 and direct that the Bill of Costs be taxed afresh by any other Deputy Registrar other than Hon. S. A. Opande. There shall be no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2022.

D.S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Githua instructed by Iseme, Kamau and Maema Advocates for the Plaintiff.

Mr Misaro instructed by Amin and Company Advocates for Defendants.

