



**Omwanza Ombati t/a Nchogu Omwanza & Nyasimi Advocate v
Wow Beverages (Miscellaneous Civil Application E664 of 2020)
[2022] KEHC 145 (KLR) (Commercial and Tax) (23 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 145 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E664 OF 2020
DAS MAJANJA, J
FEBRUARY 23, 2022**

BETWEEN

**OMWANZA OMBATI T/A NCHOGU OMWANZA & NYASIMI
ADVOCATE APPLICANT**

AND

WOW BEVERAGES RESPONDENT

RULING

1. By a ruling dated 11th March 2021, the Deputy Registrar certified the sum of KES 34,626,823.00 as due to the Advocates from the Client in respect of a Bill of Costs dated 23rd March 2020 (“the Bill of Costs”) filed by the Advocates and in respect of a suit HCCC No. 75 of 2016, *Wow Beverages v Les Grands Chais De Franc & 3 Others* (“the Suit”). The Client had instructed the Advocates to act on its behalf and file the Suit where the Client had alleged breach of a distribution contract between it and the defendants therein. The Suit was ultimately settled by a Deed of Settlement dated 19th May 2016 and a Consent letter dated 20th May 2016 marking the Suit as settled. As the Client did not settle legal fees, the Advocates filed the Bill of Costs claiming the KES 52,557,066.46 with instruction fees being pegged at KES 22,509,056.71.
2. The Client now seeks to set aside the Deputy Registrar’s decision and have the Bill of Costs taxed afresh whereas the Advocates seek to enforce the same. The Client has moved the court by the Chamber Summons dated 24th May 2021 (“the Reference”) filed under Rule 11 and 12 of the Advocates Remuneration Order (“the Order”) and supported by the affidavit of S. Amamu Chitechi, an Advocate in conduct of this suit on behalf of the Client, sworn on 24th May 2021. The Advocates oppose it through the replying affidavit of Omwanza Ombati, an advocate, sworn on 6th July 2021.



3. The Advocates' have filed the Notice of Motion dated 8th June 2021 made under section 51(2) of the Advocates Act (Chapter 16 of the Laws of Kenya) and supported by the affidavit of Omwanza Ombati sworn on 8th June 2021 seeking judgment of the certified costs.
4. The parties have also filed written submissions in support of their respective positions.

The Reference

5. The Client contests the Deputy Registrar's decision on instruction fees, 50% increase and VAT. It avers that the Deputy Registrar failed to give the reasons for the taxation as required by law under the Order and erred in law and in principle by determining the value of the subject matter as KES 1, 751,749,546.00 being an Auditor's Opinion on the estimated loss of revenue. That the Deputy Registrar failed to consider the fact that this matter had been concluded by a consent judgment for EURO 300,000.00.
6. The Client further contends that the Deputy Registrar erred in principle by failing to acknowledge that legal fees to the Advocates had already been settled and that he failed to apply and comply with the cardinal principles which are essential in guiding the taxing officer costs while taxing advocate-client bill of costs.
7. The Client also states that the Deputy Registrar failed to determine the adequate and appropriate instructions fees to be paid to the Advocates pegged on the subject matter which is the consent judgment hence wrongfully compensating the Advocates. It argues that the Deputy Registrar failed to appropriately tax the item on 50% increment on the Bill of Costs having wrongfully taxed the instructions fees and erred by charging V.A.T on all items taxed without proof that V.A.T had been paid.
8. The Client claims that the Deputy Registrar failed to consider its submissions so as to arrive at a fair and just conclusion in the spirit of dispensation of justice and award a reasonable amount based on the legal services tendered by the Advocates instead of outrightly ignoring the interests of the Client. The Client maintains that the Deputy Registrar erred by failing to consider the fact that a consent judgment overrides any other figures mentioned in the pleadings resulting in an exercise that was a mere formality with the result that the awarded fee was oppressive and unjustifiable.

The Advocates' Reply

9. The Advocates attack the competence of the Reference on several grounds. First, that the Client's deponent, being its advocate, cannot depose on behalf of the Client as it is against Rule 8 of the Advocates Practice Rules. Second, that the Reference is time barred as the ruling was delivered on 24th March 2021 but the Reference was filed on 28th May 2021 contrary to Paragraph 11 of the Order thus the court is divested of jurisdiction to deal with this matter.
10. On the merits of the Reference, the Advocates contend that in the further deposition of the Client's Managing Director sworn on 7th April 2016 that was filed in the Suit, the Client produced an Auditor's report dated 1st April 2016, by Shah Petal & Company Public Accountants which put the loss of the Client at KES. 1,751,749,546. The Advocates thus contend that Valuation Reports forming part of the records/pleadings can be used to ascertain the value of the subject matter. On the amount of EUR 300,000.00 referred to by the Client, the Advocates aver that the same was not a settlement amount and that clause 1.1.7 of the Deed of Settlement is in no way, a pecuniary settlement and that it was a term on internal credit limits for orders/shipments. That the interpretation of this Clause vis-a-vis the rest of the Agreement will show that the parties agreed to continue with the already existing contractual relationship, subject to certain terms they arrived at through the Settlement.



11. The Advocates therefore submit that the sum of EUR 300,000 cannot form the basis for assessment of the value of the subject matter as it is neither the consideration for the entry into the Settlement in question, nor the Settlement Sum, the parties having agreed to trade for another 19 months on terms to be determined in a separate agreement.

Analysis and Determination

12. I have gone through the two applications together with the respective responses and submissions of the parties. Since the Advocates have challenged the competence of the application, I propose to first deal with the same before determining the merits of the reference.
13. The Advocates impugned the Client's deposition sworn by its counsel on the ground that it violated Rule 8 of the Advocates Practice Rules which states that, "No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear".
14. While it is indeed true that advocates swearing affidavits on behalf of their clients is frowned upon, the Court of Appeal, in *Kamlesh Mansbuklal Damji Pattni v Nasir Ibrahim Ali and 2 Others NAI CA Civil Appl. No. 354 of 2004 [2005] eKLR* held that there is no express prohibition against an advocate who of his/her own knowledge can prove some facts, to state them in an affidavit on behalf of his client. I do not hear the Advocates claiming that the Client's counsel is not well versed in the facts she was deposing to or that there is a possibility she would be called as a witness or be subjected to cross-examination in what was otherwise a straight forward reference grounded on uncontested documents already on record. The objection therefore lacks merit.
15. As to whether the Reference is time barred, Paragraphs 11 and 12 of the Order outline the timelines and procedures to be followed once a party seeks to object to a taxing master's decision as follows:
 - (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
 - (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by Chamber Summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
16. The Advocates have cited the decision of the Court of Appeal, in *Mario Rossi v Salama Beach Hotel Limited MLND CA Civil Application No. 50 of 2016 [2018] eKLR* where it was stated that time lines fixed by Statute or subsidiary legislation made thereunder are of essence since they are designed to achieve an intended purpose and outcome, that is, not only do they ensure procedural order and certainty within the judicial system, but also advance a just, uniform and efficient dispensation of justice and it is for that reason that courts advocate for strict compliance with such time lines.
17. It is a matter of record that after the Deputy Registrar delivered the ruling on 12th March 2021, the Client, by its letter dated 24th March 2021 sought reasons in respect of the allowed items in the Bill of Costs, which letter was responded to by the Deputy Registrar's letter dated 3rd May 2021. It is not clear when this letter was received by the Client but it is not in dispute that the reference was filed on 28th May 2021. In order to impugn the validity or otherwise of the reference, the Advocates must



demonstrate the date when the letter was received in order for the court to calculate the running of time for purposes of filing the reference. In this instance, I am inclined to condone the delay of 11 days as it is not so inordinate to warrant the striking out of the reference.

18. Turning to the substance of the reference, I find that the main issue for determination is whether the Deputy Registrar erred in his assessment of instructions fees and the subsequent 50% increase and VAT. 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 (see *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR*). This principle was reiterated in *Republic v Ministry of Agriculture and 2 Others; Ex-parte Muchiri W’Njuguna & others [2006]* where Ojwang’ J., (as he was then) held as follows:

The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award is somewhat too high or too low; it will only interfere if it thinks the award is so high or so low as to amount to an injustice to one party or the other.... The court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors.

19. It is not in dispute that in arriving at the instruction fees, the value of the subject matter ought to be ascertained and the same can be deduced either from the pleadings, judgment or settlement, if such be the case, but if the same is not ascertainable, a taxing officer is entitled to use their discretion and the Client has rightly cited the decision in [*Joreth Ltd v Kigano & Associates CA Civil Appeal No. 66 of 1999 \[2002\] eKLR*](#) which supports this position.
20. In *Peter Muthoka & Another v Ochieng & 3 Others NRB CA Civil Appeal No. 328 of 2017 [2019] eKLR*, the Court of Appeal expounded on the principles in *Joreth Ltd v Kigano & Associates (Supra)* and set down the proper basis of taxing the instruction fees as follows;

It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court.

Where, however, a suit is settled, then, from a literal and practical reading of the provision, the subject matter value must be sought by reference, in the first instance, to the terms of the settlement. Just as one would not start with the pleadings in the face of a judgment, it is indubitable that one cannot start with the pleadings where there is a settlement.

It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does have discretion as to what he considers just but that discretion kicks



in only after he has engaged with the proper basis as expressly and mandatorily provided:
either the pleadings, the judgment or the settlement. [Emphasis mine]

21. The Client argued that the value of the subject matter could have been determined from the settlement of the parties which from the Deed of Settlement was EUR 300,000.00. The Advocates deny and claim that the said amount was never a settlement sum but a term on internal credit limits for orders/ shipments. The Deputy Registrar determined the value of the subject matter from a Valuation Report which was part of the record in the Suit which pegged the Client's estimated loss of business revenue and goodwill at KES 1,751,749,546.00.
22. In *Peter Muthoka & Another v Ochieng & 3 Others* (Supra) the Court of Appeal emphasized that where there is a settlement, then the settlement is the first port of call. I have gone through the Deed of Settlement. I disagree with the Advocates and the Deputy Registrar that the said EUR 300,000.00 was not a settlement sum but an internal credit limit for the subsequent business being undertaken by the Client and the defendants in the Suit. The Deed of Settlement was a document generated by both parties. The Valuation Report could not be used to determine the value of the subject matter unless the subject matter could not be discerned from either the judgment or settlement.
23. The subject suit was settled on the basis that the parties would continue to do business subject to a credit ceiling which represented the value of the business. The anticipated loss which was the foundation of the Suit was subsumed into the settlement and the Deputy Registrar could not rely on extraneous material to assess the value of the subject matter. The Settlement Agreement was clear on the upper value of the business to be transacted by the parties to the Suit which was the subject matter. I therefore find and hold that the Deputy Registrar erred in relying on the Valuation report in arriving at the value of the subject matter and that he applied the wrong principles of taxation. The Reference is now merited.
24. The 50% increase is contingent on the instruction fees awarded, it follows that the same will be determined based on the instruction fees to be awarded. On VAT, I note that the same was charged on the Instruction fees and other items save for disbursements. I do not find any fault in this assessment by the Deputy Registrar as fees for professional legal services rendered is subject to VAT save for the said disbursements. The same will equally be applied based on the instruction fees to be awarded.
25. The Client's Chamber Summons dated 24th May 2021 succeeds and the instruction fees and consequential orders in the decision of the Deputy Registrar dated 11th March 2021 are set aside on the following terms:
 - a. The Bill of Costs is referred back to the Deputy Registrar to determine and the instruction fees on the basis of the value of the subject matter of EURO 300,000.00 and consequential items.
 - b. The Notice of Motion dated 8th June 2021 is adjourned pending certification of fees due to the Advocates.
 - c. The costs of both applications shall be in the cause.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY 2022.

D.S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Onderi instructed by Nchogu Omwanza and Nyasimi Advocates for the Applicant.



Ms Chitechi instructed by MNO Advocates LLP instructed by Respondent/Client.

