



**Githinji & another v Mwai & 2 others; Registrar of Companies
(Interested Party) (Commercial Civil Case 184 of 2019)
[2022] KEHC 111 (KLR) (Commercial and Tax) (18 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 111 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE 184 OF 2019
DAS MAJANJA, J
FEBRUARY 18, 2022**

BETWEEN

MOSES NGACHA GITHINJI 1ST PLAINTIFF

GREYS HOLDINGS LIMITED 2ND PLAINTIFF

AND

ARTHUR KIMANI MWAI 1ST DEFENDANT

RICHARD KAMOTHO 2ND DEFENDANT

GAMECO LLP 3RD DEFENDANT

AND

REGISTRAR OF COMPANIES INTERESTED PARTY

RULING

1. Before the court for determination is the 3rd Defendant's Chamber Summons dated 4th March 2021 ("the Reference") filed under Rule 11(2) of the Advocates Remuneration Order ("the Order"), seeking to set aside the decision of the Taxing Officer/Deputy Registrar dated 10th February 2021 ("the Ruling") in respect of Item No. 1 in the 3rd Defendant's Party and Party Bill of Costs dated 24th September 2020 ("the Bill of Costs") arising out of the instant suit ("the suit"). The 3rd Defendant also seeks to have the Bill of Costs resubmitted for taxation before a different Taxing Officer.
2. The Reference is supported by the affidavits of Leroy Misaro, an Advocate practicing as such with the firm of Amin & Company Advocates which has the conduct of the suit on behalf of the 3rd Defendant sworn on 4th March 2021 and 9th March 2021 respectively. It is opposed by the 1st Plaintiff through the



Grounds of Opposition dated 28th May 2021. In addition to their rival pleadings, the parties have also filed written submissions in support of their respective positions.

3. The facts giving rise to the reference are common ground and are a matter of record. By way of a Plaint dated 29th July 2019 and filed on 31st July 2019, the Plaintiffs sought mandatory injunctive and declaratory orders on the ownership, control and management of the affairs of the 2nd Plaintiff Company. It was the 1st Plaintiff's case that his shares in the 2nd Plaintiff were illegally and fraudulently transferred by the 1st Defendant to the 2nd Defendant and that he had been wrongfully removed as a director of the company and excluded from the management of the company and its affairs.
4. In an application dated 22nd October 2019, the 3rd Defendant contended that there was no reasonable cause of action against it nor were there any prayers sought against it in the Plaint and thus sought that the suit against it be struck out with costs. In a ruling dated 29th April 2020, the court was in agreement with the 3rd Defendant's arguments and allowed the application with costs together with costs of the struck out suit.
5. To realize the said awarded costs, the 3rd Defendant filed the Bill of Costs where it claimed KES 690,142.00 where Item No. 1 was particularized and pegged at KES 671,017.00 in respect of taking instructions to defend the suit, analysing the facts and evidence and researching on the relevant law, pleadings, correspondences, perusals and consulting authorities and drafting an application to dismiss the suit.
6. The Bill of Costs was placed before the Deputy Registrar, who after considering the same together with the parties' submissions noted that the main issue for determination was whether the Bill of Costs was drawn to scale. The Deputy Registrar held in part as follows:

Noting that the value of the subject matter cannot be easily ascertained from the pleadings or ruling by Hon Justice Tuiyott, I have considered the instruction fees ought to be taxed as per Schedule 6 under "Other matters" where it is provided that the minimum fee for a matter which is defended is Kshs 75,000/-. I have noted this matter was summarily decided vide a ruling of the Notice of Motion dated 22nd October 2019, it did not proceed to full hearing. The work done by the counsel for the applicant was the work done by any legal profession in their ordinary course of business, there were no complex issues involved. The matter was also determined in less than a years' time I see no reason to increase the instruction fee. I therefore tax the instruction fee at Kshs 75,000/-

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The Bill is taxed as follows;

Instruction fees Kshs 75,000.00

Other Legal Fees Kshs 14,250.00

Disbursements Kshs 1775.00

TOTAL Kshs 91,025/-

The bill is taxed at Kshs 91, 025/-. A total of Kshs 599,117.00 is taxed off

7. It is this decision by the Deputy Registrar that has precipitated the reference where the Plaintiff is principally objecting to the award of instructions fees above.

The Reference



8. The 3rd Defendant contends that the Deputy Registrar failed to take into account the fact that the suit against the 3rd Defendant did not proceed to full hearing, the work done including, perusing the Plaintiffs' pleadings as well as the 1st and 2nd Defendant's pleadings, researching the relevant law, considering relevant facts & evidence, preparing the Defence and drafting the application to strike out the suit against the 3rd Defendant. It faults the Deputy Registrar for failing to consider that instruction fees is static and it is earned at the time of taking instructions and is not affected by the stage a suit has reached. The 3rd Defendant complains that the Deputy Registrar wrongly awarded the minimum instruction fee provided for other matters for unliquidated claims and failing to take into account other fees and allowances due to the advocate in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings, directions by the trial judge, and all other relevant circumstances.
9. The 3rd Defendant laments that in assessing the instruction fees, the Deputy Registrar only considered the pleadings and ruling of the court and the fact that according to her, the matter appeared to be simple or not complex despite the fact that the suit required a lot of careful research and was of great importance to the parties.

The 1st Plaintiff's Response

10. The 1st Plaintiff supports the decision of the Deputy Registrar and contends that the amount awarded was reasonable, just and fair in the circumstances. He submits that the Deputy Registrar properly directed herself in determining the instruction fees by taking into account the fact that the suit against the 3rd Defendant did not, indeed, proceed to full hearing.
11. The 1st Plaintiff refutes the claim that the instruction fee is a static item by stating that it is dependent on the stage in which a suit has reached and that the Deputy Registrar rightly and reasonably exercised her discretion to assess the instruction fees as she considered just, based on the pleadings and the ruling of the Court as well as the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial Judge and all other relevant circumstances.

Analysis and Determination

12. Since the only issue for determination is whether the Deputy Registrar erred in determining the instruction fee, the principle applicable is that the court will only interfere with the discretion of the taxing officer where it is demonstrated that the Deputy Registrar committed an error of principle (see *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR). Ojwang' J., explained the same principle in *Republic v Ministry of Agriculture and 2 Others; Ex-parte Muchiri W'Njuguna & others* [2006] 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.

13. The parties are in agreement that in the suit, the Plaintiff never sought any liquidated or quantified damages upon which the value of the subject matter could be ascertained and on the basis upon



which the instruction fee could be assessed. In the circumstances, the Deputy Registrar could only use her discretion in determining the appropriate instruction fees to award which as was held in *Joreth Limited v Kigano & Associates* [2002] eKLR. In this respect, this Court will not interfere with the exercise of judicial discretion unless in the exercise of that discretion the Deputy Registrar misdirected herself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Deputy Registrar was clearly wrong in the exercise of discretion and as a result, occasioned injustice (See *R. Billing & Co. Advocates v Kundan Singh Construction Limited (Now KSC International Limited)* NRB CA Civil Appeal No. 254 of 2013 [2020] eKLR and *Ouma v Warega* (1982) KLR 288).

14. The 3rd Defendant argues that the Deputy Registrar ought to have increased the basic fee of KES. 75,000.00 provided for in Schedule 6 of the Order. In arriving at her decision to retain the basic fee provided in the Order as the certified instruction fees awarded to the 3rd Defendant, the Deputy Registrar considered that the suit was summarily dismissed and did not proceed to full hearing, that the work done by the counsel for the 3rd Defendant was the work done by any legal profession in their ordinary course of business, there were no complex issues involved and the matter was also determined in less than a years' time.
15. It is true that the 3rd Defendant's involvement in the suit was brief and limited as it only filed a defence and the application to strike out which was granted. In coming to this conclusion the 3rd Defendant preparation was anything other than minimal. The work involved in preparing the defence and application deserved compensation and I think the 3rd Defendant was entitled to an enhancement of the basic fee. I however do not think that the increase would be as substantial as contended by the 3rd Defendant. I would increase the same to KES. 200,000.00 bearing in mind that this court may do so to save the parties and court costs and time where the matter is not so complex.

Disposition

16. I allow the 3rd Defendant's Reference dated 4th March 2021 to the extent that the basic instruction fee is increased to KES. 200,000.00. The matter shall be mentioned before the Deputy Registrar for certification of the final costs. The 3rd Defendant is awarded KES. 10,000.00 costs as against the 1st Plaintiff.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY 2022.

D.S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Misaro instructed by Amin and Company Advocates for 3rd Defendant.

