National Bank of Kenya Limited v Rachuonyo & Rachuonyo Advocates (Miscellaneous Application E145 of 2019) [2022] KEHC 3211 (KLR) (Commercial and Tax) (24 June 2022) (Ruling)

Neutral citation: [2022] KEHC 3211 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E145 OF 2019

EC MWITA, J

JUNE 24, 2022

BETWEEN

NATIONAL BANK OF KENYA LIMITED ..... APPLICANT

AND

RACHUONYO & RACHUONYO ADVOCATES ..... RESPONDENT

RULING

1. This is a reference by way of chamber summons dated 15th November 2021, brought under paragraph 11(2) of the *Advocates Remuneration Order*. The reference is against the ruling of the taxing officer delivered on September 24, 2021. In that ruling the taxing officer taxed the Advocates' client bill of costs and allowed taxed costs at Kshs. 2,630,794.40. The client wants the court to set aside the decision of the taxing officer and refer back the matter to the taxing officer for fresh taxation with appropriate directions on items 1(a) and 1(b) in the amended Bill of costs dated May 26, 2020.

2. The application is based on the grounds on its face, replying by Chrispus N. Maithya sworn on November 15, 2021, and written submissions dated February 23, 2022.

3. The client's argument is that in taxing instruction fee in item 1(a) the taxing officer used Kshs. 43,129,946 claimed by the plaintiff as the value of the subject matter and not Kshs 22,080 in the judgment despite the binding decision in *Peter Muthoka & another v Ochieng & 3 others* [2019] eKLR which was an erred of principle.

4. The client also argues that the taxing officer applied Schedule VI of the Advocates Remuneration Order 1997 instead of the remuneration Order, 1993, thereby erred in principle. The client again argues that the various errors and misdirection on the part of the taxing officer in assessing items 1(a) instruction fee and item 1(b) getting up fee affected the assessment on getting up fee.

5. The client asserts that the taxing officer committed errors of principle when taxing items on attendances and correspondence without taking into account the client's submissions in that regard and the provisions of Schedule 6B of the applicable scale of fees.

6. According to the client, the taxing officer erred in principle by failing to consider that item no 474 in the amended Bill of costs was made on the basis of a document running into 30 typed pages constituting 280 folios which was grossly exaggerated.

7. The client relies on *Peter Muthoka & another v Ochieng & 3 others (supra)* on the value of the subject matter; *First American Bank of Kenya Limited v Gulab P Shah & 2 others* [2002] eKLR, on the increase of instruction fee; *Kamunyi & Co. Advocates v Development Bank of Kenya Limited* (Civil Appeal No. 206 of 2006 [2015] eKLR cited in *Otieno Ragot & Company Advocates v Kenya Airports Authority* [2021] eKLR that failure to ascertain the correct subject matter in a suit for the purposes of taxation is an error of principle and *Supply Linkages v Hudson Mangeni* [2020] eKLR on the correct remuneration.

Response

8. The advocated has filed written submissions dated 3rd February 2022. The Advocate submits that the reference is based on matters of law only since facts are not disputed. According to the advocate, they successfully defended the client against a pleaded monetary claim which resulted into reduction of the amount to Kshs. 22,080. The advocate assert that the client's argument that the subject matter should be pegged on the amount in the judgment rather than what was claimed in the suit is untenable. This is so because according to the advocate, they were instructed to defend a claim of Kshs. 43,129,946 contained in the amended plaint dated January 7, 2000 and not Kshs. 22,080 in the final judgment.

9. The advocate argues that in law, an advocate is not bound to rely on the outcome of the case he is briefed to act on and there is no statutory provision in that regard. Reliance is placed on *Njogu v National Bank of Kenya Limited* [2016] eKLR. (Page 54-60). The advocate asserts that the taxing officer was correct in using the amount pleaded in the amended plaint to determine instruction fee of Kshs. 686,949.20. According to the advocate, the decision in Joreth Ltd v Kigano & Associates Advocates [2002] eKLR is clear on determining the subject matter for purposes of instruction fee.

10. It is submitted that in monetary pleaded claims, the value of the subject matter for purposes of instruction fee remains the amount pleaded even where the suit is eventually dismissed. Reliance is placed on *Governors Balloon Safaris Ltd v Skyship Company Ltd & another* [2015] eKLR and *George Arunga Sino t/a Jone Brooks Consultants Ltd v Patrick J.O Geoffrey D.O Yogo t/a Otieno Yogo & Co Advocates* [2012] eKLR.

11. The Advocate maintains that the decision in *Peter Muthoka & anotherf v Ochieng & 3 others (supra)* is distinguishable from the present case because that decision was concerned with a narrow question of determining instruction fees where a suit had been settled between the parties.

12. Regarding the applicable Advocate Remuneration Order, the advocate argues that the taxing officer was right in applying the 1997 Order, since the suit proceeded on the basis of the amended plaint filed on 7th July 2000 and not the original plaint filed on September 14, 1995. The advocate argues that they also filed an amended defence and counterclaim on 3rd December 2001, for recovery of credit facility of Kshs 8,132,177.40, thereby rendering the 1997 Remuneration Order applicable.

13. The advocate sates that the Court of Appeal differently constituted reached a different conclusion in *Andy Forwarders Services Ltd and Peter Muthoka v Ochieng & 3 others* (NBI CA No. 203 of 2018).

14. Regarding increase of the advocate's costs with one half, the advocate argues that the taxing officer was right since it is a mandatory statutory requirement. The taxing officer had no discretion to exercise on that increase. The advocate relies on *Central Bank of Kenya v Makecha & Company Advocates* [2019] eKLR that there having been no agreement between the advocate and client on fees, the taxing officer had no discretion to make as the law is that an advocate is entitled to party and party costs plus one half.

15. The advocate also relies on *Rachuonyo & Rachuonyo v National Bank of Kenya Ltd* (Misc Application No E767 of 2020) and *Masore Nyang'au & Co Advocates v Kensalt Ltd* [2019] eKLR on the same point.

16. On whether the award of Kshs. 25,200 for preparation of the Bill of costs was unreasonable, the advocate argues to the contrary. According to the advocate, the taxing officer exercised his discretion and the client has not demonstrated any overstated folios. The advocate urges this court to dismiss the reference with costs.

Determination

17. The client has challenged the decision of the taxing officer made on September 24, 2021 where the taxing officer allowed the advocate-client bill of costs at Kshs. 2,630,794.40. The client's main complaint is on item 1, instruction fee, although there are also complaints on other items.

18. According to the client, the taxing officer applied a wrong principle in assessing instruction fee. In the amended bill of costs, the advocate had sought Kshs. 2,225, 847.59, for instruction fee but the taxing officer allowed instruction fee at Kshs. 686,949.20 and Kshs. 161,992 on items 1(a) and 1(b) respectively.

19. The client's grievance is that in allowing instruction fee, the taxing officer took into account the amount in the pleadings (Kshs. 43,129,946) pleaded in the amended plaint and Kshs. 8, 132,770.40 in the counter claim) as the value of the subject matter instead of Kshs. 22,080, the amount allowed in the final judgment. The client relies on the decision in *Peter Muthoka & another v Ochieng & 3 others (supra)* to support the argument that the amount in the judgment should be the value of the subject matter.

20. The principle underlying award of costs was explained in *Manindra Chandra Nandi v Aswini Kumar Acharaya* ILR (1921) 48 Cal. 427 as follows:

> We must remember that whatever the origin of costs might be, they are now awarded, not as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected to, or as Lord Coke puts it, for whatever appears to the court to be the legal expenses incurred by the party in prosecuting the suit or his defence...The theory on which costs are now awarded to a plaintiff is that default of the defendant made it necessary to sue him and to the defendant is that the plaintiff sued him without cause; costs are thus in the nature of incidental damages allowed to indemnify a party against the expense of successfully vindicating his rights in court and consequently, the party to blame pays costs to the party without fault.

(See also *Vinod Seth v Devinder Bajaj & another* (C. A. No. 481 of 2010))

21. As parties engage in court, they often instruct advocates to represent them and, therefore, an advocate who, with the client's instructions, acts for that client, is entitled to fair and adequate remuneration for work done on behalf of his client. This is done through payment of fees, where agreed, or taxation

of advocate/client bill of costs. Remuneration Orders fix the amount an advocate is to charge his client based on the subject matter of the dispute or other factors and considerations.

22. The advocate's instruction fee is the amount of party and party costs increased by one half. For that reason, the principle that costs recompense and indemnify a party for what "appears to the court to be the legal expenses incurred by the party in prosecuting the suit or his defence" would equally apply to the advocate so that an advocate is to be fairly and adequately remunerated for the professional work he has rendered to his client.

23. Taxation of bill of costs is an exercise of discretion by the taxing officer. The law is settled that this court will not interfere with exercise of the taxing officer's discretion unless the taxing officer has erred in principle. (*Premchand Raichand Ltd & another v Quarry Services East Africa Ltd & another* [1972] EA 162); *Rogan-Kemper v Lord Grosvenor (No.3)* [1977] KLR 303; [1977] eKLR: *Bank of Uganda v Banco Arabe Espaniol*, Civil Application No. 29 of 2019)).

Instruction fee

24. I have perused the impugned decision by the taxing officer. With regard to instruction fee, the taxing officer stated:

> On instruction fee, the law is that the value of the subject matter shall be ascertainable from the pleadings, judgment or settlement. We are alive to the fact that the Applicant acted in a defence case and therefore as he received instructions, his brief was to defend a suit of Kshs. 12,592,343/= which was increased by the plaintiff through an Amended Plaint to Kshs. 43,129,946. He had further instructions to claim Kshs. 8,132,770/40 against the Plaintiff in the counter claim.

25. The officer went on to apply the amount in the pleadings in determining instruction fee. He declined to accept the client's argument that the value of the subject matter for purposes of instruction fee was the amount in the judgment. The taxing officer cited the Court of Appeal decision in *Joreth Ltd v Kigano & Associates Advocates (supra)* as laying down the principle that in determining instructions fee, the value of the subject matter should be discerned from the pleadings, judgment or settlement.

26. The client has argued that the taxing officer fell into error when he applied the value of the subject matter in the pleadings and not the amount in the judgment.

27. I have considered the argument by the client and the decision of the taxing officer on this aspect. I have also read the decision in *Peter Muthoka & another v Ochient & 3 others (supra)* which the client argues the taxing officer should have followed and determine instruction fee on the basis of the amount in the judgment, namely Kshs. 22,080 and not Kshs. 43,129,946 that was pleaded in the amended plaint.

28. A reading of the decision in *Peter Muthoka & another v Ochieng & 3 others (supra)*, shows that the facts of that case are distinguishable from those in the case at hand. In the former, the Court of Appeal was dealing with a narrow question of advocate's instruction fee where the suit had been settled between the parties. This is clear from the first paragraph of the judgment where the Court of Appeal stated that "This appeal turns on the narrow question of how a Taxing Master ought to determine for purposes of instruction fees, the value of the subject matter for purposes of an advocate - client bill of costs where a suit has been settled between the parties." (Emphasis).

29. The Court of Appeal again referred to the issue the appellant's counsel had identified for the Court's determination, stating that the clients' counsel had "cast the appeal in a single issue: 'what is the

taxation regime that a taxing master applies in taxing a bill of costs once parties reach a settlement that compromises the suit?'

30. The issue before the Court of Appeal involved a case where parties had settled the matter between themselves without the necessity of going into the hearing. That was, in my view, the basis of the statement that the court was dealing with a "narrow issue" on determination of instruction fee where settlement had been reached between the parties, and also being the question the appellant had placed before the Court for determination.

31. However, the Court of Appeal went on to stated that:

> Once judgment has been entered and for what seems to us to be 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.

That is the basis of the client's argument that the taxing officer should have used the amount in the judgment to determine instruction fee.

32. The position taken in the above statement, leads to what would certainly appear to be unfair, inequitable and disproportionate remuneration if instruction fee was to be determined on the basis of the amount in judgment where judgment has been finally handed down. Let me demonstrate using the case at hand.

33. First scenario: The amount in the pleadings is Kshs. 43,129,946 while the amount in the judgment is Kshs 22,080. Had the advocate filed their advocate-client bill of costs before judgment, instructions fee would have been determined on the basis of the amount in the pleadings, namely; Kshs. 43,129,946. However, having successfully acted for the client and reduced the final amount the plaintiff got to Kshs. 22,080, the advocate's instructions fee should be determined on the basis the amount in the judgment, that is; Kshs. 22,080, which is less than what the advocate would have got before judgment, an unfair reward for work done.

34. Let us develop the argument of unfair and inequitable remuneration further using this second scenario: Had the suit had been lost so that the claim against the client for Kshs. 43,129,946 was dismissed, the advocate's instruction fee would most likely be determined on the basis of the value of the subject matter in the pleadings, namely; Kshs. 43,129,946. The advocate would have better remuneration because of the outcome of the suit (where the suit is dismissed).

35. Third scenario: Had the suit succeeded so that the plaintiff won Kshs. 43,129,946 against the client, the advocate's instruction fee would be based on the amount in the pleadings which would also be the amount in the judgment, namely; Kshs. 43,129,946. The advocate would be better remunerated based on the outcome of the case, despite the client having to pay the full amount claimed in the suit against it. (again based on the outcome of the case)

36. Compare the advocate's remuneration in the first scenario where the advocate substantially won for the client and significantly reduced the amount the client would pay, with the third scenario where the advocate would be better remunerated despite the client having wholly lost the case.

37. The scenarios above demonstrate not only clear inequitable and unfair remuneration but also disproportionate reward to an advocate depending on the outcome of the case which goes against the principle that an advocate's remuneration is not dependent on the outcome of the case. The principle in Peter Muthoka & another v Ochieng & others (supra) also seems not to be in harmony with the position the Court of Appeal accepted, in principle, as correct in *Joreth Ltd v Kigano & Associates*

Advocates (supra) that "Instruction Fee is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached", if the value of the subject matter for purposes of instruction fee is to be determined from the amount in the judgment even though the value of the subject matter is discernible from the pleadings filed.

38. In *Joreth Ltd v Kigano & Associates Advocates (supra)*, the Court stated that that the value of the subject matter of a suit for purposes of taxation of a bill of costs should be determined from the pleadings, judgment or settlement and if not so ascertainable, the taxing officer is to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.

39. The import of that statement is that the taxing officer has first to determine whether the value of the subject matter can be ascertained from the pleadings. If not, the taxing officer then considers the judgment or settlement to determine if the value of the subject matter is discernible. If still unable to determine the value of the subject matter from thed judgment or settlement, the taxing officer then uses his discretion, applying the parameters the Court of Appeal identified, such as "the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances."

40. Instruction fee is remuneration the advocate is paid for taking instructions as well as doing other work necessary for preparing the case for hearing and should, therefore, adequately remunerate the advocate for actual work done on behalf the client.

41. The decision in Peter Muthoka & another v Ochieng & 3 others (supra) did not overrule *Joreth Ltd v Kigano & Associates Advocates (supra)*, a binding decision the taxing officer relied on in determining the value of the subject matter that was discernible from the pleadings for purposes of instruction fee.

42. Given the challenges I have pointed above as presented by the decision in *Peter Muthoka & another v Ochieng & 3 others (supra)*, I am unable to fault the taxing officer in his finding on instruction fee which, in my view, promotes not only equity, fairness and proportionate remuneration but also consistency, certainty and predictability when determining instruction fee.

Getting up fee

43. The amount for getting up fee is derived from the instruction fee allowed. Having found that the taxing officer applied the correct value of the subject matter in determining instruction fee, the challenge on getting up fee becomes moot. I find no fault on the part of the taxing officer respecting getting up fee.

Applicable Advocates Remuneration Order

44. The client argues that the taxing officer used the 1997 Advocates Remuneration Order instead of the 1993 Remuneration Order, thereby erred in principle. The advocate on their part support the taxing officer's decision, arguing that since the plaint was amended, the amendment brought in the 1997 Remuneration Order.

45. It is true that at the time the suit was filed the applicable Remuneration Order was the 1993. However, the plaint was amended at a time when the Advocate Remuneration Order in force was that of 11997. The taxing officer appreciated this in his ruling stating that "the work transcends the period 1995 to 2019 and therefore various ARO apply." The taxing officer further stated that he would only address items where objections had been raised

46. When a bill of costs is filed, costs are charged based on the Remuneration Order in force at the time of the activity charged. The client has not pointed out which item was not determined in accordance with the applicable Remuneration Order. On instruction fee I cannot fault use of the 1997 Remuneration Order given that the amended plaint was filed during that legal regime.

Attendance and correspondence

47. The client again argues that the taxing officer committed errors of principle when taxation items on attendances and correspondence without taking into account the client's submissions in that regard and the provisions of Schedule 6B of the applicable scale of fees. I have gone through the decision of the taxing officer and I am satisfied that he comprehensively addressed the client's concerns and even taxed off some items. The officer also addressed the client's concerns regarding increase of costs by one half as a statutory requirement. I can only add that in such matters, the taxing officer had no discretion to exercise.

48. In the end, having given due consideration to the reference submissions and the decisions relied on, I find that the reference has no merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE 2022

E C MWITA

JUDGE