Titus Makhanu & Associates Advocates v Alicate Holdings Limited (Miscellaneous Civil Application E145 of 2021) [2022] KEHC 12162 (KLR) (Commercial and Tax) (22 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12162 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS CIVIL APPLICATION E145 OF 2021

DAS MAJANJA, J

AUGUST 22, 2022

BETWEEN

TITUS MAKHANU & ASSOCIATES ADVOCATES ..... ADVOCATE

AND

ALICATE HOLDINGS LIMITED ..... CLIENT

RULING

1. Before this court are two references brought under paragraph 11 of the *Advocates Remuneration Order* ("the order") which relate to the ruling of the Deputy Registrar dated November 18, 2021 ("the ruling"). The Deputy Registrar assessed the costs at KES 1,524,416.77 and deducted a sum of KES 1,100,000.00, being legal fees already paid and made an award of KES 414,416.77. The Deputy Registrar taxed off KES 39,686,284.43 against a total of KES 40,100,701.20 in the Advocate-Client bill of costs dated February 22, 2021 ("the bill of costs").

2. The bill of costs was drawn by Titus Makhanu & Associates Advocates ("the Advocates") against Alicate Holdings Limited ("the client"). It is not in dispute that the Advocates represented the client in arbitration proceedings before JB Havelock ("the Arbitrator") who dismissed the entire claim.

3. The client filed the reference dated November 30, 2021 while the Advocates filed the one dated December 6, 2021. Both references prayed that the ruling be set aside on account of the findings on instruction fees. The references were canvassed by way of written submissions.

4. Since the matter concerns mainly instruction fees, it is important to appreciate, albeit briefly, the case that is subject of the taxation. The claim before the Arbitrator concerned a shareholder's agreement dated June 28, 2012 between the client on one hand and the respondents, Tandala Investments Company Limited, Hamerpop Investments Company Limited and Trogon Investments Limited

concerning the purchase of shares in Fidelity Shield Insurance Company Limited. In its statement of claim, the client sought, *inter alia*, the following reliefs;

1. A declaration that the respondents are in breach of the shareholder's agreement by their failure, refusal and or neglect to honour the put out option exercised by the claimant;
2. An order of specific performance;
3. An Award of KES 745,456,000/- being the put out option price that is due and payable to the claimant in the manner stipulated in the agreement.

The respondents opposed the claim and sought its dismissal. After hearing the claim, the Arbitrator held that the client had not made out a case and accordingly dismissed the claim with costs.

Client's Reference

5. The client's reference is supported by the affidavit of its director, Abdulali Kurji, sworn on November 30, 2021. The client's case is that KES 500,000.00 awarded by the Deputy Registrar as instruction fees and the total sum of KES 1,524,416.77 was excessive since the legal fees for the arbitration had been agreed at KES 1,100,000.00 at the commencement of the arbitration proceedings. The client urged the court to not only set aside the ruling of the Deputy Registrar but also dismiss the bill of costs.

6. The Advocates opposed the reference through the replying affidavit of its advocate, Titus Makhanu, sworn on April 10, 2022. They urged that the amount awarded was inordinately low taking into account the value of the subject matter which could be ascertained from the pleadings filed in the arbitration proceedings, a previous ruling dated November 18, 2021 in HC Comm Misc No E147 of 2021, *Titus Makhanu and Associates Advocates v Southern Shield Holdings Limited* which is a related matter and where the Advocates were awarded KES 6,670,050.00 based on the case filed in the High Court and the voluminous documents filed by the parties. The Advocates denied that there was any agreement that the fees payable for this and related matters would be KES 1,100,000.00. The Advocates urged the court to dismiss the client's reference.

Advocates' Reference

7. The Advocates' reference is supported by the affidavit of Titus Makhanu sworn on October 6, 2021. They seek to set aside the ruling on the basis that the award was inordinately low as the Deputy Registrar failed to take into account and ascertain the value of the subject matter. They disputed the claim that the amount of KES 1,100,000.00 paid by the client during the arbitration proceedings, was sufficient to cover the whole claim from the High Court, the mediation and arbitration proceedings as the instructions in each case were separate and distinct and that they were entitled to charge each instruction separately. It therefore urged the court to allow its reference. The grounds urged by the Advocates mirrored those set out in opposition to the client's Reference. They urged the court to refer the matter back for taxation as the Deputy Registrar failed to appreciate the value of the subject matter based on the pleadings before the arbitral tribunal.

Preliminary Objections

8. Before I deal with the substance of the references, I propose to dispose of the Advocates' preliminary objections dated February 25, 2022 and June 3, 2022 respectively. The thrust of these objections is that the deponent of the affidavit sworn on behalf of the client, Abdulali Kurji and the firm of Kinyua Mwaniki & Co., Advocates acting on behalf of the client is that they do not have the client's written authority executed in accordance with section 37 of the *Companies Act*, 2015 which provides as follows:

37. Execution of documents

(1) deleted by Act No 1 of 2020, s 30.

(2) A document is validly executed by a company if it is signed on behalf of the company—

(a) by two authorized signatories; or

(b) by a director of the company in the presence of a witness who attests the signature.

9. In this case, Abdulali Kurji (''Kurji'') has executed the several affidavits on behalf of the client in his capacity as director. Though the Advocates claim that Kurji has not presented any evidence to show that he is director, they have also not provided any evidence to the contrary. Under section 107(1) of the *Evidence Act* (chapter 80 of the Laws of Kenya), he who asserts must prove. Further, it is not lost to this court that this matter arises from an Advocate-client relationship where the Advocates cannot be ignorant of the client's affairs including its directors. Under section 112 of the *Evidence Act* they also have the burden of proving or disproving facts within their knowledge. Further, if the court were to inquire into whether Kurji is a director, it would have to consider evidential matters which would fall outside the province of a preliminary objection as it is trite law that a preliminary objection is based on pure questions of law or uncontested facts (see *Mukisa Biscuits v West End Distributors Limited* [1960] EA 701).

10. Since Kurji's position as a director is not disputed, it means that he has authority to give evidence through an affidavit on behalf of the client as he is an agent of the client. In this respect, I adopt the sentiments of the Court of Appeal in *Makupa Transit Shade Limited and Another v Kenya Ports Authority* MSA CA Civil Appeal No. 44 of 2014 [2015] eKLR where it observed as follows:

> "In our view, the authority, as with other corporate bodies, has its affidavits deponed on its behalf by persons with knowledge of the issues at hand who have been so authorised by it. It was therefore sufficient for the deponents to state that "they were duly authorised." It was then upto the appellants to demonstrate by evidence that they were not so authorised."

11. On a similar issue, the Court of Appeal in *Spire Bank Limited v Land Registrar & 2 others* MSA CA Civil Appeal No 52 of 2018 [2019] eKLR held as follows:

> "It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company's seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized." (Emphasis mine)

12. Since the Advocates have not discharged their burden to show that Kurji is not a director of the client, the objection is dismissed. Likewise, an advocate on record for a party acts as an agent for that party. In the absence of any evidence that the Advocates do not have any instructions or are not so authorized, the court cannot entertain a challenge by a third party, in this case, the Advocates.

13. Finally, I do not read section 37 of the *Companies Act*, 2015 to provide that a document executed on behalf a company outside the confines of the said provision is invalid in all cases. In this instance, the issue at hand concerns an affidavit which is regulated by specific provisions of the *Oaths and Statutory Declarations Act* (chapter 15 of the Laws of Kenya) and the *Civil Procedure Rules*. Further, there is nothing in the aforesaid provision that prevents or prohibits a company from acting through its agents.

Analysis and determination

14. The substantive issue for determination concerns the findings by the Deputy Registrar on instruction fees. The parties are agreed that the applicable schedule is schedule 6 of the order and in resolving the matter, this court is guided by the principle clearly elucidated by the Court of Appeal in *Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR that, "On 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."

15. In arriving at instruction fees under schedule 6 Part A 1 (b) of the *order*, 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 to determine the instruction fee. This is the position established in *Joreth Ltd v Kigano & Associates* CA Civil Appeal No 66 of 1999 [2002] eKLR cited by both parties. 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 same principles 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]

16. The inquiry before the Deputy Registrar was whether the value of the subject matter could be ascertained from the pleadings, judgment or settlement. The Deputy Registrar held that since Arbitrator found the value of the shares to be lower than KES 745,456,000.00, the value of the subject matter could not be determined from the pleading. The Deputy Registrar observed as follows:

    The issue of the value of the shares was considered by the arbitrator in paragraph 74 to 76 of the award wherein the Arbitrator noted that,

    Further the claimant would seem to have ignored the second part of sub clause 1.1.36 as underlined above for it has clearly taken the value of the Put Option shares as numbering 751,131 and not

1,500,000.00. If it had been the latter figure the calculation of the option price would have been different. Taking into account the formula in clause 12.5 of the agreement, the price for the option shares (assuming such were 1,500,000 on offer) would be much lower than the calculations put forth by the claimant taking into account the current share capital of Fidelity Insurance of Kshs 600,000,000.00.

Whereas the Arbitrator did not calculate the value of the shares he did find that the calculations by the claimant would be much lower than the Kshs 745,456,000.00 The arbitrator finally held that the claimant was not entitled to the reliefs sought in the statement of claim and dismissed the entire claim. From the above it is evident that the value of the subject matter is not Kshs 745,456,000.00 and thus the same cannot be determined from the pleadings. It is left for this court to use its discretion.

17. Having come to the conclusion that the value of the subject matter could not be ascertained from the pleadings, the Deputy Registrar turned to tax the Bill of Costs under Schedule 6 Part A of the *Order* under the heading of 'Other matters' which provides, ''to sue or defend in matters not provided for above, such sums as may be as reasonable but not less than; if undefended KES 45,000.00 and if defended KES 75,000.00." The Deputy Registrar therefore adopted the sum of KES 75,000.00 which she increased to KES 500,000.00 due to the nature of the claim and the voluminous documentation filed in the matter.

18. I have considered whether the parties' arguments on whether the Deputy Registrar erred in coming to the conclusion the subject matter could not be ascertained in the manner provided by schedule 6 Part A 1 (b) of the *order*. In this instance, the matter was not settled and it cannot be disputed that the value of the subject matter could not be ascertained from the judgment as the arbitrator did not make any finding on the value of the subject matter. The question then is whether the statement of claim set out the value of the subject matter.

19. It must be recalled that what was before the Deputy Registrar was an Advocate-client bill of costs where the client had instructed advocates to lodge a claim seeking, *inter alia*, an award of KES 745,456,000.00. The basis of this figure was based on the client's put option notice dated May 31, 2019 requiring the other shareholders to collectively purchase all the shares held in Fidelity Shield Insurance Company Limited. The put option notice put the price of the shares at KES 745,456,000.00. This figure was confirmed by Kurji in his witness statement dated February 6, 2020 filed before the arbitral tribunal. In light of specific instructions to the Advocates to lodge a specific claim on its behalf, can the client now claim that the value of the subject matter cannot be ascertained? I agree with the Advocates that the client is estopped from denying that the value of the subject matter which it so clearly affirmed in its own pleadings and evidence before the arbitral tribunal cannot be ascertained from the said pleadings. The Deputy Registrar therefore erred in failing to consider the fact that the client put the value of its own claim at KES 745,456,000.00. This is the value of the claim that the client instructed the Advocates to prosecute on its behalf and the value that was pleaded in the statement of claim. Absent a settlement or judgment and whether the claim was successful or not is irrelevant as the value of the subject matter can be determined from the pleadings specifically the statement of claim approved by the client.

20. The next issue for consideration is whether the client is entitled to a credit for KES 1,100,000.00 allegedly paid to the Advocates. On this issue the Deputy Registrar held as follows:

The respondent has provided a bank statement dated August 31, 2020 from Prime Bank which shows the firm of Titus Makhanu was paid Kshs 1,110,000.00 which indicates Titus Makhanu advocate was paid Kshs 1,110,000.00 which payment the applicant indicated it may have been used to cover its arbitration fees.

21. The client argues that the amount was agreed upon at the commencement of the arbitration proceedings was sufficient for all the legal services rendered. The Advocates rebut this contention on the basis that there is no evidence furnished to support the client's contention and further that the amount could not be applied to all the cases as they were all separate and distinct proceedings being the High Court, mediation and arbitration.

22. It is evident that the Deputy Registrar did not consider or interrogate the basis upon which this amount was paid and came to a wrong finding. The bank statement relied on is not even clear whether or not the amount was to cover the full legal fees for the arbitration proceedings. The conclusion by the Deputy Registrar that, "it may have been used to cover its arbitration fees," was an ambivalent, if not a vague finding. The duty of the Deputy Registrar is to consider the evidence and submissions placed before the court and make specific findings. It is not the duty of the court exercising appellant jurisdiction to make a decision which the Deputy Registrar ought to have made. In the circumstances, this decision cannot be supported and it is set aside.

23. In conclusion, I hold that the Deputy Registrar erred in failing to tax the instruction fees based on the amount ascertained in the statement of claim before the arbitral tribunal in accordance with schedule 6 Part A 1 (b) of the *order*. I also hold that the Deputy Registrar failed to consider whether the client should be given credit for KES 1,100,000.00 paid by the client to the Advocates on the basis of the material submitted by the parties.

24. For the reasons I have set out above, I now make the following orders:

    a. I allow the references dated November 30, 2021 and December 6, 2021 with the effect that the ruling of the Deputy Registrar dated November 18, 2021 be and is hereby set aside.

    b. The bill of costs dated February 22, 2021 shall be taxed afresh before any other Deputy Registrar other than hon S Githongori, Deputy Registrar.

    c. Each party to bear its own costs.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF AUGUST, 2022.

D.S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Makhanu instructed by Titus Makhanu and Associates Advocates for the Applicant/Advocates.

Mr Wainaina instructed by Kinyua Mwaniki and Wainaina Advocates for the Respondent/Client.