



Giro Commercial Bank Limited v Benlucks (K) Limited & 2 others (Commercial Case 478 of 2004) [2022] KEHC 13262 (KLR) (Commercial and Tax) (30 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13262 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 478 OF 2004
DAS MAJANJA, J
SEPTEMBER 30, 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. The defendants have moved the court by the chamber summons dated June 29, 2022 (“the reference”) filed under rule 11(2) of the *Advocates Remuneration Order* (“the order”) seeking to set aside the decision of the deputy registrar dated June 17, 2022 (“the ruling”) in respect of the defendant’s party and party bill of costs dated October 1, 2019 (“the bill of costs”) arising out of this suit (“the suit”).
2. The reference is supported by the affidavit of Leroy Misaro, the defendants’ advocate, sworn on June 29, 2022. It is opposed by the plaintiff through the affidavit of its advocate, Leonard Githua, sworn on September 20, 2022.
3. The parties made brief oral submissions in support of their respective positions regarding the decision of the deputy registrar on the instruction fees. in the ruling, the deputy registrar stated as follows:

The matter was dismissed for want of prosecution by Justice Riechi on June 17, 2015 and the Court of Appeal affirmed the ruling of the High Court in HCCA 89 of 2018 on July 19, 2019. The value of the subject matter (determined from the pleadings) is ksh 26,341,614.37. The basic instruction fee pursuant to schedule 6(1)(b) and arc of 1993 is ksh 345,124.25.



The matter was dismissed for want of prosecution that the instruction fee is reduced by 75% pursuant to schedule 1(b) to ksh 258,843.18. Item 1 is taxed at ksh 258,843.18.

4. The defendants complain that the deputy registrar erred in principle in failing to take into account the fact that the suit was not dismissed for want of prosecution but was dismissed for failure by the plaintiff to attend the hearing when the matter had indeed been fixed for hearing. Counsel urges that the fee awarded was manifestly low given the fact that the defendants had prepared for hearing and the matter had indeed been fixed for hearing.
5. The plaintiff supports the ruling and submits that the deputy registrar considered all relevant factors including the value of the subject matter. It submits that the suit was dismissed for want of prosecution as affirmed by the decision of the Court of Appeal in an appeal arising from the court decision setting aside the dismissal order.
6. 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). The substance of the defendants' complaint is that the deputy registrar erred in principle in relying on schedule 6a 1(b) of the order which states as follows:

1(b) To sue or defence in a suit in which the suit is determined in a summary manner in any manner whatsoever without going to full trial the fee shall be 75% of the fess chargeable under Item 1(b). [Emphasis mine]
7. The defendants' position is that the suit was dismissed after it had been fixed for hearing hence the provision does not apply. Although the court had dealt with interlocutory issues, thereafter no step was taken in the matter causing the court to issue a notice to dismiss the suit for want of prosecution under order 17 of the *Civil Procedure Rules*. The matter came before Riechi J, on June 17, 2018 who confirmed that no action having been taken in the file for a period of 3 years and there being no explanation offered for the inordinate delay, proceeded to dismiss the suit under order 17 rule 2 of the *Civil Procedure Rules*.
8. The question then is whether in the circumstances of the case, the suit was determined in a summary manner without going to full trial. From the record, the matter did not go to full trial. Although the matter had been listed for hearing previously, it did not proceed for trial. In fact, the last action by the parties was in respect of particulars requested by the defendants and the matter was listed before Musinga J., from time to time to confirm compliance with order for particulars until it fell off the radar. It did not therefore proceed for trial and was dismissed by the court on its own motion by notice to the parties. The suit was therefore dismissed summarily in terms of schedule 6a 1(b) of the *order* hence the basic instruction fee had to be discounted by 25%. i therefore find and hold that the deputy registrar did not err in principle in applying the relevant provision of the order.
9. The chamber summons dated June 29, 2022 lacks merit and is accordingly dismissed. The defendants shall pay the costs of the application assessed at kshs 15,000.00.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 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.

