



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CORAM: D. S. MAJANJA J.
MISC. CIVIL APPLICATION NO. 299 OF 2017

BETWEEN

MUMIAS SUGAR COMPANY LIMITED.....APPLICANT/CLIENT

AND

PROF. TOM OJIENDA & ASSOCIATES

ADVOCATES.....RESPONDENT

RULING

Introduction and Background

1. This cause was commenced by the Advocate Client Bill of Costs dated 11th November 2017, in which the Advocates sought KES 642,969,743.00 as legal fees for services rendered by it in arbitration proceedings between the Client (“the Company”) and Mumias Outgrowers Limited. The Bill of Costs was taxed by the Deputy Registrar and by a ruling dated 29th May 2020 certified KES. 92,076,824.30 as the amount due to the Advocates. The Company has challenged the Deputy Registrar’s decision under **Rule 11** of the **Advocates Remuneration Order** (“the **Order**”) by the Chamber Summons dated 8th June 2020

2. The application is opposed by the replying affidavit of Prof. Tom Ojienda, the Respondent’s Managing Partner (“the Advocates”), sworn on 19th October 2020. The reference was canvassed by way of written submissions.

3. At the hearing of this matter, the parties agreed to deal with the issue of instruction fees only. On this issue, the Deputy Registrar, in the ruling dated 26th May 2020 held that the Advocates having taken over the conduct of the matter were only entitled to fees for work done as the previous advocates earned fees. The Deputy Registrar then proceeded to base the instruction fees, not on the claim filed against the Company, but on the Amended Counterclaim claiming KES 3.5 billion from the Claimant and which the Advocates filed. The Deputy Registrar assessed the instruction fee at KES. 52,185,000.00.

Issues for Determination

4. From the submissions and depositions, two issues fall for determination. First, whether the Deputy Registrar applied the proper schedule of the **Order** in assessing the instruction fee. Second, whether the Advocates were entitled to the instruction fees awarded by the Deputy Registrar after taking over the matter from a previous advocate on record.

5. In dealing with this matter, it is important to recall the principle guiding this court summarised in several decisions including **Joreth Limited v Kigano & Associates NRB CA Civil Appeal No. 66 of 1999 [2002] eKLR** where the Court of Appeal stated as follows:

We have found that the learned judge erred in reassessing the instruction fee and we have also found that the taxing officer applied correct principles in arriving at the figure of instruction fee that he awarded. What the learned Judge did not appreciate was that sitting on a reference against the assessment of instruction fee by the taxing officer he ought not to have interfered with the assessment of costs unless the taxing officer had misdirected himself on a matter of principle.

Applicable Schedule of the Advocates Remuneration Order

6. In *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005] 1 KLR 528, the Court of Appeal held that the failure to take into account relevant considerations may include failure to apply the instruction fees or costs as provided in “the appropriate schedule of the Remuneration Order”. It is not in dispute that the Deputy Registrar applied **Schedule 6** of the **Order** in taxing the Bill of Costs.

7. The thrust of the Company’s case is that the Bill of Costs related to the proceedings before an Arbitral Tribunal hence taxable under **Schedule 11** of the **Order** which provides for, “*COSTS OF PROCEEDINGS BEFORE TRIBUNALS OTHER THAN THOSE UNDER SCHEDULES 8 AND 9 OF THIS ORDER EXCEPT WHERE OTHERWISE PRESCRIBED UNDER THE ACT SETTING UP THE TRIBUNAL.*” In effect the Company argues that the arbitral proceedings are not covered by **Schedule 6** of the **Order** which relates to proceedings before the High Court.

8. Counsel for the Company further submits that arbitration qua arbitration is not a proceeding under the **Arbitration Act** but proceedings before an “Arbitral Tribunal” which is defined under **section 3** thereof as, “a sole arbitrator or a panel of arbitrators.” Such a Tribunal, it is argued is not the High Court. Counsel also discounted the application of the **Schedule 6** of the **Order** to proceedings before the Arbitral Tribunal by reason of **Rule 10(2)** of the **Arbitration Rules** and submitted that it only applies to proceedings under provisions of the **Arbitration Act** itself. **Rule 10(2)** provides that, “All fees for any proceedings under the Act shall be calculated in accordance with the scale of fees applicable to the High Court.”

9. While I find the Company’s argument attractive, I am unable to accept it. The Company’s argument before the Deputy Registrar as set out in its written submissions was that, “[T]he Schedule Applicable is Schedule 6 of the Advocates (Remuneration)(Amendment) Order, 2014.” The Company relied on **Rule 10(2)** of the **Arbitration Rules** to support its case and went ahead to cite the following decisions; *Nyaundi Tuiyott and Company Advocates v Tarita Development Limited* ELD HC Misc. Appl. No. 36 of 2011 [2016] eKLR and *Lubullelah and Associates v N. K. Brothers Limited* NRB Misc. Appl. No. 52 of 2012 [2014] eKLR where it was held that **Schedule 6** of the **Order** was the appropriate scale for taxing fees in arbitral proceedings by reason of **Rule 10(2)** of the **Arbitration Rules**. The Advocates in their written submissions relied on and submitted their claim for fees on the basis of **Schedule 6** of the **Order**.

10. Having submitted before the Deputy Registrar that **Schedule 6** of the **Order** was applicable schedule for taxation, the Company cannot turn around and submit that the Deputy Registrar committed a fundamental error when the issue of the applicable schedule was neither disputed nor raised. A reference from a taxation is in the nature of an appeal and it is settled that, “a party cannot be allowed to raise a new issue and canvass the same before an appellate court.” (see *Political Parties Forum Coalition & 3 others v Registrar of Political Parties & 8 others* NRB CA Civil Appeal No. 80 of 2014 [2016] eKLR).

11. Since both parties agreed that **Schedule 6** of the **Order** was applicable to the taxation of the Bill of Costs, the Deputy Registrar did not err by proceeding on that basis since there was no dispute. This ground of the reference is dismissed.

The Instruction fees

12. Turning to the issue of instruction fees, the Company complains that the Advocates did not annex the complete set of pleadings filed by the parties before the arbitral tribunal to the Bill of Costs in order to inform the Deputy Registrar of the work they undertook based on those pleadings. The Company therefore submits that the conclusion by the Deputy Registrar that the Advocates were entitled, “to instructions on the amended Counter-claim which he had instructions to amend to Kshs. 3.5 Billion. The instruction fees on this amount is Kshs. 52,185,000.00” is premised on suppositions and conjecture as there were no pleadings before the court.

13. The Company also complains that Deputy Registrar failed to consider that the Advocates took over the conduct of the arbitration proceedings from another firm. It submitted that the Advocates took over the arbitration from the firm of *Hamilton Harrison & Mathews Advocates* (“HHM”) in late 2014. That HHM had already exhausted instruction fees as they are the ones who filed pleadings hence Advocates could not earn instruction fees for a second time. Counsel added that the Advocates were only entitled to be paid any fees for familiarizing themselves with the Statement of Defence, Set-off and Counter-claim and the Claimant’s pleadings on time expended and fair value of compensation for that task and not the instruction fees the Deputy Registrar awarded. In short, the Company contends that the bill shall not be larger than if a single advocate had been employed and in this case, the Advocates were instructed subsequently hence they cannot claim instruction fees as if they were the primary advocates. Counsel cited the case of *Kenyariri & Associates Advocates v Salama Beach Hotel & 4 Others* ELC MLD Misc. Appl. No. 16 of 2013 [2014] eKLR where the court held that the advocate who took over the matter from the previous advocate was not entitled to instruction fees in respect of the suit and was only entitled to fees paid for work done.

14. The Company complains that Deputy Registrar failed to consider and apply the principle that in awarding costs for the counterclaim, the Advocates were only entitled to costs occasioned by the counterclaim not full instruction fees. Counsel cited the cases of *A.H Malik & Co. Advocates v Mavoloni Company Limited* H.C Misc. Application No. 1114 of 1995 Nairobi (UR) and *Musoke v Dol* [1963] EA 527 and *D’Silva v Rahimtulla* [1967] EA 423 which he submitted were binding in that regard.

15. Counsel for the Company urged the court to set aside the entire ruling of the Deputy Registrar and remit the Bill of Costs for taxation before another Taxing Officer

16. In opposing the reference, the Advocates contend that their claim for instruction fees was subject to the Amended Counterclaim they prepared in response to the claim of KES. 7.6 Billion raised by Mumias Outgrowers Company Limited as monies owed to them by the Company. The Advocates added that it is this Amended Counterclaim as drawn by them that is the basis for claiming instruction fees from the Company and had they not drawn up the said Counterclaim then the value of the subject matter would not have reduced from KES 7.6 Billion to KES 3.5 Billion.

17. The Advocates reject the Company’s contention that they are not entitled to instruction fees merely because they took over conduct of the matter from the firm of HHM. Counsel for the Advocates cited the case of *N.O Sumba & Co. Advocates v Piero Cannobio* MLD Misc.

Civil Appl. No. 5 & 6 of 2015 [2017] eKLR where the court held that an advocate is entitled to instruction fees upon instruction even if only minimal work is done. In its view, the point of taking instruction was immaterial.

18. The Advocates thus submit that the Deputy Registrar did not err in principle and law by taxing their instruction fees at KES 52,185,000.00 as this was premised on the material facts in the Bill of Costs. The Advocates rebuffed the contention by the Company that the figure was baseless stating that the Amended Counterclaim Sought the value of KES. 3.5 Billion. The Advocates further urge that the Deputy Registrar only awarded the Advocates half the instruction fees hence the reference should be dismissed.

19. The Deputy Registrar accepted the *dicta* in **Kenyariri & Associates Advocates v Salama Beach Hotel & 4 Others (Supra)** where Angote J., held as follows:

*I am in agreement with the reasoning and the award by the taxing officer. Instruction fees is only paid to an advocate in respect to the work done. Having not drawn the Plaintiff in Malindi HCCC No.118 of 2009, the Applicant is not entitled to the instruction fees in respect to the suit. As was held in the case of **First American Bank of Kenya vs Shah & Another (2002) 1 EA 64**, an advocate becomes entitled to full instruction fees to defend a suit the moment a defence is filed and the subsequent progress of the matter is not relevant. The same reasoning applies to the filing of a Plaintiff. The advocate who draws a Plaintiff is the one entitled to the full instruction fees notwithstanding the progress of the matter. The subsequent advocates can only be paid for the actual work done.*

20. Having accepted the Company's position, the Deputy Registrar then proceeded to base the instruction fees on the Amended Counterclaim which the Advocates prepared and filed. The Company complains that in light of the decision in **A.H Malik & Co. Advocates v Mavoloni Company Limited (Supra)**, the Advocates were not even entitled to nominal fees being extra costs occasioned by the counterclaim as the Amended Counterclaim only reduced the amount claimed from KES 7,655,298,254.00 to KES 3,469,296,710.00 which the Deputy Registrar held to be the value of the subject matter.

21. Although the Deputy Registrar accepted the Company's position, the preponderance of authority including the case cited by the learned Judge support the position that an advocate is entitled to full instruction fees once instructed. In **Mayers & Another v Hamilton & Others [1975] EA 13** Spry Ag. P. held set out the position as follows:

I accept that the moment an advocate is instructed to sue or defend a suit, he becomes entitled to an instruction fee but it is only necessary to look at the concluding words of the particulars of the instruction fee in the bill of costs now in issue - "considering most difficult and conflicting case-law on the matter" - to realise that an advocate will not ordinarily become entitled at the moment of instruction to the whole fee which he may ultimately claim. Suppose, for example, that within a few minutes of receiving instructions to defend a suit, an advocate was informed that the Plaintiff had decided to withdraw. The advocate, as I see it, would be entitled to claim the minimum instruction fee but he could not properly claim in respect of work he had not done. The entitlement under the instruction fee grows as the matter proceeds.

22. Waweru J., elucidated the same position in **Kenya Tea Development Agency Limited v J. M. Njenga & Co., Advocates ML HC Misc. Appl. No. 6161 of 2006 [2008] eKLR** as follows:

[A]n advocate can charge only for the work he has done. He cannot charge for the work done by a previous advocate in the matter.

But having said that, a new advocate coming onto a matter somewhere in the middle of the proceedings in the High Court will be entitled to the full instruction fee prescribed in Part A of Schedule VI of the Order subject to the taxing officer's discretion to increase or (unless otherwise provided) reduce it, and as augmented by the formula in Part B (increase by one-half). A client who changes advocates in the High Court therefore can expect to pay the full instruction fee as many times as he pleases to change advocates, notwithstanding that he can recover only one instruction fee in a party and party taxation, unless there is a judge's certificate for more than one counsel.

23. In light of the aforesaid decisions and the principle that an advocate is entitled to full instruction fees upon taking over the conduct of the matter, the proper approach to determining instruction fees in this case is to consider the value of the subject matter based on the pleadings. If the counterclaim does not involve or raise issues that are substantially different from those in the main claim, then the basis of the instruction fees would be the instruction fees on the main claim and additional costs of the counterclaim. To this basic fee, the Deputy Registrar would be entitled exercise discretion to increase the fee based on the work done.

24. Before I conclude, the Company's submission that the Advocates did not annex to the Bill of Costs the full set of pleadings before the arbitral tribunal merits consideration. **Para. 69 and 70** of the **Order** provides for the manner of preparation and filing bills for taxation. A party filing a bill of costs is not required to accompany the bill with supporting documents. Indeed, this position is confirmed by **Para. 13A** of the **Order**, where the taxing officer has the power and authority to summon and examine witnesses, to administer oaths, to direct production of books, papers and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute. In addition, **Para. 74** of the **Order**, receipts and vouchers shall be produced if required by the taxing officer.

25. I hold that it was not necessary for the Advocates to file all the pleadings and documents in the arbitration. In this instance, there was no dispute that there was in fact an arbitration. There was no dispute about the value of the subject matter and the course of proceedings before the arbitrator including the fact that the Advocates prepared and filed an Amended Counterclaim. Nothing for determination turned on the nature of dispute. The Company was entitled to produce all the documents in its replying affidavit or apply to the Deputy Registrar to order the Advocates to produce any documents necessary to resolve the matter. I therefore dismiss the Company's contention that the taxation was based on conjecture.

26. In conclusion, the Deputy Registrar based the instruction fees on the Counterclaim yet the Advocates were entitled to fees for defending the main claim and prosecuting the Counterclaim. The instruction fee due to the Advocates would be equal to the instruction fee awarded to the Company for the Amended Counterclaim as both claim KES 3.5 billion. Since the Advocates did not file a reference against the decision

of the Deputy Registrar, no purpose will be served by returning the matter for re-taxation.

Conclusion

27. Based on the grounds raised by the Company in its reference and for the reasons I have given above, I now dismiss the Chamber Summons dated 8th June 2020 with costs to the Advocates.

DATED and DELIVERED at NAIROBI this 24th day of FEBRUARY 2021.

D.S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Kisaka instructed by Wekesa and Simiyu Advocates for the Client/Applicant.

Mr Ochieng with him instructed by Prof. Ojienda and Associates Advocates for the Respondent.