



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. E229 OF 2019

BETWEEN

RACHUONYO & RACHUONYO ADVOCATES.....APPLICANT/ADVOCATES

AND

NATIONAL BANK OF KENYA LIMITED.....CLIENT/RESPONDENT

RULING

Introduction and Background

1. It is common ground that the Applicant (“the Advocates”) represented and defended the Respondent/Client (“the Bank”) at the Court of Appeal in *David Kihara Gitonga & Another v National Bank of Kenya Limited & 5 Others NRB CA Civil Appeal No. 19 of 2017* (“the Appeal”). The Advocates filed an Advocate-Client Bill of Costs dated 13th June 2019 which was amended on 14th November 2019 where they sought legal fees and disbursements amounting to Kshs. 3,021,775.59.

2. The Amended Bill of Costs was considered by the Deputy Registrar who delivered the ruling dated 24th September 2020 holding, in part, as follows:

I have considered the nature of the case and the interest of the parties. The appeal was against a ruling on an application and not a final judgment. The main subject matter was the properties being land which in my view hold a lot of interest for the parties involved. The value of the suit property was Kshs. 60,000,000/-. The amount of preparation that was put in place to defend the appeal and I use my discretion and enhance the instruction fees to Kshs. 300,000/-

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The bill of costs is summarily taxed as follows

Costs Kshs. 538,310/-

50% increase Kshs. 269,155/-

16% VAT Kshs. 129,194.4/-

Disbursements Kshs. 525/-

The bill of costs has been taxed at Kshs. 937,184.4 amount taxed off is Kshs. 2,084,591.19

3. The Advocates are dissatisfied with the holding by the Deputy Registrar and have filed the Chamber Summons application (“the Reference”) dated 15th October 2020 under **Rule 11** of the *Advocates Remuneration Order, 2009* (“the **Order**”) seeking, inter alia, that the decision by the Deputy Registrar be set aside and the court refer the matter back to the Deputy Registrar with appropriate directions on the

principles for assessment on the instructions and getting up fees being items numbers 2 and 66 of their Amended Bill of Costs dated 14th November 2019.

4. The Reference is grounded on the facts set out on its face and supported by the affidavit of Clifford Owuor Rachuonyo, and advocate and partner in the Advocates' firm sworn on 15th October 2020. It is opposed by the Bank through the replying affidavit of Eustace K. Nyaga, an advocate, sworn on 10th December 2020 together with a Notice of Preliminary Objection of the same date. The Reference was canvassed by way of written submissions with the parties advancing their respective positions.

The Advocates' Reference and Submissions

5. The Advocates submit that the Deputy Registrar, having correctly identified **Rule 111(3)** the **Court of Appeal Rules (2010)**, as the appropriate provision governing taxation of an Advocate-Client Bill of Costs for remuneration of services rendered in an appeal filed in the Court of Appeal, erroneously proceeded to treat the subject taxation as if it were an appeal from the Subordinate Court to the High Court, by wrongly invoking the provisions relating to "Appeals" Clause (a) which provides that "to present or oppose an appeal in any case not provided for above, such sum as may be reasonable but not less than Kshs.25,200/=." That in so doing, the Deputy Registrar ignored the legal consequences of the said **Rule 111(3)** aforesaid which requires that an appeal to the Court of Appeal be treated as a "defended Suit" and therefore taxable under **Schedule 6B** of the **Order**.

6. The Advocates further fault the Deputy Registrar for ignoring the subject matter and its value and proceeding to treat the appeal as a matter whose value was incapable of being ascertained despite having correctly identified and set the value of the at Kshs. 60 million. Further, that the Deputy Registrar overlooked the identified value and proceeded, without setting up any justification, to tax the bill after ascertaining the value of the subject matter contrary to the **Order** which expressly precludes such a course.

7. The Advocates claim that the Deputy Registrar erred in taking into account extraneous and irrelevant factors namely that the appeal emanated from a decision on an interlocutory application and not a final Judgment without interrogating or examining the primary pleadings and the Memorandum of Appeal, to correctly determine the nature and legal consequences of the appeal, and the orders sought therein, inevitably resulting into a compounding of the errors. That in doing so, the Deputy Registrar failed to interrogate the foundation of the appeal, the Bank's defence and possible outcomes of the appeal, and their effect on the assessment of the claimed instruction fees.

8. The Advocates contend that the Deputy Registrar erred by holding that the appeal was from a mere ruling inside an ordinary application, and by implication, that instruction fees ought to be lower than instruction fees for a substantive appeal from a final decision. On the contrary, the Advocates submit, that the appeal was a substantive appeal from a decision of the High Court on an application seeking final orders on the question of reopening a concluded sale and for nullifying concluded sale transactions and also for setting aside registered transfers, in addition to other prayers seeking joinder of successive purchasers for value and interlocutory injunctive orders.

9. The Advocates state that the Deputy Registrar erred in considering and equating the substantive appeal to an interlocutory application filed in the Court of Appeal seeking interlocutory reliefs pending the main hearing of an appeal and further erred in principle and in law by failing to recognize that in taxation, all appeals, whether from an interlocutory decision or a final decision, are in law treated as suits, and taxed as such, the procedure, labour, care and skill involved being materially similar.

10. The Advocates contend that as a result of the error in calculating the instruction fees, their claim for Getting up fees and VAT thereon was also affected, being a fraction of the instruction fees awarded and consequently, the implied holding that the value of the subject matter had not been declared was erroneous, and ought to be set aside in its entirety.

The Bank's Reply and Submissions

11. The Bank raises a Preliminary Objection on the ground that the Reference has been filed outside the time allowed under **Rule 11(2)** of the **Order** without any application for the enlargement of time thus the court lacks jurisdiction to entertain it. The Bank contends that the Advocates ought to have filed their Reference on or before 9th October 2020 but it was filed electronically on 15th October 2020.

12. On the merits of the Reference, the Bank supports the decision of the Deputy Registrar. It submits that contrary to the Advocates' position, the Deputy Registrar did not commit any error in principle by treating, "the subject taxation as if it were an appeal from the Subordinate Court to the High Court" by wrongly invoking the provisions relating to 'Appeals' Clause (a) which provides that, "to present or oppose an appeal in any case not provided for above, such sum as may be reasonable but not less than Kshs.25,200/= ". The Bank submits that it is clear on the face of the Ruling that no such finding was made by the Deputy Registrar as contended by the Advocates.

13. The Bank supports the position that the correct and applicable scale fees for purposes of the taxation of Bill of Costs is the scale fees for the High Court as provided for by **Rule 111(3)** of the **Court of Appeal Rules, 2010** and that it was the Bank's case in the taxation proceedings before the Deputy Registrar that the Instruction Fees is provided for under **Schedule VI Part A** of the **Order** under the heading "Appeals" that is "to present or oppose an appeal in any case not provided for above; such sum as may be reasonable but not less than Kshs 25,200". The Bank argues that since this provision only provides the minimum amount below which costs cannot be charged for appeals, the maximum fees which would be due to the Advocates under this item would not exceed Kshs. 75,000.00 as provided for under **Schedule VI Part A** of the **Order** under the heading "Other Matters", that is, "To sue or defend in any case not provided for above; such sum as may be reasonable but not less than — (ii) If defended 75,000". The Bank submits that in the taxation proceedings that the correct and fair instruction fees to be charged for purposes of the appeal was Kshs. 75,000.00 and which amount was reasonable.

14. The Bank submits that its arguments on the Instruction Fees in the taxation proceedings before the Deputy Registrar were not accepted by the Deputy Registrar and that if the Deputy Registrar "invoked" the scale fees on Appeals under **Part A Schedule VI** of the **Order** then the Advocates would have been awarded either Kshs. 25,200.00 or any other fees not exceeding Kshs. 75,000.00.

15. The Bank rejects the Advocates' contention that the Deputy Registrar ignored the legal consequences of the said **Rule 111 (3)** which required her to treat an appeal to the Court of Appeal as a "defended Suit" taxable under **Schedule 6B** of the **Advocates' Remuneration Order** as contended by the Advocates and that even though the Deputy Registrar correctly adopted the parties' submissions that the said **Rule 111(3)** of the **Court of Appeal Rules** applied to the taxation of the Amended Bill of Costs, it did not automatically commend to itself that the Deputy Registrar ought to have applied the scale fees for a "defended suit" as alleged by the Advocates. The Bank states that this position has no basis as the Deputy Registrar was not required to treat the appeal as a "defended suit" and the only way that the scale fees for a "defended suit" under **Paragraph 2 Part V Schedule VI** of the **Order** could be applied in the determination of the Instruction Fees "to oppose an appeal" which is similarly provided for in this provision, was if the value of the subject matter was capable of being ascertained.

16. The Bank further states that the value of the subject matter in the appeal could not be ascertained from the Memorandum of Appeal dated 25th January 2017 and in view of the foregoing, the Deputy Registrar was correct in exercising judicial discretion on account of the subject matter and value thereof not being capable of being ascertained. In this respect, the Bank urges the court to follow the decision in **Rachuonyo & Rachuonyo Advocates v National Bank of Kenya Limited HC MISC No. 228 of 2019** and hold that that the scope of the Deputy Registrar's discretion in the assessment of the value and subject matter for purposes of the taxation of the instruction fees was limited to an examination of the Memorandum of Appeal filed in the appeal only. In the circumstances, the Bank urges that the Deputy Registrar was therefore correct to find and uphold that the appeal arose from the ruling of Ogola J., aforesaid on the application dated 14th July 2014 and amended on 3rd September 2014 which was filed in **HCCC No. 478 of 1998**, as clearly reflected on the face of the Memorandum of Appeal filed in the appeal. As such, the Deputy Registrar was not bound to interrogate and examine the primary pleadings filed in **HCCC No. 478 of 1998** for the reason that these pleadings had no nexus whatsoever with the appeal.

17. The Bank adds that the Memorandum of Appeal in the appeal does not disclose any ascertainable value whatsoever which would form the basis of the computation of instruction fees under **Paragraph 2 Part 2 Schedule VI** of the **Order** and that the Deputy Registrar did not err "in taking into account extraneous and irrelevant factor namely that the appeal emanated from a decision on an interlocutory application and not a final Judgment. The Bank contends that it was a factor which was well within the scope of factors that fell within the Deputy Registrar's discretion. In any event and without prejudice to the foregoing, **Rule 111(3)** still applied whether or not the appeal emanated from an interlocutory application and not a final Judgment on an application and not as a substantive appeal.

18. The Bank denies the Advocates' contention that the application filed in **HCCC No. 478 of 1998** which was the basis of the appeal was seeking, "final orders on the question of reopening a concluded sale and for nullifying concluded sale transactions and also for setting aside registered transfers" and that this position is misplaced and untenable. The Bank states that it is clearly reflected on the face of the said application that the applicants therein sought orders, inter alia, for other parties to be enjoined into that suit, together with other various injunctive reliefs. Therefore, the Bank holds that the Advocates ought not be allowed to purport to now add prayers through the Reference which were not sought for by the applicants therein in the said application to justify a purported error by the Deputy Registrar in the Ruling on this aspect.

19. The Bank submits that the Deputy Registrar did not err in "in considering and equating the substantive appeal to an interlocutory application filed in the Court of Appeal seeking interlocutory reliefs pending the main hearing of an appeal" and that no such finding was made in the Ruling in this regard. That the appeal was a substantive appeal from the ruling delivered by Ogola J., on 29th September 2015 on the application filed in **HCCC No. 478 of 1998** and the Bank reiterates that **Rule 111(3)** still applied whether the Deputy Registrar treated the appeal as an application and not as a substantive appeal.

20. The Bank submits that the Advocates have failed to demonstrate why this court should interfere with the decision of the Deputy Registrar. It maintains that the fees awarded to the Advocates are a fair reimbursement for the work done on its conduct on behalf in conducting the Appeal. The Bank cites **Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W'Njuguna & 6 others NRB Misc. Civil Application No. 621 of 2000 [2006] eKLR** to support the principle that in taxing a Bill of Costs, the Court is bound to endeavor to achieve objectivity by considering any interests which would be affected by the decision on taxation. In sum, it urges the court to dismiss the reference.

Analysis and Determination

21. I have gone through the rival pleadings and submissions of the parties and even though the Bank raised a technical issue of the Advocates filing the Reference out of time and therefore calling for the Reference to be struck out based in this ground, I find that no prejudice will be occasioned on either party if the court deals with the merits of the Reference. In any case, even if the court is to find that the Reference was filed out of time, it is my finding that a delay of six (6) days is not so inordinate to warrant the striking out of the Reference and that the balance of convenience and interests of justice tilts in favour of determining the reference on merit rather than competence.

22. The main issue for determination in the Reference is whether the Deputy Registrar erred in awarding the Instruction Fees as she did and whether this award consequently erred her awards on Getting Up Fees and VAT.

23. I do not think there is any dispute about the approach this court should take in dealing with a reference on assessment of instruction fees. The general principal is that the High Court will not normally interfere with the discretion of the taxing officer unless the Deputy Registrar has erred in principle (see **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR**). As regards the instruction fees, the Court of Appeal in **Peter Muthoka & Another v Ochieng & 3 Others [2019] eKLR** expounded on the principles in **Joreth Ltd v Kigano & Associates NRB CA Civil Appeal No. 66 of 1999 [2002] eKLR** and set down the proper basis of taxing the instruction fees 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.

24. It is not in dispute that the subject Bill of Costs arose from the Bank's instructions to the Advocates to defend the appeal and that it was the duty of the Deputy Registrar to determine the appropriate charging provision in light of **Rule 111(3)** of the **Court of Appeal Rules, 2010** which provides that remuneration of an advocate in an appeal in the Court of Appeal is guided by the rules and scales applicable to proceedings in the High Court. As the court observed in **Rachuonyo & Rachuonyo Advocates v National Bank of Kenya Limited (Supra)**, an appeal may be taxed under two provisions of the **Order**, that is, **Schedule 6A (b)** which provides for costs of proceedings in the High Court and in part '... to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgments or settlement between the parties'; and **Schedule 6** which also refers to "Appeals" under the heading "Other Matters". The former is applicable where the value of the subject matter can be ascertained from the pleadings, judgment or settlement. Where the value of the subject matter cannot be determined from the "pleadings, judgment or settlement between the parties" then recourse may be made to "Appeals" as the basis for determining the instruction fees.

25. The Deputy Registrar elected to apply **Schedule 6** under "Appeals" as the basis of determining the instruction fees hence I do not find any fault in this approach taken in identifying and applying the applicable charging provision. By applying this provision, the Deputy Registrar was of the view that the value of the subject matter could not be determined from the pleadings or judgment. Indeed, I have gone through the said Memorandum of Appeal dated 25th January 2017 which is the pleading available in the appeal and find that the same is prolix and that the value of the subject matter cannot be ascertained from it. In similar circumstances, the court in **Rachuonyo & Rachuonyo Advocates v National Bank of Kenya Limited (Supra)** observed as follows:

14. The bill of costs subject to this reference arose from instructions to defend an appeal. It is a matter of record that the appeal arose from the ruling and order of Ogola J., dated 29th September 2015. As the subject matter of the instructions was an appeal, it was the duty of the Deputy Registrar to determine the appropriate charging order in light of Rule 111(3) of the Court of Appeal Rules, 2010 which provides as follows:111(3) The remuneration of an advocate by his clients in respect of application or appeal shall be governed by the rules and scales to proceedings in the High Court.

.....

*19. The Deputy Registrar has the discretion to select the charging provision and provided it is exercised appropriately, this court will not intervene on a reference. In this case the Deputy Registrar was correct to observe that the appeal was from a ruling which dismissed two applications. In an appeal, the pleading is the Memorandum of Appeal (see **John Gakuo and Another v County Government of Nairobi and Another NRB CA (Application) No. 201 of 2016 [2017] eKLR**). From the record, it would appear that there is no judgment in respect of the appeal in **Civil Appeal No. 18 of 2017** and as such, the pleading is the document which would form the basis of determining the subject value in taxation.*

20. The Memorandum of Appeal dated 25th January 2017 is rather prolix but in short, it impugns the exercise of discretion by the High Court Judge. The Memorandum of Appeal does not make any reference to the value of the property. What is in issue and therefore the subject matter in the appeal is whether the Judge of the High Court correctly dismissed the application.

21. The Advocates have referred to the prayers in the motion and the pleadings before the High Court which make reference to the suit properties and their respective values to submit that the Deputy Registrar ought to have determined the subject matter based on for example, the pleaded value in the Amended Plaintiff. I reject this approach, as the pleading in the Court of Appeal is the Memorandum of Appeal. It speaks for itself and since it does not refer to any value of the subject matter, the Deputy Registrar was correct selecting the charging provision.

26. In this case, the Deputy Registrar stated in part that "The main subject matter was the properties being land which in my view hold a lot of interest for the parties involvedThe amount of preparation that was put in place to defend the appeal and I use my discretion and enhance the instruction fees to Kshs. 300,000.00". It follows that the Deputy Registrar considered the interest of the parties in respect of the suit properties and the amount of preparation put in place to defend the appeal to set the instruction fees at Kshs. 300,000.00. I find these reasons to be judicious and reasonable and I do not find any reason to interfere with this award of instruction fees and I am not satisfied that her decision was based on an error of principle, or the fee awarded was manifestly excessive or low as to justify interference.

27. Having found that the instruction fees as awarded by the Deputy Registrar is sound, it follows that the challenge mounted by the Advocates on the Getting up fees and VAT awarded which are consequential to the instruction fees cannot stand and ought to fail.

Disposition

28. In conclusion I hold that the Advocates' Reference dated 15th October 2020 lacks merit and is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JULY 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Amuga instructed by Amuga and Company Advocates for the Advocates/Applicant.

Ms Matunda instructed by Moronge and Company Advocates for the Client/Respondent.