



IN THE HIGH COURT OF KENYA

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. CIVIL APPLICATION NO. E207 OF 2019

CONSOLIDATED WITH

MISC. CIVIL APPLICATION NO. E1061 OF 2020

BETWEEN

INSURANCE REGULATORY AUTHORITY.....CLIENT/APPLICANT

AND

WAWERU GATONYE AND COMPANY ADVOCATES.....ADVOCATES/RESPONDENT

RULING

Introduction and Background

1. Before the court is the reference by the Applicant (“the Authority”) from the decision of the Deputy Registrar made under **Rule 11** of the **Advocates Remuneration Order** (“the **Order**”) brought by the Chamber Summons dated 26th May 2020. It is in respect of the ruling of the Deputy Registrar dated 12th May 2020 following taxation of an Advocate/Client Bill of Costs dated 3rd June 2019.
2. The application is supported by the affidavit of Godfrey Kiptum, the Commissioner of Insurance and Chief Executive Officer of the Authority, sworn on 26th May 2020. It is opposed by the replying affidavit of Charles Waweru Gatonye, an advocate and Senior Partner in the Respondent law firm (“the Advocates”), sworn on 16th September 2020. The reference was canvassed by way of written submissions.
3. The Advocates have also filed a Notice of Motion dated 25th August 2020 praying for judgment on the Certificate of Costs issued on 25th June 2020 certifying KES 262,990,246.00 as fees due to the Advocates based on **section 51(2)** of the **Advocates Act (Chapter 16 of the Laws of Kenya)**. The application is supported by the affidavit of Charles Waweru Gatonye sworn on the same day.
4. It is common ground that the Advocates represented the Authority in **John Kilel v Insurance Regulatory Authority and 2 Others HCCC 491 of 2013** (“the Suit”). The Deputy Registrar considered the parties’ depositions and rival submissions on the Bill of Costs which was for a total of KES 395,258,644.00/and by the ruling dated 12th May 2020, stated in part as follows on the instruction fees:

From the Plaintiff the value of the subject matter is Kshs. 12,075,289,826/-. The defence was filed and hence the instruction fees is to be paid. The instruction fee is calculated as follows:-

1st Million Kshs. 77,000/-

Next 19 million @ 1.5% Kshs. 285,000/-

Balance 12,055,289,826 @1.25% Kshs. 150,691,122.82

Total instruction fees is awarded at Kshs. 151,053,122.82”

5. It is this decision on instruction fees by the Deputy Registrar that is being challenged by the Authority and forms the substance of its

reference.

The Authority's Application and Submissions

6. The Authority's application is grounded on the facts that the award of instruction fees of KES. 151,053,122.82 is manifestly high and punitive in the circumstances, is without basis in law and is an unjust enrichment of the Advocates. The Authority submits that the Deputy Registrar ought to have borne in mind the provisions of **sections 1A and 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which require the court to ensure and facilitate just, expedient, proportionate and affordable resolution of civil disputes.

7. It submits that the Deputy Registrar exercised her discretion wrongly and erred in holding that the matter was of such great importance to the Authority and in considering the instruction fees, failed to consider that the matter had not proceeded for hearing since the Advocates who were defending the Authority withdrew from acting for it during the pre-trial stage.

8. The Authority further submits that there are manifest errors apparent on the face of the Taxation Ruling with respect to the sum allowed as Instruction Fees which if left to stand, would occasion great financial injury to the Authority at the tax payers expense should the Advocates seek to enforce. It adds that the amount awarded is manifestly excessive as to justify an interference of the Court and that it is in the interest of justice and public interest that this Reference be allowed.

9. Counsel for the Authority submitted that when it instructed the Advocates to defend the matter, they proceeded to prepare and file a Memorandum of Appearance, Statement of Defence, Defendant's List of Witnesses and List of Documents but that before the matter had been certified as ready for hearing, a dispute arose between the Authority and the Advocates over the legal fees payable where the parties could not agree and subsequently, the Advocates filed an application to cease from acting for the Authority which application was allowed.

10. Counsel for the Authority submits that the amount of KES 262,990,246,40 awarded to the Advocates is not only colossal but usurious bearing in mind that the suit is pending hearing and determination before the trial court. That since the Advocates ceased to act for the Authority, it was left with no choice but to look for an Advocate to represent it hence under ordinary circumstances, the advocate who took over from the Advocates would demand the settlement of their fees in full as provided for under the **Order**, therefore the Authority will be subjected to payment of the fees including the instruction fees twice, whereas it is a matter of principle that instruction fees is an independent and static item which is charged only once. Counsel relied on the cases of **Paul Ssemogerere & Olum v Attorney General - Civil Application No.5 of 2001 (UR)** and **Lion Insurance Company Ltd v Kasekende Kyeyune & Lutaya Advocates (MISCELLANEOUS APPEAL NO 358 OF 2013) [2013] UGCOMM 154 (6 September 2013)** in support of its position.

11. The Authority further submits that since the suit was yet to be heard, it would have been prudent to have a determination of the claim first before proceeding to assess the fees based on the figure that had been set out in the claim/pleadings. Counsel cited the decision of **Mayers v Hamilton [1975] EA 16** where the court stated that "... An advocate will not ordinarily become entitled at the moment of instruction, the whole fee which he may ultimately claim". In its view therefore, the Deputy Registrar's discretion in awarding the full instruction fees was exercised on a wrong principle that the full instruction fee to defend the suit was earned the moment the Advocates filed the Defence on behalf of the Authority. It urged that where an advocate withdraws from acting for the client before the determination of the suit, the advocate is not entitled to full instruction fees as this would amount to unjust enrichment.

12. On the quantum of fees awarded, Counsel for the Authority submits that based on the principles of taxation, the Deputy Registrar was required to assess the fair and reasonable remuneration under the **Order** but that this was not done, occasioning a grave injustice to the Authority. Counsel cited **Premchand Raichand Ltd and Another v Quarry Services of East Africa Ltd and Others No.3 [1972] EA 162** and **Republic v Minister for Agriculture Ex-parte Samuel Mburu Njuguna [2006] eKLR**.

13. Counsel urges the court to aside the taxed bill of costs and direct that it be taxed afresh on the basis that the suit had not been certified as ready for hearing and that the Advocates ceased to act for the Authority at the preliminary stage of the Suit and thus, not entitled to the instruction fees based on the claim in a suit that has not been heard and determined. Counsel further relied on the case of **Ratemo Oira & Company Advocates v Magereza Sacco Ltd [2016] eKLR** and **First American Bank of Kenya Limited v Gulab P. Shah & 2 others [2002] 1 EA 64**.

The Advocates' Response

14. The Advocates oppose the Reference and support the decision of the Deputy Registrar. The Advocates hold that the Deputy Registrar exercised her discretion judiciously in awarding the instruction fees. They urge that the decision was based on sound principles of law and the amount awarded as instruction fees was commensurate with the subject matter.

15. The Advocates state in the Suit, the Authority was sued for the liquidated sum of KES 12,075,289, 826.00 amongst other prayers and that they entered appearance and filed a comprehensive defence together with the list of witnesses and documents. That owing to lack of instructions from the Authority especially in providing witnesses and failure to agree on fees, the Advocates filed an application to cease acting on 7th February 2019 which was set down for hearing on 23rd May 2019 with hearing of the main suit set down for hearing on 8th July 2019. The Advocates thus contend that by the time their application to cease acting for the Authority was allowed on 23rd May 2019, the main suit had been set down for hearing.

16. The Advocates submit that it is trite law that instruction fees is determined based on the value of the subject matter of a suit determined from the pleadings, judgment or settlement and that where the matter has not been concluded then the value of the subject matter is pegged on the pleadings. However, once the matter is concluded or settled, the value for purposes of taxation is the judgment or the settlement. Therefore, the Deputy Registrar was correct in basing the taxation on the amount pleaded in the Plaintiff as the suit was yet to be concluded or settled.

17. The Advocates submit that since the taxation was based on the amount sought in the Plaintiff, the Authority's submission that the amount awarded by the Deputy Registrar was excessive lacks any basis as it was justified and in total conformity with the provisions of the **Order** and the precedent.

18. The Advocates submit that the correct legal position is that an Advocate is entitled to the full instruction fee the moment the defence is filed and since there is no dispute the Advocates filed the defence on behalf of the Authority, they are entitled to full instruction fees. Counsel cited **First American Bank of Kenya v Shah & Others** [2002] EA 64, **Tononoka Steels Ltd v The Eastern & Southern African Trade & Development Bank (P.T.A Bank)** ML HCCC No 267 of 98 (UR) and **D. Njogu & Company Advocates v Panafcon Engineering Limited** [2006] eKLR to support this proposition and added that an advocate is entitled to full instruction fees upon receiving instructions and the hearing stage is usually well taken care of by getting-up fees and attendance costs.

19. The Advocates reject the Authority's contention that the Deputy Registrar ought to have awaited the determination of the suit before taxing the bill as this contention is not based on any law. They further cite **Joreth Limited v Kigano & Associates** NRB CA Civil Appeal No. 66 of 1999 [2002] eKLR where the Court of Appeal reiterated that the Advocate is entitled to instruction fees once an advocate is instructed.

Analysis and Determination

20. From the application, depositions and submissions, the main issue for determination is whether the Deputy Registrar erred in awarding the instruction fees in the manner she did. The approach to be taken by this court in dealing with the Reference is not in dispute. Since the jurisdiction to tax bills of costs is vested in the Deputy Registrar, it is a settled principle that on a reference to a judge from the taxation decision, 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 (see **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board** NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR).

21. The parties do not dispute the fact that the Deputy Registrar applied the proper charging schedule of the **Order, Schedule 6 Paragraph 1(b)** which provides, inter alia, that:

1(b) To sue in any proceedings described in paragraph (a) where a defense or other denial of liability is filed; or to have an issue determined arising out of inter-pleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties

...

(d) To defend any other proceedings; an instruction fee calculated under subparagraph 1(b)

22. Since the charging schedule is not in dispute and judgment is yet to be entered in the Suit, what then is the value of the subject matter? In **Peter Muthoka and Another v Ochieng and 3 Others** NRB CA Civil Appeal No. 328 of 2017 [2019] eKLR, the Court of Appeal observed that:

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. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three. It is not open to the taxing officer to choose one or the other or to use them in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive. [Emphasis mine]

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 pleading that form the basis for determining the subject value.

23. I accept the submission by counsel for the Advocates that under **section 2** of the **Civil Procedure Act**, pleadings include a petition, summons, and statements in writing of the claim demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the Plaintiff to any defence or counterclaim of a defendant. In this case, the Deputy Registrar considered the value of the subject matter to be the Plaintiff's claim of KES. 12,075,289,826.00 as prayed in the plaintiff. I do not hear the Authority to claim that she wrongly assessed the value of the subject matter. Its complaint is that the amount awarded was excessive based on the stage the suit had reached. In light of the decision on **Peter Muthoka's Case (Supra)**, the value of the subject matter was correctly assessed based on what was pleaded since the matter had not been determined by way of judgment or settlement (see also **Otieno, Ragot and Company Advocates v Kenya Airports Authority** NRB

CA Civil Appeal No. 39 of 2017 [2021] eKLR). This has not been disputed in the Reference or submissions.

24. The question then is whether the Deputy Registrar ought to have departed from the established formula when the value of the subject matter is ascertainable. In **Joreth Ltd v Kigano & Associates (Supra)** the Court of Appeal outlined the principle as follows:

We would at this stage point out that the value of the subject matter of a suit for the purpose of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, among other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances .

25. The Authority's position is that the Deputy Registrar ought to have taken into account the stage where the case had reached. It has been settled that instruction fees are earned when the Advocate acts on the Client's instructions to defend the suit by filing the defence and a matter does not have to be set down for hearing for an advocate to earn instruction fees. On this issue, the Court of Appeal has pronounced itself in several decisions including in **Joreth Ltd Case (Supra)** where it observed that that:

By the first ground thereof the respondent states 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. In principle that is correct. There is nothing however to suggest in the ruling of C.K. Njai, Esq., that he had considered the Instruction Fee on the stage the suit had reached. It was the learned judge who so considered the matter. The learned judge was clearly wrong in saying that one-half the work done qualifies for one-half Instruction Fee. As we are agreeing with C.K. Njai, Esq., we need not consider the said first ground. The other two grounds in the said notice have already been dealt with by us when we referred to what C.K. Njai Esq., said in regard to the importance of the suit to the parties and the exceptional dispatch. As we agree with what Mr. Njai said those grounds do not fall for consideration.

Conclusion and Disposition

26. In conclusion, I find and hold that the Deputy Registrar applied the proper charging Schedule and ascertained the value of the subject matter from the Plaintiff. The Authority does not dispute this position. In light of the Court of Appeal decisions in **Joreth Ltd Case (Supra)** and **Peter Muthoka's Case (Supra)**, the Deputy Registrar did not have any jurisdiction to review or re-assess the instruction fee based on the stage the matter had reached. I am therefore constrained to dismiss the Reference with costs to the Respondent.

27. Turning to the Notice of Motion dated 25th August 2020, the Advocates have based their plea for judgment on the Certificate of taxation on **section 51(2)** of the **Advocates Act** which states that:

51 (2) The certificate of the taxing officer by whom a bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.

28. From the foregoing provision, the Certificate of Costs is conclusive as to the amount unless set aside by way of a reference under **Rule 11** of the **Advocates Remuneration Order**. Since I have dismissed the Reference from the decision of the Deputy Registrar, the application for judgment is allowed.

29. The net result of my findings is as follows:

(a) **The Chamber Summons dated 26th May 2020 be and is hereby dismissed with costs to the Advocates.**

(b) **The Notice of Motion dated 25th August 2020 is allowed and Judgment be and is hereby entered for the Applicant/Advocates against the Respondent/Client for the sum of KES. 262,990,246.00 only together with interest accruing therefrom at court rates from 25th June 2020.**

(c) **The Advocates are awarded costs assessed at KES. 20,000.00 for both applications.**

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF AUGUST 2021.

D.S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Kibet instructed by Waweru Gatonye and Company Advocates for the Applicant/Advocates.

Mr Leiteipan, Advocate instructed by Office of the Attorney General for the Respondent/Client.