



**Direct Line Assurance Company Limited v Hamilton Harrison &  
Mathews Advocates (Miscellaneous Civil Application E1003 of 2020)  
[2021] KEHC 259 (KLR) (Commercial and Tax) (19 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 259 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL APPLICATION E1003 OF 2020  
DAS MAJANJA, J  
NOVEMBER 19, 2021**

**BETWEEN**

**DIRECT LINE ASSURANCE COMPANY LIMITED ..... APPLICANT**

**AND**

**HAMILTON HARRISON & MATHEWS ADVOCATES ..... RESPONDENT**

**RULING**

1. The Applicant/Client (“the Client”) has filed a Chamber Summons dated 10<sup>th</sup> February 2021 (“the reference”) made, *inter alia*, under Rule 11 of the Advocates Remuneration Order, 2009 and 2014 (“the Order”) challenging the decision of the Deputy Registrar dated 28<sup>th</sup> January 2021 (“the Ruling”) following taxation of an Advocate/Client Bill of Costs dated 20<sup>th</sup> August 2020 (“the Bill of Costs”).
2. The reference is supported by the affidavit of Julius Orenge, an advocate in conduct of the matter on behalf of the Client, sworn on 10<sup>th</sup> February 2021. It is opposed by the Respondent/Advocates (“the Advocates”) through the replying affidavit of Leon Kiaire, an advocate practising the Advocates’ firm, sworn on 23<sup>rd</sup> March 2021. The parties also rely on their written submissions in support of their respective positions.
3. It is common ground that the Advocates were instructed and represented the Client in HCCC E277 OF 2019; Directline Assurance Company Limited v Samuel Kamau Macharia & 3 Others where it sought, *inter alia*, injunctive and declaratory orders against the defendants therein (“the suit”). Subsequently, the Advocates filed the Bill of Costs and claimed a total of KES 10,278,620.00 as legal fees and disbursements for the services rendered to the Client in the suit with the claim for instruction fees being pegged at KES 7,500,000.00.



4. After considering the Bill of Costs together with parties' submissions, the Deputy Registrar held as follows in respect of the instruction fees:

The Applicant has set out the basis upon which the Kshs. 7,500,000/- was arrived. Having considered the said basis, which in my opinion is mainly the importance of the case as I have highlighted hereinabove and the novelty applied, based on the fact that issues cut across several fields of law which included, Companies law, Insurance law, and Arbitration law, then the amount proposed by the Applicants are reasonable. However, this is a matter which concluded in a record time which was 3 months. Incidentally, parties reached a consent which terminated the matter. Having saved parties the rigor of litigation and there being no clear basis on which instructions fees is to be assessed at, my considered opinion is that assessing the instructions fees at Kshs. 5,000,000/- is a judicious exercise of my discretion in light of all the prevailing circumstances.

5. After crediting KES 3,000,000.00 already paid by the Client, the Deputy Registrar certified that KES 6,048,491.70 is what was due to the Advocates and taxed KES 4,230,128.30 from the Bill of Costs. In the Reference, the Client seeks orders that the Deputy Registrar's ruling be set aside and that the court makes a determination that the Advocates were overpaid on account of the KES 3,000,000.00 deposit. It also seeks that the Bill of Costs be taxed by the court or in the alternative, it be remitted to another Deputy Registrar for fresh taxation.

#### The Submissions

6. From the Client's is principally aggrieved by the Deputy Registrar's award of the instruction fees. It contends that the dispute purely related to an issue of shareholding and management and that the exercise of the parties' rights to determine shareholding had nothing calling for sanctions by the Regulator and no evidence is on record showing that the Regulator was going to impose sanctions. The Client contends that the Deputy Registrar relied on assumptions and hearsay in awarding the Advocates a sum of KES 5,000,000.00 as instructions fee notwithstanding his finding that the value of subject matter could not be determined from pleadings. Further, that the Deputy Registrar wrongly exercised his discretion and ignored the Order in his award of the instruction fees which in the circumstances is excessive.
7. The Client submits that since the suit was withdrawn at a Preliminary Stage without going to full trial, Schedule 6 Paragraph 1 (b) of the Order provides for fees to be charged at 75%, thus the Deputy Registrar did not take this provision into account.
8. The Client faults the Deputy Registrar for solely relying on alleged importance of the matter in the suit without recourse to the reliefs sought in the plaint and that there was nothing novel in law in the suit. In the Client's view the award of the instructions fees was meant to punish the Client and unjustly enrich the Advocates.
9. The Advocates support the decision of the Deputy Registrar and submit that the award of instruction fees was fair and reasonable considering that the Advocates were appointed to act with great urgency in order to protect the interests of the Client who at that time was faced with imminent collapse following a bitter dispute among its shareholders and directors. It points out the suit was extremely important to the Client as a market leader in the business of insuring public service motor vehicle commanding 60% of the market share and that there was great public interest in preserving the client company. Further, the suit required the Advocates to demonstrate great skill in wide areas of company, insurance and arbitration laws and that the Advocates expended a lot of time in the matter and on a 'drop all' basis. The Advocates also state that due to their skill and vigilance, the court rendered a ruling on 15<sup>th</sup>



October 2019 allowing the Client's application for interim measures of protection thereby protecting its management from interference.

10. The Advocates reject the Clients' claim that they were overpaid on account of the deposit of KES 3,000,000.00. They submit that they were entitled to much more fees and in any event, the Deputy Registrar deducted the said deposit from the total assessment.
11. The Advocates submit that the Client has not shown that the Deputy Registrar committed any error of principle as it has neither alleged that the taxing was guided by improper motive nor demonstrated the Deputy Registrar failed to properly exercise his discretion or apply his mind. Further, that it has failed to demonstrate that the Deputy Registrar wrongly interpreted the law or gave an unreasonable ruling. The Advocates contend that the Client has merely raised a litany of baseless and frivolous complaints which fall short of the threshold to be met before this court can disturb the decision of a taxing officer.

#### Analysis and Determination

12. The main issue for determination is whether the Deputy Registrar applied the correct legal principles in awarding the instruction fee. The approach this court should take in dealing with a reference on assessment of instruction fees is not disputed. In *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR* the Court of Appeal distilled the principle as follows:

On a 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. In *Arthur v Nyeri Electricity Undertaking [1961] EA 497*, the predecessor of this Court said at page 492 paragraph I: "where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases".

13. As cited by the Client, the same principle was reiterated in *Republic v Ministry of Agriculture and 2 Others; Ex-parte Muchiri W'Njuguna & others NRB HC Misc. Civil Appl. No. 621 of 2000 [2006] eKLR* as follows:

The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award is somewhat too high or too low; it will only interfere if it thinks the award is so high or so low as to amount to an injustice to one party or the other.... The court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors.

14. The principles to be applied when assessing instruction fees in a suit are also well settled. The Court of Appeal in the case of *Joreth Ltd v Kigano & Associates NRB CA Civil Appeal No. 66 of 1999 [2002] eKLR* 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 .

15. The parties agree that the value of the subject matter could not be ascertained from the pleadings and that the Deputy Registrar similarly found as much. In accordance with the principles outlined in *Joreth Ltd v Kigano & Associates (Supra)*, the Deputy Registrar was 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 and such relevant matters.
16. As reproduced in the introductory part, the Deputy Registrar, in arriving at KES 5,000,000.00 as the instruction fees stated that he considered a myriad of factors including the importance of the matter, the applicable laws in the matter and the period taken by the parties in court. I find that the Deputy Registrar properly exercised his discretion as per the law and principles of taxation. I do not find any reason to interfere with his discretion and finding. I also do not find that the same is excessive or meant to unjustly enrich the Advocates as has been presented by the Client.
17. On the KES 3,000,000.00 deposit paid by the Client, I find that the same was rightly credited and discounted from the Bill of Costs and that from the Deputy Registrar's calculations, the Advocates were not overpaid as claimed by the Client.
18. For the reasons I have set out above, the Client's Chamber Summons dated 10<sup>th</sup> February 2021 lacks merit and is hereby dismissed with costs to the Advocates.
19. The Advocates had filed a Notice of Motion dated 5<sup>th</sup> February 2021 made under section 51(2) of the *Advocates Act* which essentially sought judgment against the Client for the certified taxed sum of KES 6,048,491.70. Section 51(2) of the *Advocates Act* provides as follows:

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.
20. The Certificate of Costs is conclusive as to the amount unless set aside by way of a reference under Rule 11 of the Order. Since I have already dismissed the Client's reference, it follows that the Advocates' Notice of Motion dated 5<sup>th</sup> February 2021 is allowed and that judgment be and is hereby entered for the Advocates against the Client for the sum of KES KES 6,048,491.70 only.
21. The Advocates are also awarded costs of both applications which is assessed at KES 30,000.00

**DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF NOVEMBER 2021.**

**D.S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango

Mr Orenge instructed by Orenge J. and Associates Advocates for the Applicant

Mr Kimani, SC instructed by Hamilton, Harrison and Mathews Advocates for the Respondent

