



**Direct Line Assurance Company Limited v Hamilton Harrison &  
Mathews Advocates (Miscellaneous Civil Application E1004 of 2020)  
[2021] KEHC 251 (KLR) (Commercial and Tax) (19 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 251 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL APPLICATION E1004 OF 2020  
DAS MAJANJA, J  
NOVEMBER 19, 2021**

**BETWEEN**

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

**AND**

**HAMILTON HARRISSON & MATHEWS ADVOCATES ..... RESPONDENT**

**RULING**

1. The application before the court is a reference made under Rules 11 of the [Advocates Remuneration Order, 2009](#) and 2014 (“the Order”) brought by the Applicant/Client (“the Client”) by way of the Chamber Summons dated 10<sup>th</sup> February 2021 (“the Reference”). It 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 in respect of the Deputy Registrar’s ruling dated 28<sup>th</sup> January 2021 following taxation of an Advocate/Client Bill of Costs dated 20<sup>th</sup> August 2020 (“the Bill of Costs”) arising out of HCCC E278 OF 2019; Directline Assurance Company Limited & 4 Others v Suninvest & 15 Others (“the Suit”).
2. The Reference is opposed by the Respondent/Advocates (“the Advocates”) through the replying affidavit of Leon Kiaire, an advocate practising in 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. When the matter came before the Deputy Registrar, one of the issues he was called upon to determine was whether or not the Advocates had instructions to act for the Client in the suit. The Deputy Registrar held as follows in his ruling:

The Applicants rely on the following documents to demonstrate that Directline Assurance gave them instructions:



- i. Letter dated 17<sup>th</sup> September 2019 from the client (and signed by its Managing Director) to the advocate, instructing the advocate to act for the 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup> and 16<sup>th</sup> defendants and indicating that the legal fees payable for the representation shall be paid by the client.
- ii. The notice of appointment dated and filed on 20<sup>th</sup> September 2019 which clearly indicates that the advocate was appointed by the client to act on its behalf.
- iii. Letter dated 8<sup>th</sup> November 2019 from the client (signed by its legal counsel) to the advocate referring to both HCCC No. E277 of 2019 and HCCC No. E278 of 2019 and stating that “the advocates representing the Company namely Messrs Hamilton Harrison & Mathews...”
- iv. Extract from the resolution of the client’s Board of Directors passed at the meeting held on 8<sup>th</sup> November 2019 which similarly refers to both cases and identifies Hamilton Harrison & Mathews as the advocates for the client.
- v. Letter dated 12<sup>th</sup> November 2019 from the client (and signed by its legal counsel) to the advocate giving instructions on both HCCC No. E277 of 2019 and HCCC No. E278 of 2019. Specifically, the letter contains instructions to the advocate “to record and/or execute consents with the Plaintiffs’ Advocates in High Court Case No. E278 of 2019
- vi. Letter dated 13 November 2019 from the client (and signed by its legal counsel) to the advocate enclosing extracts from the resolution of the client’s Board of Directors passed at a meeting held on 13<sup>th</sup> November 2019. The resolutions recognize Hamilton Harrison & Mathews as “The Advocate representing the Company”

I have considered the submissions on the issue of whether there were or no instructions. I have also perused the documents provided above. It is true that these suits were filed on the same day with HCCC No. E277 of 2019 being the 1<sup>st</sup> first in time. In HCCC No. E277 of 2019, the issue of want of instructions did not come up, and the same has not been a ground of objection in MISC E1003 OF 2020, in which the Applicant has taxed its costs. From the letters supplied herein and the resolution passed, coupled with the fact that the issue of want of instructions did not arise in the HCCC No. E277 of 2019, I am convinced that there is sufficient evidence of instructions from Directline (the client) to the Applicant on its own behalf and on behalf of 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup> and 16<sup>th</sup> defendants who were its officers.

4. Having established that the Advocates had the requisite instructions to represent the Client, the Deputy Registrar went ahead to determine the substance of the Bill of Costs where the Advocates had claimed a total of KES 18,962,351.00 being legal fees and disbursements for their services to the Client in the suit with the claim for instruction fees being pegged at KES 12,500,000.00. The Deputy Registrar held that:

HCCC E277 OF 2020 and HCCC E278 of 2020 being suits that were related and dealt with together, I find no basis to give instructions fees that is at variant with what I gave in Misc. E1003 OF 2020. I shall allow instructions fees of Kshs. 5,000,000/-



5. The Deputy Registrar ultimately taxed and certified the entire Bill of Costs at KES 6,306,946.00 after taxing off KES 12,655,405.00. In this Reference, the Client now seeks orders that the ruling of the Deputy Registrar be set aside, that the court makes a determination that the Advocates did not render any services to the Client as Plaintiff in HCCC E278 of 2019 and that the Client in HCCC E278 of 2019 as Plaintiff could not legally instruct the Advocates to also act/represent defendants therein and that the taxing officer did not have jurisdiction to tax the Bill of Costs as instructions to the Advocates were denied by the Client. The Client seek further orders in the alternative, that the court makes a determination that the award of instructions fee of KES 5,000, 000.00 is manifestly excessive as services were not rendered to the Client.

#### The Client's Reference and Submissions

6. The Client contends that the Deputy Registrar erred in making conclusive findings that the Advocates rendered services to the Client in HCCC E278 of 2019 and that without considering pleadings and nature of the suit in HCCC E278 of 2019, the Deputy Registrar erred in law and fact by awarding instructions fees of KES 5,000,000.00 in this matter simply because HCCC E278 of 2019 was related to HCCC E277 of 2019. The Client adds that the award of KES 5,000,000.00 as instruction fees was not based on any judicial principle of taxation and that it was actually represented by the firm of Kamau Kuria & Co. Advocates in HCCC E278 of 2019. It asserts that it would be illogical that the same client would again give instructions to the Advocates herein to defend the same matter and that the Advocates did not in fact render any services to the Client., The Client adverts that the award amounts to enriching the Advocates unjustly as the dispute in HCCC E278 of 2019 concerned the Client's shareholders and the Client as a company did not have anything to do with the dispute.
7. The Client advances the position that in the suit, the 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> defendants were removed as directors from the Client's board of directors through a resolution passed on 2<sup>nd</sup> September 2019 and as pleaded in the plaint. That at the time of filing suit on 9<sup>th</sup> September 2019, the said persons were not directors of the Client having been removed from offices by the shareholders being the 2<sup>nd</sup>, 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> Plaintiffs.
8. The Client submits that through the letter dated 17<sup>th</sup> September 2019, the 7<sup>th</sup> defendant, purporting to be the Client's managing director and notwithstanding the fact that she had been so removed from that position on 2<sup>nd</sup> February 2019 instructed the Advocates to act for the said defendants. That in any event, there was no board of directors capable of giving such instructions, having been removed from office.
9. The Client states that having sued the 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup> and 16<sup>th</sup> defendants, it could not at the same time give the Advocates instructions to defend and/or act for the said defendants as the Advocates would be acting as a matter of conflict of interest. It reiterates that the 7<sup>th</sup> defendant while purporting to act on behalf of the Client had no authority or capacity to instruct the Advocates to represent the defendants knowing very well that the Client had sued them and that a plaintiff cannot appoint an Advocate to act for a Defendant it has sued as this would amount to collusion and a legal and procedural fraud.
10. The Client maintains that the Advocates represented the defendants and rendered services to them as individuals in their personal capacities. That the defendants do not dispute that at the time of filing the suit, they had been removed from office could not instruct the Advocates on behalf of the Client. The Client submits that the Deputy Registrar took cognizance of this fact but nevertheless erred in holding that instructions were given.



11. The Client submits that the Advocates cannot then state that while they acted in HCCC E277 of 2019, which raised almost similar issues for the Client, they received instructions in HCCC E278 OF 2019, from the Client to act against them and represent the defendants, where the Client had sued the defendants. The Client relies on the case of *Serve In Love Africa (Sila) Trust v David Kipsang Kipyego & 7 others ELD ELC Case No. 21 of 2017 [2017] eKLR* to submit that an advocate will be deemed to be acting in conflict of interest when serving or attempting to serve two or more incompatible interests and thereby fails to observe the fiduciary duty owed to clients and to former clients. In short, the Client accuses the Advocates of conflict of interest and submits that the Deputy Registrar, while relying on alleged board resolutions signed by the 6<sup>th</sup> and 7<sup>th</sup> defendants failed to consider that, if the said defendants were acting by the authority of the company, why were the instructions to Kamau Kuria Advocates not contested as not originating from the Client.
12. The Client submits that in the suit, the Advocate for the Client is Kamau Kuria & Company Advocates and that all proceedings and court filings were done by the said law firm and that the Advocates herein did not file a Notice of Change of Advocates to replace the firm of Kamau Kuria & Company Advocates so as to act for the Client as indicated in the Advocates' submissions since the court records will indicate that the two advocates were not on record.
13. The Client contends that the suit was filed by the Client and shareholders against the Client's management. It relies on the law as stated in *Marshall's Valve Gear Co Ltd v Manning, Wardle and Co Ltd [1909] 78 LJ Ch 46 (ChD)* that the shareholders and not the directors have the ultimate power to use the name of the Company and appoint its advocates and the principle has been acted upon that in the absence of any contract to the contrary, the majority of the shareholders in a Company have the ultimate control of its affairs and are entitled to decide whether or not an action in the name of the company shall proceed and that shareholders have a right to institute an action /suit against management and/or board of Directors through and along with the Company. In the circumstances, the Client maintains that the conduct of the said defendants in using the name of the Client for purported instructions to the advocate was fraud, a conflict of interest, and abuse of fiduciary duty and that in any event, no evidence has been filed or tendered by the Advocates to rebut the fact that the said defendants (purportedly holding themselves out as directors) had been dismissed from the board.
14. The Client also submits that the fee of KES 3,000,000.00 ought not to have been paid in the first instance as the same was done whilst the said defendants and in particular the 7<sup>th</sup> defendant who had been removed as Managing Director, did not have locus standi or capacity to do so. Thus, the said payment was done fraudulently so as to enable the said defendants cover their obligations of paying the Advocates by using Client's resources.
15. In the alternative and without prejudice to what is submitted above, the Client submits that the Deputy Registrar erred in awarding similar amounts in instructions fees as compared to HC Misc. E1003 of 2020 without considering the circumstances and reliefs pleaded in the plaint which ought to have been the guiding principle, thus, the amount awarded as instructions fees is excessive and unreasonable.

#### The Advocates' Reply and Submissions

16. The Advocates oppose the Reference. They submit that the allegation that they did not render services to the Client in the suit is inaccurate because companies like the Client make decisions through directors' resolutions. They contend that the Client instructed the Advocates in writing to act for it and other parties in the matter and there are letters, resolutions and the Notice of Appointment to that effect as outlined by the Deputy Registrar.



17. The Advocates submit that the Client has not disputed the validity of these resolutions as well as its letters of 12<sup>th</sup> and 13<sup>th</sup> November 2019 and it did not do so either before the Deputy Registrar even when its resolutions and letters were brought to the attention of the Deputy Registrar. The Advocates proffer that these resolutions and letters should be understood in the context of what was happening in the corporate governance of the Client at that time. The Client took the view that the suit was filed without its authority and it was a suit basically instituted by Samuel Kamau Macharia (the 4<sup>th</sup> plaintiff in that case) to wrestle the management of the Client from its directors at the time. The Client's initial instructions to the Advocate was to apply to stay the suit and refer the dispute to arbitration under the Client's articles of association. The application was successful and the suit was stayed with the dispute being presently before an arbitrator.
18. With respect to the allegation made that the Client was represented by the firm of Kamau Kuria & Company Advocates, the Advocates submit that first, this is a contentious matter that an advocate representing a client ought not to depose to in view of Rule 8 of the Advocates Practice Rules. Second, no resolutions have been produced to show that the Client instructed the firm of Kamau Kuria & Company Advocates. Third, the Client's resolutions of 8<sup>th</sup> and 13<sup>th</sup> November 2019 would not make sense as they instructed the Advocates and not the firm of Kamau Kuria & Company Advocates and in fact, that the law firm is not mentioned at all in the said resolutions. Thus, the Advocates assert that the Client instructed them to act for it in the suit and that the Advocates did the work it was instructed to do and fees are due and owing to it.
19. The Advocates submit that the Deputy Registrar's award of instruction fees was fair and reasonable considering that they were appointed to act with great urgency and protect the interests of the Client who at that time was faced with imminent collapse following a bitter dispute among its shareholders and directors. That 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 to stay proceedings and refer the dispute to arbitration.
20. The Advocates aver that the Client has not demonstrated that the Deputy Registrar committed an error of principle to warrant this court to disturb the ruling as he took into account all relevant matters and the law in assessing instruction fees. The Advocates also submit that the Client has not established that the instruction fee awarded was excessive in light of *Premchand Raichand v Quarry Services of East Africa Limited & Others [1972] EA 163* where the Court of Appeal held that, "... the general level of remuneration of advocates must be such as to attract worthy recruits to an honorable profession".

#### Analysis and Determination

21. From the parties' pleadings and submissions, the main issues for determination are whether the Deputy Registrar erred in determining that the Advocates had instructions from the Client to represent them in the suit and whether the instruction fees he awarded the Advocates was excessive and based on the wrong principles. This is not to say that I have not noted the objection raised by the Advocates about the competence of the Client's deposition sworn by its advocate on record. The Advocates invoke Rule 8 of the *Advocates (Practice) Rules, 1966* which provides that:

No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as witness to give evidence, whether verbally or by



declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear.

22. The Advocates' objection is answered by the Court of Appeal in [\*Kamlesh Mansbuklal Damji Pattni v Nasir Ibrahim Ali and 2 Others NAI CA Civil Appl. No. 354 of 2004 \[2005\] eKLR\*](#) where it was observed that:

Muite is of course right in his concession that advocates should not swear affidavits on behalf of their clients when their clients are readily available to do so. It accords with the spirit of the best evidence rule and, in view of the provisions of order XVIII r 2, with common sense. It would otherwise be embarrassing to apply those provisions to an advocate who may have to relinquish his role as one, to become a witness. There is otherwise no express prohibition against an advocate who of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client. So too an advocate who cannot readily find his client but has information and the sources of which he can disclose and state the grounds for believing the information. On both counts we do not find Muite's remaining affidavit offensive. As we stated earlier he is possessed of the facts stated therein and secondly he has explained, and we believe him in the circumstances of this case, that his clients were not readily available. The affidavit in reply in Kenya Horticultural Exporters Ltd case (Supra) was sworn by the advocate. It was however not struck out for that reason, but because the advocate could not prove all the statements of information and belief that he had stated even if he was to be cross-examined on them. [Emphasis mine]

23. In this case, counsel for the Client stated that he is deposing on this matter which he is well versed in, a fact that has not been disputed by the Advocates. Further, there was no indication that the advocate would be called as a witness or be subjected to cross-examination in what was otherwise a straight forward reference. This objection is dismissed.

24. Turning to the substance of the Reference, the nature of this court's jurisdiction in dealing with a reference from the decision of the Deputy Registrar was distilled by the Court of Appeal in [\*Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board NRB CA Civil Appeal No. 220 of 2004 \[2005\] eKLR\*](#) where it stated that:

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".

25. On the first issue of whether the Advocates had the requisite instructions to act for the Client, the Deputy Registrar found in the positive. It is trite that a decision in taxation where an advocate/client relationship does not exist is a nullity for want of jurisdiction and that the Deputy Registrar has the jurisdiction to determine that question in the first instance (see [\*Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited NKR CA Civil Appeal No. 154 of 2014 \[2017\] eKLR\*](#)). This question is one of fact and its determination was dependent on the material placed before the Deputy Registrar by the parties with the onus being on the Advocates.



26. I have looked at the documents exhibited and relied upon by the Advocates before the Deputy Registrar more so the Notice of Appointment dated 20<sup>th</sup> September 2019, the letters by the Client dated 8<sup>th</sup> November 2019 and 13<sup>th</sup> November 2019 together with the extract of the resolution from the minutes of the meeting held on the same date. All these letters and correspondence expressly indicate that the Advocates were instructed and that they were under instructions of the Client in the suit. I do not find fault in the Deputy Registrar holding a similar view and that it was not upon him to determine whether or not the 6<sup>th</sup> and 7<sup>th</sup> defendants therein had authority, capacity and/or locus to issue the said instructions or determine whether or not there was a Board of Directors in place at the time. There is also no evidence to show that the firm of Kamau Kuria & Company Advocates was on record for the Client in the suit and even if they were, this does not negate the fact that the Client had instructed the Advocates particularly in the context of the litigation involving shareholders which matter was not even determined by the court.
27. Having found that the Client had instructed the Advocates, the next issue for determination is whether the sum of KES 5,000,000.00 awarded by the Deputy Registrar as instruction fees was excessive and against the principles of taxation. The principles to be applied when assessing instruction fees were summarised in *Joreth Ltd v Kigano & Associates NRB CA Civil Appeal No. 66 of 1999 [2002] eKLR* which 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 .
28. As stated, the Deputy Registrar awarded the same instruction fees awarded in Misc E1003 of 2020 in respect of HCCC 277 of 2020 and reasoned that the same together with the instant suit were related and dealt with together. I do not think it is disputed that both suits were in respect of the shareholding and management of the Client.
29. I had the benefit of determining Misc. E1003 of 2020 and the parties were in agreement 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 set out 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. The Deputy Registrar, in arriving at KES 5,000,000.00 as the instruction fees in Misc. E1003 of 2020 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.
30. I do not find any fault in the manner the Deputy Registrar exercised his discretion by choosing to adopt the same instruction fees he awarded in Misc. E1003 of 2020 which was more or less similar to the suit subject of this case. I also agree with his finding that the Advocates were entitled to their full instruction fees once instructed, notwithstanding that no fundamental proceedings took place as the matter was referred to arbitration. This decision was in line with established principles and laws of taxation and I find no reason for the court to interfere with the same. I also do not find that the same is excessive or meant to unjustly enrich the Advocates as has been submitted by the Client.



31. For the reasons I have set out above, I find that the Deputy Registrar's Ruling dated 28<sup>th</sup> January 2021 is merited, sound and judicious and does not warrant any interference by this court. The Chamber Summons by the Applicant/Client dated 10<sup>th</sup> February 2021 is dismissed with costs to the Advocates/ Respondent
32. 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 6,303,946.00. 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.
33. 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 6,303,946.00 only.
34. 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 Orange instructed by Orange J. and Associates Advocates for the Applicant**

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

