IN THE HIGH COURT OF KENYA

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. CIVIL APPLICATION NO. E143 OF 2019

BETWEEN

NATIONAL BANK OF KENYA LIMITED

(as the successor in business of

KENYA NATIONAL CAPITAL

CORPORATION LIMITED "KENYAC") ..... 1ST APPLICANT/CLIENT

KENYA NATIONAL CAPITAL CORPORATION ..... 2ND APPLICANT/CLIENT

AND

RACHUONYO & RACHUONYO ADVOCATES .....RESPONDENT/ADVOCATE

RULING

Introduction and Background

1. What is before the court is the reference by the Applicant/Client ("the Bank") from the decision of the Deputy Registrar made under **Rule 11** of the ***Advocates Remuneration Order*** ("the ***Order***") and brought by the Chamber Summons dated 18th May 2020. It is in respect of the ruling of the Deputy Registrar dated 5th May 2020 following taxation of an Advocate/Client Bill of Costs dated 30th April 2019.

2. The application is supported by the affidavit and further affidavit of Samuel W. Mundia, the Bank's Head of Commercial Transactions and Litigation Department sworn on 18th May 2020 and 17th June 2020 respectively. It is opposed by the replying affidavit of Clifford Rachuonyo, an Advocate in the respondent firm, sworn on 11th June 2020. The reference was canvassed by way of written submissions.

3. It is common ground that the Advocates represented the Bank in ***HCCC No. 757 of 2009, Basil Criticos v National Bank of Kenya Limited (suing as the Successor in Business to Kenya National Capital Corporation Limited "KENYAC") & Settlement Fund Trustees*** ("the Suit")**.** The suit was dismissed by a judgment dated 15th February 2017.

4. In the bill of costs, the Advocates claimed a total of Kshs. 274,813,499.30 for services rendered to the Bank in defending the suit. The claim for instruction fees of Kshs. 124,347,048.50 was pegged on instructions to defend a claim to recover damages, loss of future earnings and profit from the sale of sisal on about 4,200 acres valued at USD 42,056,640 and damages for illegal sale of LR No. 5865/2 valued at Kshs. 3,038,890,000.00 all totalling Kshs. 6,835,015,920.

5. After considering the depositions filed by the parties and the parties' oral and written submissions, the Deputy Registrar framed two issues for consideration. First, whether the court had jurisdiction to tax the bill in view of the, *"TERMS AND CONDITIONS OF APPOINTMENT TO THE BANKS PANEL OF LAWYERS 2013"* contained in the letter dated 9th October 2013 ("the Agreement") which provided for dispute resolution as follows:

> *Your hereby agree to submit in the event of any dispute regarding your conduct of any matter handled for and on behalf of the Bank to an arbitration panel consisting of three members of the Chartered Institute of Arbitrators with the Chairman of the Law Society of*

Kenya as its head which shall determine any charges of breach of contract of the terms of service or professional negligence that may be made against your firm by the Bank and any finding by the panel shall be deemed to be final.

6. Upon consideration of the aforesaid clause and Part IV of the Agreement which provided that, *"The Bank's remuneration on fees shall be negotiated as per the provisions of Section 45(a) and (b) of the Advocates Act (Chapter 16, Laws of Kenya)"*, the Deputy Registrar concluded as follows:

Having gone through the agreement it is silent about dispute on fees and therefore I find that the bill of costs is properly filed since there is no agreement as contemplated by section 45 of the Advocates Act.

7. The second issue was whether the bill of costs was drawn to scale. As regards instruction fees, the Deputy Registrar considered the contending positions. The Advocates' case was that the value of the subject matter was Kshs. 6,834,015,920.00 while the Bank placed the value of the subject matter at Kshs. 55,000,000.00. The Deputy Registrar relied on the Amended Plaint which was for payment of Kshs. 55,000,000.00, damages of Kshs. 3,028,890,000.00 and loss of future income of USD 42,056,640.00 and concluded as follows:

Having considered the judgment and the amended plaint the subject matter of this suit would be Kshs. 3,028,890,000.00 which is the value of the property and the damages which the court has estimated at Kshs. 4.2 billion. The amount is calculated at Kshs. 3,028,890,000.00 at an exchange rate of 90.5199 .

8. The Deputy Registrar awarded Kshs. 86,237,199.00 as instruction fees, taxed off Kshs. 73,611,742.40 from the total bill and certified Kshs. 201,201,756.90 as the amount due to the Advocates. It is the decision that has now precipitated this reference.

9. From the reference, deposition and parties' submissions, two issues fall for resolution and may be summarized as follows:

a) Whether the Deputy Registrar had jurisdiction to tax the bill of costs in light of the Dispute Resolution Clause in the Agreement.

b) *Whether the Deputy Registrar correctly appreciated the value of the subject matter in assessing the instruction fee.*

Jurisdiction

10. The Bank contended that any dispute including a dispute over fees between it and the Advocates was to be resolved by an appointed Arbitral Panel under the Agreement. The Bank therefore argued that the Deputy Registrar's jurisdiction to tax the bill of costs was ousted as the letter of instruction reserved such jurisdiction for the Arbitral Panel agreed on under the Agreement.

11. The Advocates submitted that the Agreement cannot be a bar to the subject taxation proceedings and that there was no obligation on the Advocates to negotiate its fees and upon failure to proceed to arbitration. They submitted that the instruction fees were earned in 2009 before the Agreement and in any case, the Agreement merely constituted a certificate of inclusion in the Bank's Panel of Advocates.

12. The Advocates supported the decision by the Deputy Registrar and submitted that the provision relating to arbitration in the Agreement was restricted *"to disputes on the professional conduct and implementation of the Client's instructions"* thus excluding a dispute on legal fees in light of the specific provision on "*fees for litigation*" which obligated the Bank to pay either scale fees or agreed fees. In that case, they concluded, there was no mechanism stated or set out in the event of a dispute on quantum of fees payable.

13. The Bank relied on the exhaustion doctrine which posits that where a dispute resolution mechanism exists outside the court, the mechanism should be exhausted before the court's jurisdiction should be invoked (see ***Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others*** **[2015] eKLR** and ***In the Matter of the Mui Coal Basin Local Community*** **[2015] eKLR**). This principle is consistent with the **Article 159** of the Constitution which enjoins the court to promote alternative dispute resolution mechanisms and where possible the court will give it full effect.

14. The question for resolution is whether the Dispute Resolution Clause in the Agreement encompasses disputes on the quantum of legal fees. It is instructive to note that while the Clause refers to any dispute regarding conduct may be referred to the arbitration panel, the reference is qualified by the jurisdiction of the Panel. Its jurisdiction is limited to determining, "*any charges of breach of contract of the terms of service or professional negligence that may be made against your firm by the Bank.*"

15. I therefore hold that the inevitable conclusion upon reading the entire clause is that the disputes contemplated relate to breach of contract terms of service and professional negligence made against the Advocates by the Bank rather than a dispute as to the quantum of fees raised by the Advocates. It is clear from the clause that the intention of the parties was not to subject the parties to arbitration in case of a dispute in fees but to disputes of breach of the contract or professional negligence.

16. The Dispute Resolution Clause in the Agreement constitutes an arbitration agreement under **section 3(1)** of the ***Arbitration Act, 1995*** which provides:

"arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

17. If the Bank wished to invoke the arbitration clause, it had to comply with **section 6(1)** of the ***Arbitration Act*** and seek a stay of proceedings. **Section 6(1)** aforesaid provides as follows:

> *6(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—*
>
> *(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or*
>
> *(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.*

18. In order to take the benefit of the arbitration clause, the Bank ought to have applied for stay when it filed the Notice of Appointment. By filing the replying affidavits and written submissions and participating in further proceedings, the Bank took further steps in the proceedings and thus waived its right to benefit from the arbitration agreement.

19. I am therefore satisfied the Deputy Registrar properly exercised jurisdiction to tax the bill of costs.

Value of the Subject matter and Instruction Fees

20. The Bank contended that the Deputy Registrar made an error as to the correct and proper subject matter of the Suit. As a result, the Deputy Registrar arrived at the wrong computation of the Instruction Fees, Getting Up fees, the one half increase and Value Added Tax(VAT).

21. The Bank submitted that the value of the subject matter was Kshs. 3,028,890,000/- as pleaded by the Plaintiff in the Suit but Kshs. 55,000,000/- as indicated in the Government Valuer's Report dated 1st September 2006, being proceeds from the sale of the suit property therein. The Applicants added that in any case, the sum of Kshs. 3,028,890,000/- as pleaded by the Plaintiff in that suit was dismissed and not awarded and as such it could not be the basis for computation of instruction fees.

22. The Advocates contended that from the Amended Plaint and judgment in suit, the issue that went to trial and was decided upon was whether the Plaintiff therein was entitled to a sum in excess of Kshs. 6 Billion for an under sale and discharge of guarantees of Kshs. 20 Million. They submitted that overall, the Plaintiff's claim was Kshs. 6,890,015,920/- but that their claim for fees was however restricted to the real subject matter arising out of the pleadings.

23. The Advocates rejected the Bank's contention that the suit was restricted to an account of the sale proceeds of Kshs. 55 million or the validity of the sale process and that the suit raised wider and complex questions for trial, which had massive ramifications to the very existence of the Bank's business had the Plaintiff succeeded.

24. 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. 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".*

25. The same principle was reiterated in ***Republic v Ministry of Agriculture and 2 Others; Ex-parte Muchiri W'Njuguna & others*** **[2006]** 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.*

26. The substance of this reference concerns the assessment of instruction fees. The principle to be applied when assessing instruction fees in a suit are well settled. The Court of Appeal in the case of ***Joreth Ltd v Kigano & Associates*** **[2002] 1 EA 92** 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 . [Emphasis mine]

27. So much for the principles applicable and turning to the matter at hand in the Suit, the Plaintiff claimed Kshs. 55,000,000/- or Kshs. 35,000,000/- in the Amended Plaint and in the alterative; liquidated damages of Kshs. 3,028,890,000/- and Loss of Future Income of US $ 42,056,640. In the judgment dated 10th February 2017, the learned judge considered whether the Plaintiff was entitled to the reliefs in the amended Plaint and whether he had proved his damages. The learned judge, at paragraph 327 of the Judgment, concluded that the pleaded

damages were not proved to the standard required by the law and dismissed the same.

28. What then is the basis for determining the value of the subject matter between the pleadings and the judgment? In ***Peter Muthoka and Another v Ochieng and 3 Others*** **NRB CA Civil Appeal No. 328 of 2017 [2019] eKLR** the Court of Appeal expounded further on its decision in the ***Joreth Case*** **(Supra)** 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.*
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> *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.*
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> *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]

29. Since the taxation was done after the judgment, in line with the aforesaid decision, the first port of call in ascertaining the value of the subject matter was the judgment. The Deputy Registrar ought to have determined the value of the subject matter from the judgment. In the instant case, the court dismissed the Suit and with it the claims upon which the Deputy Registrar based the instruction fee, that is the claim for damages and future loss of income. The value of these claims must therefore be excluded from any determination of the value of the subject matter.

30. After excluding the items which the court dismissed from the value of the subject matter, the Deputy Registrar has therefore the discretion to examine the pleadings to determine the subject matter and its value. Since the determination is in the hand of the Deputy Registrar, I will not comment on the Bank's contention that the value of the subject matter is Kshs. 55,000,000.00. This will be determined by the Deputy Registrar upon hearing arguments from both sides.

31. Once the basic instruction fee was established, the same could be increased depending on other factors including the magnitude of the claim that was dismissed and which the Advocates have alluded to and which are clearly set out in the Order.

32. For the reasons I have set out above, I find and hold that the Deputy Registrar committed an error of principle in assessing the instruction fees which warrants interference by this court. Flowing from this finding, the items for *"getting up", "one half increase"* and *"Value Added Tax(VAT)"*, which are dependent on instruction fees, are automatically affected and will be based on the ultimate determination of the instruction fee.

Disposition

33. For the reason I have set out above, the Chamber Summons dated 18th May 2020 succeeds to the extent that the decision of the Deputy Registrar dated 5th May 2020 in respect of the instruction fee and consequential items are hereby set aside.

34. The Respondent's Advocate-Client Bill of Costs dated 30th April 2019 shall be remitted for taxation before any other Deputy Registrar other than **Hon. Claire Wanyama** for determination of the instruction fees and consequential items in line with this decision.

35. The Respondent shall bear the costs of this reference.

DATED and **DELIVERED** at **NAIROBI** this **13TH day** of **NOVEMBER** 2020.

D.S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

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

Mr Riunga Raiji with him Mr Kiura instructed by Riunga Raiji and Company Advocates for the Respondents.