



**IN THE HIGH COURT OF KENYA**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**MISC. CIVIL APPLICATION NO. E053 OF 2020**

**BETWEEN**

**NATIONAL BANK OF KENYA LIMITED.....APPLICANT/CLIENT**

**AND**

**RACHUONYO & RACHUONYO ADVOCATES.....RESPONDENT/ADVOCATES**

**RULING**

**Introduction and Background**

1. The application for consideration is the Applicant's ("the Bank") reference from the decision of the Deputy Registrar made, inter alia, under **Rule 11** of the **Advocates Remuneration Order** ("the **Order**"). It is brought by the Chamber Summons dated 8<sup>th</sup> September 2020 and it is in respect of the ruling of the Deputy Registrar dated 26<sup>th</sup> August 2020 following taxation of an Advocate/Client Bill of Costs dated 5<sup>th</sup> February 2020.

2. The application is supported by the affidavit of Chrispus N. Maithya, a Legal Officer within the Bank's Commercial Transactions and Litigation Department, sworn on 8<sup>th</sup> September 2020. It is opposed by the replying affidavit of Clifford Owuor Rachuonyo, an advocate and partner in the respondent law firm ("the Advocates"), sworn on 16<sup>th</sup> September 2020. The reference was canvassed by way of written submissions.

3. It is common ground that the Advocates represented the Bank in **HCCC No. 525 of 2005, National Bank of Kenya Limited v Abdulwadood Tanners Limited & 2 Others** ("the Suit"). The suit was heard and culminated in a judgment in favour of the Bank. In the bill of costs, the Advocates claimed Kshs. 7,398,586.72 for services rendered to the Bank in instituting the suit. The claim for instruction fees of Kshs. 2,879,433.36 was pegged on instructions to institute proceedings against the 1<sup>st</sup> Defendant in the suit for the principal debt of Kshs. 97,395,557.05 and against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants jointly and severally under personal guarantees for Kshs. 91,900,000.00 and on aggregate, the sum of Kshs. 189,295,557.00.

4. The Deputy Registrar considered the parties' depositions and rival submissions and by the ruling dated 26<sup>th</sup> August 2020 stated, in part, as follows in relation to instruction fees:

*The judgment was entered as had been prayed for in the plaint.....The joint claim against the defendants is a sum total of the two which is Kshs. 189,295,557.1 which is the value of the subject matter and the basis for assessment of instruction fees. The basic instruction fees on this amount under the Advocates Remuneration Order is Kshs. 2,879,433.36...*

5. The Deputy Registrar awarded Kshs. 2,879,433.36 as instruction fees and as prayed for by the Advocates in their Bill of Costs, taxed off Kshs. 565,939.20 from the total bill and certified Kshs. 6,832,646.80 as the amount due to the Advocates. It is this decision that has precipitated this reference.

**Issues for determination**

6. From the reference, deposition and parties' submissions, the main issue for determination is whether the Deputy Registrar erred in the assessment and computation of the instruction fees, getting up fees, one half increase allowed and the Value Added Tax(VAT) claimed in the Bill of Costs

## Instruction Fees

7. The Bank submitted that the Deputy Registrar erred in assessment and computation of the instruction fees as a consequence by relying on an incorrect and improper value of the subject matter in the suit. The Bank also contended that since the suit was not settled, the Deputy Registrar ought to have analysed both pleadings filed in the suit, and the judgment arising therefrom to determine the correct basis for the computation of instruction fees. The Bank added that it is the finality of the judgment that settled its entitlement as against the Defendants and that it is the amounts as determined to be due to it in the said judgment and not the amount pleaded in the Plaintiff that are correct and are the applicable value for purposes of the calculation of instruction fees.

8. The Bank submitted that from the face of the judgment on record, the trial Judge did not award it the sums as prayed for in the Plaintiff and that from the said judgment, the value of the subject matter ought to have been the aggregate sum of Kshs. 97,396,057.05 as awarded and particularized at paragraph 14 therein. The Bank stated that should the court deem it fit to tax the Bill of Costs, then this court ought to award the sum of Kshs. 1,500,940.86 as the instruction fees.

9. The Advocates supported the decision of the Deputy Registrar. In response, the Advocates submitted that on the face of the judgment at paragraph 15, the trial judge entered judgment as prayed in the Plaintiff and that nowhere in the judgment did the court grant a sum of Kshs. 97,396,057.05 as submitted by the Bank. The Advocates added that para. 14 of the judgment only interrogates part of the claim constituting the principal debt and not the overall liability, which specifically included a separate and distinct claim and cause of action on personal guarantees, against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, in the sum of Kshs. 91,900,000.00 which was in addition to the principle debt of Kshs. 97,395,557.05.

10. The approach this court should take in dealing with a reference on assessment of instruction fees was delineated 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** 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".*

11. The substance of this reference concerns the assessment of instruction fees and consequential items in the Bill. The principle to be applied when assessing instruction fees in a suit are well settled. In **Joreth Ltd v Kigano & Associates NRB CA Civil Appeal No. 66 of 1999 [2002] eKLR** 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. [Emphasis mine]*

12. In this case, the suit the Advocates prosecuted on behalf of the Bank culminated in a judgment hence the point of call is the judgment. As was held in **Peter Muthoka and Another v Ochieng and 3 Others NRB CA Civil Appeal No. 328 of 2017 [2019] eKLR**:

*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. [Emphasis mine]*

13. It is not in dispute that judgment was entered in the suit and that taxation was done after the judgment was entered and as such, in light of the decisions I have cited, it follows that the basis for determining the value of the subject matter is the judgment rather than the pleadings in the first instance, which the Deputy Registrar correctly applied. The issue in this case is what was the Judgment?

14. The learned Judge stated as follows, "[I] find that the Bank has proved its case on a balance of probabilities and enter judgment as prayed in the plaintiff dated 23<sup>rd</sup> September 2005 and filed on the same day" [Emphasis mine]. The learned Judge particularised the prayers in para. 5 of the Plaintiff as follows:

*5. It is the case by the Bank that the Company defaulted in repayment of the facilities and seeks judgment against the Defendants jointly and severally for the following: -*

*a) Ksh. 97,395,557.05 as against the 1<sup>st</sup> Defendant.*

*b) Ksh. 91,900,000 each as against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants jointly and severally, and contemporaneously with the sum claimed against the 1<sup>st</sup> Defendant.*

*c) Interest on (a) above at 10.5% p.a from 31<sup>st</sup> February 2005 until payment in full.*

*d) Interest on (b) above at 10.5% from 5<sup>th</sup> May 2005 until payment in full.*

e) Costs of this suit together with interest thereon at court rates from the date of judgment until payment in full.

f) Any other relief this Honourable Court deems fit and just to grant.

15. Having entered judgment as prayed in the plaint, it is clear that the principal debt was Kshs. 97,395,557.05. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were sued in their capacity as guarantors to the extent of Kshs. 91,900,000.00 hence the use of the phrase, “*jointly and severally, and contemporaneously with the sum claimed against the 1<sup>st</sup> Defendant.*” The debt claimed by the Bank was a single debt therefore the Deputy Registrar fell into an error by aggregating the principle sum and amount for each guarantee. The Bank could only claim Kshs. 97,396,057.015 from either the Company and or either of the guarantors to the limit of the guarantees. The liability of the guarantors is not in addition to the liability of the principle debtor hence the Deputy Registrar erred in principle in assessing the value of the subject matter at Kshs. 189,295,557.00. I find and hold that the value of the subject matter is the debt claimed by the Bank against the principal debtor and the guarantors jointly and severally and in this case it is Kshs. 97,396,057.015.00.

#### **Value Added Tax(VAT).**

16. There is a dispute on whether the applicable rate of VAT is between 14% and 16% in light of **Legal Notice No. 35 dated 26<sup>th</sup> March 2020** which reduced the rate of VAT from 16% to 14% with effect from 1<sup>st</sup> April 2020. I am persuaded by the decision in ***Mwangangi & Company Advocates v Machakos County MKS HC Misc. 50 of 2020 [2020] eKLR*** that the applicable rate of VAT ought to be the current rate which is 14% since the sums if paid, will be in the present and not past.

#### **Conclusion and Disposition**

17. For reasons I have set out above, I allow the reference and direct that the Deputy Registrar certify the amount due to the Advocates based on the value of the subject matter in the Plaint being Kshs. 97,396,057.015/-, calculate the getting up fee accordingly and apply the present rate of 14% or the rate applicable at the time of payment.

18. The Advocates/Respondent shall bear the costs of the reference.

**DATED and DELIVERED at NAIROBI this 14<sup>th</sup> day of DECEMBER 2020.**

**D.S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango

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

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