REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

MISC. CIVIL APPLICATION NO. 61 OF 2015

BETWEEN

OTIENO RAGOT & COMPANY ADVOCATES.... ADVOCATES/APPLICANT

AND

NATIONAL BANK OF KENYA LIMITED …….... CLIENT/ RESPONDENT

RULING NO. 2

1. There are two references under **Rule 11** of the ***Advocates Remuneration Order*** *("the* ***Order****")* for consideration. The Advocate's reference is dated 30th November 2015 while the Client's reference dated 14th December 2015 and they both arise out of the Deputy Registrar's ruling delivered on 19th September 2015 in respect of the Advocate/Client bill of costs dated 22nd May 2015.

2. The applicant challenged the decision of the Deputy Registrar on three grounds. First, the Deputy Registrar erred in basing her decision on an issue that was not before her and on which parties were not given the opportunity to address. Second, that the Deputy Registrar was erred in holding that the party and party costs were not relevant and had not connection to the taxation before her and therefore erred in ignoring the same. Third, that the Deputy Registrar erred in failing to award interest on costs where there was uncontroverted evidence that there had been compliance with **Rule 7** of the ***Order***.

3. On its part, the respondent challenged the Deputy Registrar's decision on the following grounds. First, that the Deputy Registrar erred in taxing the bill of costs when there was a remuneration agreement between the parties. Second, that the Deputy Registrar failed to appreciate the value of the subject matter and hence arrived at a wrong decision. Third, the Deputy Registrar failed to consider the respondent's submission on the application of the ***Limitation of Actions Act (Chapter 22 of the Laws of Kenya)***.

4. Both parties relied on the written submissions filed before the Deputy Registrar and highlighted their contentions orally. It is common ground that the principles upon which the court may interfere with the Deputy Registrar's discretion are well settled. In ***Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board*** **Nairobi Civil Appeal No. 220 of 2004 [2005]eKLR,** the Court of Appeal stated that, *"the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing costs."* (see also ***First American Bank of Kenya v Shah and Others*** **[2002] 1 EA 65**).

5. I now turn to the issues raised in the references. The first issue for consideration is whether the determination of the advocates costs was governed by a remuneration agreement. **Section 45(1)** of the ***Advocates Act (Chapter 16 of the Laws of Kenya) ("the Act")*** provides that;

45(1) Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may:

a. Before, after or in the course of any contentious business make any agreements fixing the amount of the advocate's remuneration in respect thereof.

b. Before, after or in the course of any contentious business in a civil court, make any agreement fixing the amount of the advocate's instruction fee in respect thereof or his fees for appearing in court or both.

6. The respondent's contention was that the applicant had a remuneration agreement dated 1st April 2005 which was executed by the applicant in its letter dated 3rd May 2005. The respondent submitted that there was sufficient evidence that there was a retainer agreement and relied on the case of ***Omulele & Company Advocates v Synresins Limited*** **MSA HC Misc. Civil Appl. No. 27 of 2013[2013]eKLR** in which the court held that where there was a remuneration agreement evidence by the exchange of correspondence within **section 45(1)** of the ***Act*** signed by the client a retainer agreement could be construed and accordingly there was no justification for taxation.

7. The Advocates countered that the services it rendered were not governed by a remuneration agreement. They argued that the respondent issued instructions on or about 29th August 2002 yet the agreement referred to by the respondent was dated 1st April 2005 hence the agreement was not applicable. Moreover, they contended that the documents exhibited did not comply with the provisions of **section 45** of the ***Act*** which provided that for such an agreement to be valid and binding it must be in writing and signed by the client or his duly authorized agent.

8. On the issue of the retainer agreement, the Deputy Registrar held as follows;

There is no way the agreement dated 1/4/2005 could be binding as a retained (sic) to a case that instructions were given more than 4 years ago.

9. Section 45(1) of the **Act** recognises that there can be agreements with respect to Advocates remuneration and it provides that, *"[That] such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized"*. For an agreement to meet the requirement of the ***Act*** it must be an agreement, in writing and signed by the client. It was the burden of the respondent to place before the Deputy Registrar the agreement it sought to rely on. Two letters were produced in evidence. The first letter (an unsigned copy) dated 1st April 2005 addressed to the Advocates proposing legal fees to be applied with effect from 8th July 1999. The letter requested the Advocates to confirm their acceptance of the terms by signing and returning a copy. The Advocates wrote back through their letter dated 3rd May 2005 in which it acknowledged receipt of the letter of 1st April 2005, returned the document executed and ended with, *"Please return to use a copy duly executed by yourselves for our records."* The respondent did not exhibit a copy of the agreement duly executed by the *"client"* within the meaning of **section 45(1)** of the ***Act***. I therefore find and hold that on the material before the Deputy Registrar, there was no remuneration agreement.

10. Despite my holding I find fault in the Deputy Registrar's holding that if indeed there was an agreement, it could not apply retrospectively. **Section 45(1) (a)** and **(b)** of ***Act*** couldn't be clearer; a retainer agreement can be made at any time and may cover work already done. The result of my finding though it that there was no remuneration agreement and as such matter could be taxed in accordance with the ***Order***.

11. mThe second issue concerns the application of the ***Limitation of Actions Act***. The respondent submitted that the primary suit was dismissed on 24th July 2003 therefore time started running and that the Advocates ought to have filed their bill of costs within 6 years of recovery of costs and since the bill of costs was filed beyond the 12 years it was time barred. The respondent cited the case of ***Abincha & Company Advocates v Trident Insurance Company Limited*** **NRB HC Misc. No. 527 of**

2011[2013]eKLR to support it proposition.

12. The Advocates took the view that in the event the ***Limitation of Actions Act*** was applicable to the Advocate/Client relationship, the question would be when does the 6-year limitation period begin to run. They submitted that time began running after completion of work which the advocate was retained to do or after lawful termination of the instructions in respect of such work. Alternatively, the Advocates urged that the time began running after lawful termination of the instructions. In either case, they contended, the proceedings were not statute barred. The Advocates also argued that the advocate/client relationship is not an ordinary contract or is a special contract that excludes the application of the ***Limitation of Actions Act***.

13. The Deputy Registrar considered the issued and held as follows;

> *I do agree with the arguments of the applicant that instructions to an advocate deems to be ongoing up to the time he ceases [to] represent his client on his own motion or when his client withdraws instructions. In this situation the client withdrew instructions and appointed the firm of Otieno, Yogo and Ojuro to represent them as evidence by the notice of change. Thus the bill of costs is not time barred. However, the bill of costs would have been barred if the respondent had not filed the notice of change on 14th August 2015 because the bill of costs was filed on 22nd May 2015.*

14. On the issue of application of ***Limitation of Actions Act***, I cannot fault the Deputy Registrar. The Advocates continued to represent the client until such time as the retainer was terminated either by themselves or by the client. It is in these circumstances that the claim of fees would start to accrue and the time would begin to run for purposes of limitation. In light of this finding it is not necessary to decide whether the ***Limitation of Action Act*** is applicable to a contract between advocate and client.

15. I now turn to consider the issue of instruction fees. The primary suit (***Herbert Osen Ochuka suing as the administrator of the estate of JACOB OCHUKA v National Bank of Kenya Kisumu HCCC No. 236 of 2001***) was struck out with costs against the plaintiff. The Advocates therefore urged that their fee would be the party and party costs determined under **Schedule VIA** of the ***Order*** increased by one-half amounting to Kshs. 8,740,336.60/-.

16. Although this issue was not addressed by the respondent in its submissions, the Deputy Registrar held that the advocate client bill of costs is independent of the party and party bill of costs as should be considered as such. She further held that the purpose of the party and party costs are intended to indemnifying the successful litigant for expenses and inconvenience suffered in litigation while the advocate client bill of costs is for actual work done pursuant to the client's instructions. The Deputy Registrar proceeded to base the instruction fee, *"On instructions to defend a suit seeking to restrain the Client from exercising its statutory power of sale arising from a charge on which Kshs. 285,388,498.15 was outstanding as at the date of filing suit."* She awarded Kshs. 4,300,377.47.

17. Could the Deputy Registrar depart from the formula provided in **Schedule VIB** which provides that the fees as between the Advocate and a client shall be the fees prescribed in **Schedule VIA** increased by one-half? While the Advocates argument is attractive, the **formula for taxing an Advocate and Client Bill of costs for work done in the High Court is provided for in Part B of Schedule VI of the *Order*. The phrase, *"fees prescribed in A above, increased by one-half"* in Part B of Schedule VI, does not necessarily mean the fees as taxed in a Party and Party Bill.**

18. Counsel for the Advocates also referred to the case of ***D. Njogu & Company Advocates v Kenya National Capital Corporation*** **NRB HC Misc. No. 21 of 2005 (UR)** where Ochieng' J. held that;

> ***[A] dvocate/Client costs can never be less than the Party and Party Costs. I say so because, it has been expressly provided that the minimum fee shall be either prescribed fees, the fee ordered by the court or the fee agreed between the parties, increased by one half. Furthermore, the rule expressly state that the increment is to include all proper attendances.***

19. While I agree with the above position, it must not be lost that the taxed party and party costs may include items such as disbursements to which the Advocate is not entitled to. To accept the position advanced by the Advocates may also prejudice the Advocates where the taxing officer had used the wrong principles to calculate the instruction fee. In this case though, the approach taken by the Deputy Registrar was to determine the value of the subject matter, assess the instruction fee and consider each item of the bill and thereafter increase the sum found due under **Schedule VIA** by one-half.

20. Although counsel for the respondent submitted that the Deputy Registrar failed to appreciate the value of the subject matter, it is not clear what the contention was from the submissions. The value of the subject matter clearly set out in the pleading and the sum amount stated in the pleading was adopted by the Deputy Registrar. I find and hold that there was no misdirection on the assessment and calculation of the fees due to the Advocates.

21. In the bill of costs, the applicant sought, *"interest thereon at 14% pa from 28.02.2005 to 30.06.2015 under Rule 7 of the Advocates Remuneration Order."* **Rule 7** provides of the ***Order*** as follows;

> *An advocate may charge interest at 14 per cent per annum on his disbursements and costs, whether by scale or otherwise, from expiration of one month from the delivery of the bill to the client, providing such claim for interest is raised before the amount of the bill has been paid or tendered in full.*

22. In declining to award interest, the Deputy Registrar held as follows;

> *In view of the foregoing once a judgment is entered on a certificate of cost, the decretal amount is liable to attract interest at 14% per annum for 30 days after service of the bill and not the date of taxation, for an advocate to be able to recover this there must be evidence on record on the date when the bill was served upon the client. I need not deliberate more on this issue of interest, therefore the item on interest is no awardable from the date the fee note was sent but from the date the advocate-client bill of costs was sent and received by the client.*

23. The issue of interest was specifically set out in the bill and it was the duty of the Deputy Registrar to make a determination on it one way or another (see ***Re. Leisure Lodges Limited*** **NRB Winding Up Cause No. 28 of 1996(UR**)). The question of whether the bill was delivered to the client for settlement within the meaning of **Rule 7** of the ***Order*** was a factual issue for determination. ***Muri Mwaniki & Wamiti Advocates v John Ngigi Ng'ang'a & Another*** **[2014] eKLR** the court held that

> ***My understanding of Rule 7 of the advocates Remuneration order is that interest is chargeable from the expiration of one month from delivery of the bill of costs by the advocate to the client. <u>Evidence of delivery is necessary.</u> To my mind, Rule 7 of the Advocates Remuneration Order does not refer to the certificate of costs but the bill of costs…The amount of the bill may be different from the taxed costs. But for all purposes of Rule 7, interest should be on the amount in the certificate of costs as those are the costs which are payable.*** **[Emphasis mine]**

24. In ***Otieno Ragot & Company Advocates v Kenindia Assurance Co., Ltd*** **KSM HC No. 63 of 2015 [2016]eKLR** Maina J., observed that, *"In my view the bill referred to in this rule is the Advocate's final bill setting out his disbursements and costs which he then requires the client to pay but not a bill which he intends to file for taxation.''* Thus the fee note dated 24th April 2005 under cover of their letter of even date was sufficient to satisfy the provision of **Rule 7** of the ***Order***. No issue objection was raised on this issue by the respondent and I accordingly hold that the Advocates were entitled to interest at 14% per annum from 24th April 2005 when the issue of interest was actually raised.

25. As a result of the findings I have made, I allow the Advocates reference dated 30th November 2015 to the extent that the amount certified by the Deputy Registrar shall accrue interest at 14% per annum from 25th April 2005 until payment in full. The Client reference dated 14th December 2015 is dismissed.

DATED and **DELIVERED** at **KISUMU** this 17th day of **August** 2016.

D.S. MAJANJA

JUDGE

Mr Otieno instructed by Otieno Ragot & Company Advocates for the applicants/advocates.

Mr Ojuro instructed by Otieno, Yogo, Ojuro & Company Advocates for the respondent/client.