REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

MISC. CIVIL APPLICATION NO. 65 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 December 2015 and the Client's reference dated 14th December 2015 and they both arise out of the Deputy Registrar's ruling delivered on 19th November 2015 in respect of the Advocate/Client bill of costs dated 26th May 2015.

2. In brief the Advocate challenges the decision of the Deputy Registrar on four main grounds. First, that the Deputy Registrar made an error of principle in taking into account only the principal sum without the interest claimed in assessing the value of the subject matter. Second, that the Deputy Registrar erred in taxing off item getting up fees claimed in Item 2 of the bill of costs yet the matter had been tried in part thereby attracting getting-up fees. Third, that items numbers 29,42,54,78 and 88 were taxed as though service was effected within Kisumu whereas in reality service was effected at the address provided in the pleadings and that fact was not challenged by the respondent. Lastly, that the Deputy Registrar failed to award interest on the costs when there was evidence that there had been compliance by the applicant with the provisions of **Rule 7** of the ***Advocates Remuneration Order***.

3. In reference, the respondent applied to set aside the entire decision of the Deputy Registrar on the ground that she failed to appreciate the applicable law in the ***Order*** on which she ought to have based her assessment. The respondent contended that the Deputy Registrar failed to appreciate the value of the subject matter as admitted by all parties and instead imported her own issues into the matter thereby arriving at an erroneous value.

4. Both parties relied on the written submissions filed before the Deputy Registrar and highlighted their contentions orally. There is no dispute that the general principal under which a Judge of the High Court may interfere with the taxing officer's discretion is well established. It is that the Court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle; it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration Order itself (see ***First American Bank of Kenya v Shah and Others*** **[2002] 1 EA 65**).

5. I now turn to the issues raised in the reference. 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 by 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 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 instructions issued to them by the respondent were issued on or about 29th August 2002 yet the agreement referred to by the respondent was dated 1st April 2005 hence the agreement was not application. 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 must be signed by the client or this duly authorized agent.

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

> *The documents provided by the respondent in relation to the retained agreement dated 1/4/2005.*
>
> *Though on the letter dated 1st April 2005 at the bottom of the page reads (first issued on 8th July 1997) but this agreement if it exists has been brought to this honourable court. Res ips Loquitur.*
>
> *The time of instruction was in 19/12/2001 no retainer agreement existed between the advocate/applicant and client/respondent.*

9. **Section 45(1)** of the **Act** recognises that there can be agreements with respect to Advocates Remuneration and it provides, *"[A]nd 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."* It is clear therefore for an agreement to meet the requirement of the ***Act*** it must be an agreement, in writing and signed by the client. In such a case it was the burden of the respondent to place before the taxing officer 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 propose 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 the findings I have made, I find fault in the Deputy Registrar holding that if indeed there was an agreement, then it could not be retrospective. **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 bill of costs could be taxed under the ***Order***.

11. The issue of instruction fees was contested. In the primary suit (***National Bank of Kenya Ltd v Leo Pius Odero sued as the administrator of the estate of SUSAN AKINYI ODERA Kisumu HCCC No. 19 of 1991***), the plaintiff filed suit to recover Kshs. 20,371,326.00 together with interest at 35% pa calculated on daily balances with effect from 1st October 1998. The suit was ultimately settled by consent letter for payment of Kshs. 900,000/- filed in court on 10th March 2010. The Advocates contended that the instruction fee should be based on Kshs. 48,891,182.40 which is the principal sum inclusive of the interest as at the date of settlement. Counsel for the Advocate cited the cases of ***Kenya Commercial Bank v George Arunga Sino t/a Arusi General Stores*** **KSM HCCC No. 123 of 1998 (UR)** and ***Thomas Asamba Maloba v Standard Chartered Bank*** **Ltd KKG HCCC No. 83 of 1995 (UR)** to support its position. In the latter case, Ochieng J., stated as follows;

> *[I]n my considered view, the learned taxing officer erred in principle when he ignored the claim for interest whereas the said interest was an integral part of the value of the subject matter of the suit as could be discerned from the pleadings.*

12. On its part, the respondent responded that the instruction fee ought to have been based on the claim for Kshs. 13,000,000/- and not Kshs. 20,371,326/- as the value of the subject matter.

13. The Deputy Registrar held that the value of the subject matter was the principal sum hence she awarded Kshs. 345,569/-. The Deputy Registrar also noted that the principal suit was settled at Kshs. 900,000/- and that the settlement did not include the element of interest and thus the element of interest could not be considered as part of the value of subject matter.

14. Under paragraph 1 of **Schedule VI** of the ***Order***, *"the value of the subject matter can be determined from the pleading, judgement or settlement between the parties."* The question is whether the Deputy Registrar erred in principle in excluding the interest element of the claim in determining the value of the subject matter in the pleading. The Deputy Registrar had a choice to either go by the pleading, judgment or settlement. The three instances are to be read disjunctively and the Order does not provide any guidance for the Deputy Registrar to exercise discretion. Such discretion must be exercised judiciously.

15. It is evident that the Deputy Registrar took into consideration the submissions and documents filed by each party and reached the conclusion that;

> *This matter was settled out of court and the defendant was to pay a sum of Kshs.900,000/- in full and final settlement of the suit. In the primary suit the court did not award interest as it did in the case of KCB v George Arunga Sinota &Anor KISIMU HCCC No. 123 of 198. Therefore I find that interest rate (sic) should not be considered as part of the subject matter in this case.*

16. I therefore find and hold that the Deputy Registrar took into consideration all the relevant factors and exercised her discretion judiciously in arriving at the value of the subject matter and thus the instruction fees. She excluded the element of interest as the matter had been settled for a lesser sum without interest yet based instruction fees on the principal amount claimed in the plaint.

17. The applicant has claimed that the taxing master erred in taxing off getting up fees whereas the matter proceeded to partial trial. **Schedule VI** of ***Order*** provides that getting up fees is allowed in addition to instruction fees if a denial of liability is filed or if issues for trial are joined by the pleadings. A perusal of the documents annexed to the application reveals that the defendant in the primary suit opposed the suit. The matter was fixed for hearing several times and although the suit did not take off, the advocates prepared for hearing and are therefore entitled to getting up fees.

18. The respondent urged that getting up fees are not awardable unless the judge issues a certificate. As no basis or authority was cited for this proposition, I dismiss the argument. I find and hold that the

Deputy Registrar erred in failing to award getting up fees in Item No. 2 of the Bill of Costs.

19. The Advocates challenged the Deputy Registrar's determination on items number 29, 54, 64, 78 and 88 on service on the ground that service was effected on the address indicated in the pleadings. Counsel submitted that the Deputy Registrar should have taxed the items as drawn because the respondent did not raise any issue with those items. A look at the said items in the bill of costs do not indicate where service was effected however, a perusal of the documents annexed reveal that the firm of *Wasuna & Co., Advocates* representing the defendant who have their offices within Kisumu Town. It therefore follows that service was effected on them and the taxing officer was correct both in principle and arithmetic in taxing the above items as she did.

20. I dismiss the Respondent/Client reference dated 14th December 2015. I allow the Advocate/Applicant reference dated 30th December 2015 to the extent that I award the applicant getting up fees in Item 2 of the bill of costs dated 26th May 2015 amounting to **Kshs. 115,190/-**.

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.