REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS

Misc Cause 914 of 2003

KIPKORIR TITOO & KIARA ADVOCATE…….PLAINTIFF

VERSUS

RELIANCE BANK LIMITED (IN LIQUIDATION)……..…DEFENDANT

R U L I N G

This is a reference from the taxing officer, pursuant to the provisions of Rule 11 of the Advocates Remuneration Order.

The taxation in issue was on an Advocate/Client Bill of Costs. The said Bill of Costs was taxed on 1st March 2005. Thereafter, the client gave notice of his objection, and requested the Taxing Officer to provide his reasons for taxing the Bill in the manner he had done. The reasons for the taxation were provided on 18th May 2005, whereupon the client made this reference.

The client is aggrieved with the whole taxation and Ruling thereon. It is the client's contention that the learned Deputy Registrar, who taxed the Bill, erred in law and fact in assessing the fees, based on the sum of Kshs. 66,467,137/=, whilst the suit was withdrawn, by consent of the parties, with no order as to costs. It is submitted that when a suit results in "zero benefit" to either party, the taxing officer should not use the amount claimed as a basis for calculating the costs.

The taxing officer is also faulted for increasing the basic scale fee by a further amount of Kshs. 482,990.25, whilst the entire proceedings in the **"mother suit"** resulted into a nil judgement for either party.

To support the reference, the client filed an affidavit of Mohamud Ahmed Mohamud, a liquidation agent with the said client. That affidavit simply sets out the brief history of the events that took place from 1st March 2005, when the taxing officer awarded Kshs. 2,644,851.40 to the advocate. Nothing turns on the said facts.

Mr. Mwangi, advocate for the client submitted that the taxed costs should be either set aside or varied, by setting aside the increament awarded.

He pointed out that the advocates, herein, Kipkorir, Titoo & Kiara Advocates, only came on record in November 2002, whereas the Plaint had been filed in November 1999. Having replaced the previous advocates, the new lawyers gave their considered legal opinion to the client, on 28th April 2003. The gist of the said opinion was that the claim by the client was not sustainable, and should therefore be terminated. Upon receipt of the professional opinion, the client accepted it, and thereafter had the case withdrawn.

Therefore, the client feels that the advocate should have charged no more than Kshs. 150,000/=, which

sum is less than the minimum instruction fee stipulated by the Advocates Remuneration Order. The client asked for a reduction of the fee because in its view the advocates had not even undertaken the steps usually taken in civil proceedings, upto judgement. It was conceded by the client that the basic instruction fees was Kshs.1,017,009/75. That sum could only become due and payable to an advocate if he had done more and more of the work that is usually undertaken in the course of a civil case said the client. Therefore, as the advocate herein, only came on board long after the pleadings had been closed, he is perceived to have only given advice to the client to withdraw the suit. For those reasons, the client feels strongly, that the advocate was not entitled to the "**full instruction fees"**, leave alone an enhancement thereto.

MAYERS & ANOTHER V. HAMILTON & OTHERS [1975] EA 13 was cited as authority for the preposition that an advocate earns his instruction fees, as he continues to carry out his instructions. In that case Spry Ag. P. held as follows, at page 16:-

> **"I accept that the moment an advocate is instructed to sue or defend a suit, he becomes entitled to an instruction fee but it is only necessary to look at the concluding words of the particulars of the instruction fee in the bill of costs now in issue - "*considering most difficult and conflicting case-law on the matter*" - to realise that an advocate will not ordinarily become entitled at the moment of instruction to the whole fee which he may ultimately claim. Suppose, for example, that within a few minutes of receiving instructions to defend a suit, an advocate were informed that the Plaintiff had decided to withdraw. The advocate, as I see it, would be entitled to claim the minimum instruction fee but he could not properly claim in respect of work he had not done. The entitlement under the instruction fee grows as the matter proceeds."**

To my mind that holding must be understood for what it is. The Acting President was commenting about a scenario wherein the Plaintiff decided to withdraw his case, shorting after the Defendant had instructed its advocate. Clearly, as the court observed, the advocate for the Defendant could not properly claim for work he had not done. He had just been instructed and then the Plaintiff withdrew the case. In those circumstances, the Defendant's advocate would not yet have "earned" the instruction fees, simply because he had been instructed. He had not taken any action in furtherance of the instructions.

The other limb of the client's reference was that by providing legal advise to a client, an advocate was doing no more than his duty to the client. Therefore, the client believes that the fact that the advocate gave such advise should not have been reason enough to warrant an increament to the basic instruction fee. For that preposition, the client placed reliance on **FIRST AMERICA BANK OF KENYA V. SHAH & OTHERS [2002], EA 64 at 70**, whereat Ringera J. (as he then was) held as follows:

> **"As regards the increase of the instruction fees, I accept that is a matter for the discretion of the Taxing Master. However, the decision must be exercised rationally. Now the only reason given by the Taxing Officer here to increase the fees is that the Defendants had done some research on the law and they had put in well researched defences. That, to my mind, is not one of the factors for taking into account in increasing the instruction fees. I am of the view that, if a Defendant does research before filing a defence and then puts a defence informed by such research, he has done no more than expected. It is nothing extraordinary. The research is not necessarily indicative of the complexity of the matter. It may well be indicative of the advocate's unfamiliarity with basic principles of law. Such unfamiliarity should not be turned into an advantage against an adversary."**

With that holding, I am completely in agreement. And, Mr. Kipkorir, advocate for the respondent herein, did not advance a submission to the contrary. Indeed, his only comment on that case, (of **FIRST AMERICAN BANK**), was the observation that the suit had been withdrawn within three days after the defences were filed.

Apart from that, the respondent submitted that the client failed to put forward any good reason to warrant the reduction of the basic instruction fee. It is true that the client has, at best, put forward a half-hearted,

lukewarm case for having the basic instruction fee reduced from Kshs. 1,017,009/75, to Kshs. 150,000/=. I therefore hold that the client has failed to satisfy me that the learned Taxing Officer erred in principle or at all, at least in assessing the starting point for calculating the instruction fees.

In **JORETH LTD V. KIGANO & ASSOCIATES [2002] 1 EA 92 at 99**, the Court of Appeal reiterated that:

> **"the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgement on settlement (if such be the case), but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst 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."**

In the light of that decision, the starting point adopted by the Taxing Officer here, was the correct one. The client accepts as much.

The next question is whether or not the advocate had "earned" the said instruction fees. In that regard, the advocate draws the attention to the fact that the case by his client had not been withdrawn, as suggested by Mr. Mwangi advocate. The client emphasizes that the case was settled.

He also points out that prior to giving advice to the client, numerous meetings were held. The fact that the said meetings were held is not in doubt, as the advocate made reference to them in his letter dated 28th April 2003.

Furthermore, a perusal of the Decree which was issued on 25th February 2003, confirms that the suit was not withdrawn, but was marked as settled.

It is significant that the advocates came on record in November 2002; gave their professional opinion later that month; and had the case marked as settled, by a consent letter dated 27th November 2002.

Unlike in the case of **MAYERS v . HAMILTON [1975] EA 13**, wherein the initiative to withdraw the case was taken by the other party, immediately after the Defendant had instructed its lawyers; in this case it is the advocates for the client (who is now aggrieved) who advised his client to settle the claim. In other words, the advocate herein cannot be said to have done nothing in furtherance to his client's instructions. He definitely read his brief; gave due consideration to all the material presented to him by the client; gave consideration to the suit, in the light of the applicable law; held meetings with the client' and formulated a considered legal opinion that the suit would not be sustainable. He then advised his client, and it is that advice which prompted the client to settle the suit. Therefore, the advocate cannot be accused of laying claim to instruction fees "at the moment of instruction," as was the case in MAYERS v HAMILTON.

A look at the decision in **TONONOKA STEELS LTD V. THE EASTERN & SOUTHERN AFRICAN TRADE & DEVELOPMENT BANK (P.T.A BANK) HCCC NO 267/98**, reveals that even when a suit was determined summarily, an advocate would still be entitled to his instruction fees. In that case, the defendant did not yet file a defence to the suit. Instead, his advocate raised a Preliminary Objection to both the application for injunction as well as the suit. The court upheld the preliminary objection, on the grounds that it lacked jurisdiction to entertain and determine the suit.

When the court was called upon to set aside the orders of the Taxing Officer, the court held as follows:-

> **"The instruction fee does not depend on the period taken to determine the suit finally. For the time taken in the course of the case hearing or arguments is a matter to be separately remunerated."**

That holding puts paid to the client's contention that the advocate herein was only instructed long after the pleadings had closed; and that the advocate only gave advise which led to the determination of the

suit. Neither the time taken in determining a case, nor the stage at which the case was determined is relevant in calculating the instruction fees. The single most important issue is the nature of the instructions. Thus, if an advocate was only instructed to oppose the taxation of a Bill of Costs, his own fee will not be determined with reference to the value of the subject matter of the whole suit. His brief would have been duly limited to the Bill of Costs, and that then becomes the subject matter of his **"cause."**

In this case, the advocate was instructed

> **"to take over the conduct of the suit in NAIROBI HCCC NO. 2158 of 1998 from the firm of Mohamed Madhani & Company Advocates who were on record for the Plaintiff, M/s RELIANCE BANK LIMITED (IN LIQUIDATION) which had sued SHILOAH INVESTMENTS LIMITED, claiming inter alia the sum of Kshs. 66,467,317.00 together with interest thereon at 32% p.a. from 18th December 1996 owing on account of money irregularly and unlawfully obtained by the Defendant, and which had obtained an injunction restraining the Defendant from selling the property known as KISUMU/MUNICIPALITY/BLOCK 7/380"**

The advocate was to take over the conduct of the Plaintiff's case. The claim by the Plaintiff was for Kshs. 66,467,317/=.

Once the extent of the advocates' instruction was clear, and so also the value of the subject matter; and provided that the advocate undertook steps in furtherance of those instructions, the advocate would have earned some instruction fees.

The only questions that now remain to be resolved are whether or not the advocate had earned the full instruction fee as prescribed or not; and secondly if he was entitled to an increament.

In **JORETH LTD V. KIGANO AND ASSOCIATES** (supra), the Court of Appeal held as follows, at page 100:-

> **"In the first ground thereof the Respondent states that Instruction Fee is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached. In principle that is correct."**

In the light of that dictum, which is binding on this court, I hold that the advocate had **"earned"** at least the basic instruction fee as prescribed.

The question as to whether the learned Taxing Officer was entitled to increase the said instruction fee as he did, is next in line.

When called upon to give reasons for the manner in which he had taxed the bill, the learned Taxing Officer said:-

> **"Although the applicant took over the matter from another advocate, it was through their advice that the suit was finally settled. In my discretion, I shall increase the sum by 482,990./25, and tax item 1 at 1,500,000/=, and hence tax off Kshs. 769,258.75."**

In my considered opinion, the fact that the suit was settled on the advice of the advocate does not justify an increament. A prudent advocate is expected to give due consideration to his client's case and the applicable law; and to then advice the client appropriately. By doing so, the advocate cannot be said to have done something extraordinary. Therefore, in my considered opinion there is no basis in law, or fact for the award, by the Taxing Officer, of the increament. To that extent, I hold that the Taxing Officer erred, in principle, in increasing the prescribed instruction fee.

In the result, the reference is allowed, but only to the extent of reducing the instruction fees from Kshs.

1,519,454.97 to Kshs. 1,017,009.75.

However, as both the parties to this reference are partially successful, I order that each of them will bear their own costs.

Finally, I direct that the learned Deputy Registrar will now calculate the final figure, based on the instruction fee as awarded herein.

It is so ordered.

Dated and Delivered at Nairobi this 26th day of July 2005.

FRED A. OCHIENG

JUDGE