



**Zakhem International Construction Limited (Nigeria) & 2 others v LJA Associates
LLP (Miscellaneous Civil Application E329, E330 & E331 of 2022 (Consolidated))
[2023] KEHC 2451 (KLR) (Commercial and Tax) (17 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2451 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E329, E330 & E331 OF 2022 (CONSOLIDATED)**

DAS MAJANJA, J

MARCH 17, 2023

BETWEEN

**ZAKHEM INTERNATIONAL CONSTRUCTION LIMITED (NIGERIA) 1ST
APPLICANT**

**ZAKHEM INTERNATIONAL CONSTRUCTION NIGERIA LIMITED 2ND
APPLICANT**

**ZAKHEM INTERNATIONAL CONSTRUCTION LIMITED (CYPRUS 3RD
APPLICANT**

AND

LJA ASSOCIATES LLP RESPONDENT

RULING

1. The applicants/clients (“the clients”) have filed various Chamber Summons all dated August 12, 2022 (“the References”) made, *inter alia*, under Rule 11(2) of the [Advocates Remuneration Order, 2009](#) (“the Order”) challenging the decision of the Deputy Registrar dated July 29, 2022 (“the Ruling”) following taxation of three Advocate/Client Bills of Costs all dated April 26, 2022 (“the Bills of Costs”).
2. The References are supported by grounds set out on their faces and the affidavits of Ibrahim Annous, the Clients’ Logistics Manager, all sworn on August 12, 2022. They are opposed by the advocates/respondent (“the Advocates”) through the replying affidavits of James Gitau Singh, an advocate and partner in the Advocates’ firm, all sworn on October 14, 2022. The parties also rely on their written submissions in support of their respective positions.



3. It is common ground that the Advocates represented the Clients who were defendants in HC COMM. No. 292 of 2018; Ecobank Nigeria Limited & another v Zakhem International Constructions Limited (Nigeria) and 4 others (“the Suit”). Subsequently, the Advocates filed the Bills of Costs and claimed a total of Kshs. 209,774,594.60 in each of them. The Deputy Registrar, in the Ruling, identified three issues for determination; Whether there existed an advocate client relationship, whether the Advocates could file three separate bills of costs and whether the items in the Bills of costs could be taxed as drawn.
4. On the whether there existed an advocate-client relationship, the Deputy Registrar found that the Advocates were instructed to act for Zakeem Construction Limited in MISC E 331 of 2022 and that the Clients submitted that the only firm which issued instructions was Zakhem International Construction Limited acting on behalf of the other two Defendants in the Suit. The Deputy Registrar concurred with the Advocates that whereas there was no formal letter of instructions from the other two defendants, they were estopped by their conduct from denying the Advocates their requisite fees. That in this instance, the Advocates had filed three separate defences and the pleadings for all three defendants and that from the bundle of documents filed, there were numerous correspondences between the Advocates and the Representatives of the three defendants which point out that the Advocates were in fact dealing with representatives from Zakhem International Construction in Kenya, Cyprus and Nigeria. The Deputy Registrar further found that from the correspondence, the terms of a settlement agreement with regard to the three defendants are discussed at length and that there was a letter from Zakeem International Construction Kenya Limited dated July 26, 2018 forwarding the Summons for both Zakhem International Construction Limited (Cyprus) and the Kenyan Company. Further, that the Deed of settlement was also executed by the three different entities.
5. The Deputy Registrar held that the Clients could not take advantage of the work done by the Advocates as they have benefitted from their services and work to the extent that the matter was settled partially. The Deputy Registrar was satisfied the Advocates had proved the existence of an advocate client relationship between the Clients and the Advocates.
6. On whether the Advocates could file three separate Bills of Costs, the Deputy Registrar was guided by the principle that when an advocate is instructed to sue or defend a suit, he becomes entitled to instruction fees and that the provisions of Para. 62(2) of the Order requires the Taxing Officer to disallow costs unnecessarily or improperly incurred when the same advocate is employed for two or more defendants and separate pleadings are delivered. That in this instance, the Advocates received three different instructions from the three Clients and proceeded to file separate defences necessitating the filing of the three Bills of Costs. However, the Deputy Registrar was of the opinion that it would be improper to allow the other legal fees for drafting of the pleadings, court attendances, correspondences and such other legal fees as provided for in items 2 to 340 of the Bills of Costs as it would be unjust enrichment of the Advocates. The Deputy Registrar reasoned that whereas the Advocates were acting for the Clients, they were able to carry out the services concurrently at once thus she considered these costs at a party to party basis and taxed them only once.
7. On whether the items in the Bills of Costs were drawn to scale, the Deputy Registrar held that in this instance, the parties agreed that the legal costs at Party to party basis was Kshs. 67,000,000.00 and that from the Kshs. 67,000,000.00, 80% was to be borne by the 1st – 4th defendants in the suit whereas the Plaintiff was to pay 20%. That noting that an advocate-client bill of costs can never be less than the party to party costs and having further determined that the Advocates are entitled to instruction fees in the three different Bills of Costs and being guided by Schedule VI Part B which provides that the minimum fee shall be the fees prescribed in A above, increased by 50%, the Deputy Registrar proceeded to tax and certify each of the Bills of Costs at Kshs. 93,264,000.00 and taxed off a sum of Kshs. 116,510,594.60.



It is this decision that the Clients are dissatisfied with and forms the basis of the References which I shall briefly highlight below together with the Advocates' responses

The Clients' References and Submissions

8. From the Clients' References and submissions, they are principally aggrieved by the Deputy Registrar's award of the item on instruction fees in the respective Bills of Costs. They aver that the Deputy Registrar misdirected herself in law in arriving at a decision that is untenable in law and failed to be guided by Para. 62 of the Order. That instead of filing a joint statement of Defence, the Advocates proceeded to file three identical statements of Defence so as to raise justify the presentation of three separate Bills of Costs with the intention from the get go was to unjustly enrich themselves to the detriment of the Clients.
9. The Clients submit that the Deputy Registrar failed to explain why the Advocates were permitted to charge instruction's fees thrice on the same matter and in respect of the same set of instructions thus arriving at a manifestly high award of instruction fees. Further that the Deputy Registrar misdirected herself on points of law especially on the clear provisions of Para. 62 of the Order and that the Ruling and reasoning thereof must be set aside.
10. The Clients state that the Deputy Registrar misdirected herself by exercising discretion on grounds based on unclear, unreasonable and legally untenable grounds by allowing the instruction fee of Kshs. 53,600,000.00 together with one-half escalation of Kshs. 26,800,000.00 amounting to Kshs 80,400,000.00 in respect of each Bill of Costs. The Clients complain that the Deputy Registrar erred in failing to make a single award on the instructions fees due to the Advocates and that she took into consideration issues that she shouldn't have and failed to consider issues she ought to have in the circumstances. That the instruction fee as ruled was baseless in law and that legal fees chargeable should not be too high to confine access to justice to the wealthy.
11. The Clients urge that no prejudice will be occasioned to the Advocates if the orders sought herein are granted and that it is in the interests of justice and fairness that the Court do grant the prayers sought.

The Advocates' Response

12. The Advocates oppose the References and support the decision of the Deputy Registrar. They contend that the taxed amounts are in accordance with the provisions of the Order and the reasons for the Ruling are in accordance with established principles and in the circumstances, there is nothing to warrant setting it aside.
13. The Advocates submit that the Clients are three companies that are distinct and independent legal entities as is evident from Albert Zakhem's deposition of August 11, 2018 and Adnan Annous's deposition of July 30, 2018. Further, that the three companies are all incorporated overseas. The Advocates contend that the Clients' deponent, who is based in Kenya, is not involved in any manner whatsoever with any of the Clients and that in the course of representing the Clients in the Suit, the Advocates have never taken instructions from him and they verily believe that he does not have the locus to institute these proceedings nor to depone to the matters in question. The Advocates thus urge that his depositions be expunged.
14. The Advocates maintain that at all material times, they were instructed by Mr. Albert Zakhem to represent Zakhem International Construction Limited (Nigeria) and Zakhem Construction Nigeria Limited whilst Mr. Ibrahim Zakhem issued instructions on behalf of Zakhem International Construction Limited (Cyprus) and that in addition to the foregoing, instructions pertaining to



Zakhem Construction (Kenya) Limited were issued by Adnan Annous as evidenced by his deposition of July 30, 2018.

15. The Advocates assert that the Clients were anxious to maintain their distinct legal entities as the plaintiff Banks had in their opinion, co-mingled accounts as evidenced in the pleadings filed in the Suit and correspondence exchanged between the Clients and the plaintiff banks. The Advocates state that in preparing the Defences, they were instructed by both Ibrahim Zakhem and Albert Zakhem together with a Law Firm from Nigeria, AEC Legal and the Clients insisted that the Advocates file different Defences for each of the defendants in the Suit which they duly did. That to avoid any conflict arising, the 4th defendant therein instructed the firm of Andrew and Steve to take over conduct of their matter.
16. That a perusal of the Plaint filed in the Suit together with the Notice of Motion and deposition of July 20, 2018 will show that the issues pleaded against each of the defendants therein raised distinct causes of action which required to be traversed individually. The Advocates state that on November 29, 2018, the Court in the Suit issued orders freezing inter alia, the 1st 2nd and 3rd defendants' bank accounts and that a partial compromise was arrived at where there was an admitted liability of USD 25,960,083.85 with a disputed amount of USD 35,838,132.42, to be referred to an independent Audit Firm for verification.

Analysis and Determination

17. As stated before, the main issue for determination is whether the Deputy Registrar applied the correct legal principles in awarding the instruction fees as she did. 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".

18. If I understand the Clients correctly, their grievance is based on the fact that the Deputy Registrar awarded instruction fees to the same advocates in the same suit acting for different parties and that the Advocates essentially filed the same defence in a bid to reap unfair instruction fees from all of them.
19. Para. 62 of the Order gives guidance on how costs are to be determined where the same advocate is employed by two or more plaintiffs or defendants as follows:

62. Costs where same advocate is employed by two or more plaintiffs or defendants.

Where the same advocate is employed for two or more plaintiffs or defendants and separate pleadings are delivered or other proceedings had by or for two or more such plaintiffs or defendants separately, the taxing officer shall consider in the taxation of such advocate's bill of costs, either between party and party or between advocate and client, whether such separate pleadings or other proceedings were necessary or proper, and if he is of opinion that any part of



the costs occasioned thereby have been unnecessarily or improperly incurred, the same shall be disallowed.

20. From the aforesaid provision, the decisive consideration is whether the pleadings, in this case, the separate defences, were necessary or proper. If the separate pleadings are not necessary or that costs occasioned are unnecessary or improperly incurred, then the Deputy Registrar may disallow such costs. In this case, the Deputy Registrar considered that the Advocates received separate instructions from each client. The Clients do not dispute that they independently instructed the Advocates to act for them in the Suit and that the Clients are three separate and distinct entities.
21. In her decision, the Deputy Registrar was guided by the principle that when an advocate is instructed to sue or defend a suit, he becomes entitled to an instruction fee. She was not wrong. Indeed, the Court of Appeal, in *Joreth Ltd v Kigano & Associates* [2002] 1 EA 92 stated that instruction fees is an independent and static item that is charged only once and is not affected or determined by the stage the suit has reached. I find that once an advocate is instructed, instruction fees must flow. The Clients, having issued three different instructions, ought to pay three different instruction fees and I find no fault in the Deputy Registrar's conclusion that indeed, the Advocates were entitled to file three separate Bills of Costs as a result.
22. The Deputy Registrar relied on Schedule VI Part B of the Order together with the settlement of the parties in the Suit to arrive at the sum of Kshs. 53,600,000.00 as instruction fees and Kshs. 93,264,000.00 as the certified taxed amount. The Clients do not challenge the above provision of the Order applied by the Deputy Registrar.
23. As stated, from their pleadings in the Suit, the Clients sought to be identified as different entities which implied that their issues were different and ought to have been handled separately rather than jointly. As such, I cannot fault the Deputy Registrar's discretion for disallowing some of the costs she considered ran concurrently but holding that it was not improper to file separate pleadings therein and that there were three separate instructions and that three separate instruction fees ought to have flowed from the same.

Conclusion and Disposition

24. For the reasons I have set out above, I find that the Deputy Registrar's Ruling dated July 29, 2022 was based on the correct principles hence I do not find any reason that warrants the court's interference. I therefore dismiss the respective Chamber Summons dated 12th August 2022 and filed herein and in Misc. Application No. E330 of 2022 and Misc. Application No. E331 of 2022 with costs to the Advocates.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH 2023.

D.S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Ms Asli instructed by Ahmednasir Abdullahi Advocates LLP for the Applicants/Client.

Mr Kinyanjui instructed by JLA Associates LLP Advocates for the Respondent.

