REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

MISCELLANEOUS NO. E. 767 OF 2020

NATIONAL BANK OF KENYA..... PLAINTIFF

-VERSUS-

RACHUONYO & RACHUONYO ADVOCATES..... RESPONDENT

RULING

1. This Ruling is in respect to an Advocates remuneration for representing his client in an Appeal from the High Court to the Court of Appeal.

2. Rule 111(3) of the Court of Appeal Rules tells us the following about such remuneration:-

> **"The remuneration of an Advocate by his clients in respect of application or appeal shall be governed by rules and scales to proceedings in the High Court.**

By these instructions the Court must look to schedule 6 of The Advocates Remuneration Order for guidance.

3. The Reference herein seeks to impugn certain aspects of the Ruling of Hon. Opande on the Bill of Costs dated 22nd August 2019. In the Bill of Costs, the Advocates sought their fees from their clients, National Bank of Kenya, for representing them in an Appeal against the decision of the High Court which dismissed their claim of Kshs.25,438,437.00. It is common ground that the Advocates ceased acting on their own volition after case management at the Court of Appeal but after they had exchanged submissions with their counterparts in respect to the appeal.

4. For convenience, this Court clusters the grievances of the client into five or so headings.

5. Paragraph 1(b) of schedule 6(A) provides for instruction fees for presenting an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties. In this matter the subject matter is agreed to be Kshs. 25,438,437.00. For this, the Taxing Master awarded instruction fees of Kshs.586,756.60 The complaint by the client is that the Taxing Master enhanced the basic fee by Kshs.5,000.00 and this is an error. When this Court works out the fees as provided by the Rules, the instruction fees ought to have been 581,576.00 and so the client is right that there is an erroneous difference of Kshs.5,000.00. It seems to this Court that there may have been a human failing on the part of the Deputy Registrar. To error is human and one objective of a reference is to correct obvious errors of this kind. I will allow the objection in that regard.

6. The second limb of criticism in regard to the instruction fees seems less persuasive. Instruction fees is earned at the time of instructions. It is true that the Advocates pulled out of the matter on their own volition yet by that time they had earned instruction fees and there can be no reason to deny them fees in that regard.

7. The Taxing Officer awarded the Advocates fees for getting up and in doing so held:-

> **"The objection by the Respondent to item 57 is that the Court must certify that a case is a proper one for consideration of getting up fees. The Respondent refers to paragraph 3 of schedule 6 of the Advocates Remuneration Order…. This provision talks of Appeals to the High court and not appeals from the High Court. Fees for appeals at the Court of Appeal are taxed under Schedule 6 as a matter before the High Court. The objection is overruled save that 1/3 shall be subject to the amount taxed on instructions."**

8. The Advocates support that holding while the client argues that in the absence of the certificate contemplated by paragraph 3, the getting up fees is not deserved.

9. This is the view I take.

10. When Rule 111 (3) of the Court of Appeal rules directs that remuneration of an advocate by his Client in respect of an appeal should be governed by the rules and scales to proceedings in the High Court, then it would be in respect to proceedings in the High Court that are a mirror of the proceedings in the Court of Appeal. The Court of Appeal is an appellate court while the High Court has a dual role as a trial and an appellate court. The provisions of remuneration in schedule 6 has provisions for both trial proceedings and appeal matters. The place to find remuneration for appeal matters before the Court of Appeal, in the view of this Court, is remuneration in respect to appeals in the High Court.

11. For this reason, on getting up fees, the relevant provision for appeals in the High Court, and by deduction appeals before the Court of Appeal, would be paragraph 3 and not paragraph 2 of schedule 6. Paragraph 3 reads:-

> **"Fees for getting up an appeal;**
>
> **In any appeal to the High Court in which a respondent appears at the hearing of the appeal and which the court at the conclusion of the hearing has certified that in view of the extent or difficulty of the work required to be done subsequently to the lodging of the appeal the case is a proper one for consideration of a getting up fee, the taxing officer may allow such a fee in addition to the instruction fee and such a fee shall not be less than one-third of the instruction fee."**

12. Eligibility for getting up fees is dependent on certification by the Court entertaining the Appeal, at the conclusion of the hearing, that in view of the extent and difficulty of the work after the lodging of the appeal, the case is a proper one for consideration of getting up fees.

13. In the matter before Court, the Advocates ceased acting before the appeal was heard and there could not have been opportunity for the certification contemplated by the provisions of paragraph 3. On my part, I would not award getting up fees and the Court takes the view that the objection in this regard should succeed.

14. I turn to consider whether the Taxing Officer erred in allowing charges for correspondence with the Client without proof. This would be in respect to receipts or perusals or writing of those letters and were in items 31-35,37,38,41 and 42. The Applicant argues that copies of the letters were not attached to the Bill of Costs and that when counsel for the Advocates sought to introduce them through its written submissions, it was objected to by the client. The Client is disappointed that this objection was not upheld. For the Advocates, it is asserted that the existence of the correspondence was not contested.

15. It has to be understood that taxation of a bill is not a hearing in which a party presenting a bill is required to attach copies of documents for which work on them requires remuneration. This is because it is not expected that documents like correspondence exchanged between parties to the Bill will be contested. If however there is such contest, and this should be far in between, then the party seeking to rely on the documents for remuneration ought to produce copies by way of affidavit evidence. Yet in this matter the Taxing Master accepted the documents attached to the submissions. While the Advocates ought to have done better, the argument by the Client before the Taxing Master should have been whether or not the copies of the letters were truly authentic rather than on the technical point on the manner of production. As the argument was won on a technicality as opposed to whether the letters truly reflected the work done,i decline to uphold the Reference in regard to this.

16. There is then the question of whether the Taxing Master erred in allowing charges for photocopying without proof of payment? This touches on items 9 and 50. It is argued that photocopying is raised under disbursements and not itemizable in the Advocate Remuneration Order.

17. The answer to this proposition is found in paragraph 5 of schedule 6 on copies. The Rule allows a charge for making copies of documents at a rate per folio. For instant, in Rule 5(a) making copies of a plaint and <u>every other</u> document is at Kshs.25 per folio. And then Rule 5(d) seems to be on making of photocopies. It reads:-

> **"Photostat copies per page; actual costs, supported by vouchers of all necessary photocopying ..... Kshs. 10."**

18. I would think that on photocopying, the person presenting the bill can choose to charge at Kshs.10 per folio or at actual costs. If the latter, then it must be supported by proof of the actual costs. Here, the Advocates charged Kshs.5 per folio (less than that provided) and proof was unnecessary. As the number of folios are not contested, then there can be no reason to fault the Taxing Master on items 9 and 50.

19. There is a matter which should not detain the Court at all. It is common ground that Kshs.100,800.00 was paid to Court as fees for filing of the records of Appeal. This deposit was from funds provided by the Client. Should it have been included in the Bill?

20. I think not. This is a Client/Advocate Bill of Costs. Unless the disbursement was paid for by the Advocates on behalf of the Client then it cannot be claimed in a bill against the Client. The suggestion by the Advocates that it was properly included and then accounted for does not seem to be a fair suggestion. The money was paid by the Client as deposit of fees, it was for a specific purpose and cannot be a proper item for a Bill as against the Client.

21. The Taxing Court increased the Advocates fees by ½ of what it reached to be party and party costs. As I understand it, the manner of arriving at an Advocates and Client costs is by making reference to Part B of Schedule 6 of the Remuneration Order which reads:-

"Advocate and Client costs;

As between advocate and client the minimum fee shall be—

(a) the fees prescribed in A above, increased by 50%; or

(b) the fees ordered by the court, increased by 50%; or

(c) the fees agreed by the parties under paragraph 57 of this order increased by 50%; as the case may be, such increase to include all proper attendances on the client and all necessary correspondences."

22. In the matter at hand the Court had not ordered party and party fees nor was there an agreement of fees under paragraph 57 of the Order. For that reason the matter of assessing the Advocates costs would fall under B (a). Clearly the process of taxing an advocates fees is by applying fees prescribed in schedule 6(A) and then increasing it by 50%. It is not as suggested by the client that actual party and party costs should first have been assessed. The language in Schedule 6(B) is unequivocal. It is by simply applying the fees prescribed in A and increasing it by 50%. The Reference in that regard is disallowed.

23. There is then an objection in the manner in which the Taxing Master dealt with items 53-56. These are items in regard to the taxation of the Bill itself. They are for drawing the Bill of Costs, making copies thereof, attending the Court registry for filing and attending the Court for taxation.

24. It is true as suggested by counsel for the client that paragraph 69(3) of the Advocate (Amendment) Remuneration Order 2009 reads:-

"Fees for attending taxation shall not be included in the body of the bill, but the item shall appear at the end, and the amount left blank for completion by the taxing officer."

25. The Court's reading of the Rule is that fees for attending the taxation itself shall be left blank for completion by the Taxing officer. Items 53, 54 and 55 is for work done prior to the actual date of taxation and should not be affected by this Rule. The only item which should not have been included in the body of the bill is item 56 which was on attending the Court for Taxation. A strict reading of the Rule is that it is the Taxing officer who should complete this item.

26. What is critical nevertheless is that it has not been argued by the client that Kshs.600.00 allowed by the Taxing officer, as proposed by the Advocates, is unreasonable or undeserved for the attendance. While there may have been a procedural lapse, it is not shown that prejudice or injustice was caused to the Client as a result of the flaw. For this reason the Court does not uphold reference on item 56. As to item 52-55, this Court has already made clear why the objection in respect thereof must also fail.

27. The upshot is that the Chamber Summons of 8th June 2020 succeeds only in regard to;

a) Item 1, instruction fees reduced by Kshs.5000 to Kshs.581,576.00

b) Item 57 on getting up fees is disallowed.

c) Item 60 should not have been included in the Bill

Dated, Signed and Delivered in Court at Nairobi this 10th Day of February 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE