



IN THE HIGH COURT OF KENYA

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. CIVIL APPLICATION NO. E146 OF 2019

BETWEEN

RACHUONYO & RACHUONYO ADVOCATESADVOCATE/APPLICANT

AND

NATIONAL BANK OF KENYA LIMITEDCLIENT/RESPONDENT

RULING

Introduction and Background

1. This matter was commenced by an Advocate/Client Bill of Costs dated 30th April 2019 in which the Advocates sought, “instruction fees to defend and oppose an application for injunction over LR No. 170/35 Redhill valued at Kshs. 23,000,000/= considering the law involved, the urgency and importance of the matter, the research in the law to be made, the documents to be perused, the complexity of the matter and time to be taken.”

2. It is common ground that the Advocates represented the Client (“the Bank”) in **HCCC 878 of 2009: Kawamabanjo Limited & Another v National Bank of Kenya Limited & 6 Others** (“the Suit”). The Advocates claimed a total of Kshs. 3,122,900.00 for services rendered to the Bank. The claim for instruction fees was pegged at Kshs. 603,000.00. The Deputy Registrar considered the parties’ depositions and submissions and by the ruling dated 30th April 2020 stated, in part, as follows:

On item 1, this is not just instruction to oppose an ordinary injunction. The application from the record came with a plaint that formed the substantive suit. Instruction fees in respect therefore is for instruction to defend the suit for an injunction. The value of the subject matter being Kshs. 23,000,000/- and by the Respondent’s admission in paragraph 8 of their submissions, the figure was pleaded in paragraph 30 and 32 of the Plaint. We cannot go out of pleadings to start considering valuation reports, when there... already exists a pleaded figure. Under the 2006...Order, the amount chargeable on the value of the subject matter above is Kshs. 402,000/-...

3. The Deputy Registrar therefore awarded Kshs. 402,000.00 as instruction fees and Kshs. 134,000.00 as getting up fees. It certified Kshs. 2,554,410.70 as the fees due to the Advocates.

4. The Bank, being dissatisfied with the decision of the Deputy Registrar, has filed this Reference under **Rule 11(2)** of the **Advocates Remuneration Order** (“the **Order**”) by way of the Chamber Summons dated 19th June 2020. It is supported by the affidavit of Chrispus Maithya, a Legal Officer with the Bank, sworn on 19th June 2020 and opposed by Clifford Owuor Rachuonyo, an advocate and partner in the Respondent law firm (“the Advocates”), sworn on 20th July 2020.

5. The parties filed a consent dated 9th October 2020 indicating, inter alia, that with the exception of item number 1 and item number 352, all the other items in the Bill of Costs be taxed and allowed to the total sum of Kshs. 981,651.00 and that the court determines the said Items 1 and 352 relating to instruction fees and getting up fees.

6. The Reference was canvassed by way of written submissions with the parties advancing their respective positions.

The Bank’s Submissions

7. The thrust of the Bank's case is that the Deputy Registrar erred in principle in failing to apply correctly the principles and formula provided for in **Schedule 6** of the **Order** for assessing the instruction fees by arriving at an improper determination on the value of the subject matter of the suit on the basis of which he proceeded to determine the instruction fees.

8. The Bank contended that there was a valuation report of the suit property on record which indicated that the value of the suit property was Kshs. 6,500,000.00 as against the pleaded figure of Kshs. 23,000,000.00 and that pursuant to **proviso (iv)** to **Schedule 7** of **Order**, in matters of the nature of the suit giving rise to the taxation, the determination of the instruction fees ought to have been one tenth of the capital value of the suit property which formula the Deputy Registrar failed to apply.

9. The Bank contends that the instruction fee awarded to the Advocates was manifestly disproportionate to the suit, unreasonable and so inordinately high as to amount to substantial oppression and injustice to the Bank. The Bank also faulted the Deputy Registrar for determining that the instructions fees related to defending the suit while the Bill of Costs as drawn expressly stated that it was for fees for defending an application for injunction. It added that the getting up fees was based on the grossly exaggerated instructions fees.

The Advocates' Submissions

10. The Advocates reject the Bank's contention that the Deputy Registrar erred in identifying the subject matter and its value at Kshs. 23,000,000.00. They respond that this sum was expressly pleaded by the Plaintiff in its statement of claim and was expressly conceded by the Bank in the taxation proceedings. The Advocates argue that the Plaintiff's claim concerned allegations of an unlawful and fraudulent sale, at an undervalue, and in which the reliefs sought were for a permanent injunction, nullification of the sale, cancellation for the title and damages for fraud. The Advocates state that the Deputy Registrar exercised his discretion properly by rejecting the Bank's invitation to ignore the pleaded sums and instead, rely on a contested valuation report of Kshs. 6,500,000.00.

11. The Advocates urge the court to reject the Bank's invitation to apply **proviso (iv)** to **Schedule 7** of **Order** which is a formula provided for calculation of conveyancing fees or for assessment of fees for disputes between a landlord and a tenant, in which formula a tenth of the capitalized value would be applied. According to the Advocates, the subject dispute did not concern rent (or fees for rental) or a conveyancing transaction as the nature of services rendered by the Advocates are completely distinct and clearly relate to defending a suit.

12. The Advocates contend that the suit has been heard and as at the date of this Reference, is pending delivery of the Judgment. The Advocates submit that the Plaintiff's interlocutory application was within the suit, which is referred to, in the Defence, was separately conducted and concluded long before the main suit proceeded to full hearing. The Advocates add that the Bank is attempting to unjustifiably denigrate the services rendered to it, and to thereby avoid payment of fees justly due which ought to be deprecated as being outside the pursuit of Justice.

13. The Advocates conclude that the Reference lacks merit as the Bank has not demonstrated that the Deputy Registrar erred on principle as submitted.

Analysis and Determination

14. Before I deal with the substance of the matter, let me dispose of a technical issue raised by the Advocates. They submit that the Reference is incurably defective in the absence of a duly styled and filed Notice of Objection, expressly setting out the contested items of taxation, and inviting the jurisdiction of the Court for review in accordance with **Rule 11 (1)** of the **Order**. They point out that the Bank merely requested for a copy of the Reasons and Ruling on Taxation. They further complain that the Reference as styled is incurably defective as it fails to set out brief and concrete grounds and points of law on claims for infringed principles of taxation upon which the Deputy Registrar is presumed to have erred, and upon which the Court is invited for review. They also urge that the grounds on the face of the Reference are vague, prolix, unsubstantiated and unnecessarily argumentative without at all setting out specific grounds or points of law for reconsideration in a review as required by established law and practice.

15. Without belabouring the point, I think this objection lacks merit for two reasons. First, it is now established that a ruling contains the reasons for the taxation hence it is unnecessary to request for specific reasons for each item taxed. Second, the parties agreed by consent on the issues to be determined in this Reference. Both parties have submitted on the issues exhaustively hence I cannot therefore say that the Advocates were prejudiced as what is contested is clear.

16. The issue for determination relates to the instruction fees to which I now turn.

Instruction Fees

17. 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 this court should follow in dealing with a reference 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. One of the grounds of dispute between the parties was whether the Advocates sought instructions fees for the application for injunction or instruction fees for the suit as the particulars provided in Item 1 and which I have set out above, only refers to an application. On this issue the Deputy Registrar concluded that the application accompanied the plaint that formed the substantive suit and that therefore the instructions given to the Advocates was to defend the suit for injunction.

19. Having considered the submissions, I do not find any misdirection. First, the tenor of the entire Bill of Costs shows that the Advocates were claiming fees for the whole panoply of services rendered to the Bank. Second, the parties and in particular the Bank did make submissions on the basis that the instruction fees were for the entire suit and not necessarily the application therefore neither party was prejudiced.

20. The next issue is whether the Deputy Registrar applied the appropriate or charging provision. In its submissions, the Bank agreed that the charging provision for Item 1 was **Schedule VI** of the **Order**, in this case the **Advocates Remuneration Order, 2006**, which was applicable at the time.

21. The Bank submits that the Deputy Registrar ought to have applied the formula indicated in **proviso (iv)** of **Schedule VI** of the **Order** in determining the instruction fees. This approach was never raised before the Deputy Registrar hence I cannot say there was an error on the basis of an issue that was not raised. I also agree with the Advocates that this formula in the **proviso (iv)** of **Schedule VI** does not apply to the circumstances of this case. It provides for calculation of instruction fees for disputes as follows:

(iv) for the purpose of assessing an instruction fee in any suit-

(a) for possession of premises, with or without a claim for arrears of rent; or

(b) for specific performance of a lease, the value of the subject matter shall be taken to be the arrears of rent or mesne profits, if any that may be found due, increased by sum equivalent to the annual rental value of the premises or to one-tenth of the capital value of the premises, whichever is higher;

22. I am in agreement with the Advocates that the above proviso of the **Schedule VI** of the **Order** is inapplicable in the circumstances as the suit did not involve any dispute as to possession of premises or for specific performance of a lease in the manner aforesaid.

23. The final issue for consideration is whether the Deputy Registrar erred in assessing the instruction fee based on value of the suit property pleaded in the Plaintiff. In **Joreth Ltd v Kigano & Associates NRB CA Civil Appeal No. 66 of 1999 [2002] eKLR** the Court of Appeal outlined the approach in assessing the value of the subject matter as follows:

We would at this stage point out that the value of the subject matter of a suit for the purpose of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, among 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 .

24. The Court of Appeal in **Peter Muthoka & Another v Ochieng & 3 others NRB CA Civil Appeal No. 328 of 2017 [2019] eKLR** expounded on the principles in **Joreth Ltd v Kigano & Associates (Supra)** and set down the proper basis of taxing the instruction fees as follows;

It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court.

.....

It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily provided: either the pleadings, the judgment or the settlement. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three. It is not open to the taxing officer to choose one or the other or to use them in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive.

25. It is not in dispute that judgment is yet to be entered in the suit hence the Deputy Registrar, consistent with the decisions I have cited, proceeded to determine the value of the subject matter from the plaintiff. The Bank's position that the Deputy Registrar ought to have been guided by a valuation report on record is also inconsistent with the provisions of the **Order** and precedent. In **Eastland Hotel Limited v Wafula Simiyu & Co. Advocates NRB CA Civil Appeal No. 105 of 2014 [2014] eKLR**, the Court of Appeal reiterated the same position as follows:

This Court's decision in JORETH LIMITED v KIGANO & ASSOCIATES (supra) which was cited to us by both the appellant and the respondent, states that the value of the subject matter for purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement. But where the same is not ascertainable from the pleadings, judgment or settlement, the taxing officer is entitled to use his/her discretion to assess instruction fees. In so doing, the taxing officer will have to take into account, amongst other matters, the nature and importance of the cause or the matter, the interest of the parties, the general conduct of the proceedings and other relevant factors which may include the complexity of the case and its urgency. It is the value of the subject matter in dispute which determines the amount of instruction fees payable to an advocate.

Was the taxing officer able to determine the value of the subject matter from the “pleadings” on record? What are “pleadings”? Under Section 2 of the Civil Procedure Act, pleading includes: “A petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.”

26. On the basis of the aforesaid decisions, I find do not find any fault in the Deputy Registrar relying on the sum of Kshs. 23,000,000.00 as the value of the subject matter. The getting up fee is dependent on the instruction fee hence it remains undisturbed by my conclusion.

Conclusion and Disposition

27. The Chamber Summons dated 19th June 2020 lacks merit and is dismissed with costs to the Advocates.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED and DELIVERED at NAIROBI this 5TH day of MAY 2021.

JOHN M. MATIVO

JUDGE

Court Assistant: Mr M. Onyango

Mr Amuga instructed by Amuga and Company Advocates for the Advocates/Applicant.

Mr Mutua instructed by Mutua Waweru and Company Advocates for the Client/Respondent.