



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CORAM: D. S. MAJANJA J.

MISC. CIVIL APPLICATION NO. E301 OF 2019

BETWEEN

RACHUONYO & RACHUONYO ADVOCATES.....ADVOCATE/APPLICANT

AND

NATIONAL BANK OF KENYA LIMITED.....CLIENT/RESPONDENT

RULING

Introduction and Background

1. The origin of this matter is an Advocate Client Bill of Costs dated 26th July 2020. The Bill was determined by a ruling of the Deputy Registrar dated 30th April 2020. This has given rise to the Reference by the Client (“the Bank”) under **Rule 11(2)** of the **Advocates Remuneration Order** (“the **Order**”) brought by the Chamber Summons dated 19th June 2020.
2. The application is supported by the affidavit of Chrispus Maithya, a Legal Officer with the Bank, sworn on 19th June 2020. It is opposed by the Respondent through the replying affidavit of Clifford Owuor Rachuonyo, an advocate and partner in the Respondent law firm (“the Advocates”), sworn on 20th July 2020.
3. Prior to the determination of the reference, the parties filed a consent in which they agreed on all items of the Bill of Costs except the instruction fees particularised as Item 12 of the Bill of Costs.
4. The Advocates represented the Bank in **Nairobi HCC No. 753 of 2012: Christopher Sebuliba v Shimmers Plaza Limited & 9 Others** (“the Suit”). In the Bill of Costs, the Advocates claim for instruction fees was pegged at Kshs. 6,205,000/- “for instructions to defend a claim for a permanent injunction from selling or realising the security being LR No.1870/IX/128(I.R 55525) and general damages for loss of earning, value of the subject being approximately Kshs. 400,000,000/- considering the law involved, the urgency and the complexity of the matter, time to be taken and research to be made”
5. The Deputy Registrar considered the parties’ rival submissions and by the ruling dated 30th April 2020 stated, in part, as follows:

*As to the subject matter of the suit, I do agree with the Respondent that the bill is not the kind where instructions fees can be ascertained from the “pleadings”... The value of the subject matter is not stated in any of the pleadings...From the record, an Agreement for sale dated 20th September 2013 between the Respondent herein and a third party.....contained in a Supplementary List of Documents dated 23rd October 2018, puts the consideration for sale the subject property at Kshs. 400,000,000/-.....I strongly feel that I am guided by the above decision*Masore Nyanga’au & Co Advocates V Kensalt Limited, ELC Misc No. 196 of 2015* to concur with the Applicant that Kshs. 400,000,000/- is the value of the subject matter in the suit. Under Schedule 6 of the Order (as amended in 2009) in force when this suit was filed in 2012, the instructions fees should be Kshs. 5,114,500/-....*

The Bank’s Submissions

6. The Bank’s case is that the Deputy Registrar erred in principle by arriving at a decision that was contrary to the law applicable and by failing to exercise the powers and discretion by failing to apply correctly the principles and formula provided for in **Schedule VI** of the

Order for assessing the instruction fees by arriving at an improper determination on the value of the subject matter of the suit.

7. The Bank faulted the Deputy Registrar for determining that the value of the subject matter at Kshs. 400,000,000.00 which amount was neither pleaded nor sought out in the reliefs claimed by the Plaintiff as against the Defendants in the Suit. That in determining the value of the subject matter, the Deputy Registrar failed to exercise his discretion in arriving at a figure which would be just in the circumstances of the suit considering that the only business the Advocates conducted in the matter was filing a Statement of Defence running into 8 folios which mainly consisted of denials to the claim put forward by the Plaintiff.

8. The Bank further complains that the Deputy Registrar failed to take into account the fact that the Advocates ceased acting even before the pre-trial conference or even before it was set down for hearing. Further that the Bank was only one of 10 Defendants in the matter and the claim against it was auxiliary and did not constitute the main cause of action in the suit.

9. The Bank asserts that the Deputy Registrar did not consider the Suit, the Bill of Costs and written and oral submissions made by the Bank on the quantum of fees payable for the business conducted by the Advocates and thereby arrived at an erroneous decision which resulted in fees that were manifestly disproportionate to the suit, unreasonable and so inordinately high as to amount to substantial oppression and injustice to the Bank.

The Advocates' Reply

10. The Advocates rebuffed the Bank's submissions that the Deputy Registrar erred in identification of the subject matter and assessment of the value at Kshs. 400,000,000.00. The Advocates support the decision of the Deputy Registrar and urge that he was correct in identifying the subject matter as primarily involving, inter-alia, a dispute in which the Plaintiff had alleged that the Bank had fraudulently procured a charge over the suit property and that pursuant to the illegal charge, the Bank had unlawfully exercised a non-existent power of sale and transferred the suit property to the 7th Defendant who had charged it to the 8th Defendant. That the Plaintiff prayed for nullification of the transfer, in addition to claims for orders of interlocutory injunction pending the hearing of the suit and a permanent injunction. The Advocates contend that the Plaintiff's target in the suit, as evidenced by the pleadings and interlocutory applications, had been to scuttle the Bank's exercise of its statutory power of sale.

11. The Advocates submit that it is not in dispute that the sale by the Bank to the 7th Defendant, on which the Plaintiff sought orders for nullification, was at a consideration of Kshs. 400,000,000.00 and that copies of the sale agreement and transfer together with copies of the orders made regarding the filed interlocutory applications were produced in the taxation proceedings and that the Deputy Registrar had no choice but to interrogate, evaluate and to consider the real issue disclosed in the pleadings, and upon which the true remedy claimed by the Plaintiff would be founded upon.

12. The Advocates further contend that it is fallacious for the Bank to suggest that the pleadings did not disclose any danger or risk to it worth defending, or that the value of such risk was of no consequence in the suit or in the taxation and that the prayer against the Bank for nullification of the charge and the transfer and cancellation of the Purchaser's title were directly relevant to assessment of instruction fees. That the Deputy Registrar having correctly identified the charge and the sale transaction as the foundation of the claim against the Bank, did not commit any error of principle or law in arriving at Kshs. 400,000,000.00 as the value of the subject matter for purposes of taxation of the Bill of Costs.

13. The Advocates submit that instruction fees are fully earned upon the taking of instructions and the subsequent filing of defence and do not depend whatsoever on the status of the prosecution of the suit or the progress attained. That the compensation for the stages attained in progress of a suit are separate; being court attendance fees, drawings and perusals, exchange of letters and earned Getting up fees and the Bank has not demonstrated any instance of unjustified remuneration, and the claim for an awarded excessive fees is untenable and without foundation.

Analysis and Determination

14. 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".*

15. Further, the principles to be applied when assessing instruction fees in a suit are well settled. In **Joreth Ltd v Kigano & Associates NRB CA Civil Appeal No. 66 of 1999 [2002] eKLR** the Court of Appeal outlined the principle 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. [Emphasis mine]

16. 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

17. It is not in dispute that judgment is yet to be entered in the suit therefore, as per the holding of the Court of Appeal in the **Peter Muthoka Case (Supra)**, the Deputy Registrar ought to have determined the value of the subject matter from the pleadings as the starting point, which he rightly observed. However, in perusing the pleadings, the Deputy Registrar came to the conclusion that the value of the subject matter could not be ascertained from the pleadings hence, in accordance with **Joreth Ltd v Kigano & Associates (Supra)**, he was 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 suit, the interest of the parties and the general conduct of the proceedings.

18. The Deputy Registrar considered that the purchase price of Kshs. 400,000,000.00 stated in the sale transaction between the Bank and the 7th Defendant in the suit was appropriate as the value of the subject matter. In my view, I see nothing wrong in the Deputy Registrar taking this approach since from the documents of the suit annexed in the Advocates' submissions dated 15th November 2019, this sale transaction between the Bank and the 7th Defendant in the suit was at the center of dispute and the Advocates were called upon by the Bank to defend the propriety of the sale. As a matter of fact, the sale price of the property in my view represented its true value. I therefore find and hold that the Deputy Registrar exercised his discretion properly in that regard.

19. The Bank argued that the Advocates were not entitled to the instruction fee on the ground of the insubstantial work they had put into the brief. This issue is answered by several authorities. I can only reproduce and reiterate what the Court of Appeal stated in the **Joreth Ltd v Kigano & Associates (Supra)** that, "*The instructions fees is an independent and static item, it is charged once only and it is not affected or determined by the stage the suit has reached.*"

20. Instruction fees were earned when the Advocates acted on the instructions of the Bank to defend the suit by filing the defence. The suit does not have to be set down for hearing for an advocate to earn instruction fees. If the Deputy Registrar considered that the Advocates put in more work, he was entitled to increase the basic fee. The Court of Appeal in **George Arunga Sino T/A Jone Brooks Consultants Limited v Patrick J.O. & Geoffrey D.O. Yogo T/A Atieno, Yogo & Co. Advocates KSM CA Civil Appeal No. 35 of 2007 [2012] eKLR** held that instruction fees is earned immediately an advocate perused the various documents relating to the claim for their client (see also **First American Bank of Kenya v Shah and others [2002] 1 EA**). Therefore, this ground by the Bank fails.

Conclusion

21. In sum, I find that the Deputy Registrar applied the correct principles of law and exercised his discretion properly in determining the value of the subject matter and assessing the instruction fees accordingly.

22. 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 Juma instructed by Mutua-Waweru and Company Advocates for the Client/Respondent.