



**Monaco Engineering Limited v Njeru, Nyaga and Company Advocates
(Miscellaneous Civil Application E412 of 2019) [2021] KEHC
9 (KLR) (Commercial and Tax) (10 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 9 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E412 OF 2019
DAS MAJANJA, J
SEPTEMBER 10, 2021**

BETWEEN

MONACO ENGINEERING LIMITED APPLICANT

AND

NJERU, NYAGA AND COMPANY ADVOCATES RESPONDENT

RULING

Introduction and Background

1. It is common ground that the Applicant/Client (“the Client”) instructed the Respondent/Advocates (“the Advocates”) to represent it in HCCC NO. 3 of 2016, Monaco Engineering Limited v Standard Chartered Bank Kenya Limited (“the suit”). When the parties fell out, the Advocates ceased to represent the Client and then filed an Advocate-Client Bill of Costs dated 19th August 2019 (“the Bill of Costs”) claiming KES 30,563,780.50 as their fees. The Deputy Registrar considered the Bill of Costs and by a ruling dated 20th February 2020, certified KES 28,884,580.50 as the Advocates’ fees.
2. The Client is dissatisfied with the decision and has filed the Chamber Summons dated 10th February 2021 under Rule 11(2) of the *Advocates Remuneration Order* (“the Order”) (“the Reference”) seeking to set aside the decision. The Reference is grounded on the facts set out on its face and is supported by the affidavits of Stanley Karari, a director of the Client, sworn on 10th February 2021 and 23rd March 2021 respectively. It is opposed by the Advocates through the Grounds of Opposition dated 15th February 2021 and the replying affidavit of Martin Njeru Nyaga, an advocate and partner in the Advocates’ firm, sworn on 23rd March 2021.



The Reference

3. I have gone through the arguments of the parties which are clearly set out in the depositions. and I propose to first deal with the technical issues raised by the Advocates.
4. First, the Advocates stated that the section and provisions relied upon by the Applicant do not apply. However, I note that the Applicant has erroneously cited “Order 11(2)” instead of “Rule 11(2)” of the Order. I say erroneously because the Reference seeks orders that are available under the Rule 11(2). In any case, it is now trite that failure to merely cite the correct legal or statutory provisions in an application is not necessarily fatal to a party’s application particularly if the other side is not prejudiced (see *Kwanza Estates Limited v Dubai Bank of Kenya Limited (In liquidation) and Another* MSA CA Civil Appeal No. 81 of 2015 [2016] eKLR and *Mohamed Aden Abdi v Abdi Nuru Omar & 2 others* KSM CA Civil Appl. No. 190 of 2006 [2007] eKLR).
5. Second, the Advocates also object to the Reference on the ground that the Client’s deponent did not have any authority from the Client to enable it swear the deposition on its behalf. The Client produced the written authority in the subsequent deposition. The Court of Appeal resolved this objection in *Makupa Transit Shade Limited & Another v Kenya Ports Authority & Another* [2015] eKLR where it stated that it was sufficient for a deponent acting on behalf of a corporation to state that “they were duly authorized” and it was then up to the other party to demonstrate by evidence that the said deponent was not so authorized. In this cause, the authority produced is sufficient.
6. Last and on the issue of time for filing the Reference, the Advocates claim that it was filed out of time and without leave of the court. The procedure and timelines for filing References is provided for under Rules 11(1) and (2) of the Order as follows:
 - (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
 - (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by Chamber Summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
7. The Deputy Registrar delivered the ruling on 20th February 2020. The Client filed a Notice of Objection on 27th February 2020 requesting for reasons for the taxation. It sent a reminder on 21st January 2021. The Deputy Registrar responded by the letter dated 28th January 2021 informing the Client that, “The Reasons for Taxation are within the Ruling delivered on 20th February 2020 and enclosed herein.” The Reference was filed on 10th February 2021 which is within 14 days provided by Rule 11(1) of the Order assuming that the letter from the Deputy Registrar was received on the same day it was written. As there is no evidence to show otherwise, I find and hold that the Reference was filed within time.
8. Turning to the merits of the Reference, the main issue for determination is whether the Bill of Costs taxed at KES 28,884,508.50 is manifestly high, unjustifiably exorbitant and erroneous at the onset and on the face of the record. In essence, the Client is challenging the discretion of the Deputy Registrar to tax the Bill of Costs and certify the amount awarded. The jurisdiction of this court to intervene in the decision of Deputy Registrar is circumscribed as was held in by the Court of Appeal in *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR that, “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.”

9. The Client contends that the Advocates only took over the suit midway and that since there are other advocates involved in the suit to date, the Advocates ought to have waited until the suit is concluded for them to file their Bill of Costs. I can only reiterate what the Court of Appeal stated in *Machira & Co. Advocates v Arthur K. Magugu & another* NRB CA Civil Appeal Mo. 199 of 2002 [2012] eKLR that, “An advocate whose instructions have been terminated is entitled to immediate payment of his fees for the services rendered. If upon demand the client refuses to pay, he is entitled to file his bill and have it taxed immediately. He does not have to wait until the matter is concluded. He also does not have to depend on the advocate on record to recover his fees for him. The client might compromise with his current advocate on his fees and no bill is filed.” I hold that it was not premature for the Advocates to file the Bill of Costs once it was apparent that they were no longer representing the Client in the suit and they did not have to wait until the suit was concluded for them to file the said Bill of Costs.
10. From the Applicant’s depositions and submissions before the Deputy Registrar, it does not challenge the provision of the Order applied by the Deputy Registrar to tax the Bill of Costs. The point of contest by the Applicant is whether the Advocates are entitled to the full instruction fees since they did not complete the suit and instructions were also withdrawn midway through the suit. I can only reproduce what the Court of Appeal stated in the *Joreth Ltd v Kigano & Associates* NRB CA Civil Appeal No. 66 of 1999 [2002] eKLR 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.”
11. Further, the Court of Appeal in *George Arunga Sino T/A Jone Brooks Cons Ultants 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 *Softa Bottling Company Limited & Others v Nairobi City Council* ML HCCC No. 263 of 2005 [2006] eKLR and *First American Bank of Kenya v Shah and others* [2002] 1 EA). This position was emphasized by Waweru J., which adopted by Rawal J.,(as she was then) in *J M Njenga & Co. Advocates v Kenya Tea Development Agency Limited* NRB HC Misc. App. No. 616 of 2006 [2011] eKLR that a new advocate coming onto a matter somewhere in the middle of the proceedings in the High Court will be entitled to the full instruction fee and that a client who changes advocates in the High Court therefore can expect to pay the full instruction fee as many times as he pleases to change advocates notwithstanding that he can recover only one instruction fee in a Party and Party Taxation unless there is a certificate for more than one counsel.
12. In the deposition in support of the Reference, the Client raises the issue that it has complained to the Law Society of Kenya about the unprofessional manner in which the Advocates handled the suit and that the complaint has not been acted on. The purpose of taxation is to determine fees due to an Advocates. The Deputy Registrar does not have jurisdiction to deal with or inquire into the conduct of the advocate, professional or otherwise, that would lead to liability for negligence or other misconduct.
13. At the end of the day, the Client must demonstrate that the Deputy Registrar erred in awarding instruction fees based on the value of the claim set out in the Amended Plaintiff. The value of the claim which formed the basis of the taxation was KES. 845,067,500.00 set out in the Plaintiff. Apart from stating the amount certified was manifestly high, exorbitant and erroneous, the Client has not shown how the Deputy Registrar erred in exercise of discretion in relation to the Order.



The application for Judgment

14. Following certification of costs, the Advocates filed the Notice of Motion dated 21st October 2021 invoking section 51 of the *Advocates Act* (Chapter 16 of the Laws of Kenya) seeking judgment for KES. 28,884,508.00 together with interest at 12% per annum from 20th February 2021 until payment in full. The application is supported by the affidavit of Martin Njeru Nyaga sworn on 21st October 2021. It opposed by the Client through the affidavit of 18th January 2021.
15. The thrust of the objection to the application is that the Client was yet to file the Reference and that by the time the application was filed, its advocates had been writing to the Deputy Registrar seeking reasons for the taxation. As I have stated above, the Reference has now been resolved.
16. Section 51(2) of the *Advocates Act* relied on by the Advocates states that:

51 (2) The certificate of the taxing officer by whom a bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.
17. From the foregoing provision, the Certificate of Costs is conclusive as to the amount unless set aside by way of a reference under Rule 11 of the Advocates Remuneration Order. Since I have dismissed the Reference from the decision of the Deputy Registrar, I now allow the application for judgment.

Disposition

18. The net effect of my findings above is as follows:
 - (a) That the Applicant's Reference dated 10th February 2021 is dismissed with costs to the Respondent.
 - (b) The Respondent's Notice of Motion dated 21st October 2021 is allowed on terms that Judgment be and is hereby entered for the Respondent against the Applicant for KES. 28,884,508.00 only together with interest thereon at 12% p.a from 20th February 2021 until payment in full.
 - (c) The costs for both applications are assessed at KES. 25,000.00 only.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF SEPTEMBER 2021.

D.S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

The Applicant/Client acting in person.

Mr Nyaga instructed by Njeru, Nyaga and Company Advocates for the Respondent/Advocates.

