



**Christopher O. Kenyariri t/a Kenyariri & Associates Advocates v First
Community Bank Limited (Miscellaneous Civil Application E048 of 2021)
[2021] KEHC 229 (KLR) (Commercial and Tax) (11 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 229 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E048 OF 2021
DAS MAJANJA, J
NOVEMBER 11, 2021**

BETWEEN

**CHRISTOPHER O. KENYARIRI T/A KENYARIRI & ASSOCIATES
ADVOCATES APPLICANT**

AND

FIRST COMMUNITY BANK LIMITED RESPONDENT

RULING

1. There are two applications for consideration in this ruling. The first application is a reference made under Para. 11(2) of the Advocates Remuneration Order (“the Order”) brought by the Advocates by way of the Chamber Summons dated 5th July 2021 challenging the ruling of the Deputy Registrar dated 21st May 2021. It is supported by the affidavits of Dr Christopher Kenyariri sworn on 5th July 2021 and 29th September 2021. It arises out of the Advocate/Client Bill of Costs dated 28th January 2021 in respect of instructions issued to the Advocate to take over the conduct of Insolvency Cause No. E013 of 2018, In the matter of Allied E. A. Limited from CFL Advocates and protect the Client’s interests. The Client opposes the Reference through the replying affidavit of its Legal Officer, Claris Ogombo, sworn on 16th September 2021.
2. The second application is the Chamber Summons dated 1st October 2021 filed by the Client under Para. 11 of the Order. It seeks that the ruling of the Deputy Registrar dated 21st May 2021 be, “varied and/or altered by giving a further credit of a sum of Kshs. 1,070,000.00 paid as deposit by the Client/Applicant.” It also seeks an order that the Advocates be compelled to refund KES. 863,368.00 to the Client. The application is supported by the affidavit of Claris Ogombo dated 1st October 2021. It is opposed by Dr Kenyariri through his replying affidavit sworn on 22nd October 2021. The Advocates



have also filed a Notice of Preliminary Objection dated 13th October 2021 challenging the competence of the application.

3. The Advocates charged instruction fees of KES. 4,665,065.00 based on instructions to advise, defend, advance and safeguard the Client's interest who held a 3rd ranking charge after ABC Bank and I & M Bank respectively on account of various securities secured by an all asset debenture of USD 1,180,000.00 (KES. 129,859,000.00) advanced to Allied E. A. Limited. On instruction fees, the Deputy Registrar awarded KES. 1,000,000.00 and taxed off KES. 3,665,065.00. In addition to the other items, which I shall deal with later, the Deputy Registrar found that the Advocates had been paid KES. 2,000,000.00 on account for which the Client was given credit leaving KES. 206,632.00 as the amount certified by the ruling dated 21st May 2021.
4. The Advocates argument is the sum of KES. 1,000,000.00 awarded as instruction fees was too low considering the nature of the case, the amount, the work and documentation involved. They also assert that the Deputy Registrar wrongfully gave credit of KES. 2,000,000.00 to the Client when there was no evidence to support this amount.
5. The Client supports the decision of the Deputy Registrar was well considered and that given that the basic minimum fee was KES. 15,000.00 and the same increased to KES. 1,000,000.00 taking into account the nature of the case and work done by the Advocates.
6. As this is a reference challenging the discretion of the Deputy Registrar to determine fees, the jurisdiction of this court to intervene in the decision of Deputy Registrar, is circumscribed. In *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR the Court of Appeal explained 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."
7. It is not in dispute that the Advocates were instructed to the represent the Client in an insolvency matter. It is not disputed that the Deputy Registrar was right in charging the instruction fee under Paragraph 1(f) of Schedule 6 of the Order which provides as follows:
 - (f) Companies
 - (i) To present or oppose proceedings under Rule 5(1) of the Companies (Winding –up) Rules 22,000
 - (ii) To support a petition for winding up of a company 10,000
 - (iii) To present or oppose any other Proceedings under the Companies Act 15,000
8. The issue in the insolvency cause was who between ABC Bank Limited and I & M Bank Limited had the priority to appoint an Administrator under the Insolvency Act. The Advocates contend that this was a complex matter which required a lot of work and documentation and taking into account the amount of USD 1,180,000.00 advanced to the debtor, it was entitled to substantial instruction fees.
9. This is a case where the Deputy Registrar had discretion to increase the instruction fee from the basic KES. 15,000.00 to an amount that is adequate to compensate the Advocates for services rendered. In doing so, the Deputy Registrar is entitled to take into account a myriad of factors and that the list is not exhaustive as was held by the Court of Appeal in *Joreth Ltd v Kigano & Associates* NRB CA Civil Appeal No. 66 of 1999 [2002] eKLR and *Vipul Premchand Haria v Kilonzo & Co Advocates* NRB



CA Civil Appeal No. 197 of 2014 [2020] eKLR. I would also hold that the amount in issue or value of the subject matter is but one of the factors to be considered. It is not necessarily decisive as the issue may be simple and straightforward, yet it may also be an indicator of the parties' interests. In this case, the Deputy Registrar was convinced that the taking into account the interests of the parties was worth protecting and increased the sum to KES. 1,000,000.00 which was reasonable in the circumstances. I agree with the Client's submissions that this amount, representing a factor of over 60 from the basic instruction fee, was sufficient. I do not find any reason to interfere with the award.

10. As to whether the Deputy Registrar erred in giving the Client a credit of KES. 2,000,000.00, the Advocates submit that the document relied on by the Deputy Registrar, the Client's Internal Memorandum dated 5th August 2019 and which showed that the Advocates had been paid the said amount was erroneous. The memo showed that the Advocates were paid deposit of KES. 2,000,000.00 on account of "Allied East Africa Limited and Miller Advocates." The Deputy Registrar also noted that the Advocates were paid KES. 750,000.00 as payment on the Insolvency Cause but since the Client did not claim credit for this amount, the Deputy Registrar declined to give credit for this amount. It is the sum of KES. 750,000.00 that forms the subject of the Client's reference. It claims that the Deputy Registrar ought to have given credit to it.
11. Whether and to what extent the Client should be given credit is a matter of evidence. Para. 13A of the Order empowers the Deputy Registrar to summon and examine witnesses, administer oaths, direct production of books, papers and documents and to adopt all such other proceedings as may be necessary for the determination of any dispute before him. The High Court will not lightly depart from a factual determination of the Deputy Registrar unless it is not supported by the evidence.
12. There is an Internal Memorandum dated 8th March 2021 from the Ag, CEO of the Client to the Legal Officer in relation to the Advocates fees which states that, "The Bank in negotiations with the Advocates agreed to pay Kes. 1,000,000/= for the FCB vs Miller Advocates matter and another Kes. 750,000.00 for defending the Bank in the matter of the insolvency of Allied (EA) Limited." Both the Advocates and Client agree that this deposit was in fact paid together with the deposit in the matter the Advocates were instructed to file suit against Miller and Company Advocates and which was the subject to the ruling in taxation Misc. E046 of 2021 between the parties.
13. Turning to the KES. 2,000,000.00 paid in relation to, "Allied East Africa Limited & Miller and Company" on the basis of a memorandum dated 5th August 2019. The Deputy Registrar found as a fact that this amount was in fact paid to the Advocates. The question is for what services? It is not clear how much this amount was for the Allied (EA) Limited Case or for the Miller and Company case. The Deputy Registrar did interrogate this matter in view of the earlier payments captured in the Client's memorandum dated 8th March 2021. However, neither the Advocates who received payment nor the Client who made the payment shed light on the nature of the payment so clearly stated hence the Deputy Registrar cannot be blamed for reaching the conclusion she did. It must be recalled the nature of payment was a matter which was peculiarly within the knowledge of the Advocates who received it. Nothing would have been easier than to rebut the prima facie of the evidence and show that in fact the payment was for other service other than the case at hand. It can hardly complain if the Deputy Registrar failed to divine what the document meant which it was clear that the fees was applied whether in whole or in part to Allied East Africa Limited.
14. The subject of the Client's reference is the sum of KES. 750,000.00 which the Deputy Registrar failed to give credit. The Advocates claim that the reference was filed out of time. I agree. Under Para. 11 (1) and (2) of the Order, the aggrieved party is required to file a notice of objection within 14 days of the decision requesting for reasons for the taxation. Upon receiving the reasons, it must file the reference within 14 days thereafter. In this case, there is evidence that it requested for reasons through



several letters dated 24th May 2021, 1st July 2021 and 15th July 2021. It appears that the reasons were not forthcoming but this is not the end of the matter. It has been held that in fact the reasons for the taxation are those that are set out in the ruling on the taxation and where there are reasons on the face of the decision, it would be futile to expect the taxing officer to furnish further reasons. (see *Rachuonyo and Rachuonyo Advocates v National Bank of Kenya Limited* ML HC Misc. Civil Application No. E146 OF 2019 [2021] eKLR and *Evans Thiga Gaturu, Advocate V Kenya Commercial Bank Limited* ML HC Misc. Application No. 343 of 2011 [2012] eKLR). The Advocates, based on the ruling filed its reference which the Client opposed. It is difficult for the Client to pretend that the reasons for the ruling were elsewhere other than in the ruling. In any case, the Client had the opportunity to file an application for extension of time to lodge the reference under Para. 11(4) of the Order but it did not. I hold that the Client's reference is filed out of time and without leave and is therefore incompetent and accordingly struck out.

15. This leaves the consideration of Items 30, 31, 40, 44, 49, 51, 52, 56, 57, 58, 61, 66, 67, 68 and 70 of the Bill of Costs which relate to attendances and which Deputy Registrar held that, "Attendances in the High Court are charged at a lower scale unless a judge specifically orders otherwise" The applicable provisions paragraphs 50 and 50A of the Order provide as follows:

50 Subject to paragraphs 22 and 58 and to any order of the court in the particular case, a bill of costs in proceedings in the High Court shall be taxable in accordance with Schedule 6 and, unless the court has made an order under paragraph 50A, where Schedule 6 provides a higher and lower scale, the costs shall be taxed in accordance with the lower scale.

50A The court may make an order that costs are to be taxed on the higher scale in Schedule 6 on special grounds arising out of the nature or importance or the difficulty or urgency of the case. The higher scale may be allowed either generally in any cause or matter or in respect of any particular application or business done.

16. Unlike in a Party and Party Bill of Costs where the Judge, during the proceedings, may order that the costs be taxed at a higher scale, in an Advocate Client Bills of Costs, the Advocate may apply to the court for such an order. Such an order may be made where the Advocate shows special grounds arising out of the nature or importance of the matter or its difficulty or urgency. The Advocates have not laid any basis in their submissions or pointed to anything on the record that would persuade the court to enhance the fee for attendances. I decline to entertain this plea.

17. For the reasons I have set out above, I now make the following orders:

- a. The Advocate/Applicant's Chamber Summons dated 5th July 2021 is dismissed.
- b. The Respondent/Client's Chamber Summons dated 1st October 2021 is struck out.
- c. There shall be no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF NOVEMBER 2021.

D.S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Dr Kenyariri instructed by Kenyariri and Associates Advocates for the Advocates.



Ms Agwata instructed by Issa and Associates Advocates for the Respondent.

