



**Christopher O. Kenyariri t/a Kenyariri & Associates Advocates v First  
Community Bank Limited (Miscellaneous Civil Application E047 of 2021)  
[2021] KEHC 226 (KLR) (Commercial and Tax) (11 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 226 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL APPLICATION E047 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. The application before the court 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 21<sup>st</sup> May 2021 and supported by the affidavit of Dr Christopher Kenyariri sworn on the same day. It arises out of the Advocate/Client Bill of Costs dated 27<sup>th</sup> January 2021 in respect of instructions issued to the Advocates by the Client to defend it in HC COMM No. E087 of 2020, Ahmed M. Sheikh v First Community Bank and Another. The Client opposes the reference through the replying affidavit of Claris Ogombo, its Legal Officer, sworn on 8<sup>th</sup> July 2021. Both parties filed written submission which mirrored what they had argued before the Deputy Registrar.
2. The only issue in this reference is the instruction fee. In the Bill of Costs, the Advocates claimed KES. 5,290,760.00 as the instruction fee. By the ruling delivered on 7<sup>th</sup> May 2021, the Deputy Registrar assessed it at KES. 460,000.00 and therefore taxed off KES. 4,830,760.00. In coming to this conclusion, the Deputy Registrar followed the decision in *Peter Muthoka and Another v Ochieng Onyango Kibet*



*and Ohaga [2019] eKLR* and held that the basis of the instruction fee was the value of the subject matter and proceeded to hold as follows:

The question that arises is what was the value of the subject matter in HCCC E087 of 2020. The Applicant submits that the instruction fee is USD 1,180,000 (Kshs. 129,269,000) which monies has fallen into arrears and had not been paid back to the lender. While the Respondent submits that the sum of Kshs. 18,000,000 is the correct value of the subject matter. I have read the court record in HCCC E087 of 2020. The suit property sought to be restrained was valued at Kshs. 18,000,000 hence the value of the subject matter is Kshs. 18,000,000 and pursuant to provisions of paragraph 1(b) of Schedule 6 of the Order, the instruction fee is as follows: ----- Item 1 is on instruction fees is therefore taxed at Kshs. 460,000/=.

3. In determining the instruction fee, the Deputy Registrar appreciated the law regarding the assessment of the instruction fee in the Peter Muthoka Case (see also *Joreth Ltd v Kigano & Associates NRB CA Civil Appeal No. 66 of 1999 [2002] eKLR*) that the value of the subject matter for the purpose of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement 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.
4. In this case, the Deputy Registrar based the decision on what the Plaintiff pleaded in HCCC E087 of 2020. Its case against the Client was to restrain it from exercising its statutory power of sale in respect of HOUSE NO. 78 ON LR NO. 209/18945 (IR NO. 115422) in MONALI PART SOUTH C. At paragraph 7 of the Plaintiff he stated that, “[H]is property was valued at the sum of Kenya Shillings Eighteen Million Shilling Only (Ksh. 18,000,000.00) as such his guarantee for the facility was limited to this amount which was the value of his property at the time the facility was advanced to the plaintiff.”
5. The Advocates’ case, as I understand, is that value of the subject matter was the debt owed by the Plaintiff to the Bank. The Advocates referred to the ruling delivered on 6<sup>th</sup> July 2020 where the court held that the Bank has not sent the requisite statutory notices for the KES. 115,937,006.67 to the Plaintiff prior to exercise of its statutory power of sale and that the court held that the Plaintiff was indebted to the Bank.
6. As the Order and the decisions I have cited show, the first point of call in determining the instruction fee are the pleadings, judgment and settlement. In that regard, the Deputy Registrar could not have regard to the “ruling” as urged by the Advocates as it is not a “judgment” or final determination for purposes of assessing the instruction fee. Likewise, this is not a case of settlement. The only point of reference for assessing the instruction fee was the pleading in this case the plaintiff which the Deputy Registrar addressed in her decision. In *R. Billing & Co. Advocates vs. Kundan Singh Construction Limited (Now KSC International Limited) [2020] eKLR* the Court considered a similar argument and held as follows:

In the suit, there was no judgment or settlement between the parties, and therefore the value of subject matter of the suit could only be determined from the pleadings. The appellant based its claim on Kshs. 1,734,581,100 as the value of the subject matter and asked the taxing officer to assess instructions fees on this sum. It will be recalled, however, that the main purpose for filing the suit was to obtain injunctive and declaratory relief against the bank by restraining it, inter alia, from wrongfully and prematurely calling in any of the three



guarantees which were set out in the plaint. In order to obtain an order of injunction, the respondent had to show, by affidavit that it stood to suffer irreparable loss and damage if the three guarantees were called. That was not to say that the sums in those guarantees constituted the value of the claim so as to demand instructions fees based on them. It was never alleged that the respondent instructed the appellant to demand recovery of any specific sum of money to be paid to it by anyone and we cannot discern any such claim from the plaint or any other pleadings.”

7. In this case, the Advocates were instructed to defend the suit for injunction restraining the Client for exercising its power of sale rather than recovery of the outstanding debt. The value of the suit property was pleaded in the Plaint and the Deputy Registrar proceeded on that basis.
8. 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.” The Advocates have not shown the Deputy Registrar erred in assessing the instruction fee to warrant interference by this court.
9. I dismiss the Chamber Summons dated 21<sup>st</sup> May 2021 with costs to the Client which I assess at KES. 15,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> 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.

