



**National Bank of Kenya Limited (as the Successor to Kenya National Capital Corporation)  
& another v Rachuonyo & Rachuonyo Advocates (Miscellaneous Civil Application  
263 of 2019) [2021] KEHC 381 (KLR) (Commercial and Tax) (15 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 381 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL APPLICATION 263 OF 2019  
DAS MAJANJA, J  
DECEMBER 15, 2021**

**BETWEEN**

**NATIONAL BANK OF KENYA LIMITED (AS THE SUCCESSOR TO KENYA  
NATIONAL CAPITAL CORPORATION) ..... 1<sup>ST</sup> APPLICANT**

**KENYA NATIONAL CAPITAL CORPORATION ..... 2<sup>ND</sup> APPLICANT**

**AND**

**RACHUONYO & RACHUONYO ADVOCATES ..... RESPONDENT**

**RULING**

Introduction and Background

1. The Applicants (collectively referred to as “the Bank”) have filed a Reference, inter alia, under Rule 11 of the *Advocates Remuneration Order*, 1962. They are challenging the ruling of the Deputy Registrar dated 26<sup>th</sup> January 2021 following taxation of an Advocate/Client Bill of Costs dated 15<sup>th</sup> August 2019 and amended on 26<sup>th</sup> May 2020.
2. The Reference is supported by the affidavits of Samuel W. Mundia, the Bank’s Head of Commercial Transactions and Litigation Department, sworn on 3<sup>rd</sup> February 2021 and 18<sup>th</sup> May 2021 respectively. It is opposed by the Advocates through the replying affidavit of Clifford Owuor Rachuonyo, an advocate and partner in the Advocates’ firm, sworn on 4<sup>th</sup> May 2021. The application was canvassed by way of written submissions with the parties advancing their respective positions.
3. It is common ground that the Advocates represented and defended the Bank at the *Court of Appeal in Civil Appeal No. 80 of 2017 Basil Criticos V National Bank of Kenya Limited & Another* (“the Appeal”). In the amended Bill of Costs, the Advocates claimed KES. 368,356,261.17 for services they



rendered to the Bank defending the Appeal and mounting the Cross-appeal therein. The Advocates' claim for instruction fees for the Appeal was KES. 103,555,238.80 whereas that of the Cross-appeal was pegged at KES. 2,104,554.18.

4. After considering the amended Bill of Costs, pleadings and submissions, the Deputy Registrar concluded that KES. 45,000,000.00 was reasonable compensation as instruction fees for the Appeal and allowed the claimed sum of KES. 2,104,554.00 as instruction fees for the Cross-appeal. In addition to awarding the instruction fees above, the Deputy Registrar taxed off KES. 207,640,350.20 from the total bill and certified KES. 109,895,288.70 as the total amount due to the Advocates. It is this decision that has now precipitated this Reference.
5. Having considered the record, reference and submissions, there are two issues for consideration. The first is whether the Deputy Registrar taxed the wrong/ incorrect bill of costs in his Ruling and the second is whether the Deputy Registrar erred in awarding the instruction fees and therefore consequential awards on Getting Up Fees, One-Half increase and VAT.

#### Correct/Incorrect Bill of Costs

6. On the first issue, the Bank submitted that the Deputy Registrar taxed the wrong/ incorrect bill of costs in the Ruling on Taxation and that he ought to have taxed the Amended Bill of Costs of 26<sup>th</sup> May 2020 and not the draft Amended Bill of Costs of 2<sup>nd</sup> December 2019. On their part, the Advocates submitted that the Deputy Registrar did indeed rule on the Amended Bill of Costs dated 26<sup>th</sup> May 2020 and that it was an inadvertent error for him to refer to the 2<sup>nd</sup> December 2019 proposed Bill of Costs. In any case, the Advocates state that the two Bills were materially similar, except that in the physically filed proposed Amended Bill dated 2<sup>nd</sup> December 2019, the claim for the item of VAT, in the sum of KES. 49,523,505.00 had been inadvertently deleted and the amount excluded from the total of the final sum claimed. In the electronically filed Amended Bill, the inadvertent error had been rectified, and a VAT claim in the sum of KES. 50,807,422.23 was restored to the final claim and that in all the two Bills, the basic fee claimed excluding VAT was the same, being a sum of KES. 317,546,388.94.
7. I have reviewed the record and I note that on 10<sup>th</sup> March 2020, the Advocates abandoned the second prayer in their Notice of Motion dated 2<sup>nd</sup> December 2019 which was that "the draft Amended Bill of Costs filed herewith be deemed duly filed upon the grant of leave....". and that the Deputy Registrar, in his ruling dated 21<sup>st</sup> May 2020 allowed the Advocates' first prayer in the Notice of Motion which was that "leave be granted to the Advocate/Applicant to amend its Bill of Costs dated 15<sup>th</sup> August 2019". It is based on this ruling that the Advocates amended and filed their Bill of Costs dated 26<sup>th</sup> May 2020 and it is my finding that this is the Bill of Costs that ought to have formed the subject of determination by the Deputy Registrar.
8. A perusal of the Deputy Registrar's Ruling on taxation, shows that there is no dispute that he makes reference to the draft Bill of Costs dated 2<sup>nd</sup> December 2019 in his determination. However, looking at the two Bills of Costs, that is, the one dated 2<sup>nd</sup> December 2019 and the one dated 26<sup>th</sup> May 2020, I am in agreement with the Advocates that the two are materially and factually similarly save for the inclusion of VAT in the latter. The values for the instruction fees claimed in both Bills and sought for both the appeal and cross-appeal remained the same, that is KES. 103,555,238.80 and Kshs. 2,104,554.18 respectively and the same can be said of the consequential claims of Getting Up and One-Half Increase fees. These were the main issues before the Deputy Registrar as submitted by the parties and the Deputy Registrar considered their arguments and made a determination.
9. Having reviewed the record, I do not see any prejudice or miscarriage of justice occasioned upon the Bank. I also find that this error by the Deputy Registrar is not one that warrants the court to interfere



and strike out his decision as this will be against the overriding objective and the principle of substantial justice in Article 159(2)(d) of the Constitution.

#### Instruction Fees

10. The Bank is challenging the Deputy Registrar's decision in awarding instruction fees and the consequential fees of Getting up, One-Half Increase and VAT.

11. The approach the court should take in dealing with a Reference on assessment of instruction fees is settled. In *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR* the Court of Appeal stated 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".

12. On the issue of instruction fees, the Court of Appeal in *Joreth Ltd v Kigano & Associates NRB CA Civil Appeal No. 66 of 1999 [2002] eKLR* observed 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 .

13. The same principle was expounded by the Court of Appeal in *Peter Muthoka & Another v Ochieng & 3 Others NRB CA Civil Appeal No. 328 of 2017 [2019] eKLR* 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.

14. Further, in *Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W'Njuguna & 6 others NRB Misc. Civil Application No. 621 of 2000 [2006] eKLR*, the court in submitting a Bill of Costs for fresh taxation outlined the following principles as a guide to the taxing officer:

- (i) .....
- (ii) the taxation of advocates' instruction fees is to seek no more and no less than reasonable compensation for professional work done;
- (iii) the taxation of advocates' instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;



- (iv) so far as apposite, comparability should be applied in the assessment of advocate's instruction fees;
  - (v) objectivity is to be sought, when applying loose-textures criteria in the taxation of costs;
  - (vi) where complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be identified and stated; and secondly, complexity is to be judged on the basis of the express or implied recognition and mode of treatment by the trial Judge;
  - (vii) where responsibility borne by advocates is taken into account, its nature is to be specified;
  - (viii) where novelty is taken into account, its nature is to be clarified;
  - (ix) where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarised form.
15. From the above authorities I have cited, it is clear that instruction fees generally flow from the value of the subject matter which can be ascertained either from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable, then the taxing officer is entitled to use his discretion.
  16. The gravamen of the Bank's case is that Deputy Registrar ought to have been guided by the Memorandum of Appeal as the basis of the calculating the value of the subject matter. The Bank urges the court to follow the decision in *Rachuonyo & Rachuonyo Advocates v National Bank of Kenya Limited HC MISC No. 228 of 2019 [2020] eKLR* where I held that the scope of the Deputy Registrar's discretion in the assessment of the value and subject matter for purposes of the taxation of the instruction fees in an appeal is limited to an examination of the Memorandum of Appeal filed in the appeal as the memorandum of Appeal is the pleading in the matter. The Bank therefore submits that the Deputy Registrar erred in looking into and assessing the instruction fee based on value of the suit before the High Court; HCCC No. 757 of 2009.
  17. The Deputy Registrar in his Ruling, arrived at the value of the subject matter as being KES. 6,835,015,920.00 by going through the Plaintiff against the judgment which was the subject of the appeal and reasoned that this amount was still the amount at stake in the appeal. At this point it is important to point out that as the court of appeal observed in *Joreth Ltd v Kigano & Associates (supra)* that the factors to be considered by the Deputy Registrar in arriving at his decision on the value of the subject matter are not cast in stone, restricted or exhaustive and that a taxing officer is to consider all other relevant circumstances in arriving at this decision.
  18. While I reiterate what I stated in *Rachuonyo & Rachuonyo Advocates v National Bank of Kenya Limited (Supra)*, the decision only points out that the pleading is the starting point for evaluation of the instruction fees and the Deputy Registrar is enjoined to consider all the circumstances. Thus, in as much as the Deputy Registrar was to determine the value of the subject matter from the pleadings before the Court of Appeal which included the Memorandum of Appeal, there is nothing that prevented him from considering other factors he deemed relevant in arriving at that decision. I reject the Bank's argument that the Deputy Registrar was only bound to look at the Memorandum of Appeal in ascertaining the value of the subject matter.
  19. In this regard, I cannot fault the Deputy Registrar considering the record of appeal which included pleadings of the High Court and other documents including the Internal Memo dated 24<sup>th</sup> January 2012 which assisted the Deputy Registrar to gauge the importance of the said suit to the Bank and to determine the instruction fees payable. Further, I fail to find any fault in his reasoning that this amount



of KES. 6,835,015,920.00 that was at stake in the High Court was still at stake against the Applicants in the appeal.

20. Moreover, I do not find any reason to interfere with the Deputy Registrar's decision in respect of the instruction fees for both the appeal and the cross-appeal. In reality, a cross-appeal is a separate and different claim just as a claim and counterclaim. From the totality of circumstances, I find that the Deputy Registrar exercised proper discretion and jurisdiction in arriving at the instruction fee of KES. 45,000,000.00 and KES. 2,104,554.00 in respect of the appeal and cross-appeal respectively nor do I find that the sums awarded were inordinately high so as to justify interference.
21. Having found that the instruction fees as awarded by the Deputy Registrar was sound, it follows that the challenge mounted by the Bank on the Getting up Fees, One-Half increase fees and VAT which are consequential to the instruction fees, cannot stand.

#### Disposition

22. The Reference dated 3<sup>rd</sup> February 2021 lacks merit and is hereby dismissed with costs which I assess at KES. 50,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF DECEMBER 2021.**

**D.S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango

Mr Juma instructed by Mutua-Waweru and Company Advocates for the Clients/Applicants.

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

