



IN THE HIGH COURT OF KENYA

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. CIVIL APPLICATION NO. E298 OF 2019

BETWEEN

ECOBANK LIMITED APPLICANT/CLIENT

AND

MACHARIA MWANGI & NJERU ADVOCATES ADVOCATES/RESPONDENT

RULING

1. The matter for consideration is the Chamber Summons dated 19th February 2020. It is the nature of a reference under **Paragraph 11(2)** of the **Advocates Remuneration Order** seeking an order that:

[3] THAT the decision of the Taxing Officer (Hon. Elizabeth Tanui) made on 15th January 2020 and the subsequent Certificate of Taxation dated 17th January 2020 be set aside and the Advocate-Client Bill of Costs dated 24th July, 2019 be remitted back to any other taxing master for a fresh taxation.

2. The application is grounded on the supporting affidavit of Caroline Mbenge, the applicant's Head Legal and Company Secretary, sworn on 17th February 2020. It is opposed through the replying affidavit of Elijah Mwangi Njeru, a partner in the respondent firm, sworn on 10th March 2020. At the hearing the parties made oral submission in support of their respective positions and adopted the submissions made before the Deputy Registrar.

3. This reference arises from the decision of the Deputy Registrar made in respect of instruction fees in respect of the Advocate-Client Bill of Costs dated 24th July 2019. In that Bill of Costs, the respondent claimed Kshs. 43,688,883.30 as instruction fees as follows:

Instructions for debt collection and realization for security for the debt USD. 28,232,287 (Kshs. 2,907,925,561.00) at an exchange rate of Kshs. 103 to 1 USD as at 18/07/2019 on account of Hashi Energy Limited, to issuing 90-day Statutory Notice demands to:

- 1) Hashi Energy Limited.
- 2) Group Finance Director, Hashi Limited
- 3) Ahmed Hashi Adan,
- 4) Fatuma Mohammed Issa,
- 5) Mohammed Ahmed Hashi,
- 6) Eastern and Southern Africa Trade and Development Bank (PTA Bank)

To complexity of the issues herein, to detailed research in recovery proceedings, to care and labour required for recovery of the sum of USD 28,232,287 (Kshs. 2,907,925,561.00) to the nature and importance of matter, to the subject value of recovery, to fair and reasonable instructions fees to the advocates under Schedule 5 Part II of the Advocates Remuneration Order 2014.

4. The Deputy Registrar found as a fact that the applicant (“the Bank”) instructed the respondent (“the Advocates”) by an email dated 11th January 2016 addressed by Ms Mbenge to Mr Mwangi instructing him to review the facility documentation and provide a legal opinion on the enforceability of the Bank’s securities and advice whether there was a need to take corrective action, whether the facility in the facility agreement was a revolving or one-off and the realization process noting that the Bank was sharing some of the securities with other banks.

5. The Advocates issued the legal opinion and proceeded to issue statutory notices under **section 90** of the **Land Act, 2012** to Hashi Energy in respect of LR No. 9595/50 (Original 9695/1) Mombasa, LR Nos. 20295 and 20299 Kisumu Municipality and Kisumu Municipality/Block 7/48 demanding immediate payment of USD 28,237,287 and to Ahmed Hashi Aden in respect of Eldoret Municipality/Block 3/35.

6. After considering the submissions by the parties, the Deputy Registrar certified the instruction fee at Kshs. 43,688,883.40 under **Paragraph 7, Part II of Schedule 5** of the **Advocates Remuneration Order**. The issue in this reference is whether the said provision applies to the circumstances of this case. Before I deal with the parties’ arguments, let me set out the provisions referred to by the parties for ease of reference.

7. **Schedule 5** of the **Advocates Remuneration Order** provides for the alternative mode of assessment. The relevant sections of **Part II** thereof set out the basis for assessment of instruction fees as follows:

1. **INSTRUCTIONS**

Such fee for instructions as, having regard to the care and labour required, the number and length of the papers to be perused, the nature or importance of the matter, the amount or value of the subject matter involved, the interest of the parties, complexity of the matter and all other circumstances in the case, may be fair and reasonable, but so that due allowances shall be given in the instruction fees for other charges raised under this Schedule.

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7. **DEBT COLLECTION**

In respect of non-contentious debt collection matters, an advocate may enter into a general agreement with a Client to charge upon the following inclusive in lieu of charging per item of work done, but -

(a) where not more than one demand letter has been written the scale shall be reduced by one-half, subject to a minimum fee of Kshs. 1,000; or

(b) where the letter of demand is followed by the institution of proceedings at the instance of the same advocate the scale does not apply and fee shall be as prescribed in paragraph 5 of this Schedule or under Schedule 6 or Schedule 7 as the case may be.

Where the amount of the debt does not exceed Kshs.100,000

10%

Where the amount of the debt exceeds Kshs.100,000 but does not exceed Kshs 500,000

Kshs.10,000 plus 5% of the amount over Kshs 100,000

Where the amount of the debt exceeds Kshs. 500,000 but does not exceed Kshs 2,000,000

Kshs. 50,000 plus 3% of the amount over Kshs 500,000

Where the amount of the debt exceeds Kshs 2,000,000

Kshs.100,000 plus 1.5% of the amount over Kshs. 2,000,000

8. The Bank's case is that the Advocates' claim fees for debt collection yet the Bank instructed it to provide an opinion and issue statutory notices to the borrower, who had defaulted in repayment of the loan, under **section 90** of the **Land Act, 2012**. The Bank stated that its instructions were specific and did not involve debt collection. It added that the process of realization of the securities was not completed as the parties reached an agreement.

9. The Bank submitted that debt recovery is distinct from security realization. In its view the debt recovery process involves notifying the debtor of default, holding discussions with the debtor on the reasons for default and payment/settlement arrangements. The Bank further submitted that in debt collection, the agent must take further steps after issuing demand to collect the debt on behalf of the principal. Those steps taken, it contended, must be proved in order to entitle the advocate to fees.

10. As regards security realization, the Bank submitted that the process is undertaken once the creditor had decided to sell the security to recover the debt, interest and penalties, if any. Accordingly, security realization involves multiple parties and includes issuance of a statutory notice as provided for under **section 90** of the **Land Act, 2012** and other notices provided thereunder. From the foregoing the Bank argued that the instructions to the advocates was to initiate the process of security realization as distinct from debt recovery.

11. On the issue of the applicable schedule, the Bank submitted that the Advocates could not rely on **Paragraph 7, Part II of Schedule 5** of the **Advocates Remuneration Order** as the wording of that schedule contemplate an agreement between the advocate and client and that in this case there was none. Counsel for the Bank pointed out that by charging items under **Paragraphs 2 to 6, Part II of Schedule 5**, the Advocates intended that **Paragraph 1, Part II of Schedule 5** should apply. Counsel for the Bank cited **Kipkorir Titoo and Kiara v Africa Banking Corporation MI HC Misc. Appl. No. 700 of 2003 [2004] eKLR** and **Anthony Thuo Kanai t/a Thuo Kanai Advocates NRB ELC Misc. App. No. 259 of 2013 [2014] eKLR** to argue that the applicable provision was **Paragraph 1 of Part II of Schedule 5**.

12. The Advocates supported the decision of the Deputy Registrar. Their position is that they were instructed to undertake debt collection and that the mode of debt collection in this case was by issuing demand letters whose nature and content was determined by the provisions of the **Land Act, 2012**. The Advocates confirmed that they issued the requisite statutory notices whereupon the Bank's customer proposed settlement to the Bank. The Advocates added that each of the notices sent were letters of demand incorporating the word "demand" and gave the debtors timelines for repayment.

13. The Advocates maintained that **Paragraph 7, Part II of Schedule 5** of the **Advocates Remuneration Order** provides for the issuance of a "demand letter" and that the known and accepted mode of non-litigious recovery of debts by advocates is through issue of demand letters. When it comes to repayment of debts secured by land, the demand in this case is the "statutory notice."

14. The issue for determination in this case is whether the Deputy Registrar applied the proper charging provision of the **Advocates Remuneration Order**. It is not in dispute that the subject matter was non-contentious in nature and therefore governed by **Schedule 5**. Under **Paragraph 22 of Advocates Remuneration Order**, the advocate is entitled to elect the applicable schedule and in this instance the Advocates elected to tax the bill under **Schedule 5** of the **Advocates Remuneration Order** (see **Mutisya & Company Advocates v Lazaro Omita Nyangol MSA HC MISC. No. 373 OF 2003 [2004] eKLR**).

15. **Schedule 5** comprises two parts; **Part I** dealing with agreed hourly rates which is not applicable to this case and **Part II** dealing with alternative method of assessment. The dispute between the parties relates to whether the instruction fees are to be assessed in terms of **Paragraph 1, Part I** or whether the subject matter is a debt collection and therefore subject to taxation under **Paragraph 7, Part II** of the **Schedule 5** of the **Advocates Remuneration Order**.

16. I agree with the Deputy Registrar's holding that whereas it is true that the Advocates issued statutory notices in terms of **section 90 (1)** of the **Land Act, 2012** towards realization of the securities held by the respondent, the whole intent and purpose of the said notices was to demand payment and collect the payments owed to the Bank by its customer. The Bank does not deny that at the time it instructed the Advocates, its customer was indebted to it and it sought to recover that debt. The fact that the recovery of the debt was by issuing of statutory notices as provided by statute does not detract from the nature of instructions.

17. However, the more fundamental issue concerns the interpretation and application of **Paragraph 7, Part II of Schedule 5** of the **Advocates Remuneration Order** to the circumstances of this case. A reading of **Paragraph 7** shows that there are three elements. First, it applies to debt collection. Second, there must be a general agreement between the advocate and client. Third, that agreement is to charge in accordance with the scale in lieu of charging for the items set out in **Paragraphs 1 to 6, Part II** for work done. Thus, I find that for **Paragraph 7** to apply, the advocates and client must enter into a general agreement applying the scale thereunder. Since the parties did not enter into a general agreement to apply the scale in **Paragraph 7, Part II of Schedule 5**, the applicable provision for taxing the Bill of Costs is therefore **Paragraph 1 of Part II of Schedule 5**.

18. The general principle upon which the court may interfere with the Deputy Registrar's discretion are well settled. In **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board Nairobi Civil Appeal No. 220 of 2004 [2005] eKLR**, the Court of Appeal stated that, "the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in

assessing costs.” (see also *First American Bank of Kenya v Shah and Others* [2002] 1 EA 65).

19. For reasons I have given, I have found that the Deputy Registrar erred in applying the wrong provisions in taxing the advocate client bill of costs. It ought to be taxed in accordance with **Paragraph 1, Part II of Schedule 5** of the *Advocates Remuneration Order*.

20. I therefore allow the reference and remit the bill of costs back for fresh taxation before a different Deputy Registrar with a direction that the instruction fee should be taxed in accordance with **Paragraph 1 of Part II of Schedule 5** of the *Advocates Remuneration Order*.

21. The respondent shall bear the costs of the reference.

DATED and DELIVERED at NAIROBI this 14th day of APRIL 2020.

D.S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Ms Ngonde instructed by Njoroge Regeru and Company Advocates for the Client/Applicant.

Mr Mwangi instructed by Macharia-Mwangi and Njeru Advocates for the Advocates/Respondent.