REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. CIVIL APPLICATION NO. E072 OF 2019

BETWEEN

KENYA RAILWAY GOLF CLUB .....CLIENT/APPLICANT

AND

EVANS THIGA GATURU, ADVOCATE.....ADVOCATE/RESPONDENT

RULING

Introduction

1. This matter arises from an advocate/client bill of costs dated 29th March 2019. The bill of costs was taxed by the Deputy Registrar who, by a ruling dated 11th November 2019, awarded the respondent/advocate ("the Advocate"), Kshs. 1,788,318.80 only certified by the Certificate of Costs dated 13th December 2019.

2. What is now before this court for consideration is client/applicant's ("the Client") reference from the Deputy Registrar's decision by the Chamber Summons dated 28th February 2020 made under **Rule 11** of the ***Advocates Remuneration Order*** ("the ***Order***") seeking to set aside the Certificate of Costs. The application is supported by affidavit of S. K. Mwaura, the Client's secretary, sworn on 28th February 2020.

3. The application is opposed by the respondent ("the Advocate") through his replying affidavit sworn on 5th May 2020. He also filed a preliminary objection to the reference. Both parties agreed to canvass the application by written submissions. The success or otherwise of the reference is dependent on the preliminary objection which I shall first deal with.

The Preliminary Objection

4. The preliminary objection is grounded on **rule 11(1)** and **(2)** of the ***Order*** which provides as follows:

> 11. (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.
>
> (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
>
> (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

5. The Advocate contended that the reference was time barred as the Client should have filed it on 3rd December 2019 instead of 2nd March 2020, 87 days outside the time prescribed by the ***Order*** and without leave of the court. The Advocate further stated that the Client was required to give notice of its objection to the taxation within 14 days of the decision, which comprised the reasons for the taxation, made on 19th November 2019 and thereafter file the reference which it failed to do. The Advocate cited several authorities to submit that the reasons for taxation were set out in the decision hence it was superfluous request for reasons. Counsel referred to ***Paul Gicheru t/a Gicheru and Company Advocates v Kargua (K) Construction Co., Ltd*** **ELD HCCC Misc. No. 124 of 2007 [2008] eKLR** where the court held that the provisions of **rule 11** of the ***Order*** were mandatory.

6. The Client submitted that although the ruling on the Bill of Costs was delivered on 19th November 2019, the reasons thereof were not read out. It however filed its Notice of Objection and Request for reasons on 22nd November 2019. Since the court did not communicate to it until it applied for and was issued with the ruling which contained the reasons, it lodged the reference within the time prescribed by **rule 11(2)** of the ***Order***. The Client relied on the decision of ***Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund*** **[2005] 1 KLR 528** submit to that the reference should not be struck out where there is substantial compliance with **rule 11(2)** of the ***Order*** as it had filed the reference within 14 days of receipt of the ruling. The Client argued that had the reference been filed earlier, it would have been considered premature as the reasons contained in the ruling would not have been received.

7. I have perused the court file and I note that after the Deputy Registrar delivered the ruling dated 19th November 2019 thereafter the Client filed a *Notice of Objection to Decision on Taxation and Request for Reasons* dated 20th November 2019 on 22nd November 2019. On 4th December 2019, the Deputy Registrar endorsed on the letter as follows, *"Reasons are in the attached copy of the ruling."* It is not apparent from the record that the reasons were communicated to the Client. However, by a letter dated 10th January 2020, the advocates for the Client wrote to the court referring to the notice dated 22nd November 2019 requesting for a typed copy of the ruling. The Client followed up with another letter dated 11th February 2020 requesting for proceedings. The ruling was finally collected on 17th February 2020.

8. A strict reading of **rule 11(2)** of the ***Order*** confirms the procedure adopted by the Client. It filed the *Notice of Objection and Request for Reasons* for the decisions within the time prescribed. The Deputy Registrar endorsed the Notice that adopted the ruling as the reasons for the decision but this was not communicated to the Client's advocates to enable it file the reference. I cannot therefore fault the Client for proceeding on the basis of the ruling. There is, however, ample authority for the proposition that reasons for the taxation decision are contained in the ruling hence there was no need to seek reasons for the decision when the ruling has been delivered (see ***Mumias Sugar Company Limited v Professor Tom Ojienda and Associates*** **KSM HC Misc. No. 279 of 2017 [2018] eKLR**). I cannot also fault the Client for filing the reference once it received the ruling from the court in light of what had earlier transpired in the circumstances of this case. I therefore reject the preliminary objection.

The Reference

9. I now turn to consider the substance of the reference. The Client challenged the instruction fees and other items under the bill of costs. I will first deal with the instruction fees. I do not think there is any dispute about the approach this court should take in determining the reference. 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**).

Instruction fee

10. The Advocate was instructed to defend the Client in **HCCC No. 10 of 2018 (Magnate Ventures Limited v Kenya Railways Golf Club Limited)**. In that suit, the plaintiff sought an injunction restraining the defendant from interfering with the bill boards erected on the defendant's property pending hearing and determination of the arbitration proceedings envisaged under the Site Licence Agreement between the parties dated 5th September 2012. It also sought a declaration that the right of the option to renew Site Licence Agreement was available to it and that the right had in fact been exercised by notices given to the defendant by the plaintiff and that the Agreement was in fact renewed for a further period of 5 years from 8th January 2018. The Advocates claimed Kshs. 1,500,000.00 as instruction fees on the ground that the value of the subject matter was Kshs. 75,000,000.00.

11. Before the Deputy Registrar, the Client took the position that the value of the contract subject between Magnate Ventures and Kenya Railways Golf Club for one year was Kshs. 5,000,000.00 hence the value of the Agreement for 5 years was Kshs. 25,000,000.00 not Kshs. 75,000,000.00 as proposed by the Advocate. The Client urged the court to be guided by the principles set out in the case of ***Republic v Minister of Agriculture & 2 Others ex-parte Samuel Muchiri W'Njuguna & 6 Others*** **NRB HC Misc. Civil Appl. No. 621 of 2000 [2006] eKLR** including, inter alia, the nature and importance of the matter, the amount involved, the interests of the parties, the general conduct of the matter and other circumstances. It invited the court to consider the fact that the Advocate had in fact proposed a sum of between Kshs. 300,000.00 to Kshs. 350,000.00 and when instructions were withdrawn, the Advocate was paid Kshs. 300,000.00.

12. In assessing the instruction fee, the Deputy Registrar stated as follows:

> From the originating summons, the plaintiff sued for frustration of an intended 5 year contract of Kshs. 5,797,836 per annum. In my view, the amount for a cumulative period of 5 years that should form the subject matter of this suit is Kshs. 28,989,180.00. This amount translated into instruction fees of Kshs. 639,837.70.

13. In support of this reference, the Client submitted that the instruction fee awarded to the Advocate was exorbitant. It relied on the decision of ***Joreth Ltd vs Kigano & Associates*** **[2002] 1 EA 92** to submit that the value of the subject matter in **NAIROBI HCCC No 10 of 2018** could not be ascertained from the pleadings hence the nature and importance of the matter, the interest of the parties, general conduct of the proceedings should have been taken into account in assessing such instruction fees that are just. It further submitted that the starting point for assessing the instruction fees ought to have been **Schedule 6 (c) (viii)** of the ***Order*** under which the minimum fee is Kshs. 5,000/- for cases and any other application not provided for in the **Schedule 6** aforesaid.

14. Although the Deputy Registrar did not specifically refer to the charging provision of the ***Order***, the manner of proceeding left no doubt that the instruction fees was assessed in accordance with **Schedule 6 A(1) (b)** of the ***Order*** which makes provision for instruction fees to sue or defend any proceedings, *"whether commenced by plaint, petition, originating summons or notice of motion"* where the value can be determined from the pleading, judgment or settlement between the parties.

15. The choice of the charging provision in the schedule is a matter within the discretion of the Deputy Registrar. In ***Makula International v Cardinal Nsubuga & Another*** **[1982] UGSC 2**, the Court of Appeal in Uganda expressed this principle as follows:

> The taxing officer should, in taxing a bill, first find the appropriate scale fee in schedule VI, and then consider whether the basic fee should be increased or reduced. He must give reasons for deciding that the basic fee should be increased or decreased. When he has decided that the scale should be exceeded, he does not arrive at a figure which he awards by multiplying the scale fee by a multiplication factor, but places what he considers a fair value upon work or responsibility involved. Lastly, he taxes the instruction fee, either by awarding the basic fee or by increasing or decreasing it.

16. The matter was commenced by the Originating Summons and the value of the subject matter could be determined from the pleadings. In fact, the Deputy Registrar accepted the proposition by the Client, in its written submissions, that the value ought to be determined by taking the total rent over the period of 5 years and not the value of the property. The Deputy Registrar proceeded to assess the instruction fee based on the ascertained value without increasing it. I therefore do not see any reason to interfere with the discretion of the Deputy Registrar on the assessment of the instruction fee.

Attendances

17. Apart from the instruction fees in Item 1, the Client has also contested items 8,15,21,25,29,59, 58, 67, 68, 89, 90, 96, 103,110, 120, 151,164, 173, 177, 186, 187, 199, 200,204, 205, 217 and 227 of the Bill of Costs.

18. Except for the items No. 15 where he claimed Kshs. 1,500.00, the Advocate claimed Kshs. 4,500.00 in items no. 8, 21,25,29,59, 68,90, 96, 103,110, 120, 151,164, 173, 177, 186, 187, 199, 200,204, 205, 217 and 227 for service of various court documents upon advocates for the parties in **HCCC No. 10 of 2018**. The Deputy Registrar taxed off, Kshs 1,000.00 in each item and awarded Kshs. 1,500.00 which according to him was to scale. The Client submitted that this amount was more than the scale amount of Kshs. 1,400.00 hence the error should be corrected.

19. In item nos. 58, 67 and 89, the Advocate claimed Kshs. 2,500.00 for attending to the court registry to file various court documents. In item 58, the Deputy Registrar taxed off Kshs. 1,500.00 while items 67 and 89 were allowed as drawn. The Client, while referring to ***Manyonge Wanyama & Associates v County Government of Kirinyaga*** **EBU E & L 2B of 2018 [2019] eKLR**, submitted that there were no special grounds arising out of the nature of the suit or important or the difficult or urgent issues to be dealt with hence the attendances ought to be taxed at the ordinary scale. In his view, the Advocate ought to have been awarded the prescribed fee of Kshs. 500.00 in the absence of any special reasons.

20. I have looked at the applicable provisions of the ***Advocates Remuneration Order, 2014*** and I agree with counsel for the Client that for service within 3 kilometres of the court registry, the fee is Kshs. 1,400.00. There is no evidence of any further distance. As regards attendances at the court offices or the registrar on routine matters, the applicable fee is Kshs. 500 as urged by the Client. I therefore amend and correct the amounts awarded in the Bill of Costs.

21. In the ruling, the Deputy Registrar has added a figure of Kshs. 552,880.00 as the *"Cost of other legal services"* It not clear what these costs are although I note that it is also not clear the total sum of the other items in the bill of costs other than instructions fees. This ought to have been made clear.

Conclusion and disposition

22. In conclusion and for the reasons I have stated, I decline to set aside item 1 of the Bill of Costs being the instruction fee. I allow the reference only to the extent of items 8,15,21,25,29,59, 58, 67, 68, 89, 90, 96, 103,110, 120, 151,164, 173, 177, 186, 187, 199, 200,204, 205, 217 and 227.

23. I direct the Deputy Registrar to assess those items in accordance with **Advocates Remuneration Order, 2014** as I have indicated above and certify the costs afresh to that extent.

24. Since the applicant/client has succeeded in part, it shall have the costs of this reference assessed at Kshs. 10,000.00 only.

DATED and **DELIVERED** at **NAIROBI** this **10th** day of **JULY** 2020.

D.S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Githiri instructed by Njuguna and Partners Advocates for the Client/Applicant.

Mr Gaturu, Advocate in person.