



IN THE HIGH COURT OF KENYA

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

MISC. CIVIL APPLICATION NO. E051 OF 2018

BETWEEN

ROBINSON KIGEN T/A

WESONGA, MUTEMBEI &

KIGEN ADVOCATES.....ADVOCATES/APPLICANT

AND

SAUTH MOHAMED.....1ST RESPONDENT/CLIENT

SAWZAN LIBAN MOHAMED.....2ND RESPONDENT/CLIENT

SAWZAN TRAVEL & TOURS LIMITED.....3RD RESPONDENT/CLIENT

RULING

1. The subject of this ruling is a reference dated 20th May 2019 filed by the respondents (also referred to as “the Clients”) under **Rule 11(1)** of the **Advocates Remuneration Order** seeking to set aside the taxation of advocate/client fees by the Deputy Registrar. By the ruling dated 29th April 2019, the Deputy Registrar awarded the Advocates Kshs. 30,000/- as instruction fees.

2. The thrust of the reference and the supporting affidavit of Sawzan Liban Mohamed sworn on 20th May 2019 is that Deputy Registrar erred in law applying the principles and law of taxation to the nature of the transaction giving rise to the taxation. The Clients complained that the Deputy Registrar failed to apply the provisions of **section 18(f)** of the **Advocates Remuneration Order** (wrongly referred to as “**section 5(f)**” by the Clients) in assessing instruction fees in respect of uncompleted transactions. They complained that the Deputy Registrar failed to appreciate the evidence on record which showed that Bill of Costs was based on an “*uncompleted transaction.*” They contended that in all circumstances, the fee awarded by the Deputy Registrar was manifestly disproportionate to the attendant transaction and was unreasonably high as to amount to substantial oppression and injustice to the applicants.

3. In considering the applicable charging provision of the **Advocates Remuneration Order**, the Deputy Registrar held that, “*I will tax the bill under Schedule 5 of the Advocates Remuneration Order 201 since schedule 3 provides that “All work relating to company matters other than that for which fees has been prescribed in this schedule shall be charged under the relevant schedule.”* It is this finding that precipitated this reference.

4. In their Advocate/Client Bill of Costs dated 12th July 2018, the Advocates claimed Kshs. 50,000/- as fees for effecting transfer of 300 shares in Swazan Travel and Tours Limited, a company with nominal capital of Kshs. 100,000/- from Ahmed Abullahi to Sawzan Liban Mohammed. The Bill of Costs was supported by documents together with the Replying Affidavit of Robinson Kigen sworn on 25th September 2018. The Advocates asserted that towards fulfilling the clients’ instructions they prepared several documents including annual returns, CR9 being the notice of cessation of directors C19, being the notice of Special Resolution, Interim Annual Returns, transfer, letter of resignation, affidavit of resignation, minutes and form D.

5. In opposition to the Bill of Costs, the Clients filed written submissions. They did not dispute the fact that after the Advocates drafted the documents, they were forwarded to the 2nd and 3rd respondents who in turn forwarded them to the shareholder for execution. However, the documents were not executed by any of the respondents or lodged at the Companies Registry. What is germane to these proceedings is that the respondents argued that from the evidence, the transaction was not completed hence the proper provision for taxation was **section 18(f)** of the **Advocates Remuneration Order** which provides for the manner of assessing fees for uncompleted transactions.

6. The jurisdiction of this court is not disputed and so also the controlling principle guiding this court in exercise of that jurisdiction. The principle is that this court will not interfere with the discretion of the taxing officer unless it is shown that either the decision was based on an error of principle or the fee was too high or too low to justify interference on the ground that it is an injustice to one party (see **Premchand Raichand Limited and Another v Quarry Services of East Africa Limited and Another** [1972]EA 162, **First American Bank of Kenya v Shah and Others** [2002]EA 64 and **Joreth Limited v Kigano and Associates** [2002]1 EA 92).

7. I find that the issue for determination in this reference is whether the instruction fee ought to be assessed in accordance with **Part II section 18(f)** or **Schedule 1** of the **Advocates Remuneration Order**. **Section 18(f)** of **Part II** of the **Advocates Remuneration Order** provides for remuneration in non-contentious matters provides, in part, as follows:

Subject to paragraph 22, the remuneration of an advocate in respect of conveyance and general business (not being in any action, or transacted in any court or in chambers of any judge or registrar) shall be regulated as follows—

Uncompleted transactions and other business

(f) In respect of any business referred to in this paragraph which is not completed, and in respect of other deeds or documents, including settlements, deeds of gift inter vivos, assents and instruments vesting property in new trustees, and any other business of a non-contentious nature, the remuneration which has otherwise not been provided for, the remuneration is to be that prescribed in Schedule 5

8. **Schedule 5** of the **Advocates Remuneration Order** provides for the alternative mode of assessment and in particular **Part II** thereof provides for assessment of instruction fees as follows:

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 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.

9. The Clients' contention is that since the transaction was incomplete then **section 18(f)** of the **Advocates Remuneration Order** applied. A reading of that provision, which I have set out above, show that it applies not only to incomplete transactions but to transactions which have not been provided for under the **Advocates Remuneration Order** in which case the provisions of **Schedule 5** would apply. As the Deputy Registrar ruled, the transaction concerned the sale of a shares in a company is governed by **Schedule 3** which refers to application of, "the relevant schedule." Since there is no other schedule applicable to the sale and transfer of shares, the applicable schedule is **Schedule 5**. However, even if I were to accept the Clients' argument that **section 18(f)** was applicable, the road would still lead to **Schedule 5**.

10. The Deputy Registrar therefore had discretion to assess the instruction fee under **Schedule 5** of the **Advocates Remuneration Order**. In reaching the decision that Kshs. 30,000/- was reasonable, the Deputy Registrar held as follows;

I have considered the documents involved and time engaged to fill the form for transfer of shares and drawing the resolution, filling the annual returns and all attached documents. I award Kshs. 30,000/- for instruction fees.

11. Having considered the reasons for awarding the instruction fees, I am unable to say that the Deputy Registrar erred in the exercise of discretion or that the fee awarded was too high or too low to amount to an injustice.

12. I dismiss the reference. I award the Advocates costs of the reference which I assess at Kshs. 8,000/- all inclusive.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER 2019.

D.S. MAJANJA

JUDGE

Mr Kigen instructed by Wesonga, Mutembei and Kigen Advocates for the Advocates.

Mr Dayib instructed by Edwin Nyanyuki, Advocate for the Respondents/Clients.