



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC NO. 95 OF 2016

MWANIKI GITAU & COMPANY ADVOCATES.....APPLICANT

VERSUS

ESTHER WAMBUI NJOROGE.....RESPONDENT

RULING

The respondent Esther Wambui Njoroje was represented by Mwaniki Gitau & Company Advocates who are the applicant in the reference before me. Following taxation of the bill of costs lodged by the firm of advocates, the respondent was aggrieved by the award of Kshs. 200,000/= under item No. 1 which related to instruction fees to appeal against the judgment and decree of the lower court.

The notice of motion before me dated 2nd of February, 2017 seeks a review and or setting aside of that award. The respondent further prays that the bill of costs dated 9th March, 2017 be remitted for taxation before another taxing master and that the costs of the application be borne by the advocates. Reasons for seeking the said orders are set out on the face of the application alongside the supporting affidavit of the respondent's.

The application is opposed and there is a replying affidavit sworn by Joseph Mwaniki Gitau. Both parties filed submissions to in argument of the application. It is the respondents' case that the advocates are not entitled to the instruction fee of Kshs. 200,000/= because the Deputy Registrar having made a clear finding that the value of the subject matter could not be determined from the pleadings, the said fee was excessive.

It is also her case that the award is not supported by any valid reasoning or basis in law or fact. If anything, the advocates did not take any further steps in the appeal except the drafting and filing of the Memorandum of Appeal, and therefore were not entitled to full instruction fees awarded.

The Deputy Registrar was also faulted for failing to appreciate and uphold the respondent's arguments that the scale applicable was Schedule 6 A and that she applied the wrong principles of law in assessing that fee. On the other hand, the applicant disputes the order sought because the respondent is guilty of laches and the grounds set out by the respondent do not demonstrate the decision was based on an error or principle of that the fee awarded was manifestly excessive.

The applicant has also pointed out that the decree from the lower court and certificate of costs clearly showed that party and party costs were Ksh. 268,229/=. It is their prayer that the application be dismissed.

The ruling of the Deputy Registrar is dated 28th September, 2016. It is true that the Deputy Registrar stated in her ruling that "**the value of the subject matter cannot be determined from the judgment on record as some orders are liquidated while others are not**". The Deputy Registrar then cited the case of **Joreth Limited vs. Kigano & Associates (2002) eKLR** and concluded that the sum of Kshs. 200,000/= is reasonable instruction fee.

I have related the said ruling to the record presented by the advocates, the submissions by the parties and cited authorities. The Memorandum of Appeal which is annexed to the affidavit of Joseph Mwaniki Gitau runs into 22 paragraphs. From that Memorandum of Appeal, it is clear the orders sought in the lower court were numerous some of which related to liquidated sums while some did not.

The reasoning advanced by the Deputy Registrar in making the award is an assertion of the discretion granted to the court and it is now established that, the superior court may only interfere with such discretion where it is shown the Deputy Registrar proceeded on wrong principles or misapprehended the applicable law, facts and circumstances.

In the case of Joreth Limited (supra) the Court of Appeal stated as follows,

“We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgments or settlements (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account amongst other matter, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the pleadings, any direction by the trial judge and all other relevant circumstances”

Guided by the above extract, and considering the Deputy Registrar considered the same principles, I am unable to fault her in the circumstances. It is clear the Deputy Registrar was alive to those requirements hence the endorsement of the same. She did not misdirect herself, neither can it be said the fee was excessive because under Item 1 the advocate clearly set out the reasons for the said claim which included **“the volume of work done, the perusal of the proceedings and Judgment perused, the importance of the matter to the respondent, the urgency of the matter, the attendance on client, in court and out of office.”**

The respondent does not have any ground to stand on by her allegation that the advocates only drafted and filed the Memorandum of Appeal. This is because the Court of Appeal has, in relation to a plaint stated **“the advocate who draws a plaint is the one entitled to the full instructions fees notwithstanding the progress of the matter.” – Joreth Limited Case.**

In view of the foregoing, I am unable to fault the Deputy Registrar consequently the notice of motion dated 2nd February, 2017 is hereby dismissed with costs.

Dated, signed and delivered at Nairobi this 12th Day of June, 2018.

A. MBOGHOLI MSAGHA

JUDGE