



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

MISC. CIVIL APPLICATION NO. 95 OF 2011

BETWEEN

OTIENO RAGOT & COMPANY ADVOCATES.....ADVOCATES/APPLICANT

AND

KENYA AIRPORTS AUTHORITY.....CLIENT/RESPONDENT

RULING

1. The applicant (“Advocates”) have filed a reference dated 29th October 2015 from the decision of the Deputy Registrar as a Taxing Officer pursuant to the provisions of **Rule 11** of the *Advocates Remuneration Order*. They seek to set aside the decision of Deputy Registrar made on 15th October 2015 taxing off Kshs. 125,702,436/- from Item No. 1, being the instruction fee, of the Advocate/Client Bill of Costs dated 24th February 2011. They also seek an order directing that the instruction fee be taxed as drawn or as is otherwise prescribed in **Schedule 6 B** of the *Advocates Remuneration Order* and interest be paid on the taxed costs in accordance with the provisions of **Rule 7** of the *Advocates Remuneration Order* with effect from 15th July, 2010 until payment in full.

2. Before I consider the respondent’s side of the case, a brief history of the matter will suffice. The Advocates represented the respondent in *Donde Opogo & 53 Others vs.- Kenya Airports Authority KSM HCCC NO. 156 OF 2009* where the plaintiffs claimed Kshs. 13,932,000,000/- for alleged compulsory acquisition of land, damages for breach of contract, interest and costs. The suit was struck out on application of the defendant and the defendant awarded costs. The costs as between party and party were taxed and certified at Kshs. 151,650,000/-.

3. As the Advocates and respondent could not agree on fees, the Advocates proceeded to file their bill of costs that is now the subject of these proceedings. The bill was taxed at Kshs. 8,759,022.74/-. Out of the several items in bill, it is the instruction fee that is contested. By the ruling dated 15th October 2015, the Deputy Registrar held that the taxing officer had a duty to evaluate each item in the Advocate/Client bill of costs independently of the Party and Party bill of costs. As to the value of the subject matter, the Deputy Registrar held that the value of the subject matter could not be ascertained from the pleadings and that in evaluating the instruction fee, the Advocates were entitled to reasonable compensation for work done. The Deputy Registrar therefore assessed the instruction fee at Kshs. 5,000,000/-.

4. The Advocates contend that the Deputy Registrar erred in law by ignoring the party and party bill of costs as taxed and by holding that she was not bound by it. Further that she took in account irrelevant considerations in taxing the instruction fee thereby arriving at a wrong conclusion that **Rule 16** of the

Advocates Remuneration Order allowed the court to make a finding other than what was contained in the party and party certificate of costs. Consequently, they argued, the sum awarded by the taxing officer was manifestly low.

5. The Advocates further submit that the Advocate/Client costs should be the "*Party and Party Costs*" increased by one-half, or alternatively the "agreed costs" increased by one-half under **Part B of Schedule 6** of the *Advocates Remuneration Order*. They further submit that that at no time should the Advocate/Client costs ever be less than the taxed or agreed party and party costs. Mr Otieno, representing the Advocates, contended that party and party costs having been taxed at Kshs. 151, 650,000/-, the taxing officer should have awarded at least the party and party costs plus one-half thereof.

6. The respondent is of the view that Deputy Registrar exercised her discretion correctly and that the court should not disturb the award. Counsel for the respondent, Mr Munyu, argued that the taxing officer has a duty to consider all the relevant facts and not to merely adopt the party and party costs blindly as a basis for determination of the Advocate/Client costs.

7. The main issue for consideration is whether the Advocate/Client bill of costs is dependent on or independent of the party and party bill of costs? Mr Otieno relied on dicta in ***D. Njogu & Company Advocates v Kenya National Capital Corporation*** NRB HC Misc. No. 21 of 2005 [2006]eKLR where Ochieng' J., held that:

[A]dvocate/Client costs can never be less than the Party and Party Costs. I say so because, it has been expressly provided that the minimum fee shall be either prescribed fees, the fee ordered by the court or the fee agreed between the parties, increased by one half. Furthermore, the rule expressly state that the increment is to include all proper attendances.

8. The **method for taxing the Advocate/Client bill of costs for work done in the High Court is provided for in Part B of Schedule 6 of the Advocates Remuneration Order which contains the phrase, "fees prescribed in A above, increased by one-half"** in Part B of Schedule 6. Apart from what Ochieng' J., stated in *D. Njogu & Company Advocates v Kenya National Capital Corporation* (Supra), **this phrase has been the subject of judicial comment in Kenya Tea Development Agency Ltd v J.M Njenga & Co. Advocates** [2008]eKLR where Waweru J., observed as follows:

But the phrase "fees prescribed in A above, increased by one-half in Part B of schedule VI" does not necessarily mean that the fees taxed in a Party and Party Bill. It does not mean that the taxing officer need only look at the global sum as taxed between the parties and increase the same by one-half in order to arrive at the correct costs due to an advocate in advocate and client taxation. The taxing officer is duty bound to look at each item in the Party and Party bill of costs in order to arrive at what is properly due to the Advocate.

9. In ***Otieno Ragot & Company Advocates v National Bank of Kenya*** KSM MISC APP NO. 61 OF 2015 [2016]eKLR I also took the view that:

Counsel for the Advocates also referred to the case of D. Njogu & Company Advocates v Kenya National Capital Corporation....While I agree with the above position, it must not be lost that the taxed party and party costs may include such items such as disbursements to which the Advocate is not entitled. To accept the position advanced by the advocates may also prejudice the advocates where the taxing officer had used the wrong principle to calculate the instruction fee...

10. My conclusion is that the whereas the formula in **Schedule 6 Part B** has to be adhered to as a basis for determining the basic instruction fee and other items, the Advocate/Client costs are not wholly pegged the party and party costs as certified. The party and party costs should not simply be taken globally and increased by one-half. The taxing officer must consider each item independently bearing in mind the principles of taxation. I therefore find and hold that the Deputy Registrar did not err in failing to take into account the certificate of costs while assessing the value of the subject matter.

11. The circumstances under which this court will interfere with the taxing officer's discretion are well settled and are that the 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).

12. In assessing the instruction fee, the Deputy Registrar considered the fact that the purpose of Advocate/Client costs is to compensate the advocate for actual work done. In assessing the instruction fee, she took the position that she could not determine the value of the subject matter as a starting point due to the nature of the pleadings, the indeterminate nature of the land claimed and the lack of valuation for the said land. In the circumstances, she took into account other factors including the interest of the parties, the fact that the Advocates were aware that they were unlikely to recover taxed costs from the 54 plaintiffs on the ground that it was hefty, that the respondent was a public body, the work done by the Advocates given that suit was struck out at a preliminary stage and the fact that the respondent had made an offer to pay the Advocates Kshs. 2.5 million. She therefore concluded that Kshs. 5 million reasonable compensation to the Advocates.

13. I have reviewed the reasoning of the Deputy Registrar and do not find any fault within the parameters necessary for this court to intervene in her discretion. My conclusion is fortified by the decision of the Court of Appeal in ***Moronge and Company Advocates v Kenya Airports Authority KSM CA Civil Appeal No. 262 of 2012[2014]eKLR*** where the facts of the primary suit were similar to the facts in the suit defended by the Advocates herein. In that case, the Deputy Registrar assessed the fees based on the sum prayed in the plaint and awarded Kshs. 278,466,690/-. Following a reference, the High Court set aside the taxation on the ground that the sum awarded was manifestly excessive in the circumstances and assessed the fee at Kshs. 1.2 million. The amount was affirmed by the Court of Appeal which, after reviewing the pleadings, observed as follows;

*In our view, there is no way the value of the subject matter of the suit could be determined from the pleading in paragraph 12. The figure given therein was, in our view, plucked from the air. Like the learned Judge, we find and hold that the figure had absolutely no basis. It could not therefore be the value of the subject matter of the suit. The suit was dismissed on a preliminary objection. The value of the subject matter of the suit could not also be ascertained from the judgment or settlement as there was none. As the value of the subject matter could not be determined from the pleadings, judgment or settlement, the taxing officer should have used his discretion to determine such instructions fees as he considered just, taking into account, amongst other matters, the interest of the parties, the general conduct of the proceedings, any direction by the trial Judge and all other relevant circumstances (see ***Joreth Limited v Kigano & Associates [Court of Appeal, Civil Appeal No. 66 of 1999 Nairobi] (UR)***). The taxing officer in our case did not do so but the learned Judge of the High Court did. In our view, he was entitled to interfere with the decision of the taxing officer as he did. We do not detect any error of principle or improper exercise of discretion.*

14. The ***Moronge Case (Supra)*** also buttresses my earlier finding that reliance that the use of party and party costs to determine the Advocate/Client costs is contrary to the principle that the Advocate is only compensated for work done and not indemnified on the basis of costs incurred by the client in defending the case. I therefore affirm the decision of the Deputy Registrar.

15. The final issue raised by the Advocates concerns the issue of interest on costs. **Rule 7** of the ***Advocates Remuneration Order*** provides as follows;

An advocate may charge interest at 14% per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, providing such claim for interest is raised before the amount of the bill has been paid or tendered in full.

16. The Advocates contend that the Deputy Registrar failed to award interest despite evidence that the

same was demanded. While Mr Munyu, learned counsel for the respondent, conceded that interest was due, he submitted that the claim for interest was made until after the taxation contrary to **Rule 7** hence interest should only be awarded from the date of the taxation. He relied on the holding of Ochieng' J., in **D. Njogu and Company Advocates v Kenya National Capital Corporation (Supra)** that;

In my considered view, it would be wrong to calculate interest from the date when the bill was sent to the client, regardless of the fact that such a bill was then watered down through taxation. If clients had to pay interest regardless of subsequent reductions on their bill, advocates would not have the incentive to charge the correct fees on the first occasion. It is for that reason that I hold, that the date from when interest should be calculable should be pegged to the date when the advocate sends the correct fee note. And by the "correct fee note" I mean the bill which is in accordance with the terms upon which the advocate had contracted with the client, or the bill which the client does not dispute, or the bill which is in accordance with the sums awarded by either the taxing officer or by the deputy registrar in a certificate of costs.

17. To establish a claim for interest, the Advocates must notify the client of by making the appropriate demand. For purposes of **Rule 7**, the bill referred to is not the bill filed in court but the bill presented to the client with the intention that it pays the fees demanded therein (see **Otieno Ragot & Company Advocates v Kenindia Assurance Co., Ltd KSM HC No. 63 of 2015 [2016]eKLR**). In **Muri Mwaniki & Wamiti v John Ngugi & Another [2014]eKLR** the Court held that evidence of delivery of the bill to the client is necessary for the claim of interest to be effective.

18. From the Advocates list of documents, the Advocates sent their fee note to the respondent on 19th July 2010 and the respondent acknowledged receipt by its letter dated 10th November, 2010. A demand for interest was made on 24th September 2010 and receipt was duly acknowledged. **Rule 7** entitles the Advocate to claim interest but the time from when interest will run is not stipulated under the rule hence it is left to the discretion of the court. In this respect, I find the guidance of Ochieng' J., in **D. Njogu and Company Advocates v Kenya National Capital Corporation (Supra)** relevant.

19. The respondent herein was not a reluctant client. There was evidence of good faith negotiation but an agreement was not reached as there was a wide gulf in opinion between the parties. I would therefore hold that in view of the dispute between the Advocates and respondent regarding the amount and the subsequent taxation, the interest of 14% per annum be paid from the date the bill of costs was taxed until payment in full.

20. The result of my finding is that the reference is dismissed save that the claim for interest succeeds. The Advocates shall have costs of this application assessed at Kshs. 20,000/-.

DATED and DELIVERED at KISUMU this 20th day of February 2017.

D.S. MAJANJA

JUDGE

Mr Otieno instructed by Otieno Ragot & Company Advocates for the applicants/advocates.

Mr Munyu instructed by Iseme, Kamau & Maema Advocates for the respondent/client.