



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, G.B.M. KARIUKI & J.
MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 151 OF 2008

BETWEEN

APPELLANT

NJAGI WANJIRU & COMPANY ADVOCATES.....

AND

THE CITY COUNCIL OF NAIROBI.....RESPONDENT

*(Appeal from the Ruling of the High Court of Kenya,
Nairobi (Osiemo, J) delivered on 19th day of September
2007*

in

H.C.Misc Civil Application No.34 of 2007)

JUDGMENT OF THE COURT

1. This appeal emanates from the decision of the High Court (Osiemo J) made September 2007 in a ruling in **High Court Miscellaneous Civil Application No.54 of 2007**. In that ruling, the High Court dismissed with costs a chamber summons application dated 15th May 2007 made by the appellant seeking orders, firstly, that the taxation dated 4th May 2007 by the Taxing Officer be set aside, reviewed and vacated in so far as it related to items numbers 1 and 36 of the Advocate-Client Bill of Costs dated 30th January 2007 and, secondly, that the Bill be remitted to another Taxing Officer to be taxed and/or be taxed by the High Court.

2. The record shows that the above-named appellant, a firm of advocates, acted for the respondent, Nairobi City Council, which was the defendant in Nbi H.C.C.C. No.1323 of 1993. In that case, the 1st plaintiff, Joseph Ndirangu Waweru, was a director of Mooreland Mercantile Co Ltd which was

named as the 2nd plaintiff. The claim by the two plaintiffs against the respondent in the said suit was for (a) general damages; (b) Ksh.29,064,011; (c) interest on (a) and (b); and (d) costs of the suit. The genesis of the claims for alleged loss was cancellation of allotment of an unsurveyed plot measuring 1.314 hectares situate at Dandora known as LR 15347, Nairobi, which the plaintiffs developed by putting up on it structures after its allotment to them by the respondent. Subsequently, the respondent demolished the plaintiffs' developments, thus precipitating the said suit for damages as claimed.

3. The appellants filed their **Advocate Client Bill of Costs** in the High Court to recover their fees in the said suit from the defendant. The decision of the Taxing Officer in his ruling on taxation dated 3rd May 2007 certified the fees at Shs.1,442,838.50/=, noting that the value of the subject matter in the suit was Ksh.55 million and not Kshs.214 million as contended by the appellants. A reference seeking review of the decision was filed before a judge in the High Court pursuant to Paragraph 11 (2) of the **Advocates (Remuneration) Order** and was dismissed by a judge of the High Court prompting this appeal.

4. In their memorandum of appeal dated 21st July 2008, the appellants proffered the following three grounds of appeal against the decision of the High Court (Osiero J) –

1. *The learned Judge erred in law and fact in failing to consider and analyse the grounds of objection canvassed in the Chamber summons dated 15.5.2007 thereby wrongly abdicating his jurisdiction under paragraph 11(2) of the Advocates (Remuneration) Order.*
2. *The learned Judge erred in law in failing to appreciate and hold that the application of part B of Schedule VI of the Advocates (Remuneration) Order, 1997 to the party-and-party costs in the taxation of the advocate-client costs is not founded on the taxing master's discretion.*
5. *The learned Judge erred in law and fact in failing to find that the taxing master disregarded relevant matters by reason whereof he wrongly exercised his judicial discretion while assessing the instruction fees and the attendant getting-up fees.*
5. The appeal was heard by way of written submissions and highlighting of

those submissions pursuant to the order to that effect made by this Court on 1st March 2015. The appellants filed their submissions but the respondent did not. Satisfied that the respondent's advocate had notice of the order requiring filing of submissions and of the hearing of the appeal on 15th June 2015, the court proceeded to hear learned counsel, Mr. Njagi Wanjeru, on the highlighting of submissions.

6. In his submission, Mr. Njagi Wanjeru contended that the value of the

subject matter of the suit should have been Kshs.214 million and that the fees should have been based on that figure but the High Court erred in upholding the decision of the Taxing Officer in which the value of the subject matter was determined as Ksh.55 million. The appellant's counsel also referred to **The Advocates (Remuneration) Order, 1997**; **Blacks Law Dictionary** 19th Edn; and **Joreth Ltd versus Kigano & Associates** [2002] 1 EA 92 and **The Civil Procedure Act** listed in his list of authorities.

7. We have perused the record of appeal and given due consideration to the submission made by the appellants. The issue for determination is straight forward. It relates to the value of the subject matter of the suit which dictated the instructions and the getting-up fees earned by the appellants. The latter was item No.1 and the former was item No.36 of the Advocate – Client Bill of Costs.

The appellants put the subject matter at Ksh.214,047,280/= and claimed as instructions fees under Para (a) of Part B of the Advocates Remuneration Order 1997 Shs.8 million in item No.1 of the Bill of Costs. On the basis of the said value of the subject matter, they claimed in item 36 as get-up fees Ksh.2,666,000/=, being 1/3 of the instructions fees.

8. In their grounds of objection canvassed in the High Court, the appellants contended that the High Court which upheld the decision of the Taxing Officer erred in principle by holding that the plaintiffs' claim of

Kshs.214,047,280/= in H.C.C.C. No.1323 of 1993 was not the subject matter or the value of the suit on which the instructions fees due to the appellants should have been based. Further, they contended that the Taxing Officer whose decision the High Court upheld misdirected himself on the express provisions of the law by failing to subject the correctly taxed fees of Ksh.865,000/= to the mandatory minimum – fee rule under Part B of Schedule B of the Advocates (Remuneration) Order by reason whereof he fell into error of principle.

9. The judgment of the High Court in Nbi H.C.C.C. No. 1323 of 1993 delivered on 29th January 2007 (by G. Mugo J) shows that the reliefs sought were confined to the reliefs stated in paragraph 2 of this ruling. The alleged figure of Shs.214,047,280/= for alleged loss of profits was in respect of “*accumulated surplus initial investment for the purpose of computing the projected loss of income from 1991 to 30th June 2004 once interest was applied on monthly rests*” following demolition of the structure on the suit property by the respondent. Yet the judgment of the High Court in the said Civil Suit (No 1323 of 1993) shows that in cross-examination on behalf of the defendant the appellants’ counsel took objection to the claim of alleged lost profits because it did not feature in the plaint. It was on account of the said counsel’s intervention that the court ordered refund by the plaintiffs to the respondent of Shs.55 million which had been paid following a preliminary decree issued on 18th April 2005 even before the hearing of the formal proof.

10. The High Court made a finding in the said judgment that the sum of Shs.214,047,280/= claimed by the plaintiffs during the hearing of the suit “*on the basis of the statement of affairs*” did not lie in law. That finding has not been upset or reversed. The effect of this is to render the claim for fees in this appeal by the appellants untenable.

11. In our view, there is no error of principle or otherwise by the High Court or by the Taxing Officer and we see no basis in law for the claim for enhancement of the fees awarded to the appellants by the Taxing Officer which the High Court upheld. We reject the appellant’s plea for enhancement of the fees as we find no merit in the appeal which we hereby dismiss with costs to the respondent.

Dated and delivered at Nairobi this 24th day of June, 2016.

J. W. MWERA

JUDGE OF APPEAL

G. B. M. KARIUKI SC

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR