



REPUBLIC OF KENYA



Makhecha & Gitonga Advocates v Standard Group PLC (Miscellaneous Civil Application E187 of 2020) [2024] KEHC 560 (KLR) (Civ) (31 January 2024) (Ruling)

Neutral citation: [2024] KEHC 560 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E187 OF 2020
DAS MAJANJA, J
JANUARY 31, 2024

BETWEEN

MAKHECHA & GITONGA ADVOCATES APPLICANT

AND

THE STANDARD GROUP PLC RESPONDENT

RULING

1. The Advocates have filed a reference from the decision of the Deputy Registrar made under Paragraph 11 of the *Advocates Remuneration Order* (“the Order”) and brought by the Chamber Summons dated 25.01.2023 (“the Reference”). It is in respect of a ruling by the Deputy Registrar dated 24.11.2022 (“the Ruling”) following taxation of the Advocate/Client Bill of Costs certified at Kshs. 286,161.80 which bill of costs the Deputy Registrar stated in her Ruling was the one dated 22.05.2020. I say so because a perusal of the record indicates that there are at least three bills of costs dated 22.05.2020, 09.07.2020 and 18.11.2021. However, it would appear that the subject Bill of Costs is the one dated 09.07.2020 as both parties submitted on the same before the Deputy Registrar and it related to the Advocates’ representation of the Client in HCCC No. 186 of 2016; *Monica Wanjiru Mbaru v The Standard Group PLC & Others* (“the Suit”).
2. The Reference is supported by the affidavit of James Gathuri, an advocate in the Advocates’ firm, sworn on 25.01.2023. There was no response from the Client. The Advocates have also filed written submissions to supplement their position. As stated, the Advocates were instructed to represent and defend the Client in the Suit.
3. In the Bill of Costs, the Advocates claimed Kshs. 664,607.00 for services rendered to the Client in the Suit, with the claim for instruction fees being pegged at Kshs. 300,000.00. After considering the parties’ written submissions, the Suit, the Bill of Costs and supporting documents on record, the Deputy Registrar held in part that the applicable law is Schedule 6 of the Order, that there was no judgment in



the Suit thus she was supposed to deduce the instruction fees from the pleadings and that the prayers in the Plaintiff in the suit were non-monetary in nature and it was not possible to ascertain the value of the subject matter from the said prayer in the pleadings.

4. The Deputy Registrar also noted that the Advocates withdrew from acting for the Client before the Suit was concluded, however, the Advocates had done considerable work for the Client as they had filed various pleadings and acted for a period of 3 years. The Deputy Registrar stated that she had taken into account the various factors outlined by the Court of Appeal in *Joreth Ltd v Kigano & Associates [2002]* eKLR to find that the Advocates deserved an increase of instruction fees from the basic fee of Kshs. 75,000.00 to Kshs. 100,000.00 and she thus taxed off Kshs. 200,000.00.
5. The Advocates are dissatisfied with this decision by the Deputy Registrar on the ground that she failed to apply the correct principles on the instruction fees. That the amount of Kshs 100,000.00 allowed as instruction fees is manifestly low, an error of principle and an injustice to the Advocates, that the Deputy Registrar failed to consider the Advocates' submissions, that she failed to appreciate that the legal fees should not be unreasonable or so low as to deter persons from adequate representation and that she erred in finding that the prayers in the Plaintiff are non-monetary in nature and that it is not possible to ascertain the value of the subject matter from the said prayers in the pleadings despite the plaintiff in the Suit seeking General Damages for Libel. For these reasons, the Advocates urge the court to vary or set aside the Ruling.

Analysis and Determination

6. The main issue falling for determination is whether the Deputy Registrar erred in awarding the instruction fees as she did. The determination of fees by the taxing officer is a matter of discretion thus the court in dealing with a reference will only interfere if it is demonstrated that there is an error of principle (see *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board [2005]* eKLR) and *Arthur v Nyeri Electricity Undertaking [1961] EA 497*).
7. In *Joreth Ltd v Kigano & Associates (Supra)* the Court of Appeal outlined the general approach in determining the instruction fees as follows:

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

8. In *Peter Muthoka & another v Ochieng & 3 others [2019]* eKLR the Court of Appeal expounded on the principles in *Joreth Ltd v Kigano & Associates (Supra)* and set down the proper basis of taxing the instruction fees as follows;

It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court.



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It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily provided: either the pleadings, the judgment or the settlement. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three. It is not open to the taxing officer to choose one or the other or to use them in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive

9. It is not in dispute that judgment is yet to be entered in the Suit therefore, as per the holding of the Court of Appeal in the *Peter Muthoka case* (*Supra*) the Deputy Registrar ought to have determined the value of the subject matter from the pleadings as the starting point, which she rightly did. The Deputy Registrar stated that she was not able to determine the value of the subject matter from the said pleadings, at least going by how the prayers in the Plaintiff were framed. The Advocates think otherwise. They submit that in a defamation suit, the value of the subject matter is the quantum of damages awarded or “awardable if the plaintiff is successful”. That the Deputy Registrar ought to have been guided by previous decisions on the amounts awarded to a person of the status of the plaintiff in the Suit (a judge) in determining the value of the subject matter.
10. I reject the position taken by the Advocates because asking the taxing officer to make a determination of the value of the subject matter based on a future, speculative and uncertain judgment would be contrary to the established principle set out by the Court of Appeal in *Joreth* (*Supra*) and *Peter Muthoka* (*Supra*) cases. The value of the subject matter can only be determined from a judgment if the said judgment has already been delivered and not one that is yet to be delivered. In such an instance, level of anticipated general damages based on decided cases would only be a factor to take into account in exercising discretion to increase the basic instruction fee. I accept the position taken by the Deputy Registrar that it was indeed not possible to ascertain the value of the subject matter at least going by the prayers sought in the Suit.
11. The Deputy Registrar was thus not at fault in applying Schedule 6 A (1) of the Order, applying factors such as the amount of work already done by the Advocates and the time taken on the Suit to increase the basic fee of Kshs. 75,000.00 to Kshs. 100,000.00. This was a sound exercise of discretion and application of the principles of taxation and I find no need for the court’s interference. For these reasons, I find that the Advocates’ attack on the instruction fees awarded is not merited.

Disposition

12. The Advocates’ Chamber Summons dated 25.01.2023 lacks merit. It is dismissed but with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2024.

D. S. MAJANJA

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JUDGE



I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Court Assistant: Mr M. Onyango

Mr Gitonga instructed by Makhecha and Gitonga Advocates for the Applicant

Ng'ania and Company Advocates for the Respondent.

