



**Makhecha & Gitonga Advocates v Standard Group PLC (Miscellaneous Civil Application E583 of 2023) [2024] KEHC 515 (KLR) (Civ) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 515 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL**  
**MISCELLANEOUS CIVIL APPLICATION E583 OF 2023**  
**DAS MAJANJA, J**  
**JANUARY 31, 2024**

**BETWEEN**

**MAKHECHA & GITONGA ADVOCATES ..... APPLICANT**

**AND**

**THE STANDARD GROUP PLC ..... RESPONDENT**

**RULING**

1. The Advocates have filed the Chamber Summons dated 27.10.2023 (“the Reference”) under Paragraph 11 of the *Advocates Remuneration Order* (“the Order”) challenging the decision of the Deputy Registrar dated 16.10.2023 (“the Ruling”) following taxation of the Advocate/Client Bill of Costs dated 25.07.2023 (“the Bill of Costs”). The Reference is supported by the supporting affidavit of Wangechi Mwangi, an advocate practising in the Advocates’ firm sworn on 27.10.2023. It is opposed by the Client through the Statement of Grounds of Opposition dated 27.11.2023. The Advocates have also filed written submissions in support of their respective positions. The respective counsel also made brief oral submissions on the matter.
2. It is common ground that the Advocates represented the Client who was a defendant in NRB HCCC 4 of 2018; Hon. John Harun Mwau v Standard Group Limited and 8 others & the AG & 4 others (Interested Parties) (“the Suit”). The Plaintiff therein sought various reliefs including Kshs 213,000,000.00 as special damages, general, exemplary, punitive and/or aggravated damages, cost and interest. The Advocates entered appearance for the defendants in the Suit and then filed a Preliminary Objection under Article 34 (2) of the *Constitution* challenging the Suit. They also filed a Statement of Defence together with submissions in support of the Preliminary Objection and a List of Authorities. The Client subsequently changed advocates in the Suit which precipitated the filing of the Bill of Costs by the Advocates where they claimed a total of Kshs 9,353,106.00 with their instruction fees being pegged at Kshs 5,277,250.00. In the Ruling, the Deputy Registrar proceeded to tax and certify the Bill



of Costs at Kshs 411,755.70. As stated, it is this decision that the Advocates are dissatisfied with and forms the basis of the Reference.

3. The Advocates aver that the Deputy Registrar erred in law and misdirected herself in finding that the prayers in the Complaint were non-monetary and that it was not possible to ascertain the value of the subject matter. That she erred in principle while taxing the Bill of Costs by failing to apply the correct principles, failing to consider that instruction fees are fully earned at the point of filing defence, failing to consider the claim for special damages of Kshs 213,000,000.00 at prayer (u) in the Complaint and failing to consider the Advocates' submissions. They further state that Deputy Registrar misdirected and awarded a fee that is manifestly low as to justify interference from the Court.
4. The Client supports the Ruling and stated that the Deputy Registrar did not err in law by holding that it is not possible to ascertain the value of the subject matter, for purposes of determining instruction fees because the Suit was a defamation matter where the general and exemplary damages had not been quantified and would only be determined by the Court at the conclusion of the Suit. According to the Client there was nothing so exceptional on the face of the pleadings that would make the Advocates claim that the Deputy Registrar acted on the wrong principles in arriving at the award of Kshs 411,755.70. It thus urges that the amount awarded is fair, sufficient and in line with settled law as was held in *Joreth Ltd v Kigano and Associates* [2002]1 EA 88, that where the value of the subject matter of a suit could not be determined from the pleadings, judgement or settlement, a taxing officer was entitled to use his discretion fee in assessing the instruction fee and in doing so the factors to be taken into account included the nature and importance of the cause, the interest of the parties, the general conduct of the proceedings, any directions of the trial Judge and all other relevant circumstances.

#### **Analysis and Determination**

5. The main issue for determination is whether the Deputy Registrar applied the correct legal principles in awarding the instruction fees. In dealing with a Reference, particularly one on instruction fees, is that that the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs (see *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR and *Arthur v Nyeri Electricity Undertaking* [1961] EA 497).
6. In the Ruling, the Deputy Registrar confirmed that the claim was one for defamation and that the plaintiff sought special damages amounting to Kshs 213,000,000.00 among other prayers. She further noted that the Advocate's services were terminated before the conclusion of the case and that aside from the complaint, there were no other documents provided by the Advocates despite there being a List and bundle of documents dated 25.07.2023. That simply put she was only able to ascertain that instructions were given by the Client as the Client had not disputed the same. The Deputy Registrar stated that she had considered the factual and legal issues with a view to gauge complexity of issues, importance of the matter, the amount involved, perusal of entire paper work, studying and preparing for the matter, responsibility shouldered based on the nature and importance of the subject matter. She held that her further analysis of the instructions to defend the Client had not shown anything in the said matter to have risen at all above the work-day chores of legal practitioners in a defamation suit. That from the documents provided by the Advocates in support of the Bill of Costs, the responsibility entrusted to counsel in the proceedings was quite ordinary, and called for nothing but normal diligence such as must attend the work of a professional in any field. The Deputy Registrar also stated that she had considered that the complaint is bulky and lengthy and therefore may have required the Advocates to engage more in terms of readership and to draw a response.



7. The Deputy Registrar stated that she was guided by *Makbecha and Gitonga Advocates v Standard Group PLC* [2022]eKLR that the instruction fees for defamation suit is provided under schedule 6 paragraph 1 under “Other matters” but that this is a minimum provided for by the Order. She held that the court had discretion to enhance instruction fees considering the complexity of the matter, responsibility by counsel, time spent, reason done and skill deployed by counsel. That the Court must ensure that the Advocates instruction fee must be reasonable compensation for professional work done. Thus, that this being the Advocate/Client Bill of Costs, the Deputy Registrar was of the view that Kshs 200,000.00 is reasonable instruction fees considering the time taken in this matter, when the instructions were terminated by the client, scope of the work done and the nature of the dispute herein.
8. I disagree with the Advocates that the Deputy Registrar held that the prayers in the Plaint were non-monetary. A perusal of the Ruling indicates that she never made such a statement or conclusion. On whether she erred in finding that it was not possible to ascertain the value of the subject matter, I find in the negative. I say so because she was rightly guided by the court’s decision in *Makbecha and Gitonga Advocates v Standard Group PLC* (*supra*) where Seron J, held that given the nature of the claim of defamation, it was not possible to ascertain the value of the subject matter. Indeed, a perusal of the Plaint indicates that this was not possible at least going by the prayers sought therein where some were declaratory. The Deputy Registrar was thus not wrong in applying Schedule 6A(1) of the Order under “other matters” which is applicable only if the value of the subject matter cannot be ascertained from the pleadings. Since the value of the subject matter could not be ascertained from the pleadings, the Deputy Registrar rightly stated that she was guided by the principles set out in *Joreth Limited v Kigano* (*supra*) including taking into account factors such as the nature and importance of the cause or matter, the amount or value of the subject matter, the interest of the parties, the general conduct of parties, the complexity of the issues raised and novel points of law, the time, research and skill expended in the in the brief and the volume of documents involved, in exercising discretion to increase the minimum instruction fees. The Deputy Registrar stated that she had considered various factors including considering the time taken in this matter, when the instructions were terminated by the client, scope of the work done and the nature of the dispute in increasing the instruction fees to Kshs 200,000.00.
9. It is true that instruction fees is an independent and static item that is charged only once and is not affected or determined by the stage the suit has reached. However, this is just one of the many factors that can influence a taxing master’s discretion. Whereas I find that she applied the correct principles in coming to the conclusion that Kshs 200,000.00 was the appropriate instruction fees, I find that this sum was inordinately low in the circumstances. I agree with the Advocates that the Deputy Registrar ought to have considered what was at stake for the Client in the Suit, which included the possibility of being liable to pay Kshs 213,000.000.00 at least going by the special damages prayer (u) in the Plaint. It is therefore my view that in addition to the factors she considered, a consideration of the claim of Kshs 213,000,000.00 ought to have been taken into account in exercising discretion to increase the instruction fees more. Taking this into account, I find that a sum of Kshs 600,000.00 would have been more appropriate.

### **Disposition**

10. I allow the Advocates’ Chamber Summons dated 27.10.2023 to the extent that the Deputy Registrar’s Ruling dated 16.10.2023 is set aside and substituted with an award of Kshs 600,000.00 as instruction fees. The Client shall also pay costs of the reference assessed at Kshs 40,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF JANUARY 2024.**

**D. S. MAJANJA**



## **JUDGE**

Court Assistant: Mr M. Onyango

Mr Gitonga instructed by Makhecha and Gitonga Advocates for the Applicant

Mr Limo instructed by Limio and Njoroge Advocates for the Respondent.

