



**APA Insurance Company Limited v J. K. Kibicho & Company
Advocates (Miscellaneous Civil Application E631, E632 & E623 of 2022
(Consolidated)) [2024] KEHC 1795 (KLR) (Civ) (28 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1795 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E631, E632 & E623 OF 2022 (CONSOLIDATED)
DAS MAJANJA, J
FEBRUARY 28, 2024**

BETWEEN

APA INSURANCE COMPANY LIMITED APPLICANT

AND

J. K. KIBICHO & COMPANY ADVOCATES RESPONDENT

RULING

Introduction and Background

1. I have consolidated this matter with HC MISC. No. 632 of 2022 and HC MISC. No. 623 of 2022 as the parties are the same and the issues raised are the same. I shall therefore apply the reasoning herein to these matters and set out the ultimate orders.
2. Before the court is the reference by the Respondent/Applicant (“the Client”) from the decision of the Deputy Registrar made under Rule 11(2) of the *Advocates Remuneration Order* (“the Order”). It is brought by the Chamber Summons dated 16.12.2022 (“the Reference”) and it is in respect of the ruling of the Deputy Registrar dated 05.12.2022 (“the Ruling”) following taxation of an Advocate/Client Bill of Costs dated 05.08.2022 (“the Bill of Costs”) filed by the Applicant/Respondent (“the Advocates”).
3. The Reference is supported by grounds set out on its face and the affidavits of Ruth Mbalelo, the Client’s Legal Officer, sworn on 16.12.2022 and 22.06.2023. It is opposed by the Advocates through the affidavits of their advocates Esther Nzewa Kiulukuku, sworn on 10.05.2023 and Maureen Cheruiyot sworn on 25.10.2023. The parties have also supplemented their arguments by filing written submissions.



4. It is common ground that the Advocates were instructed by the Client to represent and defend them in Milimani CMCC No. 5036 of 2018; *Dukan Ali Sorri v Hanif Tours & APA Insurance Limited* where the plaintiff sought general and special damages, future medical expenses and diminished earning capacity as a result of an accident that occurred on or about 19.08.2011 (“the Suit”). After the Suit was settled, the Advocates demanded payment of their legal fees amounting to Kshs. 175,008.00 as per the Final Fee Note dated 11.11.2019. As the Client was unresponsive, they opted to charge the fees in accordance with the Order. They claimed Kshs. 316,015.00 in the Bill of Costs.
5. The Deputy Registrar delivered the Ruling holding that Schedule V of the Order was the applicable provision in respect of the Bill of Costs as the Client did not object to it. The Deputy Registrar noted that the Advocates had asked for their fees through letters attaching their fee notes on the 11.11.2019, 25.11.2019, 08.01.2020 and 09.03.2022 and notified the Client that it shall file an advocate-client bill of costs. The Deputy Registrar held that a form dated 21.04.2022 tendered by the Client as evidence that it had already paid the Advocates the outstanding fees did not relate to the demand for Kshs. 175,008.00 and that the letter following the said form was not clear and was just a typed document which could not be used as evidence of payment. The Deputy Registrar concluded that the Advocates had not been paid and that the Client did not demonstrate that money was paid as there was no confirmation from the bank that money was sent or otherwise received. The Deputy Registrar was satisfied that the Client failed to discharge the burden upon them that the monies had been paid and received by the Advocates.
6. On the substance of the Bill of Costs, the Deputy Registrar certified Kshs. 100,000.00 as instruction fees, other legal fees Kshs. 152,750.00, VAT Kshs. 24,440.00 and Disbursements Kshs. 2,800.00 bringing a total of Kshs. 179,990.00 after taxing off Kshs. 136,025.00. It is this decision by the Deputy Registrar that has now precipitated this reference.
7. The thrust of the Reference is that the Advocates are estopped from presenting their Bill of Costs as they have been paid Kshs. 143,672.00 for defending the suit and such fees should be reckoned and applied in reduction of the taxed costs. Apart from allowing the Reference, in the alternative the Client also prays that the Deputy Registrar’s finding in respect of the already paid fees be set aside and the matter remitted to another Taxing Officer for re-consideration thereof under Paragraph 13A of the Order.
8. I have considered the parties’ submissions and I do not think there is any dispute about the approach this court should take in dealing with a reference before it. In *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR the Court of Appeal distilled the principle as follows:

On a reference to a judge from the taxation by the Taxing Officer, 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. In *Arthur v Nyeri Electricity Undertaking* [1961] EA 497, the predecessor of this Court said at page 492 paragraph I: “where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases”.
9. From the parties’ arguments and submissions, the main issue for the court’s determination is whether the Deputy Registrar rightly applied the correct principles in arriving at the decision that the Client had not paid the Advocates as it had claimed. It is not in dispute that a taxing officer, in taxing a bill of costs, has to give credit to sums already paid by the client to the advocate. The determination of



whether such sums have been paid is a matter of evidence. The Deputy Registrar rightly concluded that the Client had the burden of proving that it had made payment in accordance with sections 107 and 108 of the *Evidence Act* (Chapter 80 of the Laws of Kenya).

10. It is common ground that the Client annexed a document marked as “RM 3” to its deposition that was titled “Claim Fee Voucher” for the gross sum of Kshs. 152,724.00 as proof of payment. However, the Deputy Registrar stated that this was not proof of payment as there was no relation to the Advocates’ Fee note of Kshs. 175,008.00 and that there was no confirmation from the bank of the money being sent or a receipt for the payment by the Advocates or even an acknowledgement from the Advocates. The Court of Appeal, in *Abdi Ali Dere v Firoz Hussein Tundal & 2 others* NRB CA Civil Appeal No. 310 of 2005 [2013] eKLR held that ‘...the term “voucher”, in regard to payment, has at least two distinct meanings. It can mean a written authorization to pay or disburse money. It can also mean confirmation of payment.’
11. A perusal of the document demonstrates that it comprises of a different figure than that claimed by the Advocates in their Fee Note of 11.11.2019. It appears to be an internally-generated document which from my deduction suggests that money has been paid or has been authorized to be paid. While the document on its own may be prima facie proof that payment has been made, the same is not conclusive that the Advocates’ fee note was settled. The Deputy Registrar could not be faulted for finding that the same was not proof of payment as there was no acknowledgment of receipt of the same from the Advocates or such advice or confirmation from the Bank that the said sum has been paid to the Advocates. In any event, the Client has now furnished the court with a debit advice from its Bank pursuant to the leave granted to the Client on 29.05.2023 to file a further affidavit. Whereas the Advocates oppose this affidavit and term it as an introduction of new evidence without leave, I think it is the interest of justice that the same be considered as it demonstrates that the Client paid Kshs. 143,672.00 as per the Claim Fee Voucher and EFT/RTGS remittance advice.
12. I do not find any reason to interfere with the Deputy Registrar’s findings which were consistent with the evidence on record. Now that the Client has provided evidence of payment being made to the Advocates, it can be credited to the taxed sum.

Disposition

13. As earlier stated, the issues in the three matters are similar hence I now make the following dispositive orders.

HC MISC. No. 631 of 2022

14. I uphold the Deputy Registrar’s Ruling dated 05.12.2022 subject to crediting the sum of Kshs. 143,672.00 already paid by the Client. As this taxation and Reference could have been avoided had the Client made payment and communicated early enough. The Client shall pay costs of these proceedings assessed at Kshs. 20,000.00.

HC MISC. No. 632 OF 2022

15. I uphold the Deputy Registrar’s Ruling dated 05.12.2022 subject to crediting the sum of Kshs. 186,378.85 already paid by the Client. The Client shall pay costs of the reference assessed at Kshs. 20,000.00.



HC MISC. No. 623 OF 2022

16. I uphold the Deputy Registrar's Ruling dated 05.12.2022 subject to crediting the sum of Kshs. 81,225.00 already paid by the Client. The Client shall pay the Advocates costs of the Reference assessed to Kshs. 20,000.00

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF FEBRUARY 2024.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Mege instructed by Muchui and Company Advocates for the Applicant/Client

Mr Sikuku instructed by J. K. Kibicho and Company Advocates for the Respondents.

