



IN THE HIGH COURT OF KENYA

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. COMM. APPLICATION NO. E052 OF 2021

BETWEEN

KENYARIRI AND ASSOCIATES ADVOCATES.....ADVOCATE/APPLICANT

AND

FIRST COMMUNITY BANK LIMITED.....CLIENT/RESPONDENT

RULING

1. The Applicant/Advocates (“the Advocates”) have filed a Chamber Summons application (“the reference”) made under **Rule 11(2)** of the the *Advocates Remuneration Order* (“the *Order*”) challenging the decision of the Deputy Registrar dated 3rd May 2021 arising out of an Advocate – Client Bill of costs dated 27th January 2021 (“the Bill of Costs”) in respect of *Chief Magistrates Court Milimani No. 4919 of 2019, First Community Bank v Charles Nyakango Mongo t/a Bencha Investments & Another* (“the suit”). It is common ground that the Advocates were instructed and represented the Respondent/Client (“the Bank”) in the suit where the Bank had sued the defendants therein to recover inter alia the sum of KES. 13,029,600.94 that had been advanced to them as a financial facility and had fallen into arrears. In the Bill of Costs, the Advocates sought legal fees and disbursements from the Bank amounting to KES 824,217.63.

2. The Deputy Registrar considered the Bill of Costs and concluded that the Advocates had been overpaid by the Bank after taxing the Bill of Costs at KES -345,554. In arriving at that conclusion, the Deputy Registrar was in agreement with Advocates that they had drawn the instruction fees to scale and she proceeded to tax the same as drawn at KES 365,740.02.

3. The Advocates are dissatisfied with the above overall findings by the Deputy Registrar. The Reference is supported by the affidavit of Dr. Christopher Orina Kenyariri, an advocate practising in the Advocates’ firm, sworn on 30th June 2021. It is opposed by the Bank through the replying affidavit of Claris Ogombo, the Bank’s Legal Officer, sworn on 19th July 2021. The Advocates have also filed brief written submissions in support of their arguments.

4. The Advocates’ are dissatisfied with the Deputy Registrar’s finding that the Bank had made an advance payment of KES 1,071,000.00 to them. In resolving this issue, I am alive to the general principal stated in *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR* where the Court of Appeal stated that “*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.*”

5. The Advocates impugn the internal memo adduced by the Bank submitting that the same “*was not real*”. They suggest that it was manufactured to suit the Bank’s argument about the money that was transferred to them by the Bank, which the Advocates do not deny receiving. In my view, once the Bank stated that they paid a certain amount of the money to the Advocates and that part of which was to be applied towards legal fees in respect of the suit, the onus shifted to the Advocates to controvert this position by either denying receiving the said money or stating that the money so received was for a different purpose other than that stated by the Bank.

6. The Advocates did not adduce any other statement to show that it did not receive the money. It should also not be lost to the parties that under **section 176** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* such bank statements produced by the Bank are prima facie evidence that is admissible in legal proceedings and thus the presumption of their correctness is always with the Bank unless dislodged by the other party. Thus, in the absence of countering evidence, the Deputy Registrar and this court have no otherwise but to presume that the same is true, correct and accurate.

7. The Deputy Registrar, in her ruling, stated that she looked at the said statement of accounts “*with a critical eye*” and concluded that the Advocates had not disputed that they hold the account with the Bank and that the said summarized statement of accounts belongs to them. She further found that the transaction of 6th August 2019 is equally not denied and the same tallies with the internal memo dated 8th March 2019 where the deposit of KES 8,400,000.00 was a payment of fees for various matters with the sum of KES 1,000,000.00 being in respect of the suit. In respect of court filing fees, the said statement of accounts indicated that a sum of KES 71,000.00 was paid. The Deputy Registrar then went ahead to make a finding that the Bank had discharged its burden of proof that a sum of KES 1,071,000 had been paid towards the legal fees for services rendered by the Advocates inclusive of the court filing fees.

8. I find and hold that the appreciation of the evidence and findings by the Deputy Registrar were consistent with evidence on record. Further, as was held by the Court of Appeal in *Joreth v Kigano (supra)* and more recently in *Vipul Premchand Haria v Kilonzo & Co Advocates NRB CA Civil Appeal No. 197 of 2014 [2020] eKLR* the list of factors a taxing master ought to consider in assessing and determining a Bill of Costs is not exhaustive and in my view, taking into account fees already paid to an advocate is one of them. I find that the Deputy Registrar properly exercised her discretion in crediting and discounting the sum of KES 1,071,000.00 from the Bill of Costs which she rightly found had already been paid to them by the Bank in respect of the suit.

9. For these reasons, I find that the Advocates’ Reference dated 30th June 2021 lacks merit and is hereby dismissed with costs to the Bank which are assessed at KES. 15,000.00.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF AUGUST 2021

D.S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Dr Kenyariri instructed by Kenyariri and Associates Advocates for the Advocates/Applicant.

Ms instructed by Issa and Company Advocates for the Client/Respondent.



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