



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**MISC. COMM. APPLICATION NO. E051 OF 2021**

**BETWEEN**

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

**AND**

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

**RULING**

1. What is before the court is the reference by the Applicant/Advocates (“the Advocates”) from the decision of the Deputy Registrar made under **Rule 11(2)** of the *Advocates Remuneration Order* (“the Order”) and brought by the Chamber Summons dated 30<sup>th</sup> June 2021 (“the reference”). It is in respect of the ruling of the Deputy Registrar dated 3<sup>rd</sup> May 2021 following taxation of an Advocate/Client Bill of Costs dated 27<sup>th</sup> January 2021 (“the Bill of Costs”).

2. The reference is supported by grounds set out on its face and the affidavit of Dr. Christopher Orina Kenyariri, an advocate practising in the Advocates’ firm, sworn on 30<sup>th</sup> June 2021. It is opposed by the Respondent/Client (“the Bank”) through the replying affidavit of Claris Ogombo, its Legal Officer, sworn on 27<sup>th</sup> July 2021. The Advocates have also filed brief written submissions in support of their position.

3. It is common ground that the Advocates represented the Bank in *HCCC NO. E210 of 2019, First Community Bank v Hanif Tours & Travel Agency Limited and 2 Others* where the Advocates were instructed by the Bank to institute a claim of recovery of an outstanding facility of KES 36,982,503.62 against defendants therein (“the Suit”). Subsequently, the Advocates filed the Bill of Costs and claimed a total of KES 2,655,664.67 for services rendered to the Bank in the suit with the claim for instruction fees being pegged at KES 1,414,388.03.

4. After considering the Bill of Costs together with the depositions and the submissions filed by the parties, the Deputy Registrar held as follows in respect of the instruction fees:

*In this present case, it is common ground that the value of the subject matter is Kshs 36,982,503.62 and pursuant to provisions of paragraph 1 (b) of Schedule 6 of the Order, the instruction fees works as follows;*

(a) Kshs 1,000,000 - Kshs 120,000

(b) Up to Kshs 20,000,000  $\times$  2% = Kshs 400,000

(c) Balance of Kshs 15,982,504  $\times$  1.5% = Kshs 239,738

Total = Kshs 759,738

Item No. 1 on Instruction fees is therefore rounded off and taxed at Kshs 760,000/=. A sum of Kshs 654,388 is taxed off.

5. The Deputy Registrar further found the Bank had discharged its burden of proof that a sum of KES 1,500,000.00 (exclusive of V.A.T) had already been paid towards the legal fees rendered by the Advocates in the suit. In sum, the Deputy Registrar awarded KES 760,000.00 as instruction fees, taxed off KES 1,180,705.67 from the total bill and certified KES. -25,041.00 as the amount due to the Advocates after offsetting the KES 1,500,000.00 that had already been paid by the Bank to the Advocates. It is this decision by the Deputy Registrar that has now precipitated this reference.

6. From the Reference, depositions and submissions, the main issues for determination are whether the Deputy Registrar applied the correct legal principles in awarding the instruction fees as she did and whether she was correct to find that the Advocates had already been paid the sum of KES 1,500,000.00 by the Bank.

7. I do not think there is any dispute about the approach this court should take in dealing with a reference on assessment of instruction fees. In *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR* the Court of Appeal held 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.”

8. On the first issue of instruction fees, the general principles to be applied were clearly stated in *Joreth Ltd v Kigano & Associates [2002] eKLR* 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 .*

9. The parties are in agreement that the value of the subject matter was KES 36,982,503.62 which is the sum the Advocates were instructed to recover. The Deputy Registrar applied the provisions of **paragraph 1(b) of Schedule 6** of the **Order** to compute the instruction fees. I do not hear the Advocates stating that the Deputy Registrar applied the wrong provision of the **Order** but that she applied the wrong multiplier in computing which consequently gave a wrong figure. However, the Advocates do not point out how the multiplier(s) applied by the Deputy Registrar were erroneous and if they were, what ought to have been the correct ones. As shown in para. 4 above, she took a step by step approach consistent with the provisions of the **Order**. I do not find any fault or error of principle by the Deputy Registrar warranting the court’s interference.

10. The second ground of attack by the Advocates is that the Deputy Registrar should not have considered the evidence in support of the credits made to the Advocates’ account in settlement of their fees. Before the Deputy Registrar, the Bank relied on the deposition of Clarice Ogombo sworn on 29<sup>th</sup> March 2021. She stated that the Bank had paid KES. 1,500,000.00 as evidenced by an internal memo approving payment of legal fees for the Advocates on various matters including the suit. It also produced a bank statement showing that KES. 1,500,000.00 was part of the lump sum of KES. 8,400,000.00 credited to its accounts on 6<sup>th</sup> August 2019. The Bank also produced Withholding Tax Certificates for the amount paid.

11. In response, Dr Kenyariri in his further affidavit sworn on 19<sup>th</sup> April 2021 complained that the memo produced by the Client related to different claims. He denied that there was any fee note corresponding to the internal memo to support the contention that

the payment was on account of legal fees and that the tax certificates did not relate to the suit.

12. The Deputy Registrar at Para. 11 of her Ruling stated in part as follows:

*I have had a chance to consider the same arguments in High Court Miscellaneous Cause No. E050 of 2021, Christopher Orina Kenyariri t/a Kenyariri & Associates vs First Community Limited, where I noted that the Applicant does not deny being the holder of account no. 0008-404-210103-00104845-000 with the Respondent bank and as indicated in the Applicants interim statement annexed as CO-4 an amount of Kshs 8,400,000 was credited to the account of the Applicant on 6th August 2019. The narrative against the transaction reads;*

*“.....legal fees to Kenyariri for services rendered Allied, Hanif Shariff, Benchah, Edna K.....”*

*The Applicant does not deny this transaction. I make a finding that the Respondent has discharged its burden of proof that a sum of Kshs 1,500,000 (exclusive of V.A.T) has been paid towards the legal fees rendered by the Applicant in this matter.*

13. I do not find any fault in the Deputy Registrar’s finding above as the Advocates did not dispute the bank statements. **Section 176** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** creates a presumption in favour of the Bank as follows:

*176. A copy of any entry in a banker’s book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded.*

14. Once the Bank adduced the said statement, it was incumbent upon the Advocates to counter and dislodge that position by proving that the said statement was incorrect or erroneous by way of evidence and not through general and mere denials. Moreover, the contents of the memo showing how payments were to be made only corroborated the payment that eventually found its way to the Advocates’ account. The Advocates did not adduce any evidence before the Deputy Registrar to demonstrate that the Bank was altering the statements or manufacturing memos to suit their case. The fact that there was no corresponding fee note to the said sum indicated in the bank statement does not negate the fact that the said sum therein was paid to the Advocates. The Advocates could argue that in as much as they received the said KES 8,400,000.00, the same was not to be applied towards the legal fees in the suit. However, no such argument was put forth, thus the Bank’s evidence remained unchallenged. I affirm the Deputy Registrar’s finding that the Client paid KES 1,500,000.00 to the Advocates on account of fees in the suit.

15. For the reasons I have set out above, I find that the Deputy Registrar’s Ruling dated 3<sup>rd</sup> May 2021 was based on the correct principles of law and taxation. The Advocates’ Chamber Summons dated 30<sup>th</sup> June 2021 lacks merit and is hereby dismissed. The Respondent is awarded costs of KES. 15,000.00.

**DATED and DELIVERED at NAIROBI this 31<sup>st</sup> 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.