



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. E050 OF 2021

BETWEEN

KENYARIRI AND ASSOCIATES ADVOCATES...ADVOCATE/APPLICANT

AND

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

RULING

1. It is common ground that the Applicant (“the Advocates”) represented the Respondent/Client (“the Bank”) in *HCCC NO. E067 of 2019, First Community Bank v Valley Road Motors Limited & 2 Others* (“the suit”) where the Bank had sued the defendants therein to recover KES. 100,023,025.92 that had been advanced to them as a financial facility. The suit was settled before it could be heard. The Advocates filed an Advocate-Client Bill of Costs dated 27th January 2021 (“the Bill of Costs”) where they sought legal fees and disbursements amounting to KES. 6,528,530.79.

2. The Bill of Costs was considered by the Deputy Registrar who delivered her Ruling on 30th April 2021 and stated that the Advocates were actually overpaid by the Bank after taxing the Bill of Costs at KES. -531,583.00

3. The Advocates are dissatisfied with the above holding by the Deputy Registrar and have filed the Chamber Summons application (“the Reference”) dated 30th June 2021 under **Rule 11(2)** of the *Advocates Remuneration Order* (“the *Order*”) seeking that the said decision by the Deputy Registrar be set aside and/or varied and the Bill of Costs be taxed afresh. 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 9th July 2021. The Advocates have also filed brief written submissions in support of their arguments.

4. I have gone through the arguments of the parties and the Advocates’ submissions and find that the main issues for determination are whether the Deputy Registrar erred in her award of instruction fees and whether her finding that the Advocates had been overpaid was incorrect and based on the wrong principles.

5. The jurisdiction of this court to intervene in the decision of Deputy Registrar, is circumscribed. In *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR* the Court of Appeal explained 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.*”

6. On the issue of instruction fees, the approach to determination was set out by the Court of Appeal in *Joreth Ltd v Kigano & Associates NRB CA Civil Appeal No. 66 of 1999 [2002] eKLR* where it stated that:

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 .

7. There is no dispute that the value of the subject matter in the suit was KES 100,023,025.92 since this is the amount that was claimed in the Plaint. The Deputy Registrar rightly found as such. She further found that since the defendant in the suit entered appearance but had not filed her defence before settling the suit, **Paragraph 1(a)** of **Schedule 6** of the **Order** applied and she proceeded to compute the instruction fees as follows:

(a) Kshs 1,000,000 - Kshs 75,000

(b) Up to Kshs 20,000,000 \times 1.75% = Kshs 350,000

(c) Balance of Kshs 79,023,025 \times 1.5% = Kshs 1,185,345

Total = Kshs 1,610,345

8. The Advocates do not dispute the **Schedule** of the **Order** applied by the Deputy Registrar but rather fault the multiplier used in arriving at the final amount. However, the Advocates did not indicate what was wrong with the multiplier applied by the Deputy Registrar and even if they did, I have gone through the said provision of the **Order** and I do not find any fault in the multiplier(s) applied by the Deputy Registrar as they are in consonance with what is provided for by the **Order**. The Bank's argument that the Deputy Registrar ought to have actually discounted the instruction fees at 85% of the amount awarded would only be correct had the Deputy Registrar applied **Paragraph 1(b)** of **Schedule 6** of the **Order**, which was not the case. I therefore do not find any reason to interfere with the Deputy Registrar's award of instruction fees as it was based on the relevant provision of the **Order**.

9. The Advocates also faulted the Deputy Registrar for relying on the bank statements and other documents provided by the Bank as evidence of payment of the legal fees without examining their authenticity. At the hearing of the Bill of Costs, the Bank filed a Replying Affidavit of Claris Ogombo sworn on 29th March 2021 stating that the Advocates failed to give it credit for paying KES. 3,440,344.82 in instalments as follows: KES. 1,810,344.82 credited to its account on 5th June 2019, KES. 1,050,000.00 credited to its account on 25th October 2019 and KES. 580,000.00 credited to its account on 23rd April 2020 and lastly, KES. 70,435.00 paid on account of filing fees and credited to its account on 4th April 2019. All these credits were supported by a Statement of Account of the Advocates account held by the Bank.

10. In response to the statements, Dr Kenyariri, in his further affidavit sworn on 19th April 2021, deponed that the statements were, "illegal and should be disregarded". He contended that the Bank had not produced a fee note or a deposit request note which prompted the purported credits on the statements and that the firm's statements had been accessed without his consent.

11. The Deputy Registrar found that the transactions had not been denied or otherwise explained hence accepted the credits. I agree with the Deputy Registrar that the Advocates did not deny the statements or contest their authenticity. As regards the issue of consent or authority, it is not lost that the dispute concerned the Advocate and its Client who happened to be the Bank which had access to the statement. Those statements show credits with the appropriate narration in respect of the fees in the matter. Had the Advocates contested the statements, nothing would have been easier than to produce statements in its possession showing what it considered the correct entries without reference to the fees paid in the matter.

12. I also find that the Deputy Registrar did not have to examine the authenticity of the said statements because **Section 176** of the **Evidence Act** 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.

Since there were no other statements of accounts or evidence of incorrectness produced to dislodge this position by the Bank, I do not see any reason why the Deputy Registrar could not rely on the said statements produced by the Bank. The Advocates' allegations that the said documents and/or statements may have been 'doctored' to suit the Bank's case remain just that: allegations; and the same cannot hold.

13. Further, as was held by the Court of Appeal in *Joreth v Kigano (Supra)* and 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. 3,510,779.82 from the Advocates' Bill of Costs which she rightly found had already been paid to them by the Bank in accordance with the evidence presented.

14. In sum, I find that the Deputy Registrar applied the correct principles and the law in taxing the Bill of Costs. The net effect of my findings above is that the Advocates' Reference dated 30th June 2021 lacks merit and is dismissed with costs. The Respondent is awarded costs of 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 Lipwop instructed by Issa and Company Advocates for the Client/Respondent.



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