



IN THE HIGH COURT OF KENYA

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. COMM. APPLICATION NO. E054 OF 2021

BETWEEN

KENYARIRI AND ASSOCIATES ADVOCATES ADVOCATE/APPLICANT

AND

FIRST COMMUNITY BANK LIMITEDCLIENT/RESPONDENT

RULING

1. The Applicant/Advocates (“the Advocates”) are challenging the decision of the Deputy Registrar dated 3rd May 2021 and have filed a Chamber Summons dated 30th June 2021 (“the reference”) made under **Rule 11(2)** of the *Advocates Remuneration Order* (“the *Order*”) following taxation of an Advocate/Client Bill of Costs dated 27th 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 30th June 2021. It is opposed by the Respondent/Client (“the Bank”) through the replying affidavit of Claris Ogombo, its Legal Officer, sworn on 27th 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. E157 OF 2019, First Community Bank v Ednah Kerubo Nyariaro t/a Erosob Logistics & Transporters and 5 Others* where the Advocates were instructed by the Bank to institute recovery proceedings of an outstanding facility of KES 58,120,210.60 against defendants therein (“the Suit”). Subsequently, the Advocates filed the Bill of Costs and claimed a total of KES 3,918,582.78 as legal fees and disbursements for the services rendered to the Bank in the suit with the claim for instruction fees being pegged at KES 2,161,207.37.

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 58,120,503.62 and and that the matter was undefended. Pursuant to provisions of paragraph 1 (a) of Schedule 6 of the Order, the instruction fees works as follows;

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

(b) *Up to Kshs 20,000,000 × 1.75% = Kshs 350,000*

(c) Balance of Kshs 37,120,210 × 1.5% = Kshs 556,803

Total = Kshs 981,803

Item No. 1 on Instruction fees is therefore rounded off and taxed at Kshs 1,000,000/=. A sum of Kshs 1,161,207 is taxed off.

5. The Deputy Registrar further found that a sum of KES 2,070,565.00 had already been paid by the Bank to the Advocates as legal fees and disbursements in respect of the suit. In sum, the Deputy Registrar awarded KES 1,000,000.00 as instruction fees, and certified KES. -208,065.00 as the amount due to the Advocates after offsetting the KES 2,070,565.00 that had already been paid by the Bank to the Advocates and essentially concluded that the Advocates had been overpaid. It is this decision by the Deputy Registrar that has now precipitated this reference.

6. From the application, depositions and submissions, the main issues for determination are whether the Deputy Registrar applied the correct legal principles in awarding the instruction fees and whether she was correct to find that the Bank had already been paid the Advocates KES 2,070,565.00 as legal fees for the filing the suit.

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 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*”.

8. The principles to be applied when assessing instruction fees in a suit are well settled. The Court of Appeal in the case of **Joreth Ltd v Kigano & Associates [2002] eKLR** outlined the principle 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 value of the subject matter can readily be ascertained from the pleadings which show the amount claimed by the Bank was, KES 58,120,503.62. It is on this sum that the Deputy Registrar applied the provisions of **paragraph 1 (a) of Schedule 6 of the Order** as the suit was undefended, to compute the instruction fees. The Advocates did not complain that the Deputy Registrar applied the wrong provision of the **Order** but stated that she applied the wrong multiplier in her computation which consequently gave a wrong figure. The Advocates have not pointed out how the multiplier(s) applied by the Deputy Registrar were erroneous and if they were, what ought to have been the correct ones. In any case, as have set out in para. 4 above, the Deputy Registrar approached the matter methodically and in line with the appropriate schedule. I therefore reject the Advocates’ submission that the Deputy erred in arriving at the correct instruction fee.

10. Turning to the second issue, the Advocates challenged the propriety of internal memo and statement of accounts adduced by the Bank as its evidence that it had settled the Advocates’ fees. The Advocates fault the Deputy Registrar for not meticulously analyzing them and relying on them to arrive at an erroneous decision. On this issue, the Deputy Registrar ruled, in part, as follows:

(e) *In light of the Applicants concerns, I have looked with a critical eye at the annexures referred to herein above and make the following findings;*

The Applicant has not disputed that he holds an account no. 0008-404-210103-00104845-000 with the Respondent bank and that the Summarized statement of accounts annexed as CO-5 belongs to it. The transaction of 6th August 2019 is equally not denied. The same tallies with the internal memo 8th March 2019. The deposit of Kshs 8,400,000 was a payment of fees for various matters. Out of this, a sum of Kshs 2,000,000 was in respect to this particular claim.

(f) The above transactions have not been denied nor explained otherwise by the Applicant. I find that the Applicant has been paid a sum of Kshs 2,070,565 towards legal fees and disbursements in furtherance of the instructions issued herein

11. In short, the memo showed that the Bank had consolidated fees for various matters including the suit in one payment which was credited to the Advocates' Account. I do not find any fault in the Deputy Registrar's findings that the Advocates had been paid. In the circumstances, the evidential burden shifted to the Advocates to show that the payments were not in relation to the suit or were for an entirely different transaction. The Advocates failed to discharge this burden of proof. Para. 14 of *Halsbury's Laws of England, 4th Edition, Volume 17* provides that "The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case." (see also *Joruth Enterprises Ltd v Barclays Bank of Kenya Ltd* ML HCCC No. 231 of 2010 [2020] eKLR).

12. Further, **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.

13. Once the Bank adduced the said bank 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. The Advocates did not adduce any evidence before the Deputy Registrar to demonstrate that the Bank doctored the statement or manufactured 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 did not deny receiving the KES 2,070,565.00 and they never argued that the said sum so received was not in respect of the suit. This meant that the Bank's evidence remained unchallenged and I find no reason to set aside the Deputy Registrar's finding that KES 2,070,565.00 was paid to the Advocates and the same was rightly credited and discounted by the Deputy Registrar from the total Bill of Costs.

14. The consequence of my findings above is that the Advocates' Chamber Summons dated 30th June 2021 lacks merit and is hereby dismissed with costs to the Bank. I award the Bank KES. 15,000.00 as costs of the Reference.

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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