



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. CIVIL APPLICATION NO. E668 OF 2020 (OS)

IN THE MATTER OF THE ARBITRATION ACT, 1995

BETWEEN

PRABHAKI DEVELOPERS LIMITED.....PLAINTIFF/APPLICANT

AND

STRUCTURAL CONSTRUCTION INTERNATIONAL LIMITED...DEFENDANT/RESPONDENT

RULING

1. What is before the court is the Applicant's reference made under **Rule 11** of the **Advocates Remuneration Order** ("the **Order**") by way of the Chamber Summons dated 18th December 2020 following taxation of the Respondent's Bill of Costs dated 20th July 2020. The Party and Party Bill of Costs arose out of a ruling dated 2nd June 2020 in which I dismissed the Applicant's application made under **section 17(6)** of the **Arbitration Act, 1995** seeking a declaration that the arbitral tribunal constituted by the Sole Arbitrator, Tom O. Oketch, does not have jurisdiction to hear and determine the arbitration proceedings between the parties and consequential orders that the proceedings be declared null and void and that all and any proceedings between the parties in respect of the construction contract on Plot No. 7879/26 in Nairobi ("the suit property") between the parties be terminated.

2. The application is supported by the affidavit of its advocate on record, Paul Ogunde, sworn on 18th December 2020. The application is opposed by the Respondent through the affidavit of its Managing Director, Kishor Raghvani, sworn on 26th January 2021. The parties' advocates filed written submissions in support of their respective positions.

3. The substantial issue in this reference is the instruction fee awarded to the Applicant by the Deputy Registrar. In the Bill of Costs, the Respondent claimed KES 5,964,369.00 as instruction fees, "*for acting for the Defendant and prosecute a Claim in Arbitration between the Applicant and the Respondent in a dispute pertaining a Contract for construction of industrial complex, warehouse facility and 21 semi detached go downs on LR No. 7879/26 Ruaraka, a contract sum of Kshs. 715,000,000.00 and seeking costs for agreed final amount due all aggregating to a Total Claim of Kshs. 384,291,290.79 ...*"

4. The Deputy Registrar considered the Bill of Costs and in the ruling dated 4th December 2020 held as follows:

The applicant in this instant filed an application to adopt a foreign award. There was no fresh suit filed, nor any witnesses called. Section 17 referred to the Originating summons filed as an application which cannot fall under the definition of a suit as envisaged in paragraph 1 (b) of the Schedule 6 of the Advocates Remuneration Order 2014 (ARO).

In my considered view, I believe the Bill of costs should be taxed under Schedule 6 where it is provided for Other matters. The basic instruction fees provided therein is Kshs 75,000/-. However, I have considered the work done by the applicant in this matter taking into account the documentation filed and I have exercised my discretion to increase the amount to Kshs 200,000/-

5. The Applicant disagrees with the Deputy Registrar's reasoning and submits that the Deputy Registrar should not have applied **Schedule 6** of the **Order** in respect of other un-prescribed matters which contemplates an originating process for a substantive suit. In its view, the Deputy Registrar wrongly characterized the proceedings as concerning adoption of an arbitrator's award yet the matter was an appeal against arbitrator's award on an interlocutory question on jurisdiction. Counsel for the Applicant submits that the matter should be considered and taxed as an appeal where the minimum fee is KES 25,000.00. In his view, there is no justification in allowing a fee 10 times the minimum fee.

6. Although the Respondent submits that the Deputy Registrar ought to have applied **Schedule 6 para. 1 (b)** of the **Order**, it did not file a reference based on this ground. It however supports the decision of the Deputy Registrar and asserts that the instruction fee ought to be affirmed having regard to the care and labour expended on the matter, the number and length of documents perused, the nature and importance of the matter, the amount and value of the subject matter, interest of the parties, complexity of the matter and other circumstances.

7. In resolving this reference this court is guided by the principle that it will not interfere with the discretion of the Taxing Officer unless it is established that the taxing officer has not exercised his discretion judicially, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered or has acted on a wrong principles including by applying the wrong charging schedule (see **Joreth Limited v Kigano and Associates [2002] 1 EA 92** and **First American Bank of Kenya v Shah & Others [2002] 1 EA 64**). In **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] 1 KLR 528**, the Court of Appeal held that the failure to take into account relevant considerations may include failure to apply the instruction fees or costs as provided in “*the appropriate schedule of the Remuneration Order*”.

8. The question for determination in this reference is whether the Deputy Registrar erred in principle in applying the provision for “*Other matters*” in **Schedule 6** of the **Order**. I disagree with the Applicant that the subject matter of the application was an appeal. Nothing in the **Arbitration Act** or the **Arbitration Rules** supports this position. Under **Rule 3** of the **Arbitration Rules**, an application under **section 17** of the **Arbitration Act** is required to be brought by an originating summons. It is therefore considered an application. **Section 17(6)** of the **Act** does not state that the party aggrieved by the ruling of the arbitral tribunal on a question of jurisdiction may appeal. It uses the phrase, “*may apply to the High Court*”. In my ruling dated 2nd June 2020 I left no doubt that the application is not an appeal but an application invoking the court’s original jurisdiction. I held as follows:

22. This language implies that this court has original jurisdiction to decide the issue of jurisdiction afresh and reach its own conclusion unmoored from the decision of the arbitrator or arbitral tribunal

9. Although the Deputy Registrar mischaracterized the matter, I find and hold that the Deputy Registrar did not commit an error of principle in reaching the conclusion that the appropriate provision for taxation for instruction fees for an originating summons under **section 17** of the **Arbitration Act** is **Schedule 6** under “*Other matters*”.

10. As regards the other items in the Bill of Costs, the Deputy Registrar gave reasons for the decision. The Getting Up Fees were taxed off while the other items were drawn to scale. I do not find any merit in the complaint that the Deputy Registrar failed to give reasons for the decision.

11. The Chamber Summons dated 18th December 2020 is dismissed with costs to the Defendant.

DATED and DELIVERED at NAIROBI this 24th day of FEBRUARY 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Ogunde instructed by Walker Kontos Advocates for the Plaintiff.

Ms Anami instructed by Mutubwa and Company Advocates for the Defendant.