



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 30 OF 2018

4MB MINING LIMITED C/O MINISTRY OF MINING

JUBA REPUBLIC OF SOUTH SUDAN.....PLAINTIFF

-VERSUS-

MISNAK INTERNATIONAL (UK) LIMITED.....DEFENDANT

-AND-

TOTAL LINK LOGISTICS.....1ST INTERESTED PARTY

UNION LINK LOGISTICS.....2ND INTERESTED PARTY

FREIGHT FORWARDERS (K) LIMITED....3RD INTERESTED PARTY

RULING

1. This Ruling arises from a taxation by **Hon. Mr. J. M. Nyariki**, the Deputy Registrar of this court. By his decision dated 1/9/2020, the learned Taxing Officer taxed the Applicant's costs in the total sum of Kshs. 300,840/= after taxing off Kshs. 16,273,333.33.

2. This Reference was instituted by way of Chamber Summons dated 3/9/2020 in which the Defendant/Applicant herein objects to the entire taxation of the bill of costs and seeks for the following orders: -

a) This Honourable Court be pleased to set aside the decision of the taxing officer delivered on 1st September 2020 in the party and party costs dated 27/12/2019, the quantum awarded and the reasoning thereon.

b) This Honourable court be pleased to re-tax the said party and party bill of costs dated 27th December, 2019.

c) In the alternative to prayer (b) above, this Honourable court be pleased to remit the bill of costs dated 27/12/2019 for re-taxation before a different taxing officer other than the Hon. Nyariki J.M.

d) The taxing officer other than Hon. Nyariki J.M assess instruction fees based on the value of the subject matter of the suit to be ascertained from the pleadings and documents filed in the present Civil Case Number 30 of 2018.

e) The taxing officer, other than Hon. Nyariki J.M, assess the getting up fees under schedule 6 of the Advocates (Remuneration) (Amendment) Order 2014.

f) The costs of this application be provided for.

3. The grounds upon which the said application was grounded can be summarized as follows.

(a) that the taxing officer erred in failing to assess the instruction fees under schedule 6A (1)(b) of the Advocates Remuneration (Amendment) Order, 2014 which was not the applicable scale;

(b) as regards item (1) on instruction fees it is argued that the taxing officer erred in principle by failing to give due consideration to the proviso under schedule 6(1) of the Advocates Remuneration Order, 2014, which enjoins a taxing officer to give consideration to other factors including the nature and importance of the matter, the amount involved, the interest of the parties as well as the general conduct of proceedings when assessing the costs payable. In failing to do so, the applicant is of the view that the party and party costs arrived at was egregiously low so as to justify interference by this court;

(c) lastly that the taxing Officer failed to articulate the reasons for arriving at his decision.

4. The application is further supported by an affidavit of Kelvin

Okere, the Applicant's advocate. He reiterated the grounds on face of the application and further added that the Plaintiff had instituted the suit in 2018 seeking monetary relief exceeding Kshs. 800,000,000/= being the value of a gold mining equipment destined to the Ministry of Mining of South Sudan.

5. The Defendant/Applicant then opposed to the suit vide a Preliminary Objection on basis that service was effected properly on the Defendant who is based abroad. Although the trial court did not uphold the Preliminary Objection, the decision was quashed on appeal vide a Judgment by the court of appeal delivered on 25/7/2019.

6. According to Mr. Okere, the Judgment by the Court of Appeal

was a demonstration of the labourious effort and research undertaken in the matter. Furthermore, that the court of appeal condemned the Applicant to costs for both the High Court and Court of Appeal.

7. Parties consented to disposing the application by way of written submissions which were respectively highlighted on 25/11/2020 by Mr. Okere, Counsel for the Defendant/Applicant and Mr. Ngonze counsel for the Plaintiff/Respondent.

8. Mr. Okere advanced the following arguments in support of his application. Firstly, he argued that the Taxing officer used the wrong tariff in the Advocates Remuneration (Amendment) Order which is applicable for "other matters" under schedule 6 paragraph 1(j) instead of the correct tariff under schedule 6 A(1)(b). His view was that Schedule 6 paragraph 1(j) was applicable on Constitutional and Judicial Review matters but not on matters instituted by way of Plaintiff. The Counsel relied on the case of **Makupa Transit Shade CFS v County Government of Mombasa [2020] eKLR** where the court held taxation of a suit filed by Plaintiff under the proviso of "other matters" in the Advocates Remuneration Order was an error in principle for.

9. Further, Mr. Okere submitted that it was incumbent upon the taxing officer to identify the proper tariff applicable to the subject bill and failure to do so would cause great injustice to the parties. According to the counsel, similar findings were upheld in the cases of **Republic v Competition Authority ex-parte Ukwala Supermarket Limited & Another [2017] eKLR** and **Chiuri Kirui & Rugo Advocates v Tusker Mattresses Limited [2017] eKLR**.

10. Secondly, Mr. Okere submitted that the taxing master failed to give sufficient and cogent reasons for taxing the matter under the proviso for "other matters" when in the first instance the plaintiff was not seeking for prerogative orders that, although the taxing officer was of the view that the nature of the subject matter was unspecified, Mr. Okere maintained that from the pleadings the value of the subject matter was ascertainable and more specifically from the Plaintiff where the Plaintiff had sued the Defendant/Applicant for an amount of USD 8,134,705/= being the value of the machine. Further, that the taxing officer in his ruling identified the value of the subject matter as Kshs. 800,000,000/= and ought to have proceeded on that amount in ascertaining the payable fees guided by Schedule 6 A (1)(b) of the Advocates Remuneration Order.

11. Mr. Okere faulted the reasons listed by the taxing officer on two grounds: **firstly**, that the explanation by the taxing officer that the value of the subject matter was sought as an alternative prayer in the plant and the value being unspecified was not founded on any legal principle and amounted to an error in principle. He reiterated that courts have occasionally held that it would be safer to go for the alternative prayer than altering the schedule applicable. These submissions were buttressed by excerpts from the cases of **Kayam Madhany & 5 others v Industrial Promotion Services (K) Ltd & 2 others** and **Nanyuki Esso Services v touring and Sport Cars Ltd [1972] EA 500**. **Secondly**, for faulting the reasons advanced by the taxing officer was that he (the taxing officer) was contradictory in stating on one hand that the value of the subject matter was Kshs. 800,000,000/= while in his reasons for taxation, held that the subject matter was not specific.

12. Finally, Mr. Okere went on to show calculation on how the bill of cost would have been re-taxed based on Schedule 6A(1)(b) of the Advocates Remuneration Order as regards the instruction and getting up fees based on the value of Kshs. 800,000,000/= as subject matter. He also asserted that this court is better placed to re-tax the subject bill of costs instead of sending it back to the Deputy Registrar.

13. Mr. Ngonze, counsel for the Plaintiff/Respondent on the other hand opened his submissions by challenging the competency of the prayers sought. He averred that which the submissions made by Mr. Okero only touched on the instruction and getting up fees, yet the application purported to challenge the entire taxation and therefore the prayers sought cannot be sustained.

14. However, on the substance of his submissions, Mr. Ngonze stated that the consignment remained at all material times the property of the Plaintiff and the Plaintiff's claim was for release of the consignment which up to date has never been released to the Plaintiff. He added that the prayer for the payment of the value of the consignment was made on a without prejudice basis and as an alternative to the prayer for release of the containers. He asserted that the taxing officer was correct in taxing the bill and the award could only be interfered with if the Defendant/Applicant has shown good cause.

15. In establishing the gist of his submissions that the Applicant had not established a *prima facie* case, Mr. Ngonze entirely relied on the decision of the East African Court of Appeal in the case of **Alcon International Limited v Standard Chartered BANK OF Uganda & 2**

other; Reference No. 1 of 2014 which I have carefully considered.

Analysis and Determination

16. I have considered the foregoing and this is my view of the matter.

17. There is no gainsaying here that the circumstances under which a judge of the High court interferes with the taxing officer's exercise of discretion are now well established and have informed a consistent precedent for this court. These principles are:

(a) that the Court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive/low as to justify an inference that it was based on an error of principle;

(b) it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the taxing master;

(c) if the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high;

(d) it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary;

(e) the Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it;

(f) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees;

(g) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary.

These principles were stated in the case of **First American Bank of Kenya vs. Shah and Others [2002] 1 EA 64** and cited with approval by this court in **Republic v Commissioner of Domestic Taxes Ex-Parte Ukwala Supermarket Limited & 2 others [2018] eKLR**.

18. In this particular case, a second glance of the Chamber Summons and the submissions tendered by Mr. Okere, it is inevitable to conclude that the Defendant/Applicant challenges the decision on instruction and getting up fees and not the whole of the taxing officer's decision. However, it is unfathomable to hold as Mr. Ngonze submitted that the prayers in the application are baseless and in my view declining to consider the application on such ground would be a decision based on a technicality.

19. Nonetheless, Mr. Okere submitted that the decision of the taxing officer was based on an error in principle when he assessed the costs payable as instruction fees under "*other matters*" in schedule 6(1)(j) of the Advocates Remuneration Order. He stated that the residual head "*other matters*" was only applicable to Constitutional and Judicial Review matters and not in cases where the suit had been commenced by way of Plaintiff. That being the case, the learned counsel invited the court to consider that the correct tariff was Schedule 6 (a)&(b) of the Advocates Remuneration Order.

20. Mr. Ngonze on the other hand reiterated the position held by the taxing officer that the subject matter was not ascertainable hence instruction fees could only be assessed under "*other matters*".

21. At this point, I wish to confirm that taxation of party and party costs in the High Court is governed by Schedule 6 of the Advocates Remuneration Order. I will consider the paragraphs of the said schedule which are under contestation for purposes of this ruling and more specifically, Schedule 6 paragraph (1) (a) (b) & (j). The said paragraphs read as follows: -

1. Instruction fees

(a) To sue in any proceedings (whether commenced by plaintiff, petition, originating summons or notice of motion) in which no defense or other denial of liability is filed, where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties and (amounts provided).....

(b) To sue in any proceedings described in paragraph (a) where a defense or other denial of liability is filed; or to have an issue determined arising out of inter-pleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties and (amounts provided)...

(j) Constitutional petitions and prerogative orders:-

To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing master in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate (amounts provided)..

22. Needless to say, Paragraph 1 (a) applies on taxation proceedings where the subject suit was commenced by Plaintiff, Petition, Originating Summons or Notice of Motion and a defence was filed whereas paragraph 1 (b) applies to suits commenced in the same manner but there is filed defence or other denial of liability. Paragraph 1(j) on the other hand, applies only where the proceeding is a constitutional petition or one for a Judicial Review.

23. In taxing the bill at hand, it will be noted that under the second paragraph of his Ruling dated 1/9/2020 the taxing officer correctly stated that the instructions fees under item 1 would be determined as per Schedule 6 (1)(b). However, in the subsequent paragraph, the taxing officer satisfied himself that the nature subject matter was unspecific and when on to assess instruction fees at Kshs. 75,000/= guided by Schedule 6(Other matters).

24. I have clearly stated herein above that the residual head (“other matter”) as provided for under paragraph 1 (j) is only applicable to where the proceeding is a constitutional petition or one for judicial review. The suit herein was commenced by way of a plaintiff dated 27/4/2018 seeking a myriad of orders which will be listed in a short while. Having ascertained that the suit was neither a constitutional petition or a suit for judicial review, then the assessment of costs payable as instructions fees had to be conducted following principles applicable in taxing a suit that had been commenced by way of Plaintiff and to be specific, as provided for under Schedule 6 paragraph 1 (b) and not under the residual head “*other matter*” at paragraph 1(j). On the foregoing, it is my finding that the taxing officer’s finding with regards to instructions fees was based on an error on principle.

25. I also wish to add that where a Judge comes to a conclusion that the taxing officer has erred in principle in reaching his decision, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment.

26. I also reiterate that it is not really in the province of a Judge to re-tax the bill. If the Judge comes to the conclusion that the taxing officer has erred in principle, he/she should refer the bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done.

27. I take note that the taxing officer in reaching his decision, relied on the case of **Joreth Limited v Kigano & Associates [2002] 1 EA 92 at 99**, where the Court of Appeal held that “*the value of the subject matter for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgement or settlement (if such be the case) but if the same is not so ascertainable the Taxing Officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the 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.*”

28. I agree with the sentiments in the above case. I also note that taxing officer correctly pointed out that the cause of action was an alleged breach of a contractual agreement. The subject matter then is the possible estimate loss that the Plaintiff anticipated to suffer out of the alleged breach.

29. In the end, I am inclined to remit back for taxation to the same taxing officer with the directions that he proceeds to tax the bill on costs payable on instructions fees under Schedule 6 paragraph 1 (b) of the Advocates Remuneration (amendment) order, 2014. The particulars of the subject loss shall form the subject matter for purposes of taxation and if not clear, the taxing officer will exercise his discretion in assessing the instructions fees considering the factors outlined in the **Joreth Limited** case (supra).

30. The costs of this application are awarded to the Applicant.

It is so ordered.

Dated, Signed and Delivered at Mombasa this 12th day of February, 2021.

D. O. CHEPKWONY

JUDGE

Order

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

JUSTICE D.O. CHEPKWONY