



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL APPEAL NO. 11 OF 2009**

**M/S BEDROCK HOLDINGS LTD.....PLAINTIFF/APPLICANT**

**VERSUS**

**CHEMELIL SUGAR COMPANY LTD.....DEFENDANT/RESPONDENT**

**RULING**

The Ruling is in respect of a reference from taxation of the Party and Party costs.

1. The learned taxing officer had awarded the sum of Kshs 20,000/= in respect of the Instruction Fees.
2. The Defendant felt that the taxing officer had abdicated his duty, which required him to exercise his discretion with regard to the express and mandatory provisions of the **Proviso (i) to Rule 1 of Schedule VI of the Advocates Remuneration Order**.
3. The Defendant had claimed Instruction fees in the sum of Kshs 385,816/=. However, the taxing officer awarded the sum of Kshs 20,000/=.
4. It was for that reason that the Defendant submitted that the taxing officer had made an error in principle, culminating in the award of a sum that the Defendant considers to be inordinately low.
5. The absence of any explanation about why the taxing officer arrived at the sum of Kshs 20,000, led to the Defendant to submit that the said figure was simply *“plucked from the air, literally.”*
6. As far as the Defendant was concerned, the taxing officer did not take into account the nature and importance of the matter, or the amount involved, or the interest of the parties, or the general conduct of the proceedings.
7. In answer to the reference, the Plaintiff submitted that the taxing officer had exercised his discretion perfectly well, and in accordance with the **Provison (i) of rule 1 of Schedule VI of the Advocates Remuneration Order**.
8. It is common ground that the suit herein sought the following two reliefs;

***“(a) a permanent injunction restraining the Defendant by itself, its agents, servants, employees or anyone deriving its authority from proceeding with the procurement of security services and awarding of thesecurity services to anyone contrary to the laid down mandatory provisions of the Public Procurement and Disposals Act 2005 and the rules thereof.***

***(b) An order that subject to the Defendant complying with the requirements of the Public Procurement and Disposals Act 2005, the Plaintiff be allowed to continued (sic!) providing its services to the Defendant, until completion of the tender process.”***

9. According to the Defendant, the suit was brought to challenge and nullify the procedure leading to an award of a tender for provision of security services to a rival security provider and thus an inability on its part to renew an existing contract whose value was Kshs 21,905,304/=.
10. In other words, the Defendant appears to be reiterating that the value of the subject matter of the suit was discernible from the pleadings.
11. But, at the same time, the Defendant conceded that the figure of Kshs 21,905,304/= was not the value of the subject matter.

12. Once it is conceded that the value of the subject matter was not that sum, it cannot then form the basis upon which an appropriate guide can be established for the assessment of the instruction fee.

13. In order to ascertain whether or not the taxing officer erred in principle, it is important to revert to the proceedings during the process of taxation.

14. I have perused the record of the proceedings and note that the Defendant had urged the taxing officer to bear in mind the fact that;

***“value of its contract was Shs 21,903,304/=”***

15. Indeed, the final submissions made by the Defendant during taxation was that;

***“The court must look at the amount***

***involved.”***

16. In his Ruling, the learned taxing officer held that the Value claimed in respect of the Instruction Fees could not be determined from the pleadings.

17. The Defendant has now submitted that the taxing officer had erred in principle, but the Defendant agreed that the value of the subject matter was not determinable from the pleadings.

18. In my considered view, the Defendant cannot find fault with the reasoning of the taxing officer, whilst at the same time agreeing with it.

19. The Defendant has now submitted that the learned taxing officer ought to have taken into account factors such as the nature and importance of the cause; the interest of the parties; the general conduct of the proceedings; any directions of the trial Judge; and all other relevant circumstances.

20. Those factors were set out by the Court of Appeal in **JORETH LIMITED Vs KIGANO & ASSOCIATES ADVOCATES [2002] 1 E A 92.**

21. I have no doubt that the taxing officers are, in principle, expected to take into account the factors cited above.

22. However, when the Defendant had not called upon the taxing officer to take into account the said factors, it cannot turn around and blame the taxing officer for not giving consideration to the same.

23. Nonetheless I have perused the record of the proceedings and noted that the suit was struck out on the grounds that it was not open to the Plaintiff to invoke two separate procedures concurrently. The Plaintiff had sought review of the Defendant’s actions, by raising the issue with the Public Procurement Oversight Authority.

24. Whilst that process was still pending, the Plaintiff filed these proceedings.

25. In the circumstances, the learned Judge noted thus;

***“..... it shall be anomalous and open to absurd consequences if the plaintiff should seek a review and at the same time and on the same complaints, sue in the High Court. Suppose the review board decision becomes a matter for Judicial Review or appeal to the High Court? And suppose the two fora mandated under the Act, to give relief, arrive at different decisions at different times?***

***Even as the Legislature mandated those two courses to seek remedy under the Act, consistency, good order and interest of justice command that an aggrieved party, as the plaintiff company feels it is, should take one course at a time.”***

26. In my considered opinion, the Plaintiff did not give rise to any intricate legal issues. As set out earlier in this Ruling, the Plaintiff sought an injunction to stop the award of the tender for security services to anyone, in a manner that was contrary to the applicable law.

27. Secondly, the Plaintiff sought orders which would enable it to continue providing security services to the Defendant during the period when the tender process was still being undertaken.

28. The case did not reach anywhere near the stage at which the merits thereof were to be given consideration.

29. But that does not mean that at the stage when the Defendant filed the application to strike out the plaintiff, it had not applied its mind to the merits of the case.

30. If the court were to grant the injunction sought, the impact on the Defendant would have been serious, as the Defendant had, reportedly, already issued the tender to a company other than the Plaintiff. Therefore, the case was important to the parties.

31. Having assessed the factors that govern the award of instruction fees, I find that the learned taxing officer was relatively “*mean*”, when he awarded the Defendant

Kshs 20,000/=. I therefore set aside the said award, and I substitute it with an award of Kshs 40,000/=.

32. The costs of the reference are awarded to the Defendant.

**DATED, SIGNED and DELIVERED at KISUMU**

This 19<sup>th</sup> day of **May** 2021

**FRED A. OCHIENG**

**JUDGE**