



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 244 OF 2009**

**GLENCORE ENERGY UK LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**KENYA PIPELINE COMPANY LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

1. This ruling relates to a Reference filed as a chamber summons Application dated 5<sup>th</sup> June 2018, and brought under the provisions of; Rule 11(2) of the Advocates Remuneration Order. It is premised on the grounds on the face of it and an affidavit dated 5<sup>th</sup> June 2018, sworn by Gordon Ogado, an Advocate of the High Court of Kenya, practicing in the firm of Daly & Inamdar Advocates, which firm has the conduct of this matter.

2. The Applicant is seeking for orders that, the decision of the taxing officer dated 30<sup>th</sup> April 2018, taxing the Respondent's party and party bill of costs (herein "the bill"), dated 30<sup>th</sup> April 2015 with respect to item 1; instruction fees in the sum of; Kshs. 58,359,382.37 and item 2; getting up fees in the sum of; Kshs. 19,453,127.46 be set aside, and the court do issue an order directing that the said bill be re-taxed by a different taxing officer with respect to two items and the costs of thereof be provided for.

3. The Applicant avers that, the court delivered a ruling on the 13<sup>th</sup> July 2017, on a Reference it had filed and directed that, the bill be re-taxed afresh in so far as item 1; instruction fees was concerned. Pursuant thereto the Advocates' representing the parties appeared before the Hon. taxing officer, Hon. Elizabeth Tanui for re-taxation of the subject item. The parties filed and exchanged written submissions, highlighted on 26<sup>th</sup> February 2018 and on 30<sup>th</sup> April 2018; the Hon. taxing officer re-taxed the bill, the subject of the application now.

4. The Applicant argues that, the taxing officer committed an error of principle to wit:-

- a) *Failing to consider the relevant factors necessary to determine and assess the instruction fees awardable to the defendant in this matter;*
- b) *Failing to consider the court of Appeal's decision in Kenya Pipeline Company Ltd vs Glencore Energy (UK) Ltd (Civil Appeal No. 67 of 2014), which did not award interest and the decision in; First American Bank vs Shah (2002) 1 EA 64, which decisions are crucial in determining the value of the subject matter for purposes of determining the instruction fees;*
- c) *Failing to properly ascertain the value of the subject matter which would inform the instruction fees and/or failing to apply the correct exchange rate;*
- d) *Failing to hear and/or give a hearing on question other than the application of the correct Remuneration order; and/or to consider the Applicant's Advocates on arguments concerning opposition of item 1;*
- e) *Failing to apply the doctrine of relation back with regards to the amendment of pleadings in ascertaining and fixing the date of assessment of instruction fees;*
- f) *Failing to apply the principles enunciated in First American Bank vs Shah (2002) 1 EA 64, which said principles were applicable in the assessment of fees.*

5. It is averred that, the Reference is not based on quantum but on the Hon. taxing officer's imposed fetters on her jurisdiction to re-tax the bill. The Hon taxing officer breached the Applicant's constitutional right to be heard, when she failed to consider the arguments advanced. Upon delivery of the decision the Applicant filed a notice of objection on 9<sup>th</sup> May 2018, seeking for reasons from the taxing officer regarding

the taxation of items (1) and (2). The reasons were given on 23<sup>rd</sup> May 2018 and the Reference filed.

6. However, the application was opposed by the Respondent through grounds of opposition filed on 24<sup>th</sup> September 2018, which states that:-

- a) *The application/reference is misconceived, incompetent, bad in law and is an abuse of the process of court;*
- b) *The application seeks to review and/or appeal against the decision of the Honourable court delivered on 13<sup>th</sup> July 2017;*
- c) *The Plaintiff/Applicant is estopped from raising the issues herein in view of the decision of the Honourable Court delivered on 13<sup>th</sup> July 2017, which decision was not appealed against by the Plaintiff/Applicant;*
- d) *The application as filed and the prayers sought thereof are unmeritorious and ought to be dismissed with costs to the Defendant.*

7. The application was disposed of through filing of submissions by the parties. The Applicant's submissions were filed on 20<sup>th</sup> February 2019, whereby, it was argued that when the court directed a re-taxation, the taxing officer was required to consider all the arguments raised by parties and thereafter makes a determination. However, in this case, the taxing officer rejected any arguments other than the arguments on the correct Remuneration Order and the date of calculation of interest. There was no limitation and/or fetters imposed on by the Hon taxing officer by the court's ruling of 13<sup>th</sup> July 2017. That in any event, there is a world of a difference between a Re-taxation; which requires a fresh reconsideration of the arguments by the parties' Advocates in order to make a determination and an amendment to a ruling or judgment under the slip-rule; under Section 99 of the Civil Procedure Act, wherein a clerical or arithmetical error can be corrected.

8. The Applicant further submitted that, the parties were in agreement that the Court of Appeal decision of; 27<sup>th</sup> March 2015 as read along with the Defendant's Amended Statement of Defence, is indeed the control document that, would have to be considered in determining the instruction fees. The Court of Appeal judgment set aside the judgment in total and did not award interest. Therefore, whilst the High Court judgment stood, interest on the decretal amount was a factor to be taken into account, in computing the decretal amount in accordance with the principles enunciated in *Joreth Ltd vs Kigano (supra)*, but not after the decision of Court of Appeal. In that regard, the taxing officer's committed an error of principle by making reference to a non-existent element of interest.

9. It was further submitted that, the right to instruction fees crystallizes on the date of filing the statement of defence. The parties herein agreed on 18<sup>th</sup> June 2010, as being the relevant date and any contrary argument as advanced by the Respondent or considered by Hon the taxing officer amounts to an error of principle. That as held in the case of; *S.R. D'Souza & Others vs C.C. Ferrao & Others (1960) EA 602*, where there has been an error of principle, the practice has been to remit the question of quantum to be decided by the same or another taxing master.

10. However, the Respondent in response submissions filed on 8<sup>th</sup> February 2019, argued that; it is clear from Section 27 of the Civil Procedure Act, (Chapter 21) of the Laws of Kenya that, costs of and incidental to all suits, is at the discretion of the court. That whilst, a Defendant may be entitled to instruction fees at the time of filing defence, such costs only become realizable once the court issues order for costs. The Applicant's obligation to pay costs crystallized on 27<sup>th</sup> March 2015, when the court of Appeal held that, the judgment and decree of the High court be set aside and substituted with an order dismissing the Respondent's claim with costs. As such the interest accrued as at 27<sup>th</sup> March 2015, forms part of the value of the subject matter for the purposes of calculating the instruction fees.

11. It was submitted that, the Applicant filed submissions on 19<sup>th</sup> June 2013 in support of its bill of costs dated 22<sup>nd</sup> February 2013, and at paragraph 3 thereof, states that "the effective date for determining the value of the subject matter in this case will be ascertained by making reference to the Defendant's obligation to pay the Plaintiff which crystallized on 26<sup>th</sup> November 2012, when His Lordship gave judgment in favour of the Plaintiff as against the Defendant....."

12. Similarly, the Applicant submitted at paragraph 4, with respect to computation of the value of the subject matter, inclusive of accrued interest, that; ".....thus, the instruction fees fails to be determined in accordance with the decretal amount (USD 40,330,379.75) and the interest that had accrued on the decretal amount as at the date of judgment that is 26<sup>th</sup> November 2012."

13. The Respondent therefore argues that the taxing officer did not commit any error of principle in computing the amount payable. Reliance was placed on the case of; *Kipkorir, Titoo & Kiara Advocates vs Deposit Protection Fund Board (2055) eKLR*, where it was held that; "an example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles"

14. The Respondent further submitted that the submissions challenging the date of 18<sup>th</sup> June 2010, and the exchange rate of Kshs. 80.7 to USD 1.00 is barred by issue of estoppels. Reference was held on the case of; *Trade Bank Limited vs L.Z. Engineering Construction Limited (2001) EA 266*, where the Court of Appeal, adopting the definition estoppels in Halsbury's Laws of England (4<sup>th</sup> edition) at page 861 and stated:-

*"An estoppels which has come to be known as Issue Estoppel may arise where a plea of res-judicata could not be established because the causes of action are not the same. A party is precluded from contenting the contrary of any precise point which having once already been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue on the first action, provided it is embodied in a judicial decision is final, is conclusive in a second action between the same parties and their privies. The principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, or one of mixed fact and law."*

15. On the issue of remission, the Respondent argued that, it is not in dispute that in general, where there has been an error of principle, the practice is to remit the question of quantum to be decided by the same or another taxing officer as held in the case of; S.R. D'Souza & Others vs C.C. Ferrao & Another (1960) EA 602. The exception is where the Judge has discretion to deal with the matter when circumstances of the case demand so. Reference was made to the case of ; Kipkoriri, Titoo & Kiara Advocates vs Deposit Protection Fund Board (supra), and Devshi Dhanji & Others vs Kanji Naran Patel & Other (No. 2) (1976-80) 1 KLR 1024.

16. I have considered the argument advanced by the respective parties and their submissions and I find that there two main issue to determine herein being; whether the decision of the taxing officer on items (1) and (2) of the subject bill should be set aside and/or remitted to a different taxing officer for re-taxation and who should bear the costs. However before I deal with these issues, it is important to state the backgrounds facts of the matter.

17. In that regard it suffices to note that, the Applicant initially filed chamber summons application on 6<sup>th</sup> September 2016, and seeking to set aside the decision of the taxing officer dated 19<sup>th</sup> July 2016, where instructions fees, on item 1 of the bill of costs dated 30<sup>th</sup> April 2015, was taxed in the sum of Kshs. 75,256,500.76. The Applicant relied the grounds inter alia that, the Hon taxing officer relied on inapplicable Advocate's Remuneration Order and took into account interest, touching on periods when the matter was before the court of Appeal. The Application was heard and the ruling delivered on 13<sup>th</sup> July 2017. The bill was remitted for re-taxation of item 1, instruction fees. The bill of costs was then re-taxed and a decision thereon rendered on the 30<sup>th</sup> April 2018, which is the subject of this Reference.

18. The basis of the court ordering the bill to be re-taxed was that, the taxing officer had applied the wrong provisions of; Advocates Remuneration Order and there was an error in the computation of the interest, having been computed from the date of the filing of the suit as opposed to the date of judgment. There was a further issue as to whether, the Hon. taxing officer had suo moto awarded the Respondent an amount beyond the amount claimed in the bill.

19. Having considered these issues, the court formed the opinion that the Hon. taxing officer had committed an error of principle and ordered that, the amount awarded as the instruction fees should be reconsidered afresh. In this regard it suffices to note that, the court was very clear on which item was to be re-taxed and stated expressly as follows; "I shall therefore set aside the taxing officer's decision ONLY in so far as it relates to item (1) instruction fees." As such, the Applicant could not be heard on any other items which had not been contested at the taxation stage or on the Reference. The court further directed that the taxing officer was at liberty to decide whether to hear the parties afresh on the issue for retaxation.

20. I have considered the ruling delivered by the taxing officer on 30<sup>th</sup> April 2018, upon re-taxing of the bill as directed by the court. At page (1) thereof, the Hon. taxing officer clearly appreciates the directions given by the court. At page (2) of the ruling, the Hon. taxing officer then states as follows;

*" the only issues raised and considered by the Judge were the issues touching on the applicable remuneration order and the date of calculation of the interest".*

21. The Hon. Taxing officer then went on to state that, the applicable Advocates Remuneration Order is; the Advocates Amendment Order of 2006. She then stated that, the value of the subject matter should include interest at court rates of 14% per annum from 26<sup>th</sup> November 2012 to 27<sup>th</sup> March 2015. Having considered the same, she found that, the decretal sum being; USD 40,330,379.75 plus interest of 3% per annum from 8<sup>th</sup> April 2009 to 26<sup>th</sup> November 2012, together with interest at court rates of 14% per annum from 26<sup>th</sup> November 2012 to 27<sup>th</sup> March 2015 gives rise to a total of; USD 57,739,660.34 which she awarded as instruction fees. Based on the same, the getting up fees was assessed at Kshs.19, 453,127.46.

22. It is evident from this ruling that the Hon. taxing officer was properly guided by the directions of the court in re-taxing item 1 on instructions fees only and in rectifying the error of principle in the earlier ruling of 19<sup>th</sup> July 2016, by applying the proper Advocates Amendment Order, 2006. However the other issue that was raised and contested was the issue of the date of computation of interest. In the ruling delivered by the Hon. taxing officer, the dates applicable are indicated to be from the 26<sup>th</sup> November 2012, when the judgment in the High Court was entered in favour of the Plaintiff, to 27<sup>th</sup> March 2015, when the Court of Appeal delivered its judgment and set aside the judgment of the High Court and substituted the same with an order dismissing the Plaintiff's claim with costs. This was an issue the taxing officer was to consider. However the Applicant argues that the same and other issues raised were not considered, as the taxing officer argued that it was outside the court's directions.

23. This is informed by the sentiments of the Hon taxing officer as follows:-

*"The other issues raised by the defendant were not considered by the Judge during reference and hence cannot be a basis for re-taxation. The plaintiff's submissions on the reconsideration of the instruction fees based on other factors other than what was considered by the Judge, cannot with due respect suffice."*

24. However, the Applicant does not state the alleged issues that were raised by the parties and which the taxing officer did not want to consider. Be that as it were, the issue is whether the ruling of the court delivered on 13<sup>th</sup> July 2017, limited the discretion and /or power of the taxing officer while re-taxing the bill. The court's ruling was clear that the taxing officer was at liberty to decide whether to hear the parties on the issues raised on bill in relation to item(1) on instruction fees.

25. Similarly, other than the issue of the applicable Advocates Amendment Order and the date of computing the interest applicable, an issue of awarding a sum outside the claim and the reliance on the decretal sum based on the decision of the High Court set aside by the Court of Appeal. With outmost due respect the taxing officer was not precluded by the ruling of this court from hearing the parties on these issues so long as they were related to the issue of instruction fees.

26. However the question remains as to whether there are grounds to set aside the decision of the taxing officer rendered on the 30<sup>th</sup> April 2018. In my considered opinion the only contested issue herein is whether any interest payable on the decretal sum should have been taken into account in view of the fact that the judgment of the High court which awarded interest was set aside by the Court of Appeal.

27. In that regard I have considered the decision of the Court of Appeal and find that, the court at page 36 indicates that the judgment decree of the High Court was set aside and substituted it with an order dismissing the Plaintiff's claim with costs. The Judgment of the High court which was set aside had awarded the Plaintiff a sum of USD 40, 330,379.75, being damages for breach of duty and/or breach of duty as a bailee and/or conversion of; 31,752.39 meters the property of the Respondent as a bailor. The amount awarded was to attract of 3% per annum from the date of filing of the suit and at court rates from the date of Judgment until payment was made in full. The Plaintiff was also to have costs and interest.

28. My understanding therefore of the court of Appeal's decision was to discharge all the awards of the orders of the High court with costs to the Defendants. The discharge included inter alia, the interest that had been awarded. Therefore to take into account interest from the date of the Judgment of the High court amounts to an error of principle. The costs were awarded from the date of the decision of the Court of Appeal. The Respondents are in agreement with this position, but further argue that the accrued interest as at 27<sup>th</sup> March 2015, formed part of the value of the subject matter for the purpose of calculating the instruction fees and that the interest in this case was specific as per the pleadings and the Judgment of the High court and should therefore be loaded to the principal amount to form the value of the subject matter.

29. With utmost due respect, the issue of accumulated interest does not lie in the face of the decision of the court of Appeal, that set aside the interest that had been awarded by the High Court and in that regard, I do agree with the submissions of the Applicant that when the taxing officer included interest rate of 3% from 8<sup>th</sup> April 2009 to 26<sup>th</sup> November 2012, and 14% per annum from the date of the Judgment on 26<sup>th</sup> November 2012 to 27<sup>th</sup> March 2015, that amounted to an error of principle and inevitably affected the amount awarded as instruction fees. On that ground alone, the court is inclined to set aside the amount awarded herein in the sum of Kshs. 58,359,382.37 in respect to item (1) being the instruction fees. In view of the fact that the getting fee flows automatically from the instruction fees, the same will have to be reconsidered afresh.

30. The last issue is whether the matter should be referred to a different taxing officer for consideration of the same. The Applicant argued that, the bill should be remitted to the same or another taxing officer. The Respondents were in agreement save to state that, where the court finds the circumstances warrants re-taxing of the items by itself, the court has the discretion to finalize the matter in the circumstances.

31. In my considered opinion, this court having considered the first reference and having referred the matter to the same taxing officer, and the same having been referred again on a second reference, it will not serve the interest of justice to send this matter for re-taxing on an issue that can clearly be dealt with by the court. Indeed the only issue regards the amount awarded as interest which is easily be identifiable from the decision of the Taxing officer.

32. At page 3 thereof, the interest awarded at 3% on the relevant dates is USD 4,234,689.87 and at 14% on the relevant dates is USD 13,174,590.72, giving a total of USD 17,409,280.59. Therefore, the sum payable is USD 57,379,660.34 less USD 17,409,280.59, which give rise to; USD 40,330,379.75 and at the rate of Kshs. 100 totals, Kshs. 4,033,037, 975. Based on the value of the subject matter being Kshs. 4,033,037,975 and pursuant to provisions of; Paragraph 1(b) of Schedule VI of the Advocates Remuneration Amendment Order, of 2006 the instruction fees work out as follows:-

1<sup>st</sup> Kshs. 1,000,000----- Kshs. 77,000  
2<sup>nd</sup> Kshs. 20,000,000 x 1.5/100----- Kshs. 300,000  
Balance of Kshs. 4,102,037,975 x 1.25/100--Kshs. 32,816,303.80  
Total-----Kshs. 33,193,303.80  
Getting up fees Kshs. 33,193,303.80 x 1/3 --- Kshs.11, 064,434.60

In conclusion, the application herein is allowed as prayed in that, the orders of the taxing officer relation to the decision dated 30<sup>th</sup> April 2018 as regards item (1) on instruction fees and item (2) on getting up fee are hereby set aside and substituted with the order that; item (1)on instruction fees is taxed in the sum of Kshs. 33,193,303.80 and item (2)the getting up fees is taxed at Kshs. 11,064,434.60 totaling Kshs. 44,257,738.40 plus Kshs. 283,334 for the other items equals Kshs. 44,541,072.40 and Kshs. 45,889,659.60 has been taxed off.

33. Those then are the orders of the court.

**Dated, delivered and signed in an open court this 29<sup>th</sup> day of August 2019.**

**G.L. NZIOKA**

**JUDGE**

**In the presence of:**

**Mr. Muchiri for the Plaintiff**

**Mr. Kosgey for Mr. Kiche for the Defendant**

**Dennis -----Court Assistant**