



IN THE HIGH COURT AT KISUMU

CIVIL SUIT NO. 119 OF 2007

BETWEEN

MUNICIPAL COUNCIL OF KISUMU.....PLAINTIFF

AND

KENYA POWER & LIGHTING COMPANY LIMITED.....DEFENDANT

RULING NO. 3

1. The application for consideration is the defendant's reference dated 17th January 2018 made under **Rule 11** of the **Advocates Remuneration Order** seeking to review the decision of the Deputy Registrar taxing the plaintiff's bill of costs dated 9th June 2016. The bill of costs was taxed at Kshs. 2,509,157.27.
2. The parties agree with the principle so clearly stated by the Court of Appeal in **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board Nairobi Civil Appeal No. 220 of 2004 [2005] eKLR** that, "the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing costs." (see also **First American Bank of Kenya v Shah and Others [2002] 1 EA 65**).
3. The defendant complains that the Deputy Registrar erred in assessing the instruction fee based on the value of the subject matter calculated by adding the interest claimed in the plaint to the principal sum claimed. The parties are agreed that this is the only issue for consideration.
4. The defendant contended that the value of the subject matter was the amount of Kshs. 48,781,000/= claimed in the plaint dated 11th September 2007. Counsel for the defendant submitted that this sum was the basis for calculating the instruction fee. He relied on **Biomedical Laboratories Limited v Attorney General Milimani HCCC No. 43 of 2002 [2014]eKLR** where Havelock J., held that the taxing officer was right to disregard accumulated interest awarded in the judgment as part of the value of the subject matter as the interest awarded at the trial was purely to compensate the plaintiff in that case.
5. On the other hand, the plaintiff was of the view that the value of the subject matter was ascertained from the judgment entered against the defendant for the sum of Kshs 48,781,000/= together with interest at court rates from the date of filing suit. Counsel for the plaintiff called in aid the decision of Ochieng J., in **Timothy Maloba Vs. Standard Chartered Bank Ltd KKG HCCC No. 83 of 1995 (UR)** where he held that award of interest was an integral part of the claim and ought to have been considered by the taxing officer in determining the value of the subject matter. He also cited the decision of Tanui J., in **Kenya Commercial Bank v George Arunga Sino KSM HCCC No. 123 of 1998 (UR)** where the judge declined to set aside the taxed instruction fees on account of the fact that interest adjudged due was included in the value of the subject matter.
6. Since there are conflicting decisions by the High Court on the matter at hand, I think the matter should

be determined from first principles. Under **Schedule 6A (1)(b)** of the **Advocates Remuneration Order** applicable to this case instruction fees are calculated on the basis of the, “*value of the subject matter*” to be, “*determined from the pleadings, judgment or settlement between the parties.*” In this regard the Court of Appeal in **Joreth Ltd v Kigano & Associates [2002] 1 EA 92** stated as follows concerning the determination of the value of the subject matter:

We would at this stage point out that the value of the subject matter of a suit 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 the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances. [Emphasis added]

7. In my view the value of the subject matter determined from the judgment comprises the principle sum and the interest claimed and awarded in the judgment. In this case, interest is an integral part of the claim and was ascertainable following judgment entered as prayed in the plaint. In **Desai Sarvia & Another v Giro Commercial Bank, Nairobi HCCC No.1847 of 2002 (UR)**, Ibrahim J., observed that:

[I]t is the plaintiff to decide how it pleads or makes its claim. The important thing is that the interest is part of the plaintiff’s claim as instructed to its advocates and the value of the interest is determinable. It is a factor to be taken into account in the assessment of the instruction fees. I therefore hold that the decision by the Taxing Master to the effect that no instruction fees is allowed on interest accruing is not sound in law is not sustainable in principle.

This decision was cited with approval by Kimaru J., in **Bank of India v Surgilabs Limited and 3 Others Milimani HCCC No. 740 of 2003[2008]eKLR** who stated that, “*I agree with the submission made by the defendants that where interest is awarded by the court, such element of interest shall be taken into account when assessing the instruction fees payable to the successful party.*”

8. I also note that in **Biomedical Laboratories Limited v Attorney General (Supra)**, Havelock J., remarked that,

I have noted that the Plaintiff failed to put any authorities before this Court and I have carefully perused the authorities put forward by the Defendant. None of those authorities and none that I have ever come across, back the Plaintiff’s proposition that the Judgement sum be enhanced by the amount of accumulated interest for the calculation of party/party costs.

Apart from the fact that the inclusion of interest claimed and ascertained in the judgment is supported by principle, that interpretation of the law is supported by various decisions I have cited that were not shown to Havelock J. On the whole therefore, I find and hold that the Deputy Registrar was correct in assessing the value of the subject matter.

9. Counsel for the plaintiff correctly conceded that the trial magistrate erred by applying to the principal sum an interest rate of 14% pa. This interest rate only applies to the advocate/client bill of costs under **Rule 7** of the **Advocates Remuneration Order**. In all other cases, the normal court rate is 12% pa in accordance with the practice direction issued by the Chief Justice on 4th March 1982 (see **Mariga v Musila NKU CA Civil Appeals No. 66 of 1982 and 88 of 1983 [1984]eKLR**). I therefore hold that the interest due on the principal sum for purposes of calculating the value of the subject matter is 12% pa.

10. Save for the issue of interest, the reference is dismissed with costs assessed at Kshs. 5,000.00.

11. I direct the Deputy Registrar to compute the instruction fee on the basis of interest at 12%pa and certify the party and party costs accordingly.

DATED and DELIVERED at KISUMU this 26th day of January 2018.

D.S. MAJANJA

JUDGE

Mr Otieno instructed by Robson Harris and Company Advocates for the defendant/applicant.

Mr Otieno instructed by Otieno Ragot & Company Advocates for the plaintiff/respondent.