



**REPUBLIC OF KENYA**

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

**COMMERCIAL & ADMIRALTY DIVISION**

**HCC NO.8 of 2016(OS)**

**PARAGON**

**ELECTRONICS LIMITED..... APPLICANT/RESPONDENT**

**VS.**

**INVESTMENTS AND**

**MORTGAGES BANK LIMITED ..... RESPONDENT/APPLICANT**

1. In contest in this Reference is whether the Taxing Officer's finding as to what was the subject matter in these proceedings and therefore its value is correct or erroneous.
2. These proceedings were brought by way of Originating Summons dated 18<sup>th</sup> January 2016 and there is common ground as the events that led to its presentation.
3. Paragon Electronics Limited (Paragon) took a loan facility of Khs.75,000,000 from Investments and Mortgage Bank Limited (I & M Bank). The facility was secured by a Debenture and a further Debenture dated 17<sup>th</sup> January 2008 and 14<sup>th</sup> August 2008 respectively for an aggregate sum of Khs.85,000,000 as well as a charge dated 17<sup>th</sup> January 2008 over Block 1C erected on LR.209/16027 for Khs.75,000,00/-, a Mortgage over LR.330/355 for Khs.85,000,000/= and a personal Guarantee and Indemnity for Khs.85,000,000/=.
4. On 20<sup>th</sup> December 2012, the parties executed a Deed of compromise and settlement intended to register a Memorandum of Satisfaction over the securities taken and a Reconveyance over LR.330/355 upon payment of the sums set out in the Deed.
5. At the time of presenting these proceedings, Paragon asserted it had fully complied with the terms of the Deed of Compromise and Settlement and had paid the sum of USD 968,056.61 in full but I&M Bank had refused to comply and was instead demanding a further sum of Ks.309,000/=. The position taken by Paragon was that the Claim was underserved.
6. On its part, I&M Bank contended that Paragon failed to pay the outstanding sums in terms of the Deed of Compromise and Settlement and these necessitated further Demands made through its Advocates. For this reason additional Legal Costs of Khs.213,350/= were incurred and paid on 3<sup>rd</sup> June 2014. This led to an overdraft of Paragon's account to Khs.211,885.55 which upon attracting interest rose to Khs.342,458.30 as at 31<sup>st</sup> December 2015.
7. The position of I&M Bank was captured in paragraph 19 of the Affidavit of Nina Adisa Madanguda sworn on 8<sup>th</sup> February 2016 as follows:-  
  
"I verily believe that the Respondent was under obligation to deliver to the Applicant originals of the Debenture, the Further Debenture, the Charge, the Mortgage, the Guarantee and the Original Lease in respect of Block 1C on L.R No.209/16027 and the reconveyance in respect of L.R No.330/355 only upon payment by the Applicant of the sums agreed under the Deed of Compromise and Settlement as well as the associated costs, including additional legal costs incurred thereto".
8. After hearing the Originating Summons, Hon. Ochieng J. held that the Applicant had paid the settlement sum and the Respondent was obliged to honour its obligations. The Judge held:-

"In other words, I find and hold that the Respondent cannot impose any conditions to the execution and delivery up to the applicant, of the Discharge of Charge; the Memorandum of Satisfaction of Debenture; the Reconveyance of Mortgage; and the delivery up of the Originals of the Debenture; further Debenture; the Charge; the Mortgage; the Guarantee and the Original Lease in respect of

Judgment was entered in favour of Paragon with costs.

9. Upon Paragon presenting its Bill of Costs, the Taxing Officer found that the subject matter was Khs.75,000,000 being the amount advanced as a loan. This finding aggrieves I&M Bank which reiterates the position it had taken before the Taxing Officer that the value of the subject matter was the sum of Kshs.309,000 being what the Bank had demanded.

10. Paragon was unhappy that I&M Bank failed to discharge and deliver up its securities notwithstanding that had, in its view, fully complied with the terms of the Deed of Compromise and Settlement by paying the sum of USD 968,056.61. At the time of filing the Originating Summons, Paragon was well aware that I&M Bank was making a further Demand of Khs.309,000 allegedly outstanding. In the Affidavit in support of the summons it is deponed as follows:-

*“10. The Respondent has however refused to comply with the terms of the Deed of Settlement and compromise and has instead made a demand for a further Kshs.309,000.00 which is illegally outstanding. Copies of the correspondence are annexed herewith and marked as “BG3”.*

*11. I verily believe that the Respondent has no justifiable reason to withhold the documents stated in paragraph 6 hereinabove together with the discharge of charge”.*

11. It seems to me that while Paragon sought the release and discharge of the securities, the real dispute was whether I&M Bank were justified in holding the securities on the basis of what was said to be outstanding. Both sides were well aware of this Central feature of the dispute. In other words at the very core of the Dispute was whether the Bank was justified in not releasing the security documents for the reason that Khs.309,000 was due. In resolving the matter in favour of Paragon, Hon. Justice Ochieng found that Paragon had paid the Settlement sum and the Legal costs sought by I&M Bank were not contemplated by the Deed of Settlement.

12. It seems to this Court that while the proceedings were about the release of the Securities, the crux of the controversy was whether Khs.309,000 was justly due and owing to I&M Bank and if so, whether it would be good reason for the Securities to be withheld.

13. If I characterize the dispute in that manner then the value of the subject matter would be Khs.309,000 and not Kshs.75,000,000 which was the loan initially advanced to Paragon. Counsel for the Paragon had before me argued that because of the action of the Bank, the Bank had been deprived of use of its property which had been used as a charge for Khs.75 million. That argument should not, in my view, be used as a basis to claim fees on Khs.75,000,000 because if Paragon had suffered that loss because of the Bank’s conduct then it should have made a Claim for the appropriate Damages.

14. As correctly pointed out by Counsel for the I&M Bank, one of the objects of Taxation is that a successful litigant ought to be fairly reimbursed for costs it had to incur in presenting or defending litigation (Premchand Raichand Limited & another vs. Quarry Services of East Africa Limited & another [1972] EA 162). Generally, costs are not awarded to punish the loser. The narrow issue presented by the Originating Summons was whether the extra Legal costs being Khs.309,000 was contemplated by the terms of the Deed. To peg the value of the subject matter on the initial loan advanced would be to overly reimburse the successful litigant.

15. Being of that conviction, I have to find that when the Taxing Officer found that the value of the subject matter was Khs.75,000,000 she committed an error in the principle.

16. I allow the Reference file on 9<sup>th</sup> June 2017 and order that the Bill of Cost be remitted to another Taxing Officer for retaxation of the Instruction Fees. Each party shall bear its own costs on the Reference.

**Dated, Signed and Delivered in Court at Nairobi this 18<sup>th</sup> day of May ,2018.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

N/a for Applicant

Nyagah for Respondent

Nixon - Court Assistant