



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
MISCELLANEOUS CAUSE NO. 341 OF 2013

MURI MWANIKI & WAMITI ADVOCATES.....ADVOCATES/APPLICANT

-VERSUS -

MAKOMBOKI TEA FACTORY COMPANY LIMITED.....CLIENT/RESPONDENT

RULING NO.2

RULING ON REFERENCE

1. On 20th July 2015 the Ruling of the Taxing Officer, Ms D.W. Nyambu was delivered on her behalf, by Hon. Ms. E. Tanui.
2. By the said Ruling, the Advocates were awarded costs amounting to Kshs. 7,529,512.62.
3. The Client was aggrieved with the Ruling, and lodged a reference to challenge it.
4. The ruling is on the said reference.
5. It is clear from the decision of the Taxing Officer that she pegged her calculation of the Instruction Fees on “*the value of the subject matter of the pleadings (which is Kshs. 424,254,221/-*”.
6. In its reference before me, the Client submitted that the Taxing Officer had erred in principle, when she concluded that the value of the subject matter was turnover of the Company which was Kshs. 424,254,221/-.
7. According to the Client, the value of the Company’s turnover was never an issue before the court.
8. On the other hand, the Advocates reasoned that the Taxing Officer was very right when she concluded that Kshs. 424,254,221/- was the value of what was at stake.
9. According to the Advocates, the day to day operations of the company had been put at risk; and that the character of the company risked being besmirched.
10. The Applicants in that case are said to have reasoned that if the court failed to grant the orders which were being sought, the company’s turnover of Kshs. 424,254,221/- would be prejudiced.
11. In the circumstances, the Advocates submitted that the Court had considered whether or not there as

any imminent danger of loss of the sum of Kshs. 424,254,221/-. Such consideration was said to have been necessary when the Court was determining whether or not to convene an Extra Ordinary General Meeting for the company.

12. The Advocates also reasoned that the sum of Kshs. 424,254,221/- needed to be taken into account when the court was considering whether or not to order for the appointment of Inspectors who would then investigate the affairs of the company.

13. But the Client insists that the value of the company's turnover was never an issue. In the Client's opinion there were only 3 issues for determination, which were as follows;

“1. An extra ordinary meeting be convened by the Respondent/Client.

2. The Court orders that inspectors be appointed to investigate the affairs of the Respondent and a report made to Court.

3. The Court to set a time limit within which such interim report or final report from the inspectors be submitted”.

14. A closer scrutiny of the submissions by both parties reveals to me that they are actually saying the same thing. I say so because the Advocates confirms that ultimately, the Court had been called upon to determine whether or not;

a) an Inspector ought to be appointed to investigate the affairs of the company; and

b) an Extra Ordinary General Meeting ought to be held by the company.

15. It is my further understanding of the Advocates submissions that the value of the company's turnover was a relevant factor, which the court needed to take into account when determining the two issues above.

16. In the circumstances, I have no hesitation in holding that the value of the turnover was not, of itself, an issue. The said value was a relevant factor which needed to be borne in mind, when the Court was determining the questions concerning;

a) the appointment of an Inspector to investigate the affairs of the company;

b) whether or not the company needed to hold an Extra Ordinary General Meeting;

c) the amount of time, if any, during which Reports needed to be filed.

17. In the result, I hold that the learned Taxing Officer erred in principle, when she held that the value of the subject matter was the value of the company's turnover.

18. Neither of the parties had raised issues concerning the value of the turnover. Therefore, the Court was never going to be called upon to determine something which was not in dispute.

19. I am fortified in my conclusion by the following words of Hon. Lady Justice H.M. Okwengu (*as she then was*), in the case of **HADSON MOFFAT KAMAU Vs MAKOMBOKI TEA FACTORY LIMITED, MISC. CAUSE NUMBER 937 of 2006** (*at the Milimani Commercial Courts*);

“By a summons dated 30th August 2006, filed on 1st September 2006, Hadson Moffat Kamau has brought an application under sections 132, 135 and 165 of the Companies Act Cap 486 Laws of Kenya, and Rules 8 (c) and (h) of the Companies (High Court) Rules, seeking inter alia, orders for an extraordinary general meeting of Makomboki Tea Factory Limited; (the respondent Company), to be called and held, and competent inspectors to be appointed to

investigate the affairs of the respondent Company”.

20. The learned Judge was delivering her Ruling in the case which was the precursor to the matter now before me. The words I have cited above, constitute the court’s unsolicited summary of her understanding of the issues arising from the case: Therefore, I find that there cannot be a better and more objective way of discerning the issues which were before the court.

21. I further find that the issues for determination did not have any monetary value attached to them.

22. Thirdly, I agree with the learned Taxing Officer, that the letter which the Advocates wrote, dated 29th March 2007, did not constitute an Agreement between the Advocates and their Client, on fees.

23. It is for that reason that the Advocate/Client Bill of Costs needed to be taxed.

24. If there had been an Agreement between the Advocates and the Client on Fees, the Advocates would not have been permitted to file and prosecute an Advocate/Client Bill of Costs.

25. Nonetheless, the letter from the advocates does provide a useful guide of what the Advocates had led the Client to believe, was the kind of fees which the Advocates had originally anticipated to earn.

26. In conclusion, I set aside the decision of the Taxing Officer and I direct that the Advocate/Client Bill of Costs be taxed by a Taxing Officer other than Hon. Ms. D.W. Nyambu.

27. The costs of the reference are awarded to the client.

DATED, SIGNED and DELIVERED at NAIROBI this 18th day of May 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

No appearance for the Advocates/Applicant

Mutiso for Chege for the Client/Respondent

Collins Odhiambo – Court clerk.