



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 195 OF 2015

COLAS EAST AFRICA LIMITED.....PLAINTIFF

- VERSUS -

CHINA OVERSEAS ENGINEERING

GROUP COMPANY LTD.....DEFENDANT

RULING ON REFERENCE

1. The plaintiff sued the defendant for a total sum of Kshs. 15,566,476.44.
2. The defendant did not file any Defence to the claim, and the plaintiff then filed a Request for Judgement.
3. Upon receipt of the Request for Judgement, and after verifying that there was no Defence on record, the learned Deputy Registrar granted judgement for the amount which was claimed.
4. A Decree was extracted, and the plaintiff then gave Notice to the defendant, telling them that unless the decretal amount was settled within 10 days, the plaintiff would undertake execution.
5. On 3rd August 2015 the learned Deputy Registrar issued a Certificate of Costs, in the sum of Kshs. 216,329.9/-.
6. Thereafter, on 12th August 2015, the court issued a Warrant for the attachment and sale of the defendant's assets. The Warrants indicated that the sums recoverable from the defendant amounted to Kshs. 15,956,376.84/- . That would imply that the execution was to be levied to recover both the decretal amount and the costs.
7. Meanwhile, on 11th August 2015, the plaintiff's advocates filed a letter in court, informing the learned Deputy Registrar that it objected to the amount of costs that she had awarded. The plaintiff indicated that the sum was too low, and was contrary to the provisions of Schedule 6 of the Advocates Remuneration (*Amendment*) Order.
8. By the Notice, the plaintiff requested the Taxing Officer for her reasons for the costs which she had awarded.

9. The plaintiff also complained that the Taxing Officer had failed to take into account the letter dated 28th July 2015. That was the letter through which the advocates for the plaintiff had suggested to the Deputy Registrar that the party and party costs should be in the sum of Kshs. 1,916,260/-.

10. It is noted that in its submissions on this reference, the plaintiff has now adjusted its figures from the sum of Kshs. 1,916,260/- to Kshs. 417,698.34/-. The plaintiff has now described the new figure as;

“the amount the Applicant ought to have been awarded”.

11. That implies that the plaintiff acknowledges the fact that its initial request, for Kshs.1,916,260/- was completely erroneous. Accordingly, I find that the Taxing Officer did not err when she failed to take into account that figure or the write-up which came up with it.

12. I pause here to point out that although I have made reference in this Ruling, to the Taxing Officer, the costs in issue were not arrived at as a result of taxation. There was no Bill of Costs which was filed by the plaintiff, which would have been taken through the process of taxation.

13. Therefore, it is difficult to envisage how the plaintiff was to comply with Rule 11 (1) of the Advocates Remuneration Order which stipulates as follows;

“Should any party who was entitled to appear on the taxation of a bill of costs object to the decision of the taxing officer, he may within fourteen days after the signing of the officer’s certificate of taxation give notice in writing to the taxing officer of his objection, stating the grounds thereof and requiring to be furnished with a certified copy of the officer’s decision, whereupon he will be entitled to be supplied therewith upon payment of such fee (if any) as may be prescribed”.

14. Pursuant to Rule 11(2), the person objecting to the decision of the taxing officer is supposed to file an application before the Judge, within 21 days after the issue of the certified copy of the officer’s decision.

15. Assuming that Rule 11 (2) of the Advocates Remuneration Order was applicable even when a certificate of costs was issued, in the absence of taxation, it could be argued that the plaintiff in this case was not time barred, because the learned Deputy Registrar had not yet issued a certified copy of her decision.

16. Indeed, the plaintiff has made it clear that the Deputy Registrar had failed to respond to its letter, through which the plaintiff had asked for the reasons for the decision of the Deputy Registrar.

17. In **KIPKORIR TITOO & KIARA ADVOCATES Vs. DEPOSIT PROTECTION FUND BOARD [2005] 1 KLR 528**, the Court of Appeal dealt with a situation in which the taxing officer had failed to give reasons for his decision. This is what the Court said;

“If a taxing officer totally fails to record any reasons and to forward them to the objector as required then that would be a good ground for a reference, and the absence of such reasons would not in itself preclude the objector from filing a competent reference”.

18. In my considered view, the reference herein is competent.

19. The next step is to interrogate the merits of the reference.

20. The taxing officer awarded Kshs. 216,329.90 as costs in respect to the case in which the judgement was for a sum of Kshs. 15,556,476.44/-.

21. As the plaintiff correctly pointed out, Schedule 6 of the Advocates (*Remuneration*) (*Amendment*) Order, 2014 is what governs the assessment of the costs.

22. Schedule 6, Rule 1 (a) provides as follows, in relation to Instruction Fees;

“To sue in any proceedings (whether commenced by plaint, petition, originating summons or notice of motion) in which no defence or other denial of liability is filed, where the value of the subject matter can be determined from the pleading, judgement or settlement between the parties and –

<i>That value exceed,</i>	<i>But does not exceed</i>	
		<i>Kshs</i>
	<i>500,000</i>	<i>45,000</i>
<i>500,000</i>	<i>750,000</i>	<i>65,000</i>
<i>750,000</i>	<i>1,000,000</i>	<i>75,000</i>
<i>1,000,000</i>	<i>20,000,000</i>	<i>Fees as for 1,000,000 plus an additional 1.75 %</i>
<i>Over 20,000,000</i>		<i>Fees as for 20,000,000 plus an additional 1.5%</i>

23. Therefore the Instruction fee in respect to this case (*in which the judgement was for Kshs. 15,556,476.44*) is

a) Kshs. 75,000/- for the first Kshs. 1,000,000/-; plus

b) 1.75% of Kshs. 14,556,476.44

i.e. Kshs. 254,738.38

Total Kshs. 329,738.38

24. After getting that sum, it must be subjected to Schedule 6 Rule 1 (a), which provides as follows;

“Subject as hereinafter provided, the fees for instructions shall be as follows –

a) To sue in an ordinary suit in which no appearances is entered under Order IX A of the Civil Procedure Rules where no application for leave to appear and defend is made, the fee shall be 65% of the fees chargeable under item 1 (a)”.

25. 65% of the sum of Kshs. 329,738.38 is Kshs. 214,329.94/-.

26. Therefore, when the learned Deputy Registrar awarded Kshs. 216,329.90, she did not make any mistake in her calculations of the Instruction Fees. Accordingly, there is no merit in the reference.

27. However, it is acknowledged that the certificate of costs did not incorporate the Court Fees of Kshs. 70,460/- which the plaintiff had paid to the court when it filed the Plaint.

28. Nonetheless, the plaintiff did not point out that omission to the court. Instead, the plaintiff took steps to execute the Decree, which was inclusive of the costs awarded by the court.

29. I have no doubt that if the attention of the Deputy Registrar was drawn to that omission, it would have been rectified.

30. The defendant cannot be faulted for the error of omission. But the plaintiff was entitled to the reimbursement of the court fees.

31. In the final analysis I dismiss the reference, with costs to the defendant. But I also find that the plaintiff is entitled to receive payment of Kshs. 75,000/-.

32. If the parties cannot agree on the fees payable to the defendant, it would have to be taxed.

33. Before the ascertainment of the sum payable to the defendant, the plaintiff should not take steps to recover the court fees. In other words, I direct that the defendant is entitled to deduct its fees from the sum payable to the plaintiff.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 19th day of April 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

Oguturu for Oonge for the Plaintiff

Miss Kasira for Otiende for the Defendant

Collins Odhiambo – Court clerk.