



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
HIGH COURT MISC. CAUSE NO. 407 OF 2013

DESAI, SARVIA & PALLAN ADVOCATES.....APPLICANT

VERSUS

TAUSI ASSURANCE CO. LTD.....DEFENDANT/RESPONDENT

RULING

[1] This Ruling is in respect of the Reference filed herein by the Applicant, **M/s Desai, Sarvia & Pallan Advocates**, vide their Chamber Summons dated **17 November 2014**. The applicant seeks orders that the Bill of Costs filed herein on **18 September 2013** and taxed on **5 November 2014** be allowed as claimed; and that the costs of the reference be awarded to the it. The grounds relied on in support of the application are as hereunder:

[a] That the Deputy Registrar erred in determining item 1 of the Applicant's Bill of Costs by failing to correctly address the sum claimed in the Plaintiff;

[b] That the Deputy Registrar erred in her decision in respect of items 55 and 57 of the Applicant's Bill of Costs by failing to calculate correctly the number of folios in question;

[c] That the Deputy Registrar erred in the subsequent items that deal with the increase of one-half with regard to item 70, the VAT thereon as per item 71 and the final total;

[d] That the Deputy Registrar erroneously failed to order for payment of interest as claimed in the Applicant's Bill of Costs as well as VAT thereon in disregard of the applicable law and the authorities cited and supplied along with the Applicant's written submissions filed herein;

[e] That the Deputy Registrar failed to award costs for the taxation despite the same being claimed by the Applicant;

[f] That the Applicant's Bill of Costs dated 16 September 2013 was wrongly taxed by the Deputy Registrar.

[2] The Reference was made pursuant to **Paragraph 11(1) and (2) of the Advocates (Remuneration) Order**, which provides that:

"(1) Should any party object to the decision of the taxing officer, he may within fourteen days

after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection."

[3] I note that the Notice of Objection to the Taxation was filed on **18 November 2014**, which was the same date that the Chamber Application comprising the Reference was filed. The correct procedure, as set out herein above would be that upon the Notice of Objection being filed, the taxing officer would then respond with his reasons in respect of the items objected to, whereupon the Reference would be filed by way of a chamber application within fourteen days of receipt of the reasons by the objecting party. Nevertheless, it is evident that, for the purposes of the instant matter, the Reference was filed within 14 days from the date of the Ruling on Taxation, and therefore the same is competently before the court.

[4] The application was opposed by the Respondent, **Tausi Assurance Co. Ltd**, vide the Replying Affidavit sworn by **Fredrick Otieno Mege** on **14 May 2015**. The parties thereafter filed their written submissions herein and in the same vein adopted the written submissions they had made before the Taxing Officer. I will proceed to consider each of the grounds put forward in the Chamber application as hereunder:

A. That the Deputy Registrar erred in determining item 1 of the Applicant's Bill of Costs by failing to correctly address the sum claimed in the Plaintiff;

[5] The disputation herein appears, in the main, to revolve around Item 1 in the Bill of Costs dated **16 September 2013**. The Applicant asked for a total of **Kshs. 313,524** as the basic instruction fee to file a suit on behalf of the Plaintiff, **Prime Bank Ltd**, in respect of a claim for **Kshs. 10,382,489** plus interest and costs in **Nairobi HCCC No. 659 of 2005**. According to the Applicant, the quantifiable interest on the sum claimed at 12% per annum from **8 May 2000** to **25 November 2005** comes to **Kshs. 6,852,443**, thus making a total quantifiable claim of **Kshs. 17,234,932**. It was thus on the basis of the aforesaid sum that the Applicants asked for **Kshs. 313,524** pursuant to **Schedule VI of the Advocates (Remuneration) Order, 1997**. The Applicant relied on the decision of **Ibrahim, J** (as he then was) in **HCCC No. 1847 of 2002: Desai, Sarvia & Pallan vs. Giro Commercial bank Ltd** to the effect that interest being part of the Plaintiff's claim is determinable from the relief sought in the Plaintiff.

[6] In her Ruling dated **5 November 2014**, the Deputy Registrar reduced item 1 to **Kshs. 200,000** and her reasoning was thus:

"In the parent file I have noted that the matter is still pending. No settlement or judgment has been reached as yet. Interest has not been allowed neither has it been disallowed. I agree with the respondent that the court should not speculate on interest. The value of the subject matter for purposes of taxation is Kshs. 10,382,489/= as pleaded in the Plaintiff. This is the amount I will use to calculate instructions fees."

[7] Counsel for the Respondents, **Muchui & Co. Advocates**, supported the foregoing line of reasoning in their written submissions filed herein on **23 February 2016**, and pointed out that the Plaintiff in **Nairobi HCCC No. 659 of 2005** was filed on **25 November 2005**, yet interest was prayed for from **8 May 2000** which was the date of the loss; and that there was no justification in the Plaintiff why this was the case. Counsel further relied on **Section 26(1) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya**, for the proposition that the trial court retains the discretion on whether or not to award interest.

[8] With regard to the authority relied on by the Applicants, namely **Nairobi HCCC No. 1847 of 2002: Desai, Sarvia & Pallan vs. Giro Commercial bank Ltd**, it was the argument of the Respondent that the case is clearly distinguishable in that in the parent suit therein, interest was pleaded at the rate of 35% per annum from **1 January 1999** until full payment, and that this was why the Judge referred to the interest

as "**contractual interest**," and that in the instant case, it has not been alleged, let alone proved, that the interest in the subject primary suit was equally contractual. According to the Respondent therefore, the interest component herein is speculative and cannot comprise the basis for computing instructions fees.

[9] There appears to be no dispute that the parent file, **Nairobi HCCC No. 659 of 2005: Prime Bank Ltd vs Wells Fargo Ltd** was instituted in respect of a sum of **Kshs. 10,382,489** together with interest and costs. It is also not disputed that the Plaintiff had prayed for interest at court rates of 12% per annum from **8 May 2000** until payment in full. Also not disputed is the fact that the suit, which was filed on **25 November 2005**, was still pending hearing and final determination as at the date of Ruling on Taxation herein. Thus, the Applicant's computation of interest at 12% for the purpose of their Bill of Costs was in respect of the pre-action period between **8 May 2000 and 25 November 2005**, when the suit was filed.

[10] It is now trite that pre-action interest is claimable and that, its it is all in the discretion of the court. This is the legal position as expressed in **Section 26(1) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya**, which stipulates that:

"where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."

[11] The rationale for the above provision was well explained in the case of **Lata vs. Mbiyu [1965] EA 592** that the justification for an award of interest on the principal sum is, generally speaking, to compensate a plaintiff for the deprivation of any money or specific goods through act of a defendant. There can be no doubt therefore that the Plaintiff in the principal file rightly claimed for interest from the date of the date of accrual of the cause of action and that, as a general rule, it would be in order to take such interest into account in computing what is due to an advocate.

[12] A perusal of the parent file however shows that the aforesaid sum, was claimed not as a plain liquidated sum, but as special damages, for in Paragraph 10 of the Plaintiff, it was pleaded thus:

"On or about the morning of 8th day of May 2000 the Plaintiff's employee upon unlocking and entering the Plaintiff's premises discovered that unknown person/persons had forcibly gained entry into the Plaintiff's strong room located in the Plaintiff's premises and had stolen from there Kenya Shillings Nine Million Nine Hundred and Eleven Thousand Six Hundred and ten (Kshs. 9,911,610.00)."

[13] In the ensuing paragraphs, it was pleaded that the break-in and theft occurred due to breach of the defendant's duty of care owed by it to the plaintiff upon a contractual arrangement, particulars of which were supplied in paragraph 12. In paragraph 13, after setting out the particulars of loss suffered as including the **Kshs. 9,911,610/=** aforementioned, the Plaintiff stated that **"by reasons of the matters aforesaid the Plaintiff has suffered damages as specified herein above which damages the Plaintiff claims from the Defendant."**

[14] The question that then falls for determination is whether interest on general or special damages can properly be taken into account, during the pendency of the parent suit, in determining what is due as instructions fees due to Counsel, as has been done herein. In **New Tyres Enterprises Limited vs Kenya Alliance Insurance Company Limited [1988] eKLR** it was stated that where, for instance, a party has been deprived of land or movable property and receives a monetary award in compensation for loss, the usual practice is to award interest from the date of such deprivation. In that case, however the liability of the party in breach was not determined until the date of judgment which was the date the interest was payable. In the case of **Lata vs. Mbiyu** (supra) the same distinction was made thus:

"..suits for damages for personal injuries are in a different category. It cannot be said that at

the date of filing suit the plaintiff is entitled to any particular amount. This depends on the decision of a number of factors...the instant plaintiff cannot have been said to have been deprived of the money represented in these damages from any particular date before the judgment..."

[15] There is therefore a clear distinction in cases for say, money lent by a bank on interest, in which case a **contractual/compound** interest is ordinarily payable, and monies, albeit liquidated, that are recoverable as special damages for loss, as is the case herein. I am fortified in this viewpoint by the decision of the court in Nalinkumar M. Shah vs. Mumias Sugar Co. Ltd [2010] eKLR in which the court held thus:

"Whereas I recognize that the court has jurisdiction to award compound interest where a claimant is seeking restitution of money or interest by way of damages for breach of contract to pay a debt ... the court should retain the discretion to make such an award."

[16] The court, in the aforementioned case, relied on the English case of Sempra Metals Ltd vs. Inland Revenue Commissioners and Another [2007] 3 WLR 354 in which it was held that:

"In the nature of things the proof required to establish a claimed interest loss will depend upon the nature of the loss and the circumstances of the case. The loss may be the cost of borrowing money. That cost may include an element of compound interest. Or the loss may be loss of an opportunity to invest the promised money. Here again, where the circumstances require, the investment loss may need to include a compound element if it is to be a fair measure of what the plaintiff lost by the late payment. Or the loss flowing from the late payment may take some other form. Whatever form the loss takes the court will here, as elsewhere, draw from the proved or admitted facts such inferences as are appropriate. That is a matter for the trial judge."

It is for the foregoing reasons that I find the case of Desai Sarvia & Pallan Advocates vs Giro Commercial Bank Milimani HCCC No. 1847 of 2002 distinguishable from the facts of the parent case herein, noting that what was in issue therein was **contractual interest** that had been agreed between the parties at 35% per annum.

[17] In addition to the foregoing, there is also the lingering question as to why it took the Plaintiff five years from **8 May 2000** and **25 November 2005** to file the parent case, and whether it would be conscionable for it to be paid interest on account of its own lassitude. This is because in Kawoko Estate Coffee Factory Limited vs. Zassa Civil Appeal No. 32 of 1969 UR the court was of the view that **"...undue delay in bringing an action may be a good ground for refusing interest on money wrongly withheld"** and that **"...failure to prosecute a suit with diligence might well have the same result. The trial court would be best placed to consider all these matters in exercising its discretion in respect of the interest payable."**

[18] I therefore take the view that where pre-action interest is claimed, and whereas the court retains the discretion to award interest from the date of loss, such interest would only be due upon a pronouncement in that regard in the final judgment of the court. It is therefore my finding that the Applicant, at the point in time when the taxation was done, was not entitled to compute its fees on the basis of the pre-suit interest worked at **Kshs. 6,852,443**, granted that the parent suit is yet to be determined and the issue of interest resolved pursuant to **Section 26(1) of the Civil Procedure Act**. In the premises, I find no justifiable cause to interfere with the decision of the Taxing Officer in respect of Item 1. I however agree with the Applicant's argument that the formula used by the Taxing Officer, namely; Kshs. 55,000 for the first Kshs. 1,000,000 plus 1.5% of the remainder is incorrect. Paragraph 1(b) of Schedule VIA of the Advocates Remuneration Order provides for **"fee as for shs. 1,000,000 plus an additional 1.5 per cent"**

B. That the Deputy Registrar erred in her decision in respect of items 55 and 57 of the Applicant's Bill of Costs by failing to calculate correctly the number of folios in question

[19] Under **Item 55**, the Applicant asked for a sum of **Kshs. 2,646** for perusing the Defendant's list of

documents; while **Item 57** was a charge of **Kshs. 49,518** in respect of **2358** folios comprising the Plaintiff's bundle of documents. The Taxing Officer reduced the two items to **Kshs. 1260** and **Kshs. 25,200** respectively, and in her Ruling shows she merely stated that that was what was allowable. The Applicant now contends that the Deputy Registrar reduced those items without any reasoning or explanation whatsoever, and that the same should be allowed as prayed in the Bill of Costs. Upon review of the same I find no particular reason to interfere with the discretion of the taxing officer, there being no indication that the discretion was exercised on wrong principles.

C. That the Deputy Registrar erred in the subsequent items that deal with the increase of one-half with regard to item 70, the VAT thereon as per item 71 and the final total:

[20] It is evident that the Taxing Officer did increase the amounts found due as instructions fee by one-half as she was required to do pursuant to **Schedule VI of the Advocates Remuneration Order, 1997** and that she also posted the VAT component at 16% of the sum she found to be due. I therefore find no merit in this ground of objection.

D. That the Deputy Registrar erroneously failed to order for payment of interest as claimed in the Applicant's Bill of Costs as well as VAT thereon in disregard of the applicable law and the authorities cited and supplied along with the Applicant's written submissions filed herein;

[21] On this ground I would agree that interest would be due from the date of taxation and orders are hereby made accordingly.

E. That the Deputy Registrar failed to award costs for the taxation despite the same being claimed by the Applicant;

[22] Again costs for attendance at the Deputy Registrar for taxation are costs properly incurred and should have been included in the taxed amount pursuant to **Schedule VIA paragraph 7(b)**. Accordingly directions are hereby made to that effect.

F. That the Applicant's Bill of Costs dated 16 September 2013 was wrongly taxed by the Deputy Registrar.

[23] From the foregoing, it cannot be said that the Applicant's bill of costs dated 16 September 2013 was wrongly taxed by the Deputy Registrar. As stated by **Ojwang J**, (as he then was) in **Republic vs. Ministry of Agriculture & 2 Others, Ex parte Muchiri W'njuguna & 6 Others [2006] eKLR**:

"The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not therefore interfere with the award of a taxing officer ...merely because it thinks the award was somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other..."

[24] For the foregoing reasons, and save to the extent aforementioned in Paragraphs **18, 21** and **22** above, I find no merit in the Chamber Application dated **17 November 2014**. The same is accordingly dismissed with costs. The Bill of Costs is hereby referred to the Deputy Registrar with a view of appropriate recalculation of the three items aforementioned as per Paragraphs **18, 21** and **22** hereof.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13th DAY OF MAY 2016

OLGA SEWE

JUDGE