



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 1475 OF 2000

IRARU HOLDINGS LIMITED.....PLAINTIFF

VERSUS

CANADIAN FOODGRAINS BANK.....1ST DEFENDANT

TRANSAMI KENYA LIMITED (now known AS SDV TRANSAMI (K) LTD....2ND DEFENDANT

**SOCIETE GENERALE DE SURVEILLANCE (SGS) KENYA LIMITED.....3RD
DEFENDANT**

RULING

1. The answer to this Reference substantially turns on whether the finding of Instruction Fees by Hon. D.W Nyambu (the 1st Taxing Officer) was final and settled the question of Instruction Fees herein.

2. The reference is in the Chamber Summons of 15th June, 2016 whose substantive prayers are:-

2. ***THAT*** the taxation by the Honourable Elizabeth Tanui, Deputy Registrar, of items numbers 1 and 583 of the 3rd Defendants Bill of Costs dated 2nd December, 2014 made on 25th May, 2016 be set aside and upon being set aside he following Orders be made forthwith;

a) Item number 1 of the 3rd Defendant's Bill of Costs dated 2nd December, 2014 be taxed at Kshs.1,395,136.00 in accordance with an earlier assessment by the Deputy Registrar, dated by 6th June, 2014;

b) Item number 583 be taxed at Kshs.465,045.00 in accordance with an earlier taxation by the Deputy Registrar dated 6th June, 2014;

c) An Order be made that the Plaintiff/Applicant ought not to pay a further Getting up Fees (item 583), the same having been assessed on 6th June, 2014 and the same having been paid by the Plaintiff/Applicant.

3. The events leading to this Reference are not involved. On 10th October 2014, the Plaintiff withdrew its case against the 3rd Defendant. On 8th December 2014, the 3rd Defendant filed a Bill of Costs against the Plaintiff. Two items in that Bill attracted a concern by the Plaintiff. This was item 1 on Instruction Fees in which the 3rd Defendant charged Ksh.25,000,000/= and item 583 on Getting Up Fees for Ksh.8,333,334.00.

4. On 23rd May 2016, Hon. Elizabeth Tanui (the 2nd Taxing Officer) taxed the Bill and made an award of Ksh.17,687,668.00 on Instruction Fees and Ksh.5,885,889.00 on Getting Up Fees. This aggrieved the Plaintiff.

5. This Court is asked by the Plaintiff to consider some earlier events in this matter so as to understand its grievance. On 5th December 2007 this matter came up for hearing before Azangalala J,(as he then was) when in determining the Plaintiff's Application for adjournment the Judge decided,

"I reluctantly allow the Application for adjournment. The same is allowed on terms that the Plaintiff pays Court Adjournment Fee and Counsel for the 1st and 3rd Defendants adjournment costs which costs shall include a Getting up fee to be agreed if not taxed and the same to be paid before the Plaintiff can take a hearing date".

6. There was no agreement on costs and it fell to the 1st Taxing Officer to tax the 3rd Defendant's Bill. The 1st Taxing Officer rendered a decision on 6th June 2014. The salient findings of that decision relevant to the matter at hand are-;

- Instruction fees – 1,395,136/=
- Getting up fees – 465,045/=

7. Arguing the Application on behalf of the Plaintiff, Mr. Mbabu emphasized that the ruling of 6th June 2014 by 1st Taxing Officer assessed both the Instruction fees and Getting up Fees and as no reference was filed challenging those findings, parties accepted the assessment. That subsequent to the assessment, the Plaintiffs withdrew the suit and had acted upon the assessment. Counsel's contention was that the 2nd assessment amounted to a re-assessment.

8. In respect to Getting up Fees, Counsel argued that the same were ordered by a Judge, assessed and partially settled. That the 3rd Defendant was therefore not entitled to any further getting up fees as there was no further hearing or setting down of the suit for hearing.

9. In closing Counsel pointed out that the issues raised here were raised in Grounds and Submissions opposing the 2nd Defendant's Bill of Costs but they were not considered at all by the 2nd Taxing Officer in her impugned ruling.

10. The 3rd Defendant opposed the Reference on the basis of the Grounds dated 17th June, 2016 and filed on 20th June, 2016. These are:-

- The Taxing Officer of the Court exercised a discretion. That discretion cannot be challenged in any way unless it was exercised unjudicially.
- The taxed costs are not manifestly excessive and as such it does not merit this Court interfering with this taxation.
- The earlier taxation was based on an erroneous figure being the value of the subject matter.
- The value of the claim is now ascertainable.
- There cannot be any order of stay of execution regarding the taxed costs.

11. Mr. Murugara for the 3rd Defendant submitted that it has not been argued or demonstrated that there was breach of a principle of law in the taxation. Neither were the taxed costs manifestly excessive as the

taxation was based on basic fees.

12. Counsel appreciated that the entire Reference was premised on the 1st taxation. It was Counsel's view that the 1st Taxing Officer's decision was wrong as it was based on an erroneous figure of the value of the claim. It was argued that the Taxing Officer mistakenly took the figure of Kshs.6,415,255/= in prayer (c) of the Plaint as a one off.

13. In respect to the 2nd taxation, it is the view of the 3rd Defendant that the Taxing Officer was right. And that she did so after considering all issues raised before her. Counsel pointed out that the first assessment related only to Getting up Fees. After the Taxation the matter was set down for hearing on many occasions and was eventually withdrawn on a date fixed for hearing.

14. It was the 3rd Defendant's ultimate argument that the first assessment (which was erroneous in its view) could not bind the 2nd Taxing Officer and that lack of a Reference against that erroneous assessment did not mean that the 3rd Defendant accepted it.

15. The circumstances under which the High Court can interfere with the Taxing Officer's exercise of discretion in a Taxation are well settled. It must be shown that either the decision is based on error of Principle or the award is manifestly high or low.

16. The substantial attack on the 2nd Taxing Officers decision is that it revisited the issue of Instruction Fees which had already been settled by the decision of the 1st Taxing Officer. Put differently that on the question of Instruction Fees and Getting up Fees, the second Bill was Resjudicata. The contest is not about which of the two decisions is correct. And if this Court were to find merit in the Plaintiffs argument then it would have to find that the 2nd Taxing Officer committed a Breach of a Fundamental Principal of Law and there would be a reason to interfere with her decision. For the argument of Resjudicata to succeed the Applicant must demonstrate that;

(i) The issue of Instruction Fees was a matter directly and substantially in issue in the 1st Taxation.

(ii) The issue was finally decided by the decision in the 1st Taxation.

17. The task of the 1st Taxing Officer was to assess the 3rd Defendant's adjournment costs as ordered by the Judge on 5th December, 2007. Crucially and as specifically directed by the Judge that Adjournment Fees was to include Getting up Fees.

18. The 3rd Defendant invited that assessment by presenting the Bill dated 29th January 2008. Item 1 of that Bill is what is of concern here. It was drawn as follows:-

'A Getting up fee to cover the work done in preparing for trial of this case considering the claim made in the Plaint for a total of liquidated amount of Ksh.283,927,200/- in addition to a claim for loss of income at the rate Kshs.6,415,200/- per month from 15th August 2000, a claim for indemnity against any loss, damage or expense that the Plaintiff may suffer or incur in Nairobi HCCC No.2873 of 1997, a claim for aggravated and/or punitive damages for trespass into the Plaintiff's land known as LR No. Nairobi/Block 97/2363 plus interest and costs; considering that the basic scale fees (based on the 1997 Amendment Order) on the liquidated amount of Kshs.283,927,200/= only is Kshs.4,298,908/= (Schedule VI 1 (b)); and further considering that if the unliquidated claim is taken into account a reasonable instruction fee in this suit would be at least Kshs.5,000,000/= (Schedule VI 1.(1) and that a minimum getting up fee is one third of the instruction fee (Schedule VI 2)and this matter being complex a getting up fee of one half in this matter is appropriate''.

19. When the matter came up for Taxation on 11th December 2013, Mr. Ochieng appearing for the 3rd

Defendant argued that Instruction fees was ascertainable. Counsel submitted :

I submit that reasonable Getting up Fee would be ½ of Instruction Fee. That is how we arrived at the figure of Ksh.2.5m. Argument that there is no basis upon which Instruction fee can be calculated is baseless”.

20. At that Taxation Mr. Mureithi Njiru held brief for Mr. Njiru for the Plaintiff. Other than opposing the Bill as being premature, Mr. Njiru addressed the issue of Getting Up fee. In his view the Fees should have been 1/3 of the Instruction Fees. But more importantly took the position that the Court was not in a position to ascertain the Instruction Fees.

21. Having received these arguments the 1st Taxing Officer rendered a decision on 6th June, 2014. This is how the Officer approached his task of working out the Getting up Fees.

"In calculating Getting up Fees I shall just calculate Instruction fees based on the value of the subject matter”.

Clearly, as a first step the Taxing Officer had to make a finding on the Instruction Fees. The Officer then proceeded to find the value of subject matter and Instruction Fees as follows;-

“This is the total sum of Kshs.56,000,000/=+27,739,600/=+6,415,200/=+Kshs.137,600/=+plus Kshs.50,000/=. Those items are as shown on the Plaintiff. The total is thus Kshs.90,342,400/=.

For the 1st Kshs.1,000,000/= the fee is Kshs.55,000/=

$1.5\% \times 89,342,400/- = \text{Kshs.}1,340,136/=$

Total Kshs. 1,395,136/=

Getting Up Fee is 1/3 of Kshs.1,395,136/= which is Kshs.465,045/=. To that end for item 2 Kshs.465,045/= is allowed. Kshs.2,034,955/= is taxed off. The rest of the items are allowed as drawn.

The total amount taxed off is Kshs.2,034,965/=.

22. It was necessary for the Taxing Officer to decide the Instruction Fees so as to work out the Getting Up Fees. Mr. Ochieng (for the 3rd Defendant) himself expressly invited the Officer to take that approach. In addition the provisions of Schedule vi paragraph 2 of The Advocates Remuneration (Amendment) Order, 1997 (Applicable to the Bill) on Getting Up Fees provided that Getting Up Fees “shall not be less than one third of the Instruction Fees” allowed on taxation.

23. But one argument for the 3rd defendant was that the 1st Taxing Officer was making a finding on Instruction Fees solely for the purpose of awarding a Getting Up Fee and that Instruction Fees could not have been determined with finality as the suit had not been heard and Judgment given or the suit otherwise determined. Let me consider this argument.

24. I take it that when the 3rd Defendant’s Counsel proposed a figure of Kshs. 5,000,000 as reasonable Instruction Fees he was arguing that it was the Instruction Fees that the 3rd Defendant would be entitled to as at the date the adjournment was granted (ie.5th December 2007). In respect to the liquidated amount of Kshs.283,927,200/= the 3rd Defendant charged the basic fees of Kshs.4,298,908/= as provided under the 1997 Remuneration Order. The Instruction Fees for the unliquidated portion was proposed at approximately Ksh.701,092 (see the Bill as buttressed by the oral arguments before the 1st Taxing Officer). The Plaintiff’s Counsel did not make any specific reply on this. The unliquidated portion of the claim comprises the following:-

“c. Kshs.6,415,200/= per month from 15th August 2000 being further loss of income until judgement;

d. Indemnity against any loss, damage or expense that the Plaintiff may suffer or incur in Nairobi HCCC No.2873 of 1997;

g. Aggravated and/or punitive damages for trespass into the Plaintiff’s land known as L.R No. Nairobi/Block 97/2363 plus interest and costs;”

Counsel for the 3rd Defendant did not break down the Fees for each of the 3 limbs of the unliquidated portion. The figure proposed was global.

25. There was no suggestion then that in respect to prayer (c) , the Fees should be worked out on the loss of income from 15th August 2000 up to the date the adjournment was granted. Further there was no suggestion that the Fees on the item grew on each day that the matter remained undetermined.

26. In answer to the matter before her the 1st Taxing Officer determined that the value of the unliquidated sum was Kshs.6,415,200/=. This was a determination that the 3rd Defendant was entitled to Instruction Fees on the basis of that value for the unliquidated claim. This determination in my view rejected the 3rd Defendant’s proposition of a global sum for prayer (c) and the other limbs of the unliquidated claim. Importantly this amounted to a determination that the basis for charging for prayer (c) was a one off figure of Kshs.6,415,200/=. It is my finding therefore that although the 1st Taxing Officer was determining Instruction Fees as of 5th December 2007, that determination set out the basis for working out Fees on prayer (c). The 3rd Defendant takes the view that this finding by the 1st Taxing Officer is erroneous as is her finding that prayer (b) was for Kshs.27,739,600/= (instead of Ksh.227,739,600/=). But my task here is not to determine the correctness or otherwise of the 1st Taxing Officer’s decision.

27. The conclusion that this Court makes is that the issue of Instruction Fees was directly and substantially an issue in the 1st Taxation. And in so far as the decision of the 1st Taxing Officer on Instruction Fees was not challenged by way of a Reference or otherwise that decision became a final determination of the matter. It was therefore not open for the issue to be reargued in the 2nd Taxation.

28. A second issue is whether the 3rd Defendant is entitled to further Getting up Fees. Fees for Getting up or preparing for Trial is chargeable where a case has been confirmed for hearing. Although this is a one off charge, subparagraph 2(ii) of schedule VI of the Advocates Remuneration Order, 1997 permits a Judge to direct that Getting Up Fees of not more than 15% of the Instructions Fees be allowed in respect to an adjournment.

29. It is not in contention that this matter had been confirmed for hearing. It is also not in contention that the Judge’s Order on adjournment costs of 5th December 2007 specified that it would include Getting Up Fee. But those costs were in respect only to the occasion of the adjournment on 5th December 2007. Thereafter the matter came up for main hearing in Court on at least one occasion. That is on 27th October 2014 when the suit was withdrawn. The 3rd Defendant was not, therefore, foreclosed from charging Getting up Fees merely because a fee for Getting up had been included in the adjournment costs of 5th December 2007.

30. This Court has found that the 2nd Taxing Officer was in breach of a fundamental principle of Law by revisiting the issue of Instruction Fees when the same had been determined by the 1st Taxing Officer. It matters not whether the earlier determination was erroneous. I therefore interfere with the Decision of the 2nd Taxing officer of 25th May 2016 by setting aside the orders on Instruction Fees and Getting up Fees **only** and make the following Orders in line with the decision of the 1st Taxing Officer;-

- Instruction FeesKshs.1,395,136
- Getting up Fees.....Kshs.465,045/=

31. Each party to bear its own costs on this Reference.

Dated, Signed and Delivered in court at Nairobi this 22nd day of July, 2016.

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F. TUIYOTT

JUDGE

Present:

Waweru holding brief for Njiru for Plaintiff

Ondieki holding brief for Murugara for 3rd Defendant

Alex Court clerk