



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 1111 OF 2003

THE KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

KAMLESH M.D. PATTNI.....1ST DEFENDANT

UHURU HIGHWAY DEVELOPMENT LTD.....2ND DEFENDANT

GITARI T. NJEU.....3RD DEFENDANT

WORLD DUTY FREE CO. LTD.....4TH DEFENDANT

KETAN SOMAIA.....5TH DEFENDANT

DOLPHIN HOLDINGS LTD.....6TH DEFENDANT

DOLPHIN MANAGEMENT SERVICES L.....7TH DEFENDANT

BLOCK HOTELS HOLDINGS LTD

(Formerly united touring Group (K) Ltd.....8TH DEFENDANT

BLOCK HOTELS9TH DEFENDANT

UNITED TOURING LTD10TH DEFENDANT

DOLPHIN INVESTMENT LTD.....11TH DEFENDANT

TOURIST PARADISE INVESTMENTS LTD.....12TH DEFENDANT

MARSHALLS EAST AFRICA LTD.....13TH DEFENDANT

MARSHALLS INVESTMENTS LTD.....14TH DEFENDANT

MARSHALLS ENTERPRISES LTD..... 15TH DEFENDANT

DELPHIS BANK LTD..... 16TH DEFENDANT

RULING

1) The subject matter of this decision is the reference expressed in the chamber summons dated 2nd December 2014 taken out by Kenya Anti-corruption Commission, the plaintiff herein, in which it sought the following orders.

1. The taxing officer's decision with respect to item 1 of the 13th defendant's bill of costs dated 3rd May 2010 be set aside.

2. The taxing officer's decision with respect to item 1 of the 16th defendant's bill of costs dated 2nd May 2013 be set aside.

3. The bills of costs by the 13th and 16th defendants be remitted to another taxing office for fresh taxation of items 1 in each bill.

4. Costs be provided for.

2) The summons is supported by the affidavit of Ben Murei. When served Marshall E.A. Ltd and Delphis Bank Ltd, the 13th and 16th defendants respectively, filed grounds of opposition to resist the reference. When the reference came up for hearing learned counsels appearing in the matter recorded a consent order to have the reference disposed of by written submissions. This court also invited learned counsels to present oral highlights.

3) Before delving deeper into the substance of the reference let me set out in brief background of the dispute. On 30th October 2003, the Plaintiff moved the high Court by way of an originating motion suing Kamlesh M.D. Pattni and 16 others under Section 55 and 56 of the Anti-corruption and Economic Crimes Act, 2003. On 9th April 2008, a settlement was reached between the plaintiff and Kamlesh Pattni, Uhuru Highway Development Ltd, Gitari Njeu and the world Duty Free Co. Ltd, the 1st, 2nd, 3rd and 4th defendants respectively giving rise to the consent recorded in court in which the suit was eventually discontinued. Following the withdrawal of the suit, Marshalls East Africa Ltd and Delphis Bank Ltd, the 13th and 16th defendants respectively successfully applied to the Deputy registrar of this court to award them costs. Pursuant to the aforesaid order the 13th and 16th defendants filed their bills of costs which were subsequently heard and determined by Hon. A. K. Ndungu the then taxing officer. By his ruling delivered on 21st October 2014, the taxing officer taxed the two bills at ksh.5,266,320/=. The instructions fees for each of the defendants was allowed at ksh,5,000,000/=. Being dissatisfied with the aforesaid award, the plaintiff filed this reference pursuant to the provisions of paragraph 11 of the Advocates (Remuneration) Order in which it sought to set aside the decision of the taxing officer on the instructions fees. The plaintiff further urged this court to remit the 13th and 16th defendant's bill of costs to another taxing officer for fresh taxation on the item.

4) Mr. Murei, learned advocate for the plaintiff, argued that since no receivers were appointed to manage the affairs of the defendants herein, the award of costs on instructions fees was manifestly excessive hence it should be set aside. The learned advocate further argued that the taxing officer made fundamental errors when he found that the 13th and 16th defendants were associated with the rip-off through the Goldenberg scandal. A critical examination of the taxing officer's ruling will reveal that the learned taxing officer clearly found that the defendants had the onerous task of placing an appropriate defence to exonerate themselves. He also found that by the alleged association to the Goldenberg scandal, the defendants stood to lose in terms of business opportunities and loss to shareholders. It is the submission of Mr. Murei, that the taxing officer fell into error in arriving at such a conclusion because a reading of the originating motion will show that the 13th and 16th defendants did not in any way participate in the scandal. The learned advocate further argued that the plaintiff's case was that the 1st

defendant using the money he obtained from the Goldenberg scandal, entered into an agreement with Ketan Somaia, the 5th defendant to purchase 95% of his shares in the 6th to 17th defendant. He pointed out that the 13th and 16th defendants were not accused of theft of public funds hence they did not have to defend themselves against claims of theft as stated by the taxing officer and that their only brief was to oppose the appointment of an interim receiver and to present evidence relating to the shareholding of the 5th defendant and to comply with any final order respecting the transfer of such shares. Mr. Murei further pointed out that the learned taxing officer erroneously took into account the fact that the originating motion prayed for the placing of the 6th to 17th defendants under receivership yet the appointment of receivers was on an interim basis pending the hearing and determination of the suit. Therefore the instructions fees in respect of the suit could not apply to an interlocutory prayer. The plaintiff further argued that the taxing officer fell into error when he concluded that the matter was complex based on the voluminous documents. It is said he failed to identify any of the issues that he thought were complex.

5) Finally the learned advocate argued that the taxing officer overstated the importance of the case and that he failed to take into account the fact that the matter was not heard substantively.

6) Mr. Mogeni, learned advocate for the 13th defendant, filed grounds of opposition to resist the reference. He pointed out that the Goldenberg scandal was so complex that a commission of inquiry had to be established to unravel the mystery. It is Mr. Mogeni's submission that prima facie, the suit was complex hence the taxing officer was right to hold as such. It is also argued that the suit required the 13th defendant to defend so that the order appointing an interim receiver would be set aside. In any case, the learned advocate pointed out, that the judges who heard the originating motion found that the matter was complex.

7) Mr. Odera, learned advocate for the 16th defendant also opposed the reference and further adopted the submissions of Mr. Mogeni. The learned advocate argued that public offices or bodies should not be used to cripple private enterprises. He urged this court to take note of the fact that the proceedings against the defendants were swiftly commenced and unceremoniously terminated. The learned advocate further pointed out that Dr. Kamau Kuria, the plaintiff's learned advocate even admitted that the matter was complex which view the judges who heard the matter agreed with. This court was urged to find that the taxing officer did not commit any error.

8) After a careful consideration of the rival submissions, I have come to the following conclusion in the matter. The principles to be considered in such matters are well settled. This court can only interfere with the decision of a taxing officer if it is shown that the taxing officer erred in principle or that he took into account irrelevant factors or that the award given is on the face of it obviously high or low.

9) I have already set out in detail the errors the taxing officer is alleged to have committed in assessing instructions fees due to the 13th and 16th defendants. It is argued that the taxing officer erroneously found the dispute to be complex yet what the plaintiff wanted was to basically to pursue shares belonging to the 1st defendant. It is true that the taxing officer found the matter to be complex. The plaintiff argues that the case facing the 13th and 16th defendants was simple and not complex as alluded. It is said the claim against the 13th and 16th defendants was only limited to shares. It is also argued that these defendants were not obliged to resist the case against Ketan Somaia, the 5th defendant and other defendants which related to allegations of corruption and fraud. With respect, I do not agree with the plaintiff's submissions. The matter in question was not simple and straightforward. It is on record that the plaintiff's own lead counsel, Dr. Gibson Kamau Kuria admitted before the court that the dispute was complex. Justices Ojwang and Mwera, too came to the same conclusion that the matter was not simple but a complex one. After a careful re-evaluation of the material placed before this court, I find that the case facing the two defendants was complex.

It took the intervention of government to appoint a commission of inquiry with the aim of unmasking the truth in the Goldenberg saga.

10) What I got from the plaintiff's argument is that the case which is faced the 13th and 16th defendants was basically a claim over 95% shareholding. It may now appear simple but at the date of commencement of proceedings it was difficult to separate and isolate the case facing each defendant. In short, the finding of the taxing office cannot be faulted.

11) It has also been argued that the taxing officer fell into error in that the 13th and 16th defendants were to only challenge the appointment of an interim receiver hence it is argued that the instructions fees should have based on the schedule applicable to interlocutory applications. It is also argued that the case was never substantively heard. The plaintiff is basically saying that the defendants role was to merely fight the decision appointing an interim receiver which in itself was, an interlocutory application. With respect, I do not think that submission captures the intention of the plaintiff. The prayer for the appointment of an interim receiver was not an ordinary interlocutory application because the order substantially affected the operations of the two defendants causing shock waves to the shareholders of the aforesaid defendants. In the circumstances the argument that the claim was interlocutory and that it was never heard substantively does not hold water. The learned taxing officer came to the correct conclusion and I have no good ground to interfere with his decision.

12) This court has been beseeched not to make it extremely expensive and difficult for the plaintiff trace illegally acquired public assets. I agree with the submissions of the plaintiff learned counsel that the plaintiff being a public body should not be slapped with punitive costs which may frustrate its operations. However, it must be appreciated that parties whether public or private bodies are equal before the law. The plaintiff in exercise of its constitutional and statutory duties must act with due diligence considering the fact that it is heavily funded to source for the most competitive personnel to undertake those duties. The award on instructions fees in favour of the 13th and 16th defendants was neither low nor high. It cannot therefore be treated as punitive.

13) In the end and on the basis of the above reasons, I find no merit in the two references. They are dismissed with costs to the 13th and 16th defendants.

Dated and delivered in open court this 23rd day of October, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendant