REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 43 OF 2002

BIO MEDICAL LABORATORIES LTD. …….. PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL ……..…… DEFENDANT

R U L I N G

1. The Plaintiff/Decree Holder has brought a Chamber Summons before this Court under Certificate of Urgency based on the provisions of **section 48** and **Rule 11** of the *Advocates Act* and the *Advocates'(Remuneration) Order* respectively as well as **sections 1A (1), (2) and (3), 1B, 3A and 26 (1)** of the *Civil Procedure Act*. Its Application seeks directions of this Court to find that the value of the subject matter of the Decree herein is discernible taking into account the aggregate of both the principal sum claimed as well as the accrued interest thereon calculated on the basis of a commercial rate. The Plaintiff maintains that such was awarded in the Judgement dated 5th July 2012. The Plaintiff seeks further orders settling the terms of the Decree as concerning the computation of interest. Further, the Application seeks a review, variation and/or setting aside of the decision of the Taxing Officer made on 27th June 2013 as regards the Plaintiff's advocates party/party Bill of Costs dated 28th September 2012. In the alternative, the Plaintiff requests for a re-taxation of the said party/party Bill of Costs.
2. The Plaintiff's Application is brought upon the following grounds:

> **"a) Judgment was delivered herein in favour of the Plaintiff on 5th July, 2012 for a sum of Kshs. 8,225,000/= together with the commercial interest rate of 28% per annum, with effect from 1st January, 2002 until payment in full, as prayed in the Plaint.**
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> **b) The Defendant did not either by its pleadings or the statement of defence, the evidence tendered, and filed written submissions, attack or challenge the Plaintiff's case that was pleaded and led and substantively submitted on, that prayed for inter alia, the loss and damage suffered as a result of the breach of contract.**
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> **c) The Defendant's principal litigation Counsel has, after the Judgment was delivered, in approving the draft decree and in submissions at the taxation of costs, objected to:**
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> **(i) The interest rate awarded.**

(ii) The monetary value of the dispute being taken to include the aggregate sum of the principal sum awarded together with the accrued interest awarded, being calculated by the way of the commercial interest rate of 28% awarded from the effective dates.

(iii) The mode of calculation of the accrued commercial interest, in the customary commercial rates are computed, as opposed to the simple non commercial rate of interest that takes a straight line computation.

(iv) In the objections by the Defendant's Principal Litigation Counsel, no other alternative reasonable or other correct way of calculation has been offered, thereby putting the extraction of the decree at a gridlock.

d) Any attempts by the Plaintiff to reach a reasonable amicable reconciliation of the divergent methods, have been in vain, hence making this application inevitable.

e) The Defendant has repeatedly continued to high handedly oppress the Plaintiff, by failure to make any payment, even of the uncontested principal decretal sum.

f) The Plaintiff continues to suffer irreparably, and inordinate delay in payments, hence the necessity to finalise early".

3. The Plaintiff's said Application was supported by the Affidavit of **Michael Mwangi Muthee** the Managing Director of the Plaintiff company, the same being sworn on even date. Much of what was contained in the Supporting Affidavit was detailed in the Grounds in support of the Application. Further, the deponent recited what he had been told by his Advocates as to what transpired before the Taxing Officer during the proceedings before him in the taxation of the party/party Bill of Costs. Simply put, the point raised by the Plaintiff's advocates before the Taxing Officer was that the Judgement amount as awarded by this Court of Shs. 8,225,000/- on 5th July 2012 should be increased by the amount of accrued interest at commercial rates for taxation purposes. Such had been rebuffed by the Taxing Officer. Thereafter, the deponent annexed to the Supporting Affidavit an interest calculation compounded monthly which showed the total amount of interest from the year 2002 through to July 2012 at Shs. 142,074,696/-. It was the deponent's position that the amount of such interest should be added to the principal amount of Shs. 8,225,000/- as above leaving the figure he suggested be taken for instruction fees under Schedule VI of the *Advocates (Remuneration) Order* at Shs. 150,299,696/-.
4. The Defendant filed Grounds of Opposition dated 13th September 2013 along with its List of Authorities filed on 18th September 2013. The said Grounds Opposition detailed as follows:

"a) That it is in established principle of law that the court may only intervene where there has been an error or principle in the award of costs by the taxing officer.

b) That the Applicant's Application does not establish any error or principle in the award of costs.

c) That the value of the subject matter was clearly ascertainable as discerned from the judgment of court and in accordance with settled law in computing the instruction fees.

d) That the taxing officer acted judicially in being duly guided by the award in the judgment of the suit in arriving at the amount of costs awarded.

e) That in the circumstances, this application is misconceived and the orders sought by the applicant cannot issue.

f) That the application is an abuse of the court process being dilatory tactic meant

to merely frustrate the conclusion of the process.

g) The application is made in bad faith and ought to be dismissed with costs".

5. The Plaintiff filed its skeleton submissions on 20th November 2013. After setting out the prayers sought by the Application before Court, the Plaintiff noted that this had been an unnecessarily long and protracted matter. It maintained that it had suffered irreparably owing to the unnecessary delays occasioned by the Defendant. The Plaintiff related the history as regards the attempt to settle the Decree as between the parties hereto, after Judgement had been delivered herein on 5th July 2012. It submitted that the applicable rate of interest and costs was the conventional figure of 14% and as a result, the proposed interest rate of 12% as proposition that by counsel for the Defendant lacked justification. The parties having therefore failed to agree upon the terms of the Decree, the Plaintiff was left with no alternative but to file its Bill of Costs dated 25th September 2012. The most contentious issue as between the parties in relation to the taxation proceedings concerned the issue of fees or as to what made up the decretal sum so as to be taken to guide the Taxing Officer in the assessment on the value of the claim. The Plaintiff's counsel in the proceedings before the Taxing Officer the Plaintiff noted that this Court in its said Judgement had awarded interest at the commercial rate prevailing of 28% from 1st January 2002 until payment in full. As a result, the Plaintiff's counsel submitted that such was proven special damage and not a generalised order for simple interest. The Plaintiff submitted that in this Court's judgement, it believed that the Court had taken into account that the Plaintiff had obtained financing from a building society for the purpose of fulfilling the procurement of the Defendant's tender items that involved manufacture in India.
6. As regards the law applicable, the Plaintiff pointed to paragraph 16 of the *Advocates (Remuneration) Order* which provided for the taxing officer to have an unfettered discretion to allow all such costs, charges and expenses as appeared to him to have been necessary or proper for the attainment of justice. Further, under scale 1 of Schedule VI of the Order, the taxing officer had a discretion to increase or decrease instruction fees for a suit where he was satisfied that there was good reason to do so for example where a case was of more than normal difficulty or complexity or involved exceptional responsibility. The Plaintiff pointed to the decision in **Tate & Lyle Food Distribution v Greater London Council (1882) 1 WLR 149** in which the Judge had found:

   "…….. I think that it would always be right to look at the rate at which the plaintiff with the general attributes of the actual plaintiff in that case (though not, of course, with any special or peculiar attribute) could borrow money as a guide to the appropriate interest rate."

The Plaintiff went on to refer to one of the authorities put before this Court by the Defendant namely **Arthur v Nyeri Electricity Undertaking (1961) EACA 492** and agreed that the authority confirmed the applicable test that for a court to fault the taxing officer, he must have made an error of principle in the taxation proceedings. The Plaintiff submitted that the failure of the Taxing Officer in this matter to take into account the accrued interest awarded by this Court as part of the claim in assessing the value amount to be taken for taxation purposes, was an error of principle. It continued its submissions by saying that the subject matter of the Decree herein is easily discernible if one takes the aggregate of both principle and accrued interest, the latter being calculated on the basis of the commercial rate of 28% as awarded in the Judgement dated 5th July 2012.

7. Counsel for the parties appeared before Court on 20th November 2013 for submission purposes. Mr. Kihara for the Plaintiff noted that the parties had failed to agree on how to calculate interest in order to settle the Decree. The Plaintiff had proposed yearly rests which would amount to slightly less than interest compounded monthly. The Plaintiff had hoped that the matter would be sorted out before the Taxing Officer but the latter had taken the principal figure of the Judgement as the basis of calculating costs. The Taxing Officer had determined the taxation but no Certificate of Costs had yet been issued. The Plaintiff was asking for this Court to settle the Decree so far as the costs of the suit were concerned.
8. In his turn, Mr. Muiruri relied upon the Grounds of Opposition filed by the Defendant. He noted that the Taxing Officer had awarded Shs. 802,200/-by way of taxed costs in favour of the Plaintiff,

after both parties had filed their written submissions. He observed that the Plaintiff had written to the Taxing Officer objecting to his finding as regards item nos. 6 and 28. That objection was anchored under the provisions of **Rule 11** of the *Advocates (Remuneration) Order*. As far as the Defendant was concerned, the Application before this Court was the reference from the Taxing Officer's Ruling dated 27th June 2013. Parties were not before this Court to settle the Decree. The draft thereof had not been placed before the Registrar as required by **Order 21 rule 3**. The Plaintiff had drawn up a draft Decree upon which the Defendant had made its amendments. In the opinion of Mr. Muiruri, this Court could only properly determine the question of the Decree once the Deputy Registrar had made his Ruling on the same, which had not happened. Counsel outlined that the position of the Plaintiff was that it maintained and argued that in order to determine the value of the subject matter of the suit, one took the Judgement amount and added accumulated interest thereto. The Defendants took a different view and maintained that the Taxing Officer had correctly taken the ascertained figure as per the Judgement of Shs. 8,225,000/-. The Taxing Officer supported the submission of the Defendant, who had taken that figure as the basis upon which to calculate the instruction fee. The Defendant took the view that interest in itself was a compensatory matter as regards the Judgement, so that the Plaintiff could earn monies thereon to compensate it for having been kept out of its money for a period of time. In his view, interest was not to be taken into account in basing the taxation on the Judgement amount awarded.

9. Continuing with his submissions Mr. Muiruri noted that the Taxing Officer had used his discretion and enhanced the instruction fee awarded by Shs. 600,000/-. Counsel had extensively reviewed the authorities but had not found one in which the interest earned enhanced the judgement amount for the purposes of calculating the instruction fee. He noted that the costs claimed by the Plaintiff went way beyond the amount of the Judgement sum. Counsel then referred to his list of authorities and noted that all the decisions embraced the principle that costs should not be so high as to shut out users of the Court. The authorities also established that the Court would only interfere with the ruling of a Taxing Officer where he had misapplied the law. The Court had been asked to review the decision of the Taxing Officer. The Plaintiff had not submitted that he had erred as regards any provision of the law. Counsel insisted that the calculation of taxed costs is based on the principal sum arrived at in the Judgement and the question of accumulated interest has no bearing on the calculation. Finally, Counsel concluded that there was no Application before this Court for settlement of the Decree. The Plaintiff's attempt to have the Court settle the Decree was outside the provisions of the Advocates (Remuneration) Order.

10. In a brief rejoinder, Mr. Kihara for the Plaintiff, noted that none of the Grounds of Opposition were in reference to the settlement of the Decree. The Application before Court in prayers nos. 2 and 3 clearly asked for the settlement of the Decree. None of the Defendant's Grounds of Opposition or its authorities was on the point. The Plaintiff had put the issue of the settling of the Decree before the Taxing Officer who had declined to make any Order in that respect. There were only two main issues for concern being the basis of calculation of the instruction fee and throw away costs. The Taxing Officer at the delivery of his Ruling had clearly stated that the question of calculation of interest would have to be referred back to this Court. The Plaintiff only faulted the Taxing Officer as to his taking the figure of Shs. 8,235,000/- as the basis of his calculation. Mr. Kihara agreed with the point taken that costs should not be allowed to rise so far as to preclude Court users. He further confirmed that there was no authority which had decided whether interest should be part of the Decree or otherwise. The Decree could not be satisfied if interest was not taken into account. The Plaintiff would have agreed to a global settlement but that did not happen. There was no need for the costs to delay the issuance of the Decree.

11. From the heading of the Plaintiff's Application dated 1st August 2013, it is quite clear that the same is grounded upon the provisions of **section 48** of the *Advocates Act* and **Rule 11** of the *Advocates (Remuneration) Order*. To my mind, those provisions clearly indicate a reference as against the finding of the Taxing Officer as regards his Ruling in relation to the Plaintiff's party and party Bill of Costs dated 28th September 2012. **Section 26** of the *Civil Procedure Act* which is mentioned in the heading to the Application relates to the discretion of the Court to order interest at such rate as it deems reasonable to be paid upon the principal sum. Nowhere does that section provide that accumulated interest should be added to the Judgement amount. That apart, I have read with interest the Ruling of the honourable Taxing Officer dated 27th June 2013. The Officer commences his Ruling by stating that the Plaintiff had mooted the quantum of its Bill of Costs in

the amount of Shs. 110,698,173.00. The Taxing Officer recorded that:

"The plaintiff submitted in support of the Bill of costs inviting this court to take into account quantum and special interest rate as a specific prayer duly sought peculiar to the nature of the case in question."

In his determination on the point, the learned Taxing Officer came to his decision as follows:

"a perusal of schedule VI paragraph 1 of 1997 Advocates Remuneration Order provides the answer on how to ascertain instructions fees. The value of subject matter can either be determined from the pleadings, judgement or settlement between the parties.

In the instant case judgement on the matter was delivered in favour of the Plaintiff at Kshs. 8,225,000/= and not 27,562,200/= as set out in the Plaint.

In calculating instruction fees, I shall be guided by the value of subject matter as deduced from the judgement being Kshs. 8,225,000/=.

During the submissions on taxation counsel for the Plaintiff urged this court to be guided by the amount of Kshs. 110,698,173 drawn and arrived at as per interest accrued. There is no dispute interest was awarded to the Plaintiff at a commercial rate of 28% prevailing at the time. The import of this was to compensate the Plaintiff as per the evidence availed before the court which made a finding on the issue. That therefore does not follow that in calculating instructions fees court should take into account enhanced value as calculated from the interest awarded. The interest awarded was to take care of the loss incurred arising from non-payment of monetary compensation due to the breach of contract. I therefore decline to be persuaded by counsel that in calculating instructions fees a quantum of Kshs. 110,698,173 be the guide.

The interest as awarded was to restore the Plaintiff's pecuniary interest in the matter given the nature and unique circumstances which gave rise to the contractual obligations of the parties. I therefore in this bill of costs take the value of Kshs. 8,225,000/= as quantum for purposes of calculating instructions fees. The applicable schedule being schedule VI paragraph 1 (b) of 1997 Advocates Remuneration Order".

12. A little later in his Ruling, the learned Taxing Officer uses his discretion to allow an increase in the instruction fees to take into account the complexity of the matter before Court. He took cognizance of the principles that instruction fees should cover compensation for work done, the value of the subject matter, the time taken on instructions and a fair reimbursement in all the circumstances. He noted that this particular case had been heard by a number of judges ever since it was initiated in 2002. Thereafter, taking into account the nature and importance of the matter to the parties, the amount of work involved and the responsibility, documents perused and examined etc. the instruction fees were enhanced to Shs. 400,000/- from what they would have been in the ordinary course of events based on the Judgement amount of Shs. 7,205,000/- being Shs. 108,375/-. To my mind, I consider the Taxing Officer to have been most fair in assessing the party/party costs in relation to this matter. I have noted that the Plaintiff failed to put any authorities before this Court and I have carefully perused the authorities put forward by the Defendant. None of those authorities and none that I have ever come across, back the Plaintiff's proposition that the Judgement sum be enhanced by the amount of accumulated interest for the calculation of party/party costs.
13. Further, I take the point as made by learned counsel for the Defendant in terms of the prayers of the Application before this Court. Although I would agree with Mr. Kihara that prayers 2 and 3 thereof would seem to be asking this Court to settle the Decree herein, any Application in that regard should have been brought under the provisions of **Order 21** of the *Civil Procedure Rules, 2010*. The Plaintiff has not sought to rely upon that Order in its Application. Further, I accept the submission of the learned counsel for the Defendant that there has been no ruling emanating from

the Deputy Registrar as regards the settlement of the Decree. This position would seem to have been endorsed by Mr. Kihara when he submitted that the Deputy Registrar had declined to make any Order as to the settlement of the Decree. Consequently, as a result, there is no application before this Court in relation to the same.

14. The upshot of the matter is that I find no merit in the Plaintiff's Chamber Summons dated 1st August 2013. I find that the Taxing Officer has not breached any principle in relation to the taxation of the Plaintiff's said Bill of Costs sufficient to justify any interference by this Court. The Plaintiff's Application is hereby dismissed with costs to the Defendant.

DATED and delivered at Nairobi this 1st day of April, 2014.

J. B. HAVELOCK

JUDGE