REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 1255 of 2000

DIAMOND TRUST BANK KENYA LIMITED ……..……. PLAINTIFF

VERSUS

GURMAIL SINGH SAGOO ……..…… 1ST DEFENDANT

HARMEL SINGH SAGOO ……..……..…… 2ND DEFENDANT

INDERJIT SINGH SAGOO ……..……..……..……. 3RD DEFENDANT

MANJIT SINGH SANDHU ……..…..…… 4TH DEFENDANT

R U L I N G

1. The Plaintiff herein is aggrieved with the Ruling of the Deputy Registrar of this court, as Taxing Officer, as regards his Ruling of 19 March 2012. The Plaintiff's Application is brought under the provisions of **Order 22 Rule 22** of the *Civil Procedure Rules*, **Sections 1A, 1B and 3A** of the *Civil Procedure Act*, paragraph 11 of the *Advocates (Remuneration) Order* and Article 159 of the Constitution. The Application seeks orders to stay any execution of the Ruling made by the Taxing Officer on 19 March 2012 pending the hearing and determination of the Application. It also seeks leave for the Plaintiff to object to the award of the Taxing Master in the absence of reasons given therefore. In the alternative, the court was being asked to stay execution of the Ruling pending the furnishing of written reasons for the taxation by the Taxing Officer. Finally, the Application sought a stay of the execution of the Ruling pending the hearing and determination of the reference file as against the same.

2. The grounds for the Application are as follows:

"(a) On 19th March 2012, the Honourable taxing master awarded the 1st, 2nd and 3rd Defendants a sum of Kshs.648,979/= on account of instruction fees, a figure claimed in item 1 of the said Defendant's Bill of Costs dated 24th August 2011.

(b) The said award was based solely on the fact that the 1st, 2nd and 3rd Defendants had entered appearance and filed a defence to this suit.

(c) However, the said ruling ignored the fact that the no further steps were taken in the said suit after the 1st, 2nd and 3rd Defendants filed their statement of defence. In this regard, no work of exceptional dispatch was undertaken by the Defendants, no substantial issues of fact or law were canvassed and even discovery in this matter never took place.

(d) The said decision of the taxing master also ignored the fact that the suit herein was dismissed by the Court acting on its own motion.

(e) In the premises, the amount awarded as instruction fees was manifestly excessive and did not reflect the proper fee necessitated in defending the proceedings. As such, in allowing the said amount, the taxing master violated the provisions of paragraph 15 of the Advocates (Remuneration) Order.

(f) Vide a letter dated 29th March 2012, the Plaintiff wrote to the Deputy Registrar of the Honourable Court requesting to be furnished with reasons for the taxation so as to enable the Plaintiff to file a reference opposing the taxation. However, no reasons for the taxation have been furnished and the Plaintiff has therefore been unable to file a reference.

(g) Be that as it may, the 1st, 2nd and 3rd Defendants have now obtained warrants of attachment against the Plaintiff's assets and have proclaimed the Plaintiff's assets. Consequently, the Plaintiff stands the risk of losing its assets in settlement of an award that is manifestly excessive and which will unjustifiably cause the Plaintiff to suffer loss and damage.

(h) Further, the said proclamation has been done in violation of the provisions of Order 22 Rule 18 (1) (a) of the Civil Procedure rules that requires a Notice to show Cause to be issued before execution of a decree that is more than one year old is undertaken.

(i) It is therefore in the interests of justice that the intended execution be halted; leave to file a reference without assigning the reasons thereof be granted; and the award by the taxing master on item 1 of the bill of costs be reviewed and/or set aside pursuant to a duly filed reference.

(j) Other reasons and grounds to be adduced at the hearing hereof".

On 19 October 2012, this court ordered that any execution of the Ruling made by the Taxing officer on 19 March 2012 be stayed pending the hearing and determination of the Application. This Order was given owing to my apprehension that the Court record had been tampered with as there was no entry with regard to the taxation proceedings before the Deputy Registrar of this court held on 19 March 2012.

3. The Application was supported by the Affidavit of one **Stephen Kodumbe** who detailed that he was the Company Secretary of the Plaintiff bank. The deponent detailed the events in relation to the case before court leading up to the 18th of June 2009, when the court dismissed the Plaintiff's suit with costs for want of prosecution. That dismissal prompted the first, second and third Defendants to file their Bill of Costs dated 24 August 2011 for taxation. Mr. Kodumbe noted that vide a Ruling delivered on 19 March 2010, the Taxing Officer awarded the three Defendants the sum of Shs. 648,979/- on account of instruction fees in accordance with item 1 of the said Bill of Costs. He related that on 29 March 2012, the Advocates on record for the Plaintiff wrote to the Deputy Registrar of this court requesting for written reasons for his award on the said item number 1 of the Bill of Costs. He recorded that no written reasons had been supplied. The deponent had been advised by the said Advocates that in the absence of the reasons for the Taxing Officer's Ruling, the Plaintiff required the leave of this court to object to the award thereof. He had also been advised that the failure of the Taxing Officer to give written reasons for his decision in the taxation was a good ground for sustaining a reference. The deponent noted that the first, second and third Defendants had now obtained warrants of attachment from the court and have already relied upon the same to proclaim against the Plaintiff's assets. In any event, the deponent had been advised by the said Advocates that the Proclamation, a copy of which he attached to his said affidavit, contravened the mandatory provisions of **Order 22 Rule 18 (1) (a)** of the *Civil Procedure Rules*.

4. Mr. Rapinder S. Sehmi an Advocate representing the Defendants in this suit filed a detailed Replying Affidavit on 24 September 2012. As regards the quantum of the said Bill of Costs, the deponent recorded that a considerable amount of work was done in testing the accounts of the Plaintiff in terms of giving instructions to and obtaining a report from an international firm of Accountants in conjunction with the Plaintiff's Advocates prior to the suit herein being filed. He detailed that the Plaint, which had been filed

on 14 July 2000, raised various complex issues specifically in connection with the Charge documents securing a loan from the Plaintiff. Thereafter, the deponent detailed the steps taken in relation to the conduct of the proceedings in the suit and the various matters raised before court, before the suit was finally dismissed for want of prosecution on 18 June 2009 with costs to the Defendants. I gather that the various paragraphs in this regard were set out in order to provide some meat to the argument that the instruction fees in the said Bill of Costs were fully justified. Mr. Sehmi then related the events surrounding the taxation when the Bill of Costs came up for hearing initially on the 26 October 2011 before the Senior Deputy Registrar of this Division. The Senior Deputy Registrar had ordered that written submissions be filed by the parties in connection with the Taxation application. The deponent then went on to say that his firm had never received a copy of the letter addressed to the Senior Deputy Registrar requesting reasons for his Ruling which had been delivered on 19 March 2012. Thereafter his firm had addressed a number of letters, copies of which he attached to his Replying Affidavit, requesting the Plaintiff to make payment all of which seem to have received no response. The deponent stated that the Defendants wanted to recover the costs as taxed and certified by this court. As regards the Plaintiff's submissions as regards **Order 22 rule 18**, the deponent stated that such was a mere technicality and should not be allowed to defeat the execution of the taxed costs.

5. On the 6 December 2012, Mr Otieno appeared before the Plaintiff holding brief for Mr. Kuria while the said Mr. Sehmi appeared for the Defendants. Mr. Otieno submitted that the Plaintiff had applied and requested for the Taxing Officer's reasons for his Ruling on the taxation delivered on 19 March 2012. The application had been made by letter dated the 29 March 2012 which basically stated that the Plaintiff was aggrieved by the decision relating to item 1 of the Defendants' Bill of Costs dated 24 August 2011. The Plaintiff had not been able to obtain a copy of the Ruling nor indeed had the Taxing Officer provided his reasons therefore. In the meantime, the Defendants obtained warrants in readiness for execution. Plaintiff's counsel maintained that it would be in the interests of justice if the court would either grant the Plaintiff leave to file the Reference without the reasons or suspend the execution pending the provision of the reasons by the Senior Deputy Registrar. Counsel further noted that the mode of execution put forward by the Defendants offended **Order 22 Rule 18 (1) (a)** of the *Civil Procedure Rules*. He pointed out that the Notice to Show Cause was issued in 2009 before the taxation had commenced. Thereafter counsel criticised the contents of the Replying Affidavit in that it made no reference to the Application before court rather it commented upon the reasons for the assessment of the taxed costs.

6. In turn, Mr. Sehmi urged the court to look at the third, fourth and fifth prayers of the Application and observed that there was nothing in the Advocates Act under which the Application is made, which allows the court to give the leave sought. In his opinion, there was no provision which allowed the Applicant to make such an application. As there is no reference with regard to the taxation before court, the prayers sought could not be granted. He noted that this was not an Application seeking to set-aside the Ruling of the Taxing Officer. He submitted that the Plaintiff had to establish that it had the locus to make the Application for prayers 2, 3, 4 and 5 to be granted. There were no sufficient or good reasons for the prayers to be granted. He was of the view that the Plaintiff had been evasive and dilatory in this matter warranting the dismissal of the Application. He noted that the Plaintiff's claim against the Defendants was for more than Shs. 40 million and consequently the instruction fee as adjudged by the Taxing Officer was Shs. 648,000/- with reference to the Plaint amount. Mr. Sehmi stated that this was the reason why he had, in his Replying Affidavit, given the court the full history of the matter. He then went into details as regards the instruction fee under item no. 1 and asked the court to have a look at the submissions made by both parties in relation to the taxation proceedings. He went on to refer to the Advocates' letter to the Senior Deputy Registrar dated 29 of March 2012, bearing the Court's stamp of 2 April 2012. He asked the court to peruse paragraph 21 of his Replying Affidavit which made it very clear as to why he had reservations with regard to that letter. Counsel then went into details of the letters that he had written to the Advocates acting for the Plaintiff as well as the telephone calls he had made to which he had received no reply.

7. Counsel for the Defendants then went on to note that the Application was not a reference so the court had not been invited to assess the taxed costs. He also detailed that the Application was not put forward on a question of setting aside the taxation. He referred the court to **section 51 (2)** of the *Advocates Act* where the court is required to accept the Certificate of Taxation unless it is set aside. He noted that no

application had been made by the Plaintiff to set-aside the Certificate of Taxation. Indeed, no reference with regard to the Taxing Officer's Ruling had been filed by the Plaintiff. He was of the opinion that the Application before court was no more than an afterthought. Counsel then referred the court to his authorities being **S. R. D'Souza & Ors versus Ferrao & Ors (1960) EA 602, Arthur versus Nyeri Electricity Undertaking (1961) EA 492, Rogan-Kamper versus Lord Grosvenor (No. 3) (1978) KLR 203** and **Shah versus Mbogo (1967) EA 116**. As regards the **D'Souza** case, counsel emphasised what he understood to be the general principle as acted upon as expressed in the judgement of **Buckley L. J.** In the quoted case of **In the Estate of Ogilvie: Ogilvie versus Massey (2) (1910) P. 243** at p. **245**:

"On questions of quantum the decision of the taxing master is generally speaking final. It must be a very exceptional case in which the court will even listen to an application to review his decision. In questions of quantum the judge is not nearly as competent as the taxing master to say what is the proper amount to be allowed; the court will not interfere unless the taxing master is shewn to have gone wholly wrong. If a question of principle is involved it is different; on a mere question of quantum in the absence of particular circumstances the decision of the taxing master is conclusive. I think that the learned judge ought not to have interfered."

Similarly in the **Arthur versus Nyeri Electricity Undertaking** case **Gould JA** took a similar line:

"Where there has been an error in principle the court will interfere, but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will intervene only in exceptional cases."

As regards the **Rogan-Kamper** case, my perusal of the same indicates that the learned Judge of Appeal therein endorsed the principle as set out in the **Ogilvie** case (supra).

8. In concluding his submissions, Mr.Sehmi maintained that the Plaintiff herein was clutching at straws. He was of the opinion that there was simply no justification for the Application before court. He detailed that if the Plaintiff had written the letter dated 29 March 2012 addressed to the Senior Deputy Registrar of this court, it was incumbent upon the Senior Deputy Registrar to provide his reasons for arriving at the figure which he had in relation to item 1 of the Bill of Costs. The Senior Deputy Registrar had not responded to the letter which in counsel's view raised considerable suspicion as to the authenticity of the same. He concluded that this court should not tolerate laches or dilatoriness. To this end he pointed to the finding in **Shah versus Mbogo** (supra) where this Court had enunciated on the principles governing the exercise of the court's discretion to set aside (in that case) an *ex-parte* judgement:

"This discretion is intended so to be exercised to avoid injustice or hardship resulting from accidents, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice".

9. To this, Mr. Otieno briefly responded that this court's inherent jurisdiction emanated from **section 3A** of the *Civil Procedure Act*. The requirement that reasons be supplied before a reference is made, is under paragraph 11 of the Advocates Remuneration Order. In that paragraph there is no time limit within which the Deputy Registrar needs to give his reasons. The Plaintiff will be prejudiced by the Deputy Registrar's failure to provide such reasons. Counsel urged me to ignore the aspersions cast by counsel for the Defendant as regards the said letter dated 29 March 2012. He further maintained that all the issues raised by the Plaintiff in opposition to the Bill of Costs had been raised before the Senior Deputy Registrar and taken up with him. However all such was speculative as regards his decision as the parties do not have the reasons therefore. Counsel concluded by underlining that the Application before court was seeking to enlarge time to file a reference and it was not an appropriate forum to make any observations on the merits of the findings of the Senior Deputy Registrar. Counsel re-emphasised that the Defendants should not have applied for execution of the Decree which was issued on 18 June 2009, without details of the taxed costs. This failure to follow the correct procedure for execution would lead to an injustice against the Plaintiff.

10. Unfortunately, it appears that the current court file is a skeleton one. On it is a copy of the Decree

dated 18 June 2009 along with the written submissions of both parties as regards the taxation of the Defendants' Bill of Costs dated 24 August 2011, which also appears on the file. Then there appears the Certificate of Taxation dated 17 July 2012, duly sealed. Thereafter the Application currently before court together with the ancillary documentation in relation thereto is on the file. There is no record of the taxation proceedings before the Senior Deputy Registrar. The only document that appears is a hand written note by the Senior Deputy Registrar headed with the case number and reading:

T. C. **668,300/=**

C. C. F. **1500/=**

F. C. **950/=**

670,750

Regretfully, this court has no idea what these hieroglyphics mean in terms of the taxation of the Bill of Costs. In fact they seem to relate to the figures on the face of the Warrant of Attachment dated 12 October 2012, not to the Bill of Costs at all. I would presume that the initials **T. C.** stand for "taxed costs". It seems therefore that there is nothing on the court file under the hand of the Senior Deputy Registrar relating to the taxation or the Ruling in that regard. It may well be that the Senior Deputy Registrar has kept his own notes in relation to those proceedings.

11. Learned counsel for the Defendants has cast doubt on the authenticity of the letter exhibited to the Affidavit in support of the Application dated 29 March 2012. Certainly the original of this letter does not appear upon the skeleton Court file. However I note from the Affidavit in support of the Application that the copy of the letter exhibited as "SK 4" bears the court's stamp as received on 2 April 2012. On the face of the copy of the letter, there is no evidence that the same was copied to the Advocates for the Defendants. However, the provisions of the **Rule 11** of the Advocates (Remuneration) Order do not require that it should be so copied. I am satisfied that as the copy shows the endorsement of the original having been received by court on 2 April 2012, that the same is authentic. The said **Rule 11** reads as follows:

"11. (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 the 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".

There are two matters of procedure which the Plaintiff would seem to have overlooked so far as the Application before this court is concerned. Firstly, this being an application to extend or enlarge time, as per **Rule 11 (4)**, the same should have been brought by way of Chamber Summons not Notice of Motion. Secondly and with regard to **section 51 (2)** of the Advocates Act, the Plaintiff has not sought orders from this court to set aside the certificate of the taxing officer. Without being asked to do so, this court cannot *suo moto* (of its own accord) set aside the Certificate of Taxation dated 17 July 2012. All that this court has been asked to do is to stay the execution of the Ruling made by the Senior Deputy Registrar not to set-aside the Certificate of Taxation. Consequently the same is final as to the amount of the costs covered thereby. As set out above in the findings in the **Ogilvie** and **Arthur versus Nyeri Electricity Undertaking**cases, questions solely of quantum in taxation matters are best suited to be dealt with by Taxing Officers and there is no good reason why this court should interfere. In any event, it is desirable that litigation such as this which has now dragged on for over the 12 years should come to an end. Accordingly, I dismiss the Plaintiff's Notice of Motion dated 16 October 2012 but in all the circumstances I make no order as to costs.

DATED and delivered at Nairobi this 11th day of February 2013.

J. B. HAVELOCK
JUDGE