REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Case 771 of 2009

OURU POWER LTD…….……………………........……………………………… PLAINTIFF

VERSUS

INTERTEK INTERNATIONAL LTD……………........……….……………. 1ST DEFENDANT

KENYA BUREAU OF STANDARDS…………..………………………. 2ND DEFENDANT

HON. ATTORNEY GENERAL …………………………….....………… 3RD DEFENDANT

RULING

1. Clause 2 of the Advocates Remuneration Order 2006 provides:-

"Fees for getting up or preparing for trial

In any case in which denial or liability is filed, or in which issues for trial are joined by the pleadings a fee for getting up and preparing the case for trial shall be allowed in addition to instructions fees and shall not be less than 1/3 of the instruction fees allowed on taxation:-

……………..

(i) **……………**

(ii) No fee under this paragraph is chargeable until the case has been confirmed for hearing ……………"

This suit was filed on 16th October, 2009 by the Plaintiff against the Defendants jointly and/or severally for Kshs.74,479,211/69. Subsequently all the Defendants entered appearance and filed their respective defences. The last of such defences was filed on 17th March, 2010 by the 3rd Defendant. The Plaintiff filed its bundle of documents on 13th May, 2010 and a statement of issues of law on 7th June, 2010. On 18th January, 2011, a representative of the Advocates for the Plaintiff attended the registry and fixed the suit for hearing on 6th October, 2011. The record would show that on 26th July, 2011, Mrs. J. Manyasi, a senior Deputy Registrar of this court signed an entry removing the suit from the hearing list but the date of the hearing list for which she was removing the suit is not specified. It would seem that the Plaintiff's

Advocates served the 2nd Defendant's Advocates with hearing notice on 28th January, 2011. On3rd October, 2011, the court on its own volition posted a notice to the parties to the effect that all suits listed for hearing between 3rd and 7th October, 2011 had been taken out of the cause list.

2. On 10th October, 2011, the 2nd Defendant took out a motion on notice to strike out the Plaintiff's suit for disclosing no reasonable cause of action. On16th February, 2012, Hon. Kimondo J struck out the suit against the 2nd Defendant with costs. The 2nd Defendant prepared a bill of costs which was taxed at Kshs.1,358,852/60 out of which she allowed a sum of Kshs.327,414/- for getting up fees.

3. By its Chamber summons dated 29th June, 2012, the Plaintiff filed a reference against the said taxation which was partially compromised by the parties on 3rd July, 2012. The parties agreed that the only issue falling for consideration by this court is whether in the circumstances of this case, the taxing master was in order to allow the item for getting up fees. The Plaintiff contended that since discovery had not yet been undertaken and the Defendant had not filed their documents and issues, the hearing of the suit was premature, that he notice taking out the matter from the cause list of 6th October, 2011 was given in good time, that there was no evidence before the taxing master to show that the 2nd Defendant had prepared for trial. Mr. Ogutu, learned Counsel for the Plaintiff relied on the cases of **Mayers –vs- Hamilton & others 1975 EA** and **Evans Thinga Gakuru –vs- KBC HC Misc Appl. No. 343 of 2011** and urged that the court allows the reference against the item on getting up fees.

4. On its part the 2nd Defendant filed written submissions dated 17th July, 2012. It was submitted on the 2nd Defendants behalf that denial of liability had been filed, that issues for trial had been joined by the pleading s, that the 2nd Defendant had prepared for trial as a hearing notice had been served upon it by the Plaintiff, that this case had been confirmed for hearing as the Plaintiff had set in motion all systems for trial, issues had been filed as well as documents. That the 2nd Defendant was not obligated to file any documents having filed a notice of non-admission. To the 2nd Defendant a case is confirmed for trial once the same is listed for hearing. Reliance was placed in the Court of Appeal decision of **Mayers –vs- Hamilton (1975) EA 13**. The 2nd Defendant urged that he taxing master was right as she had referred all the submissions before her before awarding the item for getting up fees.

5. In the case relied on by Plaintiff of **Evans Thiga Gaturu Advocate –vs- Kenya Commercial Bank Ltd Misc Appl. 343 of 2011** when considering whet her a reference had been filed out of time. Hon. Odunga J held that:-

"It is therefore clear that the interpretations by the court especially the High Court on this issue is varied. In my own view, where no reasons appear on the face of the decision of the taxing master, it is only prudent that such reasons be furnished in order for the judge to make an informed decision as to whether or not the discretion of the taxing master was exercised on sound legal principles."

I do agree with that exposition of the law.

6. As to when to interfere with a taxing officer's discretion the Court of Appeal held in the case of **Kipkorir Titoo Kiara Advocates –vs- Deposit Protection Fund Board (2005) 1 KLR 528** that:-

"On reference to a judge from a taxation by the taxing officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer errored in principle in assessing the costs – An example of an error of principle is where the costs allowed are so manifesting excessive as to justify an interference tat the taxing officer acted on erroneous principles.

……………….

***If the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule vi(i)** that would be an error of principle …….."*

7. The item No. 29 of the 2nd Defendants Bill of Costs dated 29th February, 2012 that was before the taxing officer was the one for getting up fees. It was one of the items hotly contested. I have seen the ruling of the taxing master made on 23rd April, 2012. From the record, this is the ruling that was supplied to the Plaintiff as containing the reasons for the award of costs. On the said item No. 29, the taxing officer held:-

"Item 29. I will allow 1/3 of the instructions fees. The 2nd Defendant submitted that they prepared for trial. I will allow Kshs.327,414/-."

From the said ruling therefore, that item was allowed for the reason that the 2nd Defendant had submitted that it had prepared for trial. The 2nd Defendant did reproduce the relevant part of its written submissions before the taxing master. They appear at page 1 of the present written submissions. In it, the 2nd Defendant had submitted that denial of liability had been filed, issues for trial had been joined in the pleadings, the plaintiffs had filed its bundle of documents and the 2nd Defendant had likewise filed its non-admission of the documents on 17th May, 2010, that issues had been filed and that the suit had been listed for hearing on 6/10/11 and the 2nd Defendant had prepared for trial. This is not contained in the ruling of the taxing officer but I will take it that the same informed her decision.

8. From the wording of Clause 2 (ii) of Schedule VI of the Advocates Remuneration Order, it is clear that no fee is chargeable for getting up fee until a case has been confirmed for hearing. Nowhere in the submissions of the 2nd Defendant before the taxing officer was there any indication that the case had been confirmed for hearing. I also note from the ruling of the learned taxing master that she did not seek to ascertain whether this suit was ever confirmed for hearing. That alone would show that the taxing officer failed to apply the formula for assessing the costs for getting up fees and it amounted to an error of principle.

9. Before me, the 2nd Defendant relied on the decision of **Mayers –vs- Hamilton** on the proposition that the suit is confirmed the moment it is set down for hearing. I do not agree with proposition for two reasons. Firstly, the dicta in **Mayer's case** cannot apply in the present case because the Court of Appeal in the case was dealing in a case where the Advocates Remuneration Order does not seem to have contained the provisions of the present Clause 2 (ii) which requires confirmation of the suit for hearing (see letters F and G of the authority).

10. Secondly, under our present rules, a suit is confirmed for hearing after the provisions of Order 11 of the Civil Procedure Rules 2010 have been fully complied with. Notwithstanding that case managers have not been appointed, case conference and trial conference are undertaken by the Judges themselves. Ordinarily, no suit will be confirmed for trial unless order 3 rule 2 and Order 7 Rule 5 have been complied with. I have perused the record and I have confirmed that those provisions had not been complied with. To that extent therefore the suit had not been confirmed for hearing in terms of Clause 2(ii) of Schedule VI of the Advocates Remuneration Order.

11. I should point out here that I am alive to the fact that this is a suit that was filed prior to the coming into force of the Civil Procedure Rules 2010, but by virtue of the transitional provisions of Order 54 Rule 2 of those rules, the said 2010 rules apply to all suits including those which were filed prior to those rules coming into force.

12. Accordingly, I am of the view that the taxing officer was guilty of failing to consider the formula under which getting up fees is awardable under Schedule VI of the Advocates Remuneration Order and thereby erred in principle and her ruling is subject to be interfered with.

13. The answer to the issue put forth for consideration by this court is therefore that item No. 29 in the 2nd Defendant's bill of costs dated 29th February, 2012, for getting up fees was not chargeable and is hereby declined.

It is so ordered.

DATED and DELIVERED at Nairobi this 28th day of September, 2012.

…………………………………………………….

A. MABEYA

JUDGE