



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Miscellaneous Civil Case 1566 of 2007

TOTAL KENYA LIMITED PLAINTIFF

VERSUS

CHEVRON KENYA LTD. & 6 OTHERS DEFENDANTS

R U L I N G

1. The Chamber Summons dated 11th February, 2010 is taken out on behalf of the 3rd Defendant, Kobil Petroleum Limited. The Applicant sought to set aside the ruling by the Taxing Master in regard to assessments of instruction fees at Kshs.50,000/= instead of the sum claimed of Kshs.367,500/=. According to the Applicant, a bill of cost was filed on 3rd June, 2008 seeking for the assessment of costs. Item 1 was the instruction fees sought under **Schedule 6** of the **Advocates Remuneration Order**. The Taxing Officer was faulted for assessing the instruction fees based on paragraph 1 (1) (b) of **Schedule 6** of the **Advocates Remuneration Order**.

2. According to the Applicant, the Taxing Master misguided himself and erred in principle by failing to appreciate that the Respondent had applied before the High Court, under the **Arbitration Act** for an arbitrator to be appointed in respect of a dispute that arose between the parties. The subject matter that was claimed against the 3rd Defendant (Applicant in this application) was in excess of Kshs.31 million. That was the basis upon which the 3rd defendant based the instruction fees for the assessment by the taxing master. The 3rd Defendant defended the proceedings in the High Court to determine whether an arbitrator should be appointed. For that reason, the taxation should have fallen under paragraph 1 (b) and 1 (e) of **Schedule 6**.

3. However, the Taxing Master did not give reasons why he did not apply the correct **Schedule**. The criteria that should have guided the Taxing Officer is set out in the **Remuneration Order**. He is supposed to assess the complexity of the matter which criteria was not taken into consideration. Mr. Ismael, learned Counsel for the Applicant urged the Court to consider the submissions and allow the application for the assessment of fees owing to the 3rd Defendant while applying the correct **Schedule**.

4. This application was opposed; Mr. Mbaluto, learned Counsel for Total (K) Ltd. submitted that the dispute between the parties was not liquidated. It was an application to refer the dispute for arbitration. The value of subject matter was not stated. The application was filed by way of a Chamber Summons which was struck out with costs to the Respondent. Thereafter, the 1st and 2nd Respondents, filed their bills of

costs and they were awarded a sum of Kshs.50,000/= each as instructions fees. When the 3rd Defendant filed their bill, it was also assessed for the same amount which was reasonable and fair assessment for the services rendered. The Taxing Master applied **Schedule 6 (L)** and awarded a sum of Kshs.50,000/= as in other similar matters.

5. In analyzing the issues raised in this application, the principles to bear in mind, is whether the Taxing Officer made an error in principle, this can be discerned if the following factors were not taken into consideration while making the assessment;

- (i) ***The nature and the importance of the matter.***
- (ii) ***The amount of the value of the subject matter involved.***
- (iii) ***The interest of the parties and the general conduct of the proceedings.***

See the case of **FIRST AMERICAN BANK OF KENYA v. SHAH AND OTHER EALR (2002) 1EA page 64 the judgment of Ringera, J.** where it was held:-

“The High Court was not entitled to upset a taxation merely because, in its opinion, the amount awarded was high and it would not interfere with a Taxing Officer’s decision unless the decision was based on an error of principle of the fee awarded was so manifestly excessive as to justify and inference that it was based on an error of principles (Steel Construction Petroleum Engineering (EA) Limited v. Uganda Sugar Factory (1970) EA 141 followed. Under the Advocates (Remuneration) Order, some of the relevant factors to be considered were the nature and importance of the matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge.”

6. The issue for determination in this application is whether the Taxing Master erred by holding that the applicable **Schedule** is paragraph 1 (L) of **Schedule 6** of the **Advocates (Remuneration) Order**. The other issue to determine is whether the Taxing Master took into consideration the above factors. I have gone through the proceedings that gave rise to the order in which the suit which was filed by way of Originating Summons by the Applicant was struck out with costs to the Respondent. The application that challenged the Originating Summons was brought by the 3rd Defendant. The proceedings reveal that application was argued principally by Mr. Ismael, learned Counsel for the 3rd Defendant.

7. I have also considered the pleadings, the Applicant was seeking for a determination of a dispute regarding the cost of murban crude oil which was supplied to the Respondents in the month of November, 2004. The Applicant had attached several documents from which the costs which was sought to be determined could be deduced. Going by the volumes of documents and the issues that were raised before **Justice Kihara**, it is obvious this was a weighty matter, had the Taxing Officer taken into account the complexity of the matter, he would have arrived at the correct **Schedule** for the assessment of the instruction fees. Moreover, the Taxing Officer did not give reasons for choosing to apply that **Schedule 6 (L)** and for disregarding the submissions by the 3rd Defendant.

8. In the premises, I find there is an error in principle. This application is allowed and the decision of the Taxing Master dated 1st February, 2010, is set aside. Item (1) of the applicants bill of costs should be submitted for taxation by another Taxing Officer who should take into account the complexity of the instructions and the work done by the 3rd Defendant’s Advocate. The 3rd Defendant shall also be entitled to costs of this application.

RULING READ AND SIGNED ON THIS 17TH SEPTEMBER, 2010.

M.K. KOOME

JUDGE