REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS 143 OF 2008

MURAGE & MWANGI, ADVOCATES.....ADVOCATE/APPLICANT

VERSUS

KENYA POWER & LIGHTING COMPANY LIMITED….CLIENT/RESPONDENT

RULING

The advocate/client bill of costs herein dated 26th February, 2008 was taxed on 6th June, 2008 at KShs. 3,564,716/00, all inclusive. Both parties have challenged that taxation under **paragraph 11** of the **Advocates (Remuneration) Order** (remuneration order). The client's challenge is by **chamber summons dated 28th August, 2008**. The Advocate challenged the taxation by **chamber summons dated 29th August, 2008.**

When the applications came up for hearing on 24th November, 2008, it was agreed that the Advocate's application raises an issue of principle while the Client's application mainly challenges quantum. It was agreed that the Advocate ought to address the court first. The parties agreed to put in written submissions. I have considered those written submissions and the authorities relied upon.

The issue of principle raised in the chamber summons dated 29th August, 2009 is that item 1 of the bill of costs should have been taxed under Schedule VI, paragraph 1(b) of the remuneration order, and not under paragraph 1(l) of the same schedule. The further issue raised in this application is that even if it were held that the item was taxable under paragraph 1(l), the amount awarded was so manifestly low as to amount to a wrongful exercise of discretion by the taxing officer. Item 1 of the bill was instruction fee. KShs. 8,608,000/00 was claimed. Only KShs. 1,500,000/00 was allowed.

In the chamber summons dated 28th August 2008, the main complaint is that the sum of KShs. 1,500,000/00 allowed on item 1 was so manifestly excessive as to amount to an erroneous award and ought to be reduced. The getting-up fee (item 47) which is pegged on item 1 ought to be similarly reduced.

There is also a complaint on items 18, 28, 29, 36, 37, 38, 94, 97, 107 and 114. That complaint is that those claims were allowed notwithstanding that the Advocate had failed to establish that the work therein had been done as claimed. The items were correspondence, attendances at the court registry, making copies of documents and service of process. Except for items 107 and 114 (KShs. 1,000/00 each), the others were small sums of money.

In the present case instruction fees would be taxable under paragraph 1(b) of the schedule only if defence

or other denial of liability was filed, and if it is possible to determine the value of the subject-matter from the pleadings, judgment or settlement between the parties.

It is common ground that defence in the suit was filed, and that there is no judgment or settlement as the suit awaits hearing and disposal. The Advocate submits that it is possible to determine the value of the subject-matter from paragraphs 7 and 8 of the plaint. I have perused that plaint, as well as the defence and reply to defence.

The Plaintiff in the suit **(Nairobi HCCC No. 1295 of 2001)** claimed general damages, costs and interest on account of negligence in performance of an electric power supply contract between it and the defendant (for whom the Advocate was acting). The Plaintiff pleaded at paragraph 7 of the plaint that as a result of the said negligence

"…**the Plaintiff has not been able to carry on with the coffee farming business as envisaged and has consequently lost an average of …2,000 bags of coffee each year at the modest price of US $ 240 per bag from 1990 to date. The Plaintiff holds the Defendant liable in negligence for the stated loss of business."**

At paragraph 8 it is pleaded that the Plaintiff's claim against the Defendant is for general damages for:-

"…**loss of business from 1990 to date as a result of the Defendant's negligence…".**

It is clear and self-evident that the Plaintiff claimed unquantified general damages. It did not claim quantified special damages. The quantum of such general damages, if awarded, will only be known upon delivery of judgment or upon the recording of a settlement. There is now no such judgment or settlement. Looking at paragraphs 7 and 8 of the plaint, and indeed also at the defence and reply to defence, it is not possible at all to determine the value of the subject-matter from the pleadings. The Plaintiff gave the figures of 2,000 bags of coffee per year @ US $ 240 each bag to demonstrate the loss it was incurring and for which it held the Defendant liable, and to give an indication as to the kind of general damages it was anticipating. Those figures do not constitute a quantification of the general damages claimed.

The learned taxing officer therefore did not err in holding that it was not possible to determine the value of the subject-matter of the suit from the pleadings. I similarly find. He did not commit any error of principle by taxing the instruction fees under Schedule VI, paragraph 1(l), and not under paragraph 1(b), of the remuneration order.

Regarding quantum, this was a matter for the discretion of the taxing officer. The court would interfere only if it is demonstrated that the amount in question is so manifestly low or excessive as to amount to a wholly erroneous award.

In the present case the taxing officer has stated clearly in his ruling that he took into account the following matters, as he was obligated to do:-

(i) the nature and importance of the suit;

(ii) the interest of the parties in the suit;

(iii) the general damages anticipated by the plaintiff;

(iv) the fact that though the case had been prepared for hearing it had not yet been heard; and

(v) that the Advocate was the second advocate to act in the matter for the Client.

The learned taxing officer also noted that the Client offered between KShs. 400,000/00 and KShs. 500,000/00 as instruction fees. As already seen, he awarded KShs. 1,500,000/00.

Can this sum be said to be manifestly low or manifestly excessive? I think not. It matters not that, were I the taxing officer, I would probably have awarded rather less or rather more than that sum. What is to be noted is that the suit was of considerable importance to the parties, especially in view of the general damages anticipated by the Plaintiff. I cannot fault the taxing officer in the exercise of his discretion in arriving at the award he made on instruction fees.

In respect to items 18, 28, 29, 36, 37, 38, 94, 96, 97, 107 and 114, the Client's complaint is that the Advocate failed to establish that the work claimed in those items had been done. Paragraph 75 of the remuneration order was cited. Sub-paragraph (1) of that paragraph states:-

"**75(1) All drafts and other documents or copies thereof, the preparation of which is charged for, shall be produced at taxation if required by the taxing officer."**

I find nothing in the record of taxation to indicate that the taxing officer required production by the Advocate of any documents, and that the Advocate was unable to produce them. By giving him the "benefit of doubt", the taxing officer was just saying in other words that he believed, on balance, that the Advocate had done the work he claimed for in those items. There is no substance in this complaint.

In the result I find no merit in either the Client's or the Advocate's application. Both are hereby dismissed. Each will bear his/its own costs of the applications. It is so ordered.

DATED AT NAIROBI THIS 25TH DAY OF JUNE, 2009

H. P. G. WAWERU

J U D G E

DELIVERED THIS 26TH DAY OF JUNE, 2009