REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION 6161 OF 2006

KENYA TEA DEVELOPMENT AGENCY LTD .....APPLICANT

V E R S U S

J. M. NJENGA & CO. ADVOCATES .....RESPONDENT

R U L I N G

This is a reference (by chamber summons dated 4th June, 2007) against the taxation dated 12th April, 2007 of an advocate and client bill of costs dated 6th August, 2006 in respect to work done in **Nairobi HCCC NO. 4994 of 1993 (O.S.).** The bill was taxed at KShs. 23,229,871/00. It was based upon a party and party taxation in the same suit following the formula provided in Schedule VI, Part B of the Advocates (Remuneration) Order (hereinafter referred to as the Order). That part provides in the material portion:-

"**B – ADVOCATE AND CLIENT COSTS**

As between advocate and client the minimum fee shall be:-

(a) the fees prescribed in A above, increased by one-half; or

(b) .....; or

(c) ....."

The fees prescribed in A are, of course, the party and party costs.

The reference is brought under paragraph 11 of the Order. The taxation is challenged in respect to item No. 1 of the bill (instruction fee, and actually comprising items Nos. 1, 2, 3, 4 and 5). There is only one ground for the application stated on the face thereof:-

That the taxing officer misdirected himself in his finding that his discretion was limited to adopting the costs as taxed in the party and party bill of costs, and thereby wrongly exercised his discretion.

The arguments backing this ground are also stated on the face of the application. They are:-

(a) That the costs as taxed in the party and party bill included interest specifically awarded to the plaintiff in the suit (the Applicant herein) and therefore not due to the Respondent.

(b) That those costs also included fees for services rendered by a previous firm of advocates acting for the Applicant in the suit from 1993 to 14th May, 2002 before the Respondent took over conduct of the suit for the Applicant, and therefore also not due to the Respondent.

There is a supporting affidavit sworn by one CHRISTOPHER M'MAITSI, the Applicant's company secretary. The affidavit in essence sets out the arguments in support of the reference.

Not unexpectedly, the Respondent has opposed the reference as set out in the replying affidavit sworn by one JEREMY M. NJENGA, a partner in the firm. The grounds of opposition emerging from the replying affidavit are:-

1. That the taxing officer did not misdirect himself and exercised his discretion properly.

2. That his decision resulting from that exercise was sound in law.

The bulk of the replying affidavit comprises submissions in support of that position taken by the Respondent.

I have considered the arguments as contained in the supporting and replying affidavits and also as made by the learned counsels at the hearing, including the cases cited. Indeed the formula for taxing an advocate and client bill of costs for work done in the High Court is provided for in Part B of Schedule VI of the Order. But the phrase "**fees prescribed in A above, increased by one-half"** in Part B of Schedule VI, does not necessarily mean the fees as taxed in a party and party bill. It does not mean that the taxing officer need only look at the global sum as taxed between the parties and increase the same by one half in order to arrive at the correct costs due to an advocate in an advocate and client taxation. The taxing officer is duty bound to look at each item in the party and party bill of costs in order to arrive at what is properly due to the advocate. This is especially important where more than one advocate has acted for the party in the matter. Whereas in a party and party taxation it will not matter how many advocates may have acted for the client in the matter, that fact will be of importance in an advocate and client bill of costs. This is because an advocate can charge only for the work he has done. He cannot charge for the work done by a previous advocate in the matter.

But having said that, a new advocate coming onto a matter somewhere in the middle of the proceedings in the High Court will be entitled to the full instruction fee prescribed in Part A of Schedule VI of the Order subject to the taxing officer's discretion to increase or (unless otherwise provided) reduce it, and as augmented by the formula in Part B (increase by one-half). A client who changes advocates in the High Court therefore can expect to pay the full instruction fee as many times as he pleases to change advocates, notwithstanding that he can recover only one instruction fee in a party and party taxation, unless there is a judge's certificate for more than one counsel.

In the present case the taxing officer did not look at each item in the party and party bill in order to know what was properly due to the Respondent. Had he done so, he would have noted that the instruction fee awarded in the party and party bill of costs was KShs. 4,540,000/=. He would then have increased this sum by one-half in order to arrive at the correct award for instruction fee for the Respondent. This failure amounted to a grave misdirection and error of principle that resulted in an award to the Respondent that is wholly erroneous and excessive.

Further, the Respondent should not have been allowed any costs for work done before he came onto the record for the Applicant on 14th May, 2002. The Respondent could not be properly allowed costs for work done by the previous advocates, Messrs J. K. Kibicho & Company. He was entitled only to costs for work done since he began representing the client in the matter. This was another error of principle

committed by the taxing officer.

In the present case, as already seen, objection has been taken only to the instruction fee. The amount claimed for instruction fee in the party and party bill of costs dated 24th May, 2006 was KShs. 4,540,000/00. That was the amount allowed. Also claimed in the party and party bill of costs was interest on the total bill of KShs. 6,164,167/00 at 12% p.a. from 3rd September, 1993 (the date of filing suit) to 18th May, 2006. The interest amounted to KShs. 9,616,100/52. It was also allowed.

Now, this interest claimed in the party and party bill is not, and cannot be, fees prescribed in Part A of Schedule VI. The interest was awarded in the decree upon the costs to the Applicant. It should not have been part of the party and party bill of costs and should have been reckoned and calculated outside the bill of costs, preferably at the time of payment of the costs or execution for the same.

For the same reason, the interest should not be part of the Respondent's costs in its advocate and client bill of costs. Interest on an advocate's costs is catered for entirely separately from interest on a party's costs awarded in the decree. It is chargeable under paragraph 7 of the Order independently of whether or not a party has been awarded interest on costs in the decree.

The Respondent's costs should thus not include the interest awarded on costs in the decree. By including that interest in calculating the Respondent's costs, the taxing officer committed another serious error of principle that resulted in improper increase of the Respondent's costs by over KShs. 14 million (that is the interest of KShs. 9,616,100/52 increased by one-half).

For the above reasons the taxation of the advocate and client bill of costs was entirely unsatisfactory. To let it stand would amount to a grave injustice to the Applicant. I will therefore allow this reference. The taxation done on 12th April, 2007 of the Respondent's advocate and client bill of costs dated 6th August, 2006 is hereby set aside. I direct that the bill of costs be remitted back to the taxing officer for taxation afresh in accordance with the guidelines given in this ruling. The Applicant shall have costs of this application. It is so ordered.

DATED AT NAIROBI THIS 25TH DAY OF APRIL, 2008

H. P. G. WAWERU

J U D G E

DELIVERED AT NAIROBI THIS 25th DAY OF APRIL, 2008