REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

MISCELLANEOUS APPLICATION 650 OF 2003

KIRUNDI & CO. ADVOCATES ……APPLICANT

V E R S U S

KENYA COMMERCIAL BANK LTD……..RESPONDENT

R U L I N G

This is a reference (by chamber summons dated 8th February, 2008) from taxation of the Applicant's advocate/client bill of costs dated 25th October, 2007. KShs. 152,011,524/20 was claimed in the bill; KShs. 1,447,215/50 was awarded. The only substantive item in the bill contested before the taxing officer was instruction fee, claimed at KShs. 96,606,750/00. KShs. 1 million was awarded on this item. The incidental claims of one-third increment to arrive at advocate/client instruction fee and Value Added Tax (VAT) were proportionately reduced.

The reference is only with regard to that one item, instruction fee. I have considered the submissions of the learned counsels appearing, including the many cases, texts and other documents appearing in the Applicant's amended list of authorities dated 8th May, 2008, and also the Respondent's list of authorities dated 5th March, 2008. One may not tell from the size of the application, supporting documents and also the number of authorities cited; but this is really a very simple matter. The back-ground is not in dispute and is as follows:-

1. The Applicant was appointed by the Respondent as leading counsel to prosecute **Nairobi HCCC No. 1314 of 1996.**

2. In that suit the Respondent, KENYA COMMERCIAL BANK LTD, had sued (through another firm of advocates) BARCLAYS BANK OF KENYA LIMITED for damages arising out of defamation.

3. The pleadings filed did not go beyond the plaint.

4. The suit was compromised and withdrawn, apparently unconditionally.

The main issue for determination in this reference is,

Whether the value of the subject-matter in Nairobi HCCC No. 1314 of 1996 can be determined from the pleadings, judgment or settlement between the parties?

If so, the instruction fee should have been taxed under **Schedule VI, Part A, paragraph 1(a)** of the **Advocates (Remuneration) Order** (Rem Order). If not, taxation had to be under paragraph 1(l) of the same part and schedule.

It is common ground that there was no judgment here; the suit was withdrawn. It is also common ground that there was no settlement between the parties fixing any damages to be paid. The only pleading filed was the plaint. Mr. Kirundi, appearing for the Applicant, submitted as he had done before the taxing officer. His argument was that it was possible to determine the value of the subject-matter from the defamatory broadcast pleaded in the plaint. The broadcast was to the effect that Kenya Commercial Bank had "**cooked"** its accounts to reflect a reduction by over KShs. 1 billion in the provision for bad and doubtful debts, which in turn would result in a "**write-back"** to the bank's profit and loss account that would make its profits go up. He further submitted that in reality, therefore, the subject-matter of the suit was this alleged "**cooking"** of accounts whose value, in terms of the alleged false increase of the bank's profits, was given at over KShs. 1 billion. In his view, the value of the subject-matter was clearly this KShs. 1 billion. The taxing officer thus erred in principle in taxing the instruction fee under paragraph 1(l) instead of paragraph 1(a).

Mr. Kirundi also argued in the alternative that, given the enormous importance of the suit to the Respondent and the amount of work done by the Applicant, the taxing officer ought to have been guided by the KShs. 1 billion mentioned in the pleaded defamatory broadcast in determining the fair and reasonable instruction fee to be awarded to the Applicant. As it happened, the amount awarded was so manifestly low as to amount to an error of principle.

The response of Mr. Ougo, learned counsel for the Respondent, was that the cause of action pleaded in the only pleading filed (the plaint) was defamation. The subject-matter of the suit was therefore the alleged damage to the Plaintiff's character and reputation for which it claimed damages. The monetary value of that subject-matter could not be determined from the pleadings. It could also not be determined from any judgment, as there was none; the suit was withdrawn at its early stages. There was also no monetary settlement between the parties, the suit having been simply withdrawn.

This being the case, further submitted Mr. Ougo, assigning any monetary value to the subject-matter was erroneous and speculative. It was simply not possible to determine the value of the subject-matter. Instruction fee was therefore properly taxed under paragraph 1(l), though the taxing officer was too generous, considering that the basic instruction fee provided under the paragraph was, at the relevant time, only KShs. 4,000/00. Save for this undue generosity, he did not commit any error of principle.

I have considered those rival submissions. The subject-matter of a defamation case is the alleged damage to the reputation and character of the plaintiff for which damages are sought. The value of that damage cannot be quantified in the pleadings; that is why unquantified damages are claimed. Should the plaintiff get judgment, the court will quantify the damages to be awarded. The quantified damages then become the value of the subject-matter. The parties themselves may reach settlement on what damages will be paid to the plaintiff. In that case the settlement sum becomes the value of the subject-matter.

In the present case, there was no such settlement. There was also no judgment awarding any damages. It was thus not possible to determine the value of the subject-matter from any judgment or settlement between the parties. Was it possible to determine such value from the pleading filed, that is, the plaint? Certainly not. The claimed damages were not, and could not have been, quantified. Mr. Kirundi's argument, though ingenious, that the value of the subject-matter was the alleged falsification of the Plaintiff's accounts to the value of KShs. 1 billion cannot, with respect, be correct and must be rejected. Without any judgment awarding damages or a settlement between the parties quantifying any such damages, it is not possible to quantify the value of the subject-matter in a defamation case. Such value will not be determined from the plaint or any other pleading.

I therefore hold that the present case fell in the category provided for in paragraph 1(l) of Part A of Schedule VI of the Remuneration Order, being not a case provided for in any sub-paragraphs (a) to (k) (both inclusive) in paragraph 1 of Part A of the schedule. The case certainly did not fall under paragraph 1(a) for the plain reason that the value of the subject-matter could not be determined from the pleadings, judgment or settlement between the parties. The taxing officer therefore taxed the bill under the correct provision and committed no error of principle in that regard.

I will now determine the alternative argument presented by Mr. Kirundi. That argument was that in exercising his discretion, the taxing officer awarded an amount for instruction fee that was so manifestly low as to amount to an error of principle.

The law in this regard has been well-settled for a long time now. Where the taxing officer has committed an error of principle the court will intervene. However, questions solely of quantum are regarded as matters which taxing officers are particularly suited to deal with, and the court will intervene only in exceptional cases. In exercising his discretion the taxing officer will take into account all relevant circumstances of the case, including the nature and importance of the case to the parties, the amount involved, the interest of the parties, the general conduct of the proceedings, and such.

What was the case here? The Respondent and the Defendant in the defamation case were probably the largest banks in the country at the time and no doubt business rivals. The seriousness of the alleged defamation, if proved, could not have been in doubt. The possible harm to the reputation of the Respondent as a bank and damage to its business on account of the alleged defamation, were a serious possibility. In short, the importance of the case to the Respondent could not have been in doubt. If it got judgment, the damages awarded were likely to be considerable; hence the importance of the case to the defendant as well. If the matter went to trial it would be a battle of titans. But the matter never went to trial. Only the plaint was filed. The suit was then withdrawn.

I have no doubt that the Applicant gave the brief the enormous seriousness that he says he did. I also have no doubt that his firm expended the considerable work on the brief that he says it did. And that was as it should have been! A client must expect the very best of his advocate, no less, whatever the brief.

This was the kind of case where, if the Applicant had negotiated his fees up front, he would probably have got much more than what the taxing officer awarded him. But he did not negotiate his fee. The case remained essentially what it was, a straight-forward defamation case. The scale instruction fee provided under paragraph 1(l) at the relevant time was only KShs. 4,000/00. The taxing officer duly considered all necessary factors in determining what to award to the Applicant. That is why he did not multiply the scale instruction fee by a factor of ten, twenty, or even a hundred. He multiplied it by two hundred-and-fifty (250) to arrive at the KShs. 1 million that he awarded as instruction fee! He was, in my respectful view, more than generous. If he erred at all, it was on the generous, not the mean, side!

Having correctly determined the paragraph and sub-paragraph of Part A of Schedule VI upon which to tax the instruction fee, the rest was purely a question of quantum. That was a question that the taxing officer was eminently suited to deal with. The resulting award was not so low as to amount to an error of principle; on the contrary, it may be argued that it was the opposite. This is not an exceptional case meriting interference by the court.

For the above reasons I find no merit in this reference and I must reject it. It is hereby dismissed with costs to the Respondent. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF JULY, 2008

H. P. G. WAWERU

J U D G E

DELIVERED THIS 25TH DAY OF JULY, 2008