

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 740 of 2003

BANK OF INDIA.....PLAINTIFF

- VERSUS -

SURGILABS LIMITED.....1ST DEFENDANT

RAMESH SHAMJI BHATT.....2ND DEFENDANT

MRS. JAGDEEP RAMESH BHATT.....3RD DEFENDANT

BHAGWANJI RAICHAND SHAH.....4TH DEFENDANT

R U L I N G

On 11th July 2007, the Taxing Officer of this court assessed the costs to be paid to the defendants at Kshs.110,713/40. The defendants were aggrieved by the said assessment of their costs. They filed reference to this court pursuant to the provisions of Paragraph 11 of the Advocates (Remuneration) Order. The defendants sought an order of this court to review or set aside the said decision of the Taxing Officer. They further sought an order for this court to substitute its own decision thereof or alternatively remit back the taxation to the Taxing Officer for re-assessment. The defendants were aggrieved that the Taxing Officer had taxed Item No.1 in the defendants' bill of costs without taking into consideration the fact that the plaintiff had sought interest in the its suit. The defendants were of the opinion that the Taxing Officer had erred in principle by failing to consider the element of interest in assessing the costs due to the defendants.

At the hearing of the reference, I heard the submissions made by Miss Nagi for the 1st, 2nd and 3rd defendants. She submitted that the Taxing Officer had erred in principle when she failed to take into account the element of interest in assessing the defendants' instructions fees. She explained that the plaintiff had sought to be awarded in its plaint the principal sum together with Interest. According to Miss Nagi, the value of the subject matter of the suit should be determined from the pleadings filed by the parties, the judgment entered or where there is a compromise of the suit, such compromise. She submitted that under Schedule VI Paragraph 1(b) of the Advocates (Remuneration) Order, 1997 (*which was applicable in this case*), the instructions fees should have been based on the amount pleaded of Kshs.1,650,557/35 and an interest at rate of 19% per annum. She explained that the plaintiff had in the alternative pleaded that it should be awarded the sum of Kshs.740,756/60 and Swiss Francs 66,600 apart from damages and an interest rate of 19% per annum on the principal until payment in full of the principal sum, costs and interest.

Miss Nagi submitted that in the circumstances the defendants were entitled to have their instruction fees assessed based on what was pleaded by the plaintiff in the plaint. She took issue with the fact that the Taxing Officer had taken into account the principal sum while ignoring the fact that the plaintiff had sought to be awarded 19% interest per annum. She urged the court to hold that the defendants were entitled to have their instruction fees assessed together with the interest. In support of her argument, Miss Nagi relied on Ibrahim J's decision in Desai Sarvia & Anor vs. Giro Commercial Bank, Nairobi HCCC No.1847 of 2002 (unreported) where he held at page 4 as follows:

“..... it is the plaintiff to decide how it pleads or makes its claim. The important thing is that the interest is part of the plaintiff’s claim as instructed to its advocates and the value of the interest is determinable. It is a factor to be taken into account in the assessment of the instruction fees. I therefore hold that the decision by the Taxing Master to the effect that no instruction fees is allowed on interest accruing is not sound in law is not sustainable in principle.”

She urged the court to allow the reference and allow the reference by the defendants.

Mr. Mwenda for the plaintiff opposed the reference. He relied on the replying affidavit filed by Raja Kishori Lenta on behalf of the plaintiff. He submitted that no judgment was entered in favour of the defendant in the suit, rather, the plaintiff’s suit was dismissed for want of prosecution. He maintained that there was no legal reason for the court to award instruction fees on the basis of the claim for interest pleaded in the plaint since no decision was made by the court regarding the payment of such interest.

He submitted it was not open for the defendants to challenge the decision of the court in dismissing the suit for want of prosecution at the stage when the Taxing Officer was assessing the costs payable to the defendants. He reiterated that the defendants’ bill of costs that was taxed by the Taxing Officer was manifestly excessive. He took issue with the Taxing Officer’s decision to assess the defendants’ costs using the 1997 Advocates (Remuneration) Order instead of the 1986 Advocates (Remuneration) Order. He urged the court to dismiss the reference since there was no basis in law for allowing the same.

I have carefully considered the rival arguments made in this reference. I have also read the reasons given by the Taxing Officer in support of her decision to tax Item No.1 which the defendants seek to impeach in this reference. In determining whether to interfere with the discretion a Taxing Officer in taxing a bill of cost, this court is guided by the principles laid down by the Court of Appeal in Kipkorir, Titoo & Kiara Advocates –vs- Deposit Protection Fund Board [2005] IKLR528 at Page 533, where the court held that;

“On a reference to a judge from the taxation by the taxing officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs. In Arthur vs. Nyeri Electricity Undertaking [1961] E.A 497 Paragraph I: ‘where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases.’ An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an interference that the taxing officer acted on erroneous principles – see Arthur – vs- Electricity Undertaking (supra) and where the taxing officer has overemphasized the difficulties, importance and complexity of the suit (See Devshi Dhanji –vs- Kanji Naran patel (No.2) [1978] KLR 243)”.

Immediately after the taxing officer assessed the defendants’ bill of costs, both the plaintiff and the defendants were dissatisfied with her decision. The plaintiff and the defendants filed separate references to this court challenging the decision of the taxing officer. The plaintiff did not prosecute its reference when the same was listed for hearing on 19th June 2008. This court dismissed the plaintiff’s reference for want of prosecution on the said date. The issue for determination by this court in this reference is whether the taxing officer committed such errors of principle in taxing the defendant’s bill of costs as to warrant interference by this court. The defendants main complaint relates to the assessment of their instruction fees as contained in Item No.1 in their bill of costs. The Taxing Officer assessed the defendants’ instruction fees on the basis of the sum of Kshs.1,650,557/35 which the plaintiff sought to recover from the defendants in its suit. The Taxing Officer assessed the defendants’ instruction fees at Kshs.64,758/40. The defendants had sought assessment of their instruction fees at Kshs.310,824/25 on the basis that the plaintiff had sought to be awarded the principal sum of Kshs.1,650,557/35 plus interest at the rate of 19% per annum. In their bill of costs, the defendant used the figure of Kshs.18,054,977/04 to arrive at their assessment of the sum mentioned above. The defendants allege that Taxing Officer committed an error in principle when she failed to include the element of interest in assessing the instruction fees payable to the defendants.

I have considered the defendants’ argument in this regard. I agree with the submission made by the

defendants that where interest is awarded by the court, such element of interest shall be taken into account when assessing the instruction fees payable to the successful party. However, where a suit has been dismissed for want of prosecution by the court, as in the present suit, it is clear that no order regarding interest was made by the court. In dismissing a suit for want of prosecution, the court is not making judgment on the basis of the merits of the case; rather, the court is making a decision on the basis of the rules of Civil Procedure.

The defendants cannot therefore claim that a decision was made by the court regarding interest when the court dismissed the plaintiff's suit for want of prosecution. Neither can the defendants allege that since the plaintiff pleaded in its plaint that it should be awarded interest on the principal amount, the same ought to be taken into account when assessing the instruction fees payable to the defendants. Under Section 26 of the Civil Procedure Act, the court has discretion to determine whether or not to award interest. Further, the court has discretion to make an award on the rate of interest that shall be paid to any successful party. It is therefore clear that the fact that a plaintiff pleads that it should be awarded interest at a certain annual rate on the principal amount does not necessarily imply that such interest pleaded shall be awarded by the court. It cannot therefore be said that when the plaintiff pleads that he should be awarded interest on the principal amount then such element of interest is automatically taken into account when an assessment of costs is being made. A condition precedent for the taking into account of the element of interest is that an order must first have been made by the court. In that regard, I agree with the reasoning of Ibrahim, J in Desai Sarvia & Anor –vs- Giro Commercial Bank (*supra*).

In the premises therefore, since the Court (*in dismissing the Plaintiff's suit for want of prosecution*) did not make any order regarding the payment of interest, the thrust of defendants' argument regarding the taking into account of the element of interest in assessing the defendants' instruction fees cannot be sustained. The Taxing Officer did not commit an error of principle or wrongly exercise her discretion when she assessed the instruction fees payable to the defendants after excluding the element of interest. This reference lacks merit. It is hereby dismissed with costs to the plaintiff.

DATED at NAIROBI this 8th day of OCTOBER, 2008.

L. KIMARU

JUDGE