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

Civil Case 567 of 1999

IN THE MATTER OF THE ADVOCATES ACT

AND

IN THE MATTER OF THE TAXATION OF

PARTY AND PARTY BILL OF COSTS

BETWEEN

SOUTHERN CREDIT BANK CORPORATION LIMITED..PLAINTIFF/APPLICANT

VERSUS

KINGSWAY TYRES & AUTO MART LTD. ….........................…….1ST DEFENDANT

NAKUMATT HOLDINGS LIMITED ……...………........................…2ND DEFENDANT

COMMISSIONER OF CUSTOMS & EXCISE ..……..........................3RD DEFENDANT

KINGSWAY MOTORS LIMITED ….................................4TH DEFENDANT/APPLICANT

RULING

In the amended Plaint dated 1st February, 2001, the Plaintiff interalia sought for special damages as set out in paragraph 19, plus costs and interest. In paragraph 19(b) the Plaintiff sought for "**loss on the loans and facilities secured by the said vehicles whose total outlay now stands at 47,330,571/80 as at 30th April, 1999 with interest thereon at a rate of 4% per month from the said date"**. The dispute between the parties involved 29 new KIA pride motor vehicles allegedly bought with facilities from the Plaintiff. The exact amount of monies advanced by the Plaintiff and the value of the subject motor vehicles is not disclosed in the amended Plaint.

The initial party who was advanced financial facility by the Plaintiff went into receivership. The facility was for the purchase of 29 new KIA pride motor vehicles from a company known as **Kingsway Motors Ltd**, the 4th Defendant herein. It appears only 15 motor vehicles were released to **M/S Shah Motors (K) Ltd**. According to the Plaint, the directors of **Shah Motors Ltd** fled the country sometimes in 1997 and due to their disappearance 14 of the said motor vehicles were illegally moved away from the show room of **Shah Motors (K) Ltd**. The said vehicles were pride saloon vehicles allegedly pledged as a security for the loan facility advanced by the Plaintiff. The Plaintiff then suspected several parties to have

been behind the disappearance of those vehicles culminating in suing 4 defendants.

The Plaintiff later discovered the 14 missing vehicles were registered in the names of **Athi River Mining Company** having been sold to them by the 4th Defendant **M/S Kingsway Motors (K) Ltd**. It is alleged that the said vehicles are the subject of another litigation in HCCC No.21/1998. It is clear that 13 of the said vehicles were attached by the Commissioner of Customs and Excise from a private godown. By reasons of the matters stated, the Plaintiff claim to have suffered loss and damages. And it is against that background that the plaintiff sought for special damages as set out in paragraph 19 of the Amended Plaint.

According to **Mr. Wandabwa** the suit was for special damages particulars of which are set out and whose magnitude is determinable and calculable. As at the date of filing suit, the Plaintiff was claiming a sum of Kshs.47,330,571/80, hence the subject matter is clearly determinable. And that the taxing master was correct in including the issue of interest in the claim.

The prayers of the Plaint was based on the subject value of the vehicles that were lost due to the disappearance of the directors of **Shah Motors (K) Ltd**. The Plaintiff did not pray for a liquidated claim but for what it calls special damages. I have no basis to show how the figure of Kshs.47,330,571/80 was arrived at. The said figure is not a liquidated claim but was based on what the Plaintiff thought had been lost through deception. In any case the interest rate of 4% does not arise from a contractual agreement or document.

It is not factual or legal that the Plaintiff would have succeeded in the claim set out plus interest at the rate of 4%. The taxing master contended that she based her decision on the interest because that is what the Plaintiff would have been awarded had it succeeded in the matter. Even if the Plaintiff had succeeded, I am not sure it would have gotten judgement for Kshs.47,330,571/80, because no basis was laid for that claim. The sum was a mere claim with no documentary or legal basis and it cannot be termed as acceptable unless it was factually proved and determined to be correct. In my view the sum was not a representative of the true value of the subject matter. And therefore the issue of interest thereon could not be a basis to guide or persuade the taxing master. The criteria for arriving at the figure of Kshs.47 million is suspect but was in my view based hypothesis with no formula to guide the court. It is my position the claim by the Plaintiff was unascertainable with precise definition. The figure was subject to proof as it was only special damages, where the formula and criteria has not been defined.

In **Misc. Civil Application No.150/2006 George Arunga Sino t/a John Brooks Consultants**, I held

"It must be appreciated that instruction fees is assessed having regard to the case and labour required, the number and length of papers to be perused, the nature and importance of the matter, the amount or value of the subject matter involved, the interest of parties, complexity of the matter, and the general administration of justice. The award must be fair and reasonable so that litigation is not meant to be the preserve of the rich and powerful. In essence instruction fees must be computed on the footing of the work done".

As stated the claim in the amended Plaint is based on loss on the loans and facilities secured for the purchase of the 15 motor vehicles. The words used in paragraph 19(b) of the amended Plaint is;

"**whose total outlay now stands at Kshs.47,330,571/80 as at 30th April, 1999 with interest thereon at a rate of 4% per month from the said date".**

The concern of the parties in this matter is whether the issue of interest was a factor for consideration in the taxation. The issue of interest was not based on any contractual relationship, therefore it was an issue to be determined by the trial court. The suit was for a sum of money in the names special damages and therefore Section 26 of the Civil Procedure Act correctly applies in this matter. There is no indication in the pleadings that the interest as specified was contractual, hence the court has the discretion to award interest as it deems just.

The issue of interest was a prayer to be adjudicated and determined at the hearing, and upon hearing the rival evidence of the parties. I think the claim of interest was a mere claim by the Plaintiff to be fully agitated between the parties at the hearing of the matt er. The court had the final say in that determination. I am in agreement with **Justice Emukule** in **Misc. Civil Application NO.555/2003**, when he says that interest being at the discretion of the court cannot form part of the principal subject matter of the suit. I think I must align myself with the position taken by **Justice Emukule** that no instruction fee may be founded on it, it is quite sound in the circumstances in this matter.

In **Misc. Civil application No.21/2005 D. Njogu & Co. Advocates vs Kenya National Capital Corporation Justice Ochieng** faced with similar problem had this to say;

"So, whilst I accept that the Advocate may have been instructed to sue for not only the principal sum, but also for interest thereon at a specific rate that fact alone cannot mean that the claim would be successful. In other words, the court could dismiss the whole claim, or grant part of the principal sum. Alternatively, the court could grant judgement for the whole principal sum, but without interest or even with interest at rates other than those claimed. Effectively therefore the value of the subject matter of the suit would remain indeterminate until the court passed its verdict on the case".

In this case the Plaintiff's cause of action was unsuccessful and I doubt whether the subject matter had been determined by the trial court. I think the guiding factor of this taxation should be the sum claimed by the Plaintiff in paragraph 19(b), without forgetting the value of the motor vehicles that gave rise to the dispute. It is my decision that the taxing officer fell into an error of principle by failing to consider the relevant issues that were central concern in the Plaintiff's suit. It was an error on the part of the taxing officer to take into account or include the figure arrived at after computation of interest. The subject value of the dispute cannot be pegged on the calculation done by the Respondent without any reference to the judgement of the court. It is not certain that the court would have awarded the sum of Kshs.47,330,571/= plus interest at the rate of 4% to the Plaintiff. The final award of the court is not usually based on the claim or prayers in the Plaint. The figure can be either reduced, enhanced or dismissed completely.

In my humble view there was no basis for the taxing master to fall to the net set by the Respondent herein. I am satisfied that the taxing master misdirected herself and acted contrary to established principles of law. The taxation was therefore based on an error of principle in which the taxing master failed to appreciate. She was of the view that the interest was calculable and determinable because the respondent put a certain figure before court for consideration. With respect she did not even make her calculation of the final amount after 4% interest rate was loaded into the principal sum. Of course the Plaintiff did not succeed in its claim and no sum was awarded or fixed by the court.

In my view it was incumbent upon the taxing master to investigate and determine the proper subject matter for dispute. Nevertheless, she went with the train provided by the Respondent. The train took the taxing master and the parties to the wrong direction. It is not the business of the taxing master to know whether a particular item for taxation has been controverted. Indeed it is the cardinal duty of the taxing master to assess and award the correct figure. Whether a party endeavours to show what it thinks to be the value of the subject matter is not the yardstick to measure what the court would award. The taxing master is required only to take the issue or matters into consideration but it should not form the basis of her decision.

It is not open to the taxing master to say that the respondent had put forward a figure of 1 billion therefore that is the correct figure to be adopted for purposes of taxing the bill. I think that is not the correct approach to be adopted for purposes of undertaking a taxation. I therefore, think the sum awarded is manifestly excessive as to justify my interference. The figure was based on an error of principle committed by the taxing master. It is my decision that the award was based on irrelevant factors, which calls for the jurisdiction of this court to remedy the situation.

Accordingly I do find merit in the reference dated 20th November, 2006. The award by the taxing master is hereby set aside and the matter is remitted back for taxation before another taxing

officer. The Respondent is ordered to pay the costs of this reference to the Applicant.

Dated and delivered at Nairobi this 28th day of March, 2007.

M. A. WARSAME

JUDGE

Court: Ruling delivered in the presence of

Mr. Musolo for 4th Defendant/Respondent and M/s Thangai for the Applicant

M. A. WARSAME

JUDGE

Mr. Musolo: I seek leave to appeal against that decision.

Court: Leave is granted.

M. A. WARSAME

JUDGE