



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CIVIL CASE 1498 OF 2001

IN THE MATTER OF THE ADVOCATES ACT
AND
IN THE MATTER OF TAXATION
BETWEEN

KIBET & CO., ADVOCATESTHE ADVOCATES

CENTRAL BANK OF KENYA LTD. THE CLIENT

MATTER ARISING
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE 589 OF 1999

UHURU HIGHWAY DEVELOPMENT LTD1ST PLAINTIFF

KAMLESH MANSUKHAL PATTNI 2ND PLAINTIFF

PANSAL INVESTMENTS LTD 3RD PLAINTIFF

GRAND HOTELS MANAGEMENT LTD 4TH PLAINTIFF

VERSUS

CENTRAL BANK OF KENYA 1ST DEFENDANT

DEPOSIT PROTECTION FUND 2ND DEFENDANT

JOSEPH KITTONY..... 3RD DEFENDANT

RULING

By its application of the 18.12.2004 the Applicant seeks the following orders: -

- (a) That the quantum of instruction fees in respect of the suit and the instruction fees for items 5,32,37,60,74,114,121, 132,138 138, 159 and 179 of the Advocates Bill of Costs dated 14th December 2001 be reviewed and substituted thereof with such amount as is reasonable and just.
- (b) That the quantum of fees allowed as getting up fees be disallowed and taxed off.
- (c) That the cost of this application be provided for.

The grounds for the Application are set out and were argued in extenso by Mr. Macharia for the Applicant.

The Application arises from an Advocate and Client Bill filed by the Respondent to this Application arising out of work done by the Respondent in HCCC No. 589 of 1999 on behalf of Joseph Kittony the 3rd Defendant at the behest of the Applicant herein. The items objected to fall into two categories:

1. The instruction fee for filing a Defence
2. Instruction fee incurred in respect of interlocutory applications in which a standard sum of Kshs.100,000/= was claimed and which the Taxing Officer allowed a standard sum of Kshs.50,000/= each.
3. The instruction fee the subject matter of the Reference is item 3 in the Bill of costs although the Application refers to items 5. This I perceive is a mistake but will deal with the matter on the basis that the Applicant refers to item 3.

The Taxing Officer determined that the proper schedule under which the Respondent could charge was under schedule VI 1(l) which states:-

“to sue or defend in any case not provided for above: such sum as may be reasonable but not less than Kshs.6000/-“

Mr. Macharia took no exception to this finding although Mr. Ochieng Oduol submitted that the VI 1 (b) applied based on a figure of Kshs.2.5 Billion, which he submitted, was the value of the subject matter, which could be determined from the pleadings. However no cross-reference was filed by the Respondent and I uphold the taxing master’s decision on this aspect of the matter.

The suit filed sued the Central Bank of Kenya, The Deposit Protection Fund Board and Joseph Kittony.

The relief sought was as follows:-

- (i) An injunction restraining CBK by itself, its officer’s, servants, or agents, or auctioneers or otherwise howsoever, from selling auctioning or otherwise howsoever dealing with or alienating L.R. No.209/9514 whether by public auction or private treaty or otherwise howsoever;
- (ii) The court appointment of a Receiver of L.R. No.209/9514 with such howsoever this Honourable Court deems appropriate in the circumstances;
- (iii) That Kittony by himself his agents or servants or otherwise BE RESTRAINED from acting or continuing to act as Receiver and or Manager of the Grand Regency Hotel or L.R. No.209/9514;
- (iv) An injunction to restrain Kittony from remaining in or going into possession occupation and control of the suit premises and of the business of the Grand Regency Hotel; (v) Any or all such injunction and interlocutory orders in the court deems appropriate in all the circumstances of the case;
- (vi) A declaration that the Charge and the Guarantee are null and void illegal and unenforceable;
- (vii) A declaration that the appointment of the Receiver and Manager by the CBK is also null and void and his appointment must be cancelled and the hotel be handed over to UHDL the as this Honourable court deems appropriate;
- (viii) An order that an account be taken of what has been received by the Receiver and Manager and of the goods which have disappeared from the hotel and abuse of the facilities of the hotel by the staff from the hotel, and in the alternative in the absence of full and adequate accounts that the

sum due and payable in respect of these claims be assessed on a quantum merits and be paid and an order for payment of the amount found so due to UHDL and as this Honourable court deems appropriate;

(ix) An order that CBK deliver up the UHDL or to such person as it appoints, the Guarantee, the Charge and all documents in the possession or power of CBK relating to the property charged;

(x) An order that CBK do execute a discharge of Charge, in the pleadings, mentioned and all encumbrances created by CBK, or any person claiming under it and the CBK failing to do so that a discharge be executed by the Registrar of this Honourable Court;

(xi) An order that CBK do pay to UHDL the costs of drawing up, engrossing, stamping and registering the said discharge and the amount thereof be certified by the Registrar and that the CBK do pay to UHDL the costs paid by it to three advocates for the CBK in respect of the charge and guarantee the subject matter of this suit;

(xii) Damages for the Trespass against CBK and Kittony

(xiii) Damages against all the Defendants for breach of Agreement referred to hereinabove.

(xiv) A declaration that the charge and guarantee are void by reason that they were obtained by duress and undue influence and the same be order to be set aside.

(xv) An order that the Agreement A, annexed hereto be performed and perfected in terms hereinabove stated if not already done, by all the Defendants and the charged debt of Kshs.2.5 Billion (Now Kshs.2.205 Billion) be deducted out of the sum of Kshs.3.585 billion owed by the CBK to EBL and the charge registered on 31st December, 1993 against the title L.R. No.209/9514 in the Land Titles Registry at Nairobi as L.R. 36755/17, be discharged. And in the alternative a declaration that having regard to the facts hereinabove stated agreement "A" has been performed and perfected as or by law required and that agreement "B" is null and void; (xvi) General damages against the CBK and Kittony mismanagement of the hotel loss of business, running down the hotel and unlawfully taking over the management of the hotel since 15th April, 1994.

(xvii) An order directing the Fund to reimburse UHDL in the sum of 2.5 billion should the UHDL be held responsible for the debt of Kshs.2.5 billion;

(xviii) That in the alternative if agreement. A cannot be perfected CBK do refund to PIL the full maturity value of the Treasury Bills seized or otherwise taken as herein above stated together with interest at the rate paid on 90 days Treasury Bills from the date of taking to the date of payment in full.

(xix) An order setting aside the Guarantee, the charge the payment of 13.525 billion to CBK and 5.783 billion to the Treasury as a fraudulent preference over other creditors and being illegal;

(xx) A declaration that the original loan of Kshs.13.525 billion purported to have been advanced by CBK to EBL was null and void and irrecoverable;

(xxi) That the moveable (chattels) lying in or at the suit premises be released to UHDL;

(xxii) Judgment for the sum of 6.3 billion to be paid by CBK to PIL in terms of the settlement and agreement aforesaid; (xxiii) An order for the refund of the sum of 100,000,000/= with interest at CBK Treasury Bill rates until payment in full; (xxiv) Interest at the rate determined by this Honourable Court of 24%; (xxv) Costs of the suit with interests as hereinabove stated at the rate of 24% from the date of filing suit;

(xxvi) Any other, further or consequential relief this Honourable Court may deem just and fit to

grant.

The main allegation in the Plaintiff was that the 1st Defendant had coerced the 2nd Plaintiff (Pattni) to accept and admit personal liability for all the sums alleged to be owing to the 1st Defendant by a bank known as Exchange Bank Limited.

Allegations were made that charges over the property in the sum of Kshs.2.5 Billion were extracted from Pattni and the company in which he has beneficial interest by pressure duress and undue influence.

In paragraph 29 of the Plaintiff it is alleged that the 1st Defendant appointed Mr. Kittony as receiver in respect of the said charged property.

There then appear allegations of mismanagement and wrong doing by Mr. Kittony and the 1st Defendant in connection with the receivership over the Grand Regency Hotel.

As has been seen damages were claimed against the Central Bank and Mr. Kittony.

A Defence was filed for Mr. Kittony pleading res-judicata and that he was validly and lawfully appointed a Receiver. The Allegation of wrong doing by him are then denied seriatim.

Mr. Macharia attacked the Ruling of the Learned Taxing Officer on a number of grounds:-

1. That it is not relevant that it took the Taxing Officer 19 days to go through the file;
2. That the Taxing Officer was wrong to state that the value of the property could not be over emphasized;
3. That the Taxing Officer's statement that the matter had taken over a decade was wrong in fact and the Respondent was only in the matter for a couple of years or so;
4. That the reference to enormous documents, which were filed, were not those of the Respondent.
5. That the reference to interest at 24% is not a matter, which can be taken into account in assessing an instruction fee.
6. The Taxing Officer was overawed wrongly by the charge being for a sum of Kshs.2.5 Billion.

Mr. Macharia relied on a number of cases many of which are referred to by the Taxing Officer in her ruling.

There are, however, two cases, which are particularly relevant on the principles to be taken into account by a Taxing Officer in determining the amount of the fees namely:- \

The first is **Steel Construction Petroleum Engineering E.A. Limited Vs Uganda Sugar Factory {1970} E.A. page 141 per page 143 where Spry JA** referred to matters which a Taxing Officer should take into account in the assessment of an instructions fee and **Joreth versus Kigano & Associates C.A No. 66 of 1999** where in a joint Judgment the Learned Court of Appeal set out the criteria to be addressed by a Taxing Officer in taxing a bill of costs.

These criteria are rightly set out by the taxing officer in her ruling a page 10 and 11.

Mr. Ochieng Oduol supported the ruling of the Taxing Officer and submitted that she had not acted upon any wrong principle nor had it been shown that the amount allowed on taxation was manifestly excessive.

In the case of First American Bank of Kenya Ltd versus Shah & Others CC No.2255 of 2000 Mr.

Justice Ringera (as he then was) on page 11 stated: -

“ I completely agree with the submission made on behalf of the 3rd Defendant in that respect. In my opinion, the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees. In the premises I don't consider that the taxing officer erred in not taking into account that the suit was withdrawn only three days after it was filed and that no hearing had taken place”

I would with respect adopt his findings.

Has the Applicant shown that the taxing officer acted on some wrong principle, which would include taking into account some irrelevant matters.

The taxing officer quiet correctly turned to the pleadings to ascertain the matters in issue in the suit, however, in my view she failed to appreciate that the main issues which the third Defendant had to face were allegations relating to the lawfulness of the charge under which he was appointed and whether or not he had been wrongfully appointed and was therefore liable in damages for his acts as a receiver. The fact that the charge was for Kshs.2.5 Billion was not relevant to these issues. What the Respondents were required to do was to consider the efficacy of the charge and deal with the facts and law relevant to the appointment of a receiver and his liability in the event that the appointment was unlawful.

Also taking into account that the interest claimed was not a relevant factor as the only claim which had a monetary content against him was the claim for damages.

A reading of the ruling leaves one with the impression that the Taxing Officer was thoroughly overawed by the figures set out in the Plaint without considering to what extent if any they impacted upon the claim against the Receiver in his capacity as Receiver and agent of the 1st Defendant.

The basic instruction fees was rightly determined by the Taxing Officer in the sum of Kshs.6000/= and she rightly found that this sums could be increased.

In determining an instruction fees it must be related to the value of the work done by an advocate. The Taxing Officer says it took her 19 days to go through the present file. Accepting this as correct it cannot be suggested that Kshs.40 Million is a reasonable assessment of the value of the work done. It appears to me an error in principle to set out how long it took the Taxing Officer to go through the parent file.

In any event in my view by any standards for an advocate to earn a fee of Kshs.40 Million which in this case is increased to Kshs.60 Million in an advocates and Client Bill is manifestly excessive.

I would wish to adopt the procedure taken by Ringera J., in the case referred to above in which he determined the basic instructions fees without remitting the same back to the Taxing Officer. I think in this case taking into account the criteria rightly set out by the Taxing Officer in the determination of an instruction fees that a sum of Kshs.3 Million would be fair fee representing as it does an increase of 200 times over the basic fee of Kshs.6000. This is to be increased by 50% under part B of the schedule 6 of the Advocates Remuneration Rules.

Turning to the applications, these varied in complicity in that in some affidavits were filed and in others not. I do not think we can apply a standard rate to each application. In each case the Taxing Officer must assess how much work was done and either allow the basic instruction fee of Kshs.2500 or if an increase is justified calculate this on the basis of what work was done. In this case however, I send the bill back to the Taxing Officer to calculate what is fair in each individual case for the application in question.

I give the costs to the Applicant.

Dated and delivered at Nairobi this 15th day of July 2005

P.J. RANSLEY

JUDGE