REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Misc Appli 21 of 2005

D. NJOGU & COMPANY ……..…..…APPLICANT

VERSUS

KENYA NATIONAL CAPITAL CORPORATION …… RESPONDENT

RULING

This is a ruling on a reference pursuant to the provisions of Rule 11 (2) of the Advocates (Remuneration) Order.

The applicant is asking the court to set aside the Ruling made by the Taxing Officer on 6th May 2005. The applicant is also asking the court to either re-assess the fees on the items numbered 1, 16, 19 and 20, or alternatively to remit the said items to the Taxing Officer for review and reconsideration.

It was contended by the applicant that the Taxing Officer had acted in excess of her jurisdiction. It was also contended that the Taxing Officer had misdirected herself and acted contrary to established principles of law. Consequently, the sums awarded by the Taxing Officer were said to be so manifestly low as to be proof that they had been arrived at on the basis of an error of principle.

In order to have a better understanding of the matters in issue, I feel that it is prudent to first set out some historic background to the matter.

It is common ground that the applicant was the advocate for the respondent in **HCCC NO. 299 OF 2003 (Milimani) – Kenya National Capital Corporation Limited –vs- Integrated Wood Complex Limited & Hosea Kiplagat.**

In that suit, the claim by the respondent, (who was the Plaintiff) was for Kshs.82,706,408.60, together with interest at 30% per annum from 18th October 2000. The respondent had also claimed for costs of that suit.

The record shows that on 4th November 2004, the Hon. Azangalala J. gave judgement in favour of the respondent, for Kshs.189,177,700.58, together with interest thereon at 30% per annum from 4th November 2004, until payment in full. The court also awarded to the respondent, the costs of that suit. And, there is a Certificate of Taxation dated 26th November 2004, in which the costs payable to the respondent herein were certified as being Kshs.2,875,145.50.

For reasons that are not clear, but which have no relevance to this reference, the respondent fell out with its advocates. The said advocates (who are now the applicants) then filed their Advocate-Client Bill of Costs on 13th January 2005. Out of the thirty-five items on the Bill of Costs, there were only four which

were contested: those were the items numbered 1, 16, 19 and 20. And having received the Ruling of the Taxing Officer on the said four items, the applicant was so dissatisfied that it decided to file a reference. This decision is in relation to that reference.

It is common ground between the parties that the costs are calculable in accordance with the provisions of paragraph "1B" of Schedule VI, of the Advocates (Remuneration) Order, 1997. However, the parties are unable to agree on how the said provisions are applicable to the case.

As far as the applicant is concerned, the advocate/client costs should be either the "Party and Party Costs", increased by one-half, or alternatively the "agreed costs" increased by one-half. Thus, the applicant believes that at no time should the Advocate/Client costs ever be less than the Party and Party Costs.

Therefore, as a starting point, the applicant submits that as the Party and Party Costs herein were taxed by consent, in the sum of Kshs.2,875,145.50, there was simply no way whatsoever that the Advocate/Client Bill could be less than that sum. At the very least, the applicant believes that the Taxing Officer should have awarded to them, at least the Party and Party Costs, plus one-half thereof.

Items Numbered 16, 19 and 20

The costs claimed under those three heads were for attendances before a judge. It was contended that on two occasions, the attendances lasted for an hour each, whilst on the other occasion, the attendance was for half-an-hour.

In her considered Ruling, the learned Taxing Officer held as follows;

"Item 16 - If hearing of application lasted one month (sic!) in High Court, it is shs.1,200/=. So I tax off shs.1050/=.

Item 19 - I tax off shs.1050/= (ditto).

Item 20 - I tax shs.750/= taxed off."

First, I must say that the manner in which the ruling was worded is not very helpful, as the reasons for arriving at the various decisions are not clear.

Secondly, it is clear that the reference to item numbered 16 as having lasted one MONTH, was an error apparent on the face of the record. From the Bill of Costs, the applicant had indicated that the hearing of the application lasted an HOUR.

Be that as it may, the question that then arises is whether the learned Taxing Officer erred in principle by taxing off the sum of Kshs.1050/=.

It is evident from paragraph 7 of Schedule VI that for attendances before a court or in chambers before a judge, the following costs shall be payable on Party and Party Bill of Costs;

"		***Ordinary Scale***	***Higher Scale***
(i)	**half-hour or less**	**600/=**	**900/=**
(ii)	**one-hour**	**1,200/=**	**1,500/=**
(iii)	**half-day**	**2,400/=**	**3,600/=**
(iv)	**whole-day**	**4,800/=**	**7,200/="**

The Remuneration Order then stipulates, under paragraph "B", which governs the Advocate and Client Costs, that:

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

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

(b) the fees ordered by the court, increased by one-half; or

(c) the fees agreed by the parties under paragraph 57 of this Order; increased by one-half;

as the case may be, such increase to include all proper attendances on the client and all necessary correspondence."

From my reading of those words, my understanding is that the Advocate/Client costs can never be less than the Party and Party costs. I say so because, it has been expressly provided that the minimum fee shall be either the prescribed fee, the fee ordered by the court or the fee agreed between the parties, increased by one-half. Furthermore, the rule expressly states that the increment is to include all proper attendances.

Therefore, if the application before a judge was for a period of half-an hour, the minimum fee payable by the client to his advocate should be Kshs.600/=, increased by one-half. Therefore, for an attendance before a judge, for half-an-hour, the minimum fee should be Kshs.900/=.

Applying the same line of reasoning to attendances for an hour, the minimum fee payable by the client to his advocate, for one hour, should be Kshs.1,800/=.

In effect, I do find that the failure by the Taxing Officer to increase the minimum fee by one-half, in respect of the attendances before the judge, was an error in principle.

Instruction Fees

In **THOMAS JAMES ARTHUR –VS- NYERI ELECTRICITY UNDERTAKING [1961] EA 492,** the Court of Appeal held that the court would interfere if there had been an error in principle. However, the court emphasized that questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal, and the court will intervene only in exceptional cases.

I have no doubt in mind that that is the correct legal position.

In **FIRST AMERICAN BANK OF KENYA –VS- SHAH & OTHERS [2002] E.A.L.R. 64 at page 69**, Ringera J. (as he then was) held as follows;

"First, I find that on the authorities, this court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error in principle. (See Steel Construction Petroleum Engineering (EA) Limited –vs- Uganda Sugar Factory [1970] EA 141). Of course, it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors, and according to the Advocates Remuneration Order itself, some of the relevant factors to take into account include the nature and importance of the course or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge."

In this case, the applicant has faulted the taxing officer for failing to take into account the sum which was awarded by the judge, when he granted summary judgement. As earlier stated herein, the principal claim was for Kshs.82,706,408.60/=. However, the decretal amount, as at 4th November 2004 was Kshs.189,179,585.60/-. In the circumstances, the question which arises is whether or not the Taxing

Officer erred in principle when she held as follows;

"I therefore hold that the decision by the taxing master to the effect that no instruction fees is allowed on interest accruing is not allowed in law and is not sustainable in principle.

I am inclined to the view held by Justice Emukule by virtue of the provisions of Section 26 of the Civil Procedure Act regarding interest. I therefore find that the instruction fees is based on what was pleaded and awarded in judgement minus the interest which is 1,280,596/= increased by ½ to give total shs.1,920,894/2cts, so I tax off shs.2,148,146.40cts."

In the light of that decision, there arose two competing submissions. On the one hand, the applicant contends that the instruction fee should have been pegged to the sum which was awarded in the judgement: whilst on the other hand, the respondent insists that the Taxing Officer was correct to have ignored the interest when determining the basic amount that would be the foundation for calculating the instruction fees. Each of the parties was armed with an authority to support its position.

The respondent cited the decision of the Hon. Emukule J. in **AHMEDNASIR ABDIKADIR & COMPANY ADVOCATES–VS- POSTAL CORPORATION OF KENYA, MISC. APPLICATION NO. 555 OF 2005,** to support its contention that interest should be excluded. In his decision, at page 23, the Hon. Emukule J. held as follows;

"Where therefore a sum certain or liquidated is claimed, such a claim for such sum representing interest claimed, is still a prayer to be adjudicated by the Court upon agitation by the party claiming and the party in opposition thereto. Any other interpretation would do violence and damage to the clear provisions of Section 26 aforesaid. I would therefore concur with Mr. Ochieng Oduol, Counsel for the Respondent's submissions that even if specifically pleaded as in this case (HCCC No. 1055 of 2000 and Counter-claim in HCCC No. 822 of 1996) interest being at the discretion of the court cannot form part of the principal subject matter of the suit, and that no instruction fee may be founded on it."

In the light of that decision, the learned Taxing Officer excluded interest from the figures which were the foundation upon which the instruction fee was calculated.

On the other hand, the applicant relied on the following words of the Hon. Ibrahim J. in **DESAI SARVIA & PALLAN ADVOCATES –VS- GIRO COMMERCIAL BANK LIMITED, MISC. APPLICATION NO. 1847 OF 2002 at page 4;**

"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 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 and is not sustainable in principle."

On the face of it, the decisions in the two cases are diametrically opposed. The learned Taxing Officer went along with one of the two decisions, as she was perfectly entitled to do. However, the question that arises now, is whether or not she was wrong, in principle.

In my considered opinion, an in-depth analysis of the two decisions actually reveals that they do not state two different things.

First, it must be appreciated that in the case of **AHMEDNASIR ABDIKADIR & COMPANY ADVOCATES –VS- POSTAL CORPORATION OF KENYA (supra),** the taxation of the Advocate/Client Bill of Costs came about in the middle of the ongoing proceedings between the Plaintiff and the Defendant. It is evident from page 6 of the Ruling that there was still pending, an application for summary judgement. Therefore, in those circumstances, it is perfectly understood that if the instruction

fee was calculable on the basis of interest which had been claimed, the Taxing Officer would be doing so in contemplation of something which might or might not come to pass. To my mind that would be wrong, as there was no way that the said Taxing Officer could determine whether the judgement would award interest or not; and if any interest was awarded, the rate thereof, or the date from which the interest would be applied.

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.

However, as soon as the court did pass judgement, the value of the subject matter would have been determined. In those circumstances, I do not accept the respondent's contention that in ascertaining the value of the subject matter, the Taxing Officer should still be guided by the sums claimed in the Plaint. In my considered view, as soon as the court passes judgement on a claim, the value of the subject matter is to be ascertained by reference to the judgement, as opposed to the statement of claim.

I therefore hold that by basing the calculations of the instruction fee on the sum which was claimed, the Taxing Officer made an error in principle. She ought to have derived the value of the subject matter from the judgement. Accordingly, I do find merit in the reference dated 6th July 2005.

The fees awarded by the learned Taxing Officer under the items numbered 1, 16, 19, 20 are set therefore aside, and the said items are hereby remitted for taxation anew, before any Taxing Officer.

Finally, I deem it necessary to point out that although the Taxing Officers do have the discretion to either decrease or increase the instruction fees awardable in a Party and Party Bill of Costs, once he has exercised that discretion by taxing the said Party and Party Bill of Costs, the Advocate/Client costs cannot be taxed at a lesser sum.

In this case, the respondent has cast aspersions about the applicant's lack of authority to consent to the Party and Party costs. However, as the respondent never raised such concerns either during the original taxation, or even by an affidavit during this reference, I direct the Taxing Officer to disregard such insinuations, as no steps have been put in place to challenge the validity of the Certificate of Taxation dated 26th November 2004.

The applicant is awarded the costs of this reference.

Dated and Delivered at Nairobi, this 10th day of November 2005

F. A. OCHIENG

JUDGE