REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 572 OF 2000

GREEN HILLS INVESTMENTS LTD.....
PLAINTIFF

VERSUS

CHINA NATIONAL COMPLETE PLANT EXPORT CORPORATION
(COMPLAINT

T/A
COVEC.....RESPONDENT

JUDGMENT

This is a reference from the decision of the taxing officer who in this case was the Deputy Registrar Milimani Commercial Courts, Mrs H A Omondi dated 15th April 2003 on the taxation of the objector's ammended Bill of Costs.

The objector was aggrieved by the said decision and seeks the following orders:-

"1. That the costs allowed by the taxing officer the Deputy Registrar Milimani Commercial Courts, Mrs H A Omondi on the taxation on the 25th February, 2003 of the objector's ammended Bill of Costs dated 15th January, 2003 in respect of item 1 be reviewed and increased or remitted with appropriate directions to a taxing officer as the Court shall deem fit for consideration.

2. The costs of this application be provided for. And for any further orders and directions that this honourable court may deem fit and necessary in all the circumstances to make and give".

The appellant says that its instruction fees was almost Shs 1.2m the taxing officer taxed off Shs 1,193,574/- leaving shs 5,900/- only as instruction fees. The entire bill was taxed at Kshs 22,645/-.

The objector is particularly aggrieved with the manner in which item 1 was taxed. It says that it was manifestly excessive, unreasonable and had no legal basis. It is asserted that she failed to consider the issues before the Court and the complexity thereof. That she failed to consider that the purported attachment and attempted execution upon the objector's property was totally illegal, irregular and incompetent.

Justice Ringera found that the purported joinder of the Objector as a party by insertion of its name in the execution papers was highly irregular. The judge called the entire process including the execution as an abuse of the process of court. The objector continues that it was not a simple garnishee or objection

proceedings. That the attachment put in jeopardy the assets of the objector.

That the warrants of attachment and sale were for a sum of about 24 million yet they were defective and irregular. The value of the subject of the garnishee order was about shs 21m the objector repeatedly complained of the blatant action through its counsel's submission. Counsel says that he had to study the entire court file to find out about his client's Covec's involvement. That the amount awarded does not reflect the time spent, the responsibility and industry required and complexity of the issues. That there was no consideration of the risk to which the objector's business and investments was expressed to.

The Objector wants this court to review and increase the costs awarded on Item 1 or to remit the same to the taxing officer with appropriate directions for consideration.

The reference is opposed by the plaintiff/decree-holder which filed grounds of opposition. The decree-holder says that the taxing officer did not misdirect herself. That the proceedings are garnishee proceedings and not the main suit. That under paragraph 13 relating to objection proceedings the amount to be awarded is a minimum of shs 2,250/- and that the Garnishee proceedings under paragraph 14 the minimum amount is shs 3000/-. That the taxing master awarded shs 6000/- in her discretion.

That objection proceedings are simple and no suit was instituted. That volume of papers does not mean the matter is complex. It says that the question of irregularity, abuse of the process of the Court should not be considered in the taxation and the decree-holder should not be punished for the wrongful attachment.

I have carefully perused the reference, the grounds of objection, and the Advocates Remuneration Order. I have also taken into account the counsel's submissions. These definitely were not a normal objection and garnishee proceedings. The objector, Covec was never a party to the Arbitration or suit herein. Its name was deliberately inserted by adding the following words to the defendant's name:- "Now trading as Covec. " Justice Ringera found this to be highly irregular and an abuse of the process of the Court.

There is no doubt the objector must have suffered in its business, reputation and operations as is evident from the proceedings. This being the case, it should be pointed out that what is before the Court is taxation of costs and not a claim for damages for wrongful attachment. The objector if it wants to pursue the said claim ought to look for the right forum. The Taxing Master was entitled not to consider the loss suffered by the Objector.

With regard to the objection and garnishee proceedings, the amounts awardable are Kshs 2,250/- and Shs 3000/- respectively. The garnishee proceedings amount is minimum and the taxing officer has discretion to award what he/she considers to be reasonable. I am of the view that the basis of Justice Ringera's ruling, the objector is entitled to the costs in respect of the objection proceedings and the garnishee proceedings. The two became intertwined in the proceedings.

Looking at the applications and various affidavits, grounds of opposition together with the proceedings and the ruling, I agree with counsel for the Objector that the issues of law and fact herein were complex and intricate.

The foremost was the investigations into the wrongful impleading of Covec. The decree-holder resisted throughout despite its clear wrongdoing and the matter went into full hearing. Considering all matters and circumstances, I think that the taxing master ought to have fully addressed her mind to the foregoing matters.

With due respect, it could have taken that the Courts do not appreciate professional input and industry by counsels for parties before it. The award of shs 6000/- in my view appears to be unreasonable and not commensurate with the complexity of the matter, time taken and all circumstances.

The taxing master is given the discretion to award what is reasonable. However, such discretion itself ought to be exercised reasonably and judiciously. Some valid reasons or explanations must be given for the award of a specific sum. It is not a question of plucking a number from the abacus. A sum of shs

5900/- to be exact is inexplicable and disproportionate to the work done.

The general principles with regard to such applications or references in taxation was adopted in *S R D'Souza & Others –vs- C C Ferrao & Others* (1960) EA 602 which was a Court of Appeal decision. It adopted the principles stated by *Buckley LJ* in the Estate of Ogilvie: *Ogilvie –vs***78** *Massey* (1910) P 243.

"On questions of quantum the decision of the taxing mater is generally speaking final. It must be a very exceptional case in which the Court will even listen to an application to review his decision. In question of quantum the judge is not nearly as competent as the taxing master to say what is the proper amount to be allowed; the Court will not interfere unless the taxing master is shown to have gone wholly wrong. If a question of principle is involved it is different; on a mere question of quantum in the absence of particular circumstances the decision of the taxing master is conclusive. I think that the learned judge ought not to have interfered".

I agree with the said general principles. I am of the view that first there is a question of principle in this case, namely, that discretion ought to be exercised within reason, fairly and judiciously. And also, the officer ought to take time to look at issues of complexity of the facts and the law and the industry and time put in the matter. Secondly, while I ought not interfere with quantum generally, the amount awarded herein was outside reasonable limits so as to be manifestly inadequate to such extent it could be deemed to be a mockery of legal representation. In the smallest claims in the lower courts, instructions fees of Shs 18,000/- or above are not uncommon. In this matter the value of the subject matter was Shs 23 million ie the warrant of attachment, the monetary implications to the objector could possibly surpass this, the points of law and facts were quite intricate and required research and careful consideration.

In all, I would allow the reference and do hereby refer it back to the taxing officer for review. Should it be referred to Mrs H A Omondi or another taxing officer?

In the case of *British United Manufacturing Co Ltd –vs- Holdfast boots Ltd* (1936) 3 [ALL ER] 717, Bennett J when faced with such a decision said (p 727):-

"…….So the matter must go back for review, and the question is who is to be the person to review? It is conceded that if I make an order for review I have jurisdiction to say by whom the review should take place, and the question between – the parties in this matter is whether the bill should be reconsidered by the master who taxed it or by a new one . It is always desirable, I think when you are dealing with matters about which there is a real conflict between the parties, that there is a real conflict between the parties, that there should not be the smallest doubt about the impartiality and the freedom from prejudice of the mind of the person who has to decide between them."

I would agree with the said observations. So while I have no doubt about the independence and impartiality of Mrs Omondi, the Deputy Registrar, in order to sustain the air of impartiality and freedom, I direct that the review be done by another Taxing Master.

The costs of the referenced is awarded to the objector against the decreeholder.

Dated and Delivered at Nairobi this 5th day of February 2004.

M.K.IBRAHIM

JUDGE