



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**MILIMANI COMMERCIAL COURTS NAIROBI**

**CIVIL SUIT NO.247 OF 2001**

**KENYA WILDLIFE SERVICES.....PLAINTIFF**

**VERSUS**

**ASSOCIATED CONSTRUCTION COMPANY LTD.....DEFENDANT**

**RULING**

In an originating summons under section 17(6) of the Arbitration Act taken out by the plaintiff, Commissioner of Assize Ransley ruled that the arbitrator had no jurisdiction to entertain the substantive matters before him. He ordered the defendant to pay the costs of the suit.

The plaintiff filed a bill of costs and claimed an instruction fee of Kshs.1,547,202.00. The Taxing Officer taxed off Kshs.1,541,202.00 and thus awarded a fee of Kshs.6000. It is against that decision that the reference now before the court has been lodged.

Looking at the proceedings before the Taxing Officer it is evident that the plaintiff's stand was that the bill should be taxed in accordance with Schedule VI (1) (b) of the Advocate's Remuneration Order. According to the plaintiff, the amount claimed in the arbitration was Kshs.100,480,137.00 and accordingly the minimum instruction fees was Ksh.1,547,202.00. The defendant for its part argued that what was before the court was not what was claimed in the arbitration but merely an issue as to whether or not the arbitrator had jurisdiction to determine that substantive claim. According to the plaintiff, the applicable fee was Kshs.6000. The Taxing Officer accepted the arguments advanced on behalf of the defendant and held that the correct fee was Kshs.6000.

Now having heard Mr. Fraser for the plaintiff and Mr. Simani for the defendant in the reference before me, I am persuaded by Mr. Simani that the Taxing Officer was correct to find that Schedule VI 1(b) was not applicable in the circumstances of this case as the plaintiff was not suing for any amount or on the basis of the claim before the arbitrator but had simply applied to the court for a decision on whether the arbitrator had jurisdiction to determine the claim before him. The issue was one of jurisdiction rather than determination of a claim involving the quantum claimed in the arbitration proceedings. On the other hand, I am also persuaded by Mr. Fraser that schedule VI (1) (K) was inapplicable as the plaintiff was not objecting to an award made by the arbitrator. A reference to the court under Section 17(6) for a decision on the arbitrator's decision is not a challenge to any award. I agree with Mr. Fraser that the reference to an objection to an award in paragraph (K) of Schedule (VI) is a left over from the old arbitration Act, which was cap.49 in the Laws of Kenya. In my opinion, the plaintiff's instruction fees ought to have been taxed under paragraph (l) which is the residual provision. That paragraph provides that to sue or defend in any case not provided for on the preceding paragraphs, the instruction fees shall be such sum as may be reasonable but not less than Kshs.6000.

It follows from that that the taxing office erred in principle in basing the taxation here on the wrong provision of the remuneration order. I accordingly allow the reference and remit the plaintiff's bill of costs back to the taxing officer with a direction that the instruction fee should be taxed in accordance with paragraph (l). The taxing officer will no doubt recognise that the fee must not be less than Kshs.6000 and he or she should give due weight to such matters as will be urged by the parties as bearing on the exercise of the discretion to increase the basic fee.

As both parties have partially succeeded in this reference- the plaintiff has lost on the applicability of paragraph (b) and the defendant has also lost on the applicability of paragraph (k), I think the just order to make on costs is that the defendant do pay half the plaintiff's costs of the reference.

Orders accordingly.

**Dated and delivered Nairobi this 27th day of November , 2002**

**A.G Ringera**

**JUDGE**