



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. E1102 OF 2020

ALPHA GRAIN MILLERS LIMITED.....1ST APPLICANT

CAPWELL INDUSTRIES LIMITED.....2ND APPLICANT

KABANSORA MILLERS LIMITED.....3RD APPLICANT

KARIBU FLOUR MILLS LIMITED.....4TH APPLICANT

KITUI FLOUR MILLS LIMITED.....5TH APPLICANT

MOMBASA MAIZE MILLERS LIMITED.....6TH APPLICANT

OSHO GRAIN MILLERS LIMITED.....7TH APPLICANT

PEMBE FLOUR MILLS LIMITED.....8TH APPLICANT

-VERSUS-

MINISTRY OF AGRICULTURE, LIVESTOCK

AND FISHERIES.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. The applicants herein, were the claimants before the Arbitral Tribunal in Nairobi Centre for International Arbitration (NCIA) case No. NCIA/Dis/ARB/01/19(01-08). The Tribunal made a finding in favour of the claimants who were also awarded the costs of the arbitration that were thereafter taxed thus giving rise to the application that is the subject of this ruling.

2. Dissatisfied with the Arbitrator's findings/ award on costs, the applicants filed the application dated 29th September 2020 seeking the following orders:

1. Spent.

2. Spent.

3. The court be pleased to set aside the Award on Costs published on 2nd September 2020.

4. A declaration be issued that the costs in arbitrations be calculated in accordance the scale fees applicable to the High Court under Schedule 6 of the Advocates Remuneration Order.

5. The court do assess the applicant's arbitration costs on a party to party basis at Kshs 40,317,743.55 under Schedule 6 of the Advocates Remuneration Order in accordance with the Applicant' Party to Party Bill of Costs dated 29th June 2020.

6. The assessed costs do form part of the decree in Misc. No. E871 of 2020 Alpha Grain Millers Ltd & 7 Others V Ministry of Agriculture, Livestock & Fisheries & Another.

7. The court be at liberty to make any order in the interest of justice.

8. The cost of this application awarded to the applicants.

3. The application is supported by the affidavit of the applicant's advocate, **Mr. Allen Waiyaki Gichuhi** and as premised on the grounds that: -

1. *The applicant has a pending application for enforcement of the Award in Miscellaneous No. E871 of 2020 Alpha Grain Millers Ltd & Others v Ministry of Agriculture, Livestock & Fisheries & Another from which the costs were assessed.*

2. *The Award of costs was against public policy when the arbitrator applied the wrong schedule in the Advocates Remuneration Order resulting in a substantial reduction of legal fees lawfully due to the applicant's advocates.*

3. *The application raises an important matter of public importance in the assessment of costs in arbitrations and the applicable scale to be adopted as the Nairobi Centre for International Arbitration Act does not have any regulations for the assessment of party to party arbitration costs. The automatic default position is the Arbitration Act and the Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules 2012 that adopt the use of Schedule 6 of the Advocates Remuneration Order.*

4. *The Party to Party costs of Kshs 40,317,743.55 are to scale and credit has been given for Kshs 1,008,232.98 that was paid by the respondent after the party and party bill of costs was filed representing its portion of the arbitrator's costs, administration fees and disbursements.*

5. *The arbitrator erred by finding that Schedule 5 instead of Schedule 6 of the Advocates Remuneration Order, 2014 applied.*

6. *The decision of the Sole Arbitrator is contrary to the public policy, written law, the Advocates Remuneration Act and decided High Court cases for the following reasons: -*

a) *The arbitrator departed from three High Court decisions that unanimously determined that all fees in arbitral proceedings shall be calculated in accordance with scale fees applicable to the High Court.*

b) *The arbitrator erred in failing to consider and apply Rule 10(2) of the Arbitration Rules that provide that any proceedings under the Arbitration Act should be calculated in accordance with the scale fees applicable to the High Court.*

c) *The arbitrator erred in failing to consider that Section 18(1) (c) of the Arbitration Act empowers the tribunal to compel a party to provide security for costs. The quantum for security for costs is logically and practically based on Schedule 6 of the Advocates Remuneration Order.*

d) *The arbitrator erred in failing to have regard to Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules 2012 that provide at Rule 14 as follows: -*

"Unless all parties agree otherwise, the award shall state whether any party shall pay all or any party of any costs incurred by the other party and whether those costs are assessed as between party and party or as between advocate and client."

Party and Party costs are specifically prescribed in Schedule 6 of the Advocates Remuneration Order.

e) *The arbitrator erred by applying Schedule 5 of the Advocates Remuneration Order that deals with fees in respect of business the remuneration for which is not otherwise prescribed or which has been subject to an election. It is a fatal misdirection to Schedule 5 when the applicant had not elected to have it apply in ascertainment of costs.*

f) *The arbitrator erred by arriving at the sum of Kshs 15 million, a sum that he simply plucked from the air without any legal justification or basis. Even if one were to apply Schedule 5 part 7 on debt collection, the costs based on about Kshs 2 billion at 1.5 % would come to Kshs 30 million.*

g) *The arbitrator erred in refusing to apply getting up fees when the matter went to full hearing.*

4. Parties canvassed the application by way of written submissions which I have considered.

5. The applicants' main contest was on the scale/schedule adopted by the Arbitrator on assessing the costs payable to them. They argued that the arbitrator erred in finding that Scheduled 5 of the Advocates Remuneration Order 2014 (ARO) was applicable and stated that the correct schedule should have been Schedule 6 of the Advocates Remuneration Order. For this argument, the applicants cited the decisions in *Liko & Anam v Easy Properties Ltd & 2 Others* [2020] eKLR, *Kerosi Ondieki & Company Advocates v Narok County Government* [2017] eKLR

and *Nyaundi Tuiyott & Company Advocates v Tarita Development Ltd* [2016] eKLR wherein the courts held that Schedule 6 of the Advocates Remuneration Order was the applicable Schedule in respect to costs of arbitration.

6. The applicants faulted the arbitrator for departing from above-cited High Court decisions and for applying Schedule 5 of the Advocates Remuneration Order that deals with fees in respect of business the remuneration for which is not otherwise prescribed or which has been subject to an election.

7. It was submitted that the Arbitral Tribunal exercised its discretion unreasonably and without any lawful justification by invoking the provisions of Schedule 5 of Advocates Remuneration Order in determining instructions fees.

8. The respondent, on the other hand, supported the Arbitrator's findings on the Award of costs and submitted that Section 32(B) (1) of the Arbitration Act (hereinafter "**the Act**") grants the arbitral tribunal the absolute discretion to determine the arbitration expenses.

9. The respondents submitted that Schedule 6 of Advocates Remuneration Order is not applicable in determining costs of arbitration since Arbitral Tribunals cannot be deemed as High Courts. It was further submitted that Rule 10 of Arbitration Rules 1997 (hereinafter "**Rules**") only applies to proceedings envisaged under Section 40 of the Act.

10. The respondents urged the court to adhere to the well-known principle that courts should not interfere with the discretion of the taxing officer except in very exceptional circumstances. It was further submitted that even though a winning party is entitled to costs, such costs should not be in amounts that are punitive or burdensome to the opposing party.

11. I have carefully considered the instant application the respondents' response and the parties' submissions. I note that the main issue for determination is whether the Arbitrator ought to have adopted and applied Schedule 6 of the Advocates Remuneration Order in taxing the Applicants' Bill of Costs.

12. The power of the Arbitral Tribunal to determine the costs of arbitration is provided for under Rule 31(6) (b) and (7) of The Nairobi Centre for International Arbitration Rules which stipulates as follows: -

(1) The costs of the arbitration shall, except the legal or other costs incurred by the parties, be determined by the Centre in accordance with the First Schedule

(6) The Arbitral Tribunal shall

(a) have the power to order, in its award, that all or part of the legal or other costs incurred by a party be paid by another party, unless the parties otherwise agree in writing; and

(b) determine and specify the amount of each item comprising the costs on such terms as it considers fit.

(7) The Arbitral Tribunal shall, unless the parties otherwise agree in writing, make its orders on both arbitration and legal costs on the general principle that costs shall reflect the parties' relative success or failure in the award or arbitration, except where the Arbitral Tribunal considers the general principle inappropriate.

13. Section 32(B) (1) of the Act also mirrors the provisions of the above Rules and stipulates as follows: -

(1) Unless otherwise agreed by the parties, the costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration, shall be determined and apportioned by the arbitral tribunal in its award under this section, or any additional award under section 34(5).

14. Courts have taken the position that they will not interfere with the taxing officer's discretion in determining costs except where there is an error in principle. This is the position that was taken in *Republic v Attorney General Ex parte Kirinyaga Construction Company Ltd* [2015] eKLR wherein it was held that: -

"Further it has been held that the court should interfere with the decision of the Taxing Officer where there has been an error in principle but should not do so in questions solely of quantum as that is an area where the Taxing Officer is more experienced and therefore more apt to the job; the court will intervene only in exceptional cases and multiplication factors should not be considered when assessing costs by the Taxing officer or even the judge on appeal; the costs should not be allowed to rise to such level as to confine access to court to the wealthy; a successful litigant ought to be fairly reimbursed for the costs he had to incur in the case; the general level of Remuneration of Advocates must be such as to attract recruits to the profession; so far as practicable there should be consistency in the awards made; every case must be decided on its own merit and in every variable degree, the value of the suit property may be taken into account; the instructions fees ought to take into account the amount of work done by the advocate, and where relevant, the subject matter of the suit as well as the prevailing economic conditions; one must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel if preeminent reputation; then one must know that what fee this hypothetical character would be content to take on the brief; clearly it is important that advocates should be well motivated but it is also in the public interest that cost be kept to a reasonable level so that justice is not put beyond the reach of poor litigants."

15. Having regard to the above stated principles in taxation of costs, the question which then arises is whether the Arbitrator erred in principle in adopting Schedule 5 of the Advocates Remuneration Order in taxing the Applicants' costs. In other words, should the Arbitrator

have applied Schedule 6 of the Advocates Remuneration Order in taxing the said costs.

16. It is noteworthy that this is not the first time that the court is grappling with the question of the applicable Schedule in taxing the costs of a successful applicant before the Arbitral Tribunal. In **Kerosi Ondieki & Company Advocates v Narok County Government** case (supra) the court held as follows regarding the applicable Schedule: -

“20. I note that the Taxing Master relied on the Advocates Remuneration Order of 2009 and in particular Schedule VI (1) (K) which deals with the costs to be awarded in respect to the presentation of an arbitrator’s award. My finding is that the Taxing Master did not err in principle, in relying on the provisions of Schedule VI 1(K) of the Advocates Remuneration Order when assessing the instruction fees so as to warrant the intervention of this court as the said schedule is very clear on the amount to be awarded for presentation of arbitrator’s award.”

17. Similarly, in **Nyaundi Tuiyott & Company Advocates v Tarita Development Ltd** case(supra) it was held: -

“14. It is common ground that the law applicable to the impugned taxation was Schedule VI of the Advocates Remuneration Order in view of the provisions of Rule 10(2) of the Arbitration Rules which provides that all fees in arbitral proceedings shall be calculated in accordance with the scale of fees applicable to the High Court. Schedule VI provides the formula for taxation of both party and party costs and advocates/clients costs in matters filed in the High Court. It prescribes the minimum amount which can be awarded as instruction fees based on the value of the subject matter as can be ascertained either from the pleadings, judgment or settlement between the parties. In addition, the provision gives the taxing master wide discretion in increasing or reducing the amounts specified under the schedule.

23. I am thus in total agreement with Angote J in Kenyariri & Associates Advocates V Salama Beach Hotel Ltd & Others [2014] e KLR that the value of the subject matter should not be determined solely from the pleadings. The amount stated in the pleadings should only determine the value of the subject matter if at the time of taxation, the suit had not been determined. But if taxation takes place after the matter in question had been determined either by the court in a judgment or by consent of the parties, then the taxing master should calculate instructions fees based on the amount awarded by the court or the sum agreed upon by the parties. But since the taxation in this case was in respect of arbitration proceedings, which had been determined at the time the bill was taxed, the taxing master ought to have calculated instruction fees on the basis of the Arbitration Award.”

18. Rule 10(2) of the Arbitration Rules 1997 stipulates as follows regarding fees in relation to arbitration proceedings: -

..... (2) all fees for any proceedings under the Act shall be calculated in accordance with the scale of fees applicable to the High Court.

19. The respondent supported the Arbitrators findings that Rule 10(2) of the Rules only relate, to proceedings specified at Section 40 of the Act and cannot apply to proceedings undertaken before an Arbitral Tribunal. I however, very respectfully, disagree with the Arbitrator’s findings and the respondents’ argument over the applicability of Rule 10(2) of the Arbitration Rules.

20. My finding is that a simple reading of Rule 10(2) shows that it clearly refers to any proceedings under the Arbitration Act and goes on to state that the same shall be calculated according to the scale applicable to proceedings before the High Court. My further finding is that if the intention of the lawmakers was to make Rule 10(2) of the Arbitration Rules only applicable to proceedings specified under Section 40 of the Act, nothing would have been easier than to state as much in the said Rule. To the contrary, the Rule refers to all fees for any proceedings under the Act. In the instant case, I find that the proceedings before the Arbitral Tribunal fell within the purview of proceedings under the Act for which the applicable scale of fees is the scale applicable in High Court which is Schedule 6 of the Advocates Remuneration Order.

21. I further find that there is no inconsistency between the provisions of Section 40 of the Act and Rule 10(2) of the Rules as Rule 10(2) simply clarifies the applicable scale in calculating costs in any proceedings under the Act.

22. Having found that the applicable Schedule is Schedule 6 of Advocates Remuneration Order and bearing in mind the fact that the award made by the Arbitrator was for the liquidated total sum of Kshs 1,997,967,893.75, I find that there was error in taxing the Bills of Costs under Schedule 5 of Advocates Remuneration Order which error can be corrected before this court through the exercise of discretion by simply re-taxing the bill instead of remitting it back to the taxing officer so as not to waste judicial time and saddle the parties with unnecessary costs. (see **First American Bank of Kenya Ltd v Gulab P. Shah & Others** [2002] IEA 61).

23. It is settled law that when a court reviews taxations, it is vested with the power to exercise the wider degree of supervision which means that the court must be satisfied that the Taxing Master was clearly wrong before it can interfere with the ruling. This is the position that was taken in **Ocean Commodities Inc and Others v Standard Bank of SA Ltd and Others** 1984 (3) SA 15 (A) at 18F C G where the court held that: -

“ . . . that the Court must be satisfied that the Taxing Master was clearly wrong before it will interfere with a ruling made by him . . . viz that the Court will not interfere with a ruling made by the Taxing Master in every case where its view of the matter in dispute differs from that of the Taxing Master, but only when it is satisfied that the Taxing Masters view of the matter differs so materially from its own that it should be held to vitiate his ruling.”

24. In the present case, the Arbitrator rendered himself as follows before arriving at the conclusion that the sum of Kshs 15 million represented a fair assessment of the instruction fees due to the claimant.

“The claimants have sought the amount of Kshs 30,169,518.40 as instructions fees based on the aggregate value of the amounts

awarded to the claimants in the Final Award.

I note that other than the fact that the amounts claimed by each Claimant are significant, the claims, though brought separately, were consolidated into cause and heard together. The Claimants called only one (1) witness on the question of liability which issue did not raise any novel or complex issues of fact or law. As will be evident from the Final Award, once the question of liability had been determined in the Interim Award, the Final Award essentially consisted of an arithmetical exercise which did not tax either counsel or the Tribunal unduly. I do not therefore consider that the aggregate quantum of the amounts awarded to the Claimants can properly form the primary basis for assessment of the Party to Party Costs.”

25. Having regard to the above stated principles governing interference with taxation of costs, the amount awarded to the claimants and the applicable schedule for taxing costs of arbitration, I am not satisfied that the Arbitrator addressed his mind to the issues at hand or even justified his assessment calculation of instruction fees at Kshs 15 million.

26. My finding is that the subject matter of the case was properly ascertainable and the arbitrator ought to have gone ahead to apply the appropriate schedule, which I have noted is Schedule 6 of the Advocates Remuneration Order, in taxing the Claimants' Bill of Costs.

27. Consequently, I vary the sum awarded by the Arbitrator on account of Instruction fees from Kshs 15 million to Kshs 30,169,518.41 together with getting up fees of Kshs 10,056,506.14 which is by law charged at one third of the instruction fees. The total sum awarded under instruction fees therefore comes to Kshs 40,226,024.55.

28. For the above reasons, I find that the application dated 29th September 2020 is merited and I therefore allow it in the following terms:

a. A declaration be and is hereby issued that the costs in arbitration be calculated in accordance the scale fees applicable to the High Court under Schedule 6 of the Advocates Remuneration Order.

b. That I assess the applicant's arbitration costs on a party to party basis at Kshs 40,226,024.55 under Schedule 6 of the Advocates Remuneration Order in accordance with the Applicant' Party to Party Bill of Costs dated 29th June 2020.

c. The assessed costs shall form part of the decree in Misc. No. E871 of 2020 Alpha Grain Millers Ltd & 7 Others V Ministry of Agriculture, Livestock & Fisheries & Another.

d. The cost of this application are awarded to the applicants.

Dated, signed and delivered via Microsoft Teams at Nairobi this 6th day of May 2021 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Kigata for the Applicants.

No appearance for the Respondents.

Court Assistant: Sylvia.