



Slok Construction Limited v United Millers Limited (Miscellaneous Civil Application 361 of 2013) [2021] KEHC 13 (KLR) (Commercial and Tax) (10 September 2021) (Ruling)

Neutral citation: [2021] KEHC 13 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION 361 OF 2013
DAS MAJANJA, J
SEPTEMBER 10, 2021**

BETWEEN

SLOK CONSTRUCTION LIMITED APPLICANT

AND

UNITED MILLERS LIMITED RESPONDENT

RULING

1. The Applicant has filed the Chamber Summons dated 4th September 2020 (“the Reference”) under *Advocates Remuneration Order* (“the Order”) from the decision of the Deputy Registrar delivered on 13th November 2019 following taxation of the Respondent’s Party and Party Bill of Costs dated 17th October 2013 (“the Bill of Costs”).
2. The application is supported by the affidavit of Sunil Narshi Shah, a director and shareholder of the Applicant, sworn on 4th September 2020. It is opposed by the Respondent through the replying affidavit of the Respondent’s director, Vimal Vyas, sworn on 23rd July 2021. The parties’ advocates made brief oral submissions in support of their respective positions.
3. It is common ground that the parties were embroiled in a construction agreement dispute that was resolved by way of arbitration and an award published on 28th May 2013 in favour of the Respondent who was also awarded 85% of its costs “...based on a party to Advocate basis”. Thereafter, the Respondent filed the Bill of Costs where it claimed a total of KES 6,195,646.14 with instruction fees



being pegged at KES 3,907,601.73. By the ruling dated 13th November 2019, the Deputy Registrar held in part as follows:

6. In this case, the award of the Arbitrator which was adopted as judgment of the court on the 4th December 2013 provided as follows.....(a) The Respondent shall pay the Claimant Kshs. 86,508,276.21...

.....The value of the subject matter is therefore Kshs. 86,506,276.21 and pursuant to provisions of Paragraph 1(b) of Schedule VI of the Advocates(Remuneration)(Amendment) Order, the instruction fees works as follows;

1st Kshs. 1,000,000 – Kshs. 77,000

2nd Kshs. 20,000,000 – Kshs. 300,000

Balance of Kshs. 65,506,276.21 – Kshs. 818,828

Total – Kshs. 1,195,828

The basic instruction fee is Kshs. 1,195,828. However, given the length of period this matter has taken in the judicial system, the fee is enhanced to Kshs. 1,500,000/=

.....

7. Getting up fees flows from instruction fees. The same is 1/3 thereof. Item No. 2 is therefore taxed at Kshs. 500,000/=....

.....

- 9.... The Applicant made 18 attendances before the Deputy Registrar for taxation and ruling therefore Item No. 48 is taxed at Kshs. 18,000/=

All the other items not mentioned herein above are drawn to scale

4. In sum, the Deputy Registrar taxed off KES 675,646.00 from the total bill and certified KES 5,520,000.00 as the amount due to the Respondent and further held that the Applicant shall only pay 85% of the same in line with the arbitral award that was adopted as a judgment and decree of the court on 4th December 2013. It is this decision that has now precipitated this Reference.

Whether the Reference is out of time

5. Before I proceed to deal with the substance of the Reference, I propose to dispose of the objection that the Reference was filed out of time and without leave of the court.
6. Rules 11(1) and (2) of the Order provides for the procedure and timelines to be followed by a party aggrieved by the decision of a taxing officer as follows:
 - (1) (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
 - (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by Chamber Summons, which shall be served on all the parties concerned, setting out the grounds of his objection.



7. It is not in dispute that the Deputy Registrar delivered the ruling on the taxation on 13th November 2019. By the letter dated 26th November 2019 and filed in court on 27th November 2019, the Applicant's advocates filed its letter under Rule 11(1) of the Order seeking reasons for the decision. By a letter dated 12th February 2020, the Deputy Registrar wrote a letter to the Applicant informing it that the reasons for her decision were contained in the ruling delivered on 13th November 2019 and that the ruling was available from the Registry.
8. This meant that the Applicant had fourteen days from the said 12th of February 2020 to file the reference. The Applicant however filed the Reference on 7th September 2020, close to seven months after being informed of the reasons for the ruling which is contrary to the clear provisions of the Order above without the leave of the court. The Deputy Registrar's letter in the court file does not indicate whether or when the letter was received by the Applicant. However, in its deposition, the Applicant shows that it sent several reminders to the Deputy Registrar dated 20th December 2019, 16th January 2020, 6th February 2020 and 2nd June 2020. It received the Deputy Registrar's letter on 24th August 2021 meaning that the 14 days should be reckoned from that date hence filed by 7th September 2020. It is therefore filed within time.
9. A strict reading of rule 11(2) of the Order confirms the procedure adopted by the Applicant. It filed the Notice of Objection and Request for Reasons for the decisions within the time prescribed. The Applicant cannot be faulted for following the strict provisions of the law. I am of course, aware, that there is ample authority for the proposition that reasons for the taxation decision are contained in the ruling hence there was no need to seek reasons for the decision when the ruling has been delivered (see *Mumias Sugar Company Limited v Professor Tom Ojienda and Associates* KSM HC Misc. No. 279 of 2017 [2018] eKLR). Further, in the absence of any other evidence that the letter from the Deputy Registrar was not received on 24th August 2021, I hold that the Reference was filed within the time limited by the Order.

Analysis and Determination

10. The Applicant is challenging the Deputy Registrar's decision in respect of Items 1, 2, 48, 53, 54 and 55 which include instruction fees, getting up, attendances before the Deputy Registrar and the items constituting the sub-totals and 16% VAT. In resolving this issue, the court is guided by the principal that on a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs (see *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR).
11. From its submissions, the Applicant does not dispute the value of the subject matter and the provision of the Order applied by Deputy Registrar. Its case is that for an award of KES 85,508,276.21, the fee chargeable is an amount of KES 1,330,124.14 only. The Applicant's assails the discretion exercised by the Deputy Registrar to enhance the instruction fee from KES 1,195,828.00 to KES 1,500,000.00, "given the length of period this matter has taken in the Judicial System" and it submits that the Order does not provide for enhancement of fees justified by a protracted, lengthy duration of a matter under any of its Schedules. Instead, the number of appearances offers the basis for said enhancements as prescribed under the Schedule 6 A (7) of the Order thus the Deputy Registrar has not ascribed any justifiable grounds in exercising her discretion as she did.
12. The Respondent supports the decision of the Deputy Registrar and submits that the Deputy Registrar exercised discretion to assess the costs taking into account amongst other matters, the nature and importance of the cause of the matter; the interest of the parties; the general conduct of the



proceedings, and any directions by the trial judge and all other relevant circumstances. It denies that the instruction fees were much higher as prescribed by the Order, 2006 and urges the court to dismiss this ground as the basic instruction fees was enhanced considering the length of period that the matter took in the judicial system.

13. Under Schedule VI Para. 1(b) of the Order, 2006, the instruction fee for a defended matter whose value is KES. 86,506,276.21 is based on the following scale:

1st KES 1,000,000.00 KES. 77,000.00

Between KES. 1,000,000.00 and KES 20,000,000.00 fees for KES 1,000,000.00 plus an addition 1.5%

Over KES 20,000,000.00 fees for KES 20,000,000.00 plus an additional 1.25%

14. The formula set out above is what the Deputy Registrar applied in the ruling which I have set out at para. 3 above. I therefore do not find any error in that regard. Whether the Deputy Registrar can increase the basic instruction fee is answered by Schedule VI Part A(1) which provides that “The fee for instructions in suits shall be as follows, unless the taxing officer in his discretion shall increase or (unless otherwise provided) reduce it”. It is therefore incorrect for the Applicant to claim that the Schedule therein only provides for enhancements in respect of the number of appearances and not a protracted or lengthy duration of a matter.
15. When increasing the instruction fee, the Deputy Registrar must give reasons for enhancement. In this case, the Deputy Registrar stated that the increment was to take into account, “the length of period this matter has taken in the Judicial System”. I hold that the Deputy Registrar erred by failing to understand that the Bill of Costs related to arbitration proceedings where the issue for those proceeding has been left to the court. It did not relate to proceedings conducted in court hence consideration of the period of time the matter was in court was not appropriate. What was filed in court was the Bill of Costs and the Respondent was compensated for each attendance under Item No. 48. I therefore set aside the aside the sum of KES. 304,172.00 being increment awarded above the basic instruction fee. The instruction fee under Item No. 1 shall be reduced by that amount.
16. The Applicant argues that the Respondent is not entitled to getting up fees because the matter arose from arbitration proceedings. The Applicant referred to the case of Wambugu, Motende and Company Advocates v Attorney General [2013] eKLR, where the court held that the where the matter is resolved through mediation and did not go to full trial, then getting up fees would not be awarded. As I have stated in the previous paragraph, the Bill of Costs was in respect of Party and Party Costs incurred in the arbitration proceedings. Para. 5.0 of the Arbitral Award shows that the both parties called witnesses; the Claimant called Mr Vimal Shah while the Respondent called Mr James Njuguna Gitocho and Mr Sunil Shah. Since the matter was heard, the Respondent is entitled to getting up fees. Ultimately, the getting up fee is tied to the finding of instruction fees as taxed by the Taxing Officer.
17. In its submissions, the Applicant has challenged Item No. 3 of the Bill of Costs where the Respondent claimed KES. 2,573,621.25 as, “[I]nstructions to have Mr Mwai Mathenge Advocate to appear with M/s Miller & Company Advocates to represent the Claimant and to Mr Mwai Mathenge’s agreed fee of 3.5% of the decretal sum being Kshs. 3,027,789.70” I reject this challenge as the Applicant’s objection dated 26th November 2019 leading to the Reference did not refer to Item No. 3 of the Bill of Costs. This amounts to introducing a new ground for the Reference which was not part of the objection. In fact, the Applicant did not challenge Item No. 3 in its submissions in opposition to the Bill of Costs before the Deputy Registrar.
18. On the items listed as Nos 48, 53, 54 and 55 in the Bill of Costs, the Applicant submits that the same could only be granted upon sufficient proof by the Respondent and that the Respondent having



failed to provide proof for the said disbursements in accurately quantified and calculated sums, thus the Applicant submits that the same be disregarded. In response, the Respondent contends that the Deputy Registrar took to taxing off all unsubstantiated items on the Bill of Costs where the initial disbursements were charged at KES 62,500.00 and finally arrived at an award of KES 10,000.00 for disbursements.

19. Item No. 48 of the Bill of Costs related to attendances before the Deputy Registrar for the taxation. Since the attendances for taxation can only be determined after the Bill of Costs has been filed and taxed, the award is within the knowledge of the Deputy Registrar. The Deputy Registrar awarded KES. 18,000.00 for 18 attendances. These attendances have not been disputed by the Applicant and are indeed reflected on the record. I do not find any reason for the court to interfere with this holding by the Deputy Registrar.

Conclusion and Disposition

20. My overall finding is that the Applicant's Reference dated 4th September 2020 succeeds only to the extent that the instruction fee is reduced by KES. 304,172.00. The Getting up fee and taxes due shall be reduced accordingly. The Applicant is awarded costs of the Reference which I assess as KES. 30,000.00.

21. The matter is now referred to the Deputy Registrar to certify the final costs in line with this decision.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF SEPTEMBER 2021.

D.S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Ogejo instructed by Ogejo, Omboto and Kijala Advocates for the Applicant.

Mr Chege instructed by Miller and Company Advocates for the Respondent.

