REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO.206 OF 2010

WEST KENYA SUGAR COMPANY LIMITED.....PLAINTIFF

VERSUS

AGRICULTURE FISHERIES & FOOD AUTHORITY....1ST DEFENDANT

BUTALI SUGAR MILLS LIMITED.....2ND DEFENDANT

RULING

1. Before this Court is the Reference from Taxation brought by way of Chamber Summons dated **30th April 2019**. In that Reference the 2nd Defendant **BUTALI SUGAR MILLS** sought the following Orders: -

> **"a. The Honourable Court be pleased to set aside the Deputy Registrar's Ruling delivered on 20th September 2018 as it relates to the reasoning and determination pertaining to item 1 of the Party and Party Bill of Costs dated 24th April 2018, and to determine the proper fees payable on item 1.**
>
> **b. Costs of this application be provided for."**

2. The Reference which was premised upon **Order II(1) and (2)** of the **Advocates (Remuneration) Order** was supported by an Affidavit dated **3rd May 2017** sworn by **JAMES OCHIENG ODUOL** an Advocate of the High Court of Kenya.

3. The Plaintiff **WEST KENYA SUGAR COMPANY LTD** opposed the Reference. The Reference was canvassed by way of written submissions. The 2nd Defendant filed their written submissions on **30th July 2019**, whilst the Plaintiff filed its submissions on **27th September 2019**.

BACKGROUND

4. The genesis of this Reference is the Ruling on a Bill of Costs delivered on **20th September 2018** by **Hon C. Wanyama,** Deputy Registrar. In that Ruling the Taxing Master taxed off an amount of **Kshs.58,007,125** thereby finally taxing the Bill of Costs at **Kshs.2,183,055/=.**

5. The 2nd Defendant was aggrieved by the Taxing Officer decision with respect to **Item No.1**. Instruction Fees. They submit that the Taxing Officer ignored and/or failed to properly identify the subject matter of the suit and accordingly she ended up taxing the Bill using an erroneous subject matter. That the amount awarded under this heading ought to have been **Kshs.60,000,000**.

6. On their part the Plaintiff submits that the Plaint and suit herein did not seek a money claim. By the Amended Plaint dated **30th June 2010** the prayers sought were as follows:-

> **"a. A permanent injunction restraining the First Defendant by itself, its servants and/or agents or otherwise howsoever from entertaining any application made to it by the Second Defendant and from granting to the second defendant or any other person or corporate body a licence to operate and or construct a sugar mill within a radius of twenty-four (24) Kilometres mill to mill of the location of the Plaintiff's sugar mill with zones allocated on a pro rata basis based on mill capacities.**

b. An order compelling the First Defendant to issue an order requiring Butali Sugar Mills Ltd to forthwith desist from the construction of a sugar mill within a radius of twenty four (24) Kilometres mill to mill of the location of the Plaintiff's sugar Mill.

c. Costs of the suit.

d. Such further or other relief that this Honourable Court may deem fit to grant."

7. The Plaintiffs further submit that they were not seeking any orders or reliefs as against the 2nd Defendant. That the 2nd Defendant was only enjoined to the suit much later by way of its own application dated **21st May 2010**. The Plaintiff further submits that by way of an application dated **10th February 2014** filed by **AGRICULTURE FISHERIES & FOOD AUTHORITY** (the 1st Plaintiff in the suit), the Plaintiff's suit was dismissed. Finally the Plaintiff submits that the figure of **Kshs.60,000,000/=** which the 2nd Defendant claims as Instruction Fees is overly inflated and indeed is exorbitant**.**

ANALYSIS AND DETERMINATION

8. I have carefully considered the written submissions filed by both parties in this matter. Paragraph II of the **Advocates Remuneration Order** provides as follows:-

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 to which he objects.

2. The taxing officer shall forth with 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 those reasons apply to a judge by chamber summons, which shall be served on all the parties concerned setting out the grounds of his objection.

9. The only issue for determination is whether the Taxing Master erred in assessing the Instruction Fees at **Kshs.200,000** instead of the **Kshs.6,000,000.00** claimed by the 2nd Defendant.

10. As a general principle the exercise of Taxing a Bill of Costs remains the preserve of the Taxing Master. The High Court ought only interfere where there has been an error of principle on the part of the Taxing Master. In **FIRST AMERICAN BANK OF KENYA –VS-SHAH & OTHERS [2002] I E.A 64,** it was held thus:-

"I find that on authorities this court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision on taxation was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an interference that it was based on an error of principle."

11. Similarly in the case of **Kipkorir, Titoo & Kiara Advocates V Deposit Protection Fund Board [2005] eKLR**, the Court of Appeal held that:-

"On 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."

12. In coming to her decision on how much to award as Instruction fees the Taxing master in her Ruling at Pages 2-3 stated as follows:-

"The amendment to the plaint was made pursuant to a successful application by the second defendant under Order 1 Rule 10(2) and 22 of the Civil Procedure Rules and other enabling provisions to be joined as the second Defendant in the suit. The Plaintiff was very specific in the amended plaint at paragraph 5 that "the Plaintiff seeks no relief against the second defendant who has been made a party to this suit as a second Defendant herein as a result of a successful application by it to this Honourable court dated 3rd May 2010 to be joined as such." The same was echoed in paragraph 2 of the amended reply to defence dated 23rd June 2010.

In the ruling of 13th December 2017 the suit was dismissed for want of prosecution with costs. Since a defence was filed then instruction fees is due and will be calculated under schedule VI paragraph (1) of the Advocates Remuneration Amendment Order 2006 which provides to sue or defend any case not provided for above such sum as may be reasonable but not less than Kshs.6,300/=."

I have considered the ruling delivered on 17th September 2010 where costs were awarded to the Respondent herein. At Page 11 paragraph 12 of the ruling the judge stated that "It is the 2nd Defendant who will suffer loss after constructing a mill at the cost of 2.5 billion. They have also undertaken a cane development programme, and contracted farmers to grow cane." According to the judge the application for injunction was accompanied by voluminous documents which were judicial review proceedings and other documents.

The case of Joreth Ltd Vs Kigano & Associates, 2002 IEA 92 the Court of Appeal had observed therein as follows:-

"We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a Bill of

costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances."

At paragraph 27 on page 18 of the ruling the judge observed that:

"The order sought by the Plaintiff would not only affect the 2nd Defendant but other parties who have legitimate expectation of deriving their livelihood from Butali's Sugar Mill."

Having considered the importance of the subject matter, interest of the parties and volume of documents to be perused to be able to defend the suit, I use my discretion to increase the instruction fees to Kshs.2,000,000/=."

13. From the record it is clear that the subject matter of the suit was not an actual monetary award, whose value could be ascertained from the pleadings and the judgment. In those circumstances the correct schedule applicable was **Schedule VI(1)** which provides:-

"To prevent or oppose a case not provided for which suit should be reasonable but not less than Kshs.6,300/="

14. In BUNSON TRAVEL & OTHERS –VS- KENYA AIRWAYS HCCC NO.304 OF 2004, it was held that:-

"…..the advocate therein have drawn the courts attention to the fact the Plaintiff who had sued his erstwhile client was owed Kshs.116,344,489/30. Notwithstanding that sum, the Taxing Officer did find that that was not one for a money claim. It was held <u>that the subject matter of this suit was an injunction</u>. Therefore when the taxing officer went ahead to peg the calculation of the instruction fee to the sum of Kshs.116,344,489/30, the client filed a successful reference. [own emphasis]

15. A similar situation pertains in the present suit. The suit was filed seeking injunctive orders not a monetary award. I am satisfied that the taxing officer correctly applied the known legal principles and in exercise of her discretion increased the amount payable as Instruction Fees from **Kshs.6,300** to **Kshs.2,000,000** having given due consideration to the importance of the matter, the interest of the parties and the voluminous documents involved in the suit.

16. In **REPUBLIC –VS- MINISTRY OF AGRICULTURE & 2 OTHERS Ex Parte SAMUEL MUCHIRI W'NJUGUNA & 6 OTHERS, Hon Justice J.B Ojwang [2006] eKLR** (retired) observed thus:-

"The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where is an officer of great experience, merely because it thinks the award somewhat too high or too low; <u>it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other</u>…The 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 manifestly excessive as to justify an interference that it was based on an error of principle…." [own emphasis]

17. I find no evidence of an error in principle or misapplication of the law on the part of the Taxing Officer. Accordingly, I find no merit in the present Reference. The same is hereby dismissed in its entirety with costs to the Plaintiff.

Dated in Nairobi this 9th day of June, 2020.

……..

Justice Maureen A. Odero