



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. CIVIL APPLICATION NO. 278 OF 2017

BETWEEN

GREENSTAR SYSTEMS LIMITED.....APPLICANT

AND

KENYATTA INTERNATIONAL CONVENTION CENTRE (KICC).....RESPONDENT

RULING

Introduction and Background

1. The Applicant has brought this reference from the decision of the Deputy Registrar made under **Rule 11** of the **Advocates Remuneration Order** (“the **Order**”) by the Chamber Summons dated 22nd June 2020. It is in respect of the ruling of the Deputy Registrar dated 21st May 2020 following taxation of a Party & Party Bill of Costs dated 2nd October 2019.
2. The application is supported by the affidavit of John Ibae Kuria, the Applicant’s Managing Director, sworn on 22nd June 2020. It is opposed by the replying affidavit of the Respondent’s Corporation Secretary, Janefrances Mutio Mutisya, sworn on 10th August 2020. The reference was canvassed by written submissions.
3. It is common ground that the parties were embroiled in a dispute which was resolved by an arbitral tribunal. By an award dated 17th March 2017, the Applicant was awarded Kshs. 47,419,029.86 (“the Award”). The parties were directed to bear their own costs. The Respondent filed an application dated 14th June 2017 seeking to set aside the Award while the Applicant had filed an application dated 14th July 2017 seeking to enforce the Award. The applications were heard together and by a ruling dated 19th January 2018, Sewe J., dismissed the Respondent’s application and allowed the Applicant’s application. The Respondent was ordered to pay costs for both applications. The Respondent then filed an application dated 7th August 2018 seeking to stay and/or set aside the execution proceedings commenced by the Applicant. The court dismissed the application on 18th October 2018 with costs to the Applicant.
4. In order to recover its costs, the Applicant filed the Party and Party Bill of Costs dated 2nd October 2019. It sought instruction fees, “to defend the Respondent herein against the Applicant’s suit seeking the stay of enforcement and setting aside of the Arbitral Award” and instruction fees, “to file an application on behalf of the Respondent against the applicant for leave to enforce the Final Award made” in items No. 1 and 18 respectively. In the Bill of Costs, the Applicant claimed Kshs. 3,706,515.12 including Kshs 1,055,000.00 as instruction fees on account of each application.
5. The Deputy Registrar taxed off Kshs. 3,289,371.12/- and awarded the sum of Kshs. 417,144/- as the amount due to the Applicant in the ruling dated 21st May 2020 stating, in part, as follows:

[3] The bill of costs is taxed under schedule 6 of the Advocates Remuneration Order 2014. (In) Item 1 of the bill I am guided by Paragraph (j) (iii) of schedule 6 which provides that “to present or oppose application for setting aside arbitral award Kshs. 50,000.” The item is taxed at Kshs. 50,000/- (In) Item 18 I have considered the application and costs were granted. The application is viewed under any other case not provided for and since it was defended I award 75,000/- for the said item. I am not convinced that it was a complex matter.

6. From the reference, depositions and parties' submissions, the only issue for resolution is whether the Deputy Registrar applied the correct principles in awarding the sum of Kshs. 417,144.00 as costs to the Applicant.

The Submissions

7. The Applicant submitted that in awarding Kshs. 417,144.00, the Deputy Registrar failed to exercise her discretion judiciously and awarded costs which are manifestly low. The Applicant added that the Deputy Registrar erred in principle by not taking into account the complexity, nature and subject matter of the suit and that the amount awarded is an injustice to the Applicant.

8. Counsel for the Applicant submitted that Item No. 1 of the Bill of Costs dealt with defence against the Respondent's Application seeking the setting aside of the Arbitral Award and that the Deputy Registrar erred by not taking into consideration the fundamental principles that are clearly elucidated at **Schedule 6 Paragraph (j)** of the **Order**. Counsel submitted that the subject matter was an arbitral Award amounting to Kshs. 47,419,029.86/- together with costs which was being sought to be set aside and execution stayed by the Respondent.

9. Counsel further submitted that the instruction fees in Item No. 18 of the Bill of Costs was assessed as per the provisions of **paragraph (j)** of **Schedule 6** of the **Order** instead of the provisions of **Scale 1** of the **Schedule 6** of the **Order**. Counsel stated that the Deputy Registrar failed to appreciate the extent and involvement of carrying out the instructions. Counsel relied on the case of **Gitonga Mureithi & Co Advocates v Kenyatta International Convention Center Misc Civil App No. 334 of 2018 (UR)** where the sum of Kshs. 1,000,000.00 was awarded for an application to set aside an arbitral award when the amount of work was factored in.

10. Counsel for the Applicant submitted that this court has the discretion to either remit the bill to the taxing master with appropriate direction on how it should be taxed or to proceed and tax the same.

11. The Respondent supported the decision of the Deputy Registrar and urged the court to dismiss the reference and uphold the decision as it was based on sound legal principles. Counsel for the Respondent submitted that the Applicant did not file any submissions in support of its Bill of Costs hence it should not cry foul by filing the instant reference. Counsel submitted that the Applicant alleged that the value of the subject matter is Kshs. 47,419,029.86/- but was unable to persuade the Deputy Registrar to award instruction fees based on the figure quoted. Counsel submitted that in any case, the arbitral tribunal held that each party shall bear their own costs of the arbitration therefore the Applicant cannot base the value of the subject matter on Kshs. 47,419,029.86.00. Counsel added that since the applications under consideration were filed in the High Court, the bill of costs cannot be based on an award.

12. Counsel submitted that the application dated 14th June 2017 was an ordinary application for stay of enforcement of the award, it was not complex as alleged and did not require anything more than the normal exercise of diligence of a professional in any field on the part of the Applicant's counsel. Counsel contended that the case of **Gitonga Mureithi & Co Advocates v Kenyatta International Convention Center (Supra)** was not binding as it was distinguishable on the ground that it was in respect of an Advocate-Client Bill of Costs and not a Party and Party Bill of Costs.

Analysis and Determination

13. The principles upon which the court exercises jurisdiction in a reference is settled. In **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR** the Court of Appeal summarised the principle as follows:

*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. In **Arthur v Nyeri Electricity Undertaking [1961] EA 497**, the predecessor of this Court said at page 492 paragraph I: "where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases".*

14. The substance of this reference concerns selection of the proper charging order for determination of instruction fees and determination of instruction fees. In **Makula International v Cardinal Nsubuga & Another [1982] UGSC 2**, the Court of Appeal in Uganda expressed the approach to taxation as follows:

The taxing officer should, in taxing a bill, first find the appropriate scale fee in schedule VI, and then consider whether the basic fee should be increased or reduced. He must give reasons for deciding that the basic fee should be increased or decreased. When he has decided that the scale should be exceeded, he does not arrive at a figure which he awards by multiplying the scale fee by a multiplication factor, but places what he considers a fair value upon work or responsibility involved. Lastly, he taxes the instruction fee, either by awarding the basic fee or by increasing or decreasing it.

15. As regards the application to defend the application to set aside the Award, the trial magistrate identified the charging provisions as **Schedule 6 Paragraph 1(j)** of the **Order** which provides as follows:

(j) *Constitutional petitions and prerogative orders*

To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing master in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate—

(i) *where the matter is not complex or opposed such sum as may be reasonable but not less than 45,000*

(ii) where the matter is opposed and found to satisfy the criteria set out above, such sum as may reasonable but not less than 100,000

(iii) to present or oppose application for setting aside arbitral award- 50,000. [Emphasis mine]

16. While I agree that **Paragraph 1(j)(iii)** aforesaid appears under the heading, “*Constitutional petition ...*”, the subject matter therein is incongruent with the subject head. Setting aside an arbitral award is a separate and different subject matter from constitutional petitions. The clear intent of the **Order** was to prescribe specific fees for an application to set aside an arbitral award and the heading in the rule is for purpose of convenience. The Deputy Registrar was correct to apply the charging provision as a starting point for the assessment of instruction fees for the application to set aside judgment.

17. Even if I take the position that the **Schedule 6 Paragraph 1(j)** of the **Order** is not applicable, it does not follow that **Schedule 6 Paragraph 1** of the **Order** should apply to an application to set aside an arbitral award. The matter before the court was originated by an application to set aside an arbitral award which was countered by an application to enforce the award. The issue whether the sum claimed by the Applicant from the Respondent was, as the Respondent submits, determined by the arbitral tribunal. What was before the court were consequential proceedings after the award. In that regard, the Deputy Registrar was correct to identify the appropriate charging order for the application to enforce the arbitral award under **Schedule 6A 1(j) (viii)** of the **Order** which provides for matters arising during proceedings not otherwise provided for, sets a minimum fee of Kshs. 50,000.00 where the application is opposed.

18. Having identified the appropriate charging order for Items No. 1 and 18 of the Bill of Costs, the Deputy Registrar was required to exercise her discretion taking into account the factors set out in the proviso to **Schedule 6A(1)** of the **Order** as elucidated in **Makula International v Cardinal Nsubuga & Another (Supra)** and **Republic v Ministry of Agriculture and 2 Others; Ex-parte Muchiri W’Njuguna & others** NRB HC Misc. Appl. No. 621 of 2000 [2006] eKLR.

19. A reading of the Deputy Registrar’s decision, which I have excerpted above, shows that for Item No. 1, no reasons were given for taxing the item at Kshs. 50,000.00. In respect of Item No. 18, the reasons given is that the Deputy Registrar was not convinced that the matter was complex. In **Republic v Minister for Agriculture and 2 Others ex parte W’Njuguna and 6 Others (Supra)** the court emphasised the necessity to give reasons for arriving at a conclusion as follows:

It is necessary to ascertain how she arrived at that figure; for although the judicial review applicant’s firm position is that it was an exercise of lawful discretion which therefore, this court should uphold, the correct perception of the discretion donated by law, I believe, is that such a discretion is only duly exercised when it is guided by transparent, regular, reliable and just criteria... and

[I]t was necessary to specify clearly and candidly how she exercised her discretion... it is not enough to set by attributing to oneself discretion originating from legal provision and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if these by themselves could permit assignment of mystical figures of taxed costs ...

20. I find that the conclusions reached by the Deputy Registrar were not founded on a proper exercise of judicial discretion which requires the court to take into account relevant factors that support the conclusion. In short, the decision of the Deputy Registrar does not contain any reasons for the conclusions which are required to show that the discretion was exercised judiciously.

Disposition

21. The Chamber Summons dated 22nd June 2020 is allowed. The Applicant’s Party and Party Bill of Costs dated 2nd October 2019 is remitted for taxation before any other Deputy Registrar other than **Hon. Claire Wanyama** for determination of the instruction fees and consequential items in line with this decision.

22. The Respondent shall bear the costs of the reference.

DATED and DELIVERED at NAIROBI this 4th day of DECEMBER 2020.

D.S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Mbobu instructed by Kyalo and Associates Advocates for the Applicant.

Mr Juma instructed by J. O. Juma and Company Advocates for the Respondent.