



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
MISCELLANEOUS CIVIL APPLICATION NO. 514 OF 2014

**KENYA AGRICULTURAL &
LIVESTOCK RESEARCH ORGANISATION**
(Formerly Kenya Agricultural Research Institute).....APPLICANT

VERSUS

NJAMA LIMITED.....RESPONDENT

RULING NO.3

1. The application dated 11th July 2016 was brought by way of a reference from the decision of the learned Taxing Officer.
2. The Applicant, **KENYA AGRICULTURAL & LIVESTOCK RESEARCH ORGANISATION** (formerly *Kenya Agricultural Research Institute*) challenged the decision of the Taxing Officer in respect to Items 1, 2 and 3 of the Bill of Costs.
3. The Applicant (hereinafter “**KALRO**” asked the court to find that the Taxing Officer had failed to consider the importance and complexity of the case between the parties.
4. The matter was described as complex because it involved a Government Institution and a private citizen. As far as **KALRO** was concerned, the claim against it could have brought the institution to a halt.
5. Secondly, the Taxing Officer is blamed for failing to take into account the amount of time which was expended on the case.
6. According to **KALRO**, a lot of research was conducted by the advocate.
7. Thirdly, the Taxing Officer is said to have erred when he declined to grant Getting Up Fees. As far as **KALRO** was concerned, it was not only when witnesses were called to testify that Getting Up fees are earned.
8. The organization submitted that Getting Up Fees are awardable in any trial, whether such trial was conducted through oral testimonies or through affidavit evidence.

9. In this case, the documentation, said to be about 1,000 pages, was described as voluminous. Therefore, the implication was that the advocate had to spend a considerable amount of time preparing for the trial.

10. In answer to the reference, the Respondent, **NJAMA LIMITED** (*hereinafter "Njama"*) submitted that the proceedings in issue were not a suit. Njama's reasoning was that the matter was in the nature of a Miscellaneous Application, which did not require any preparation.

11. The Respondent's contention was as follows;

"We simply came to court and argued, and a Ruling was given".

12. In those circumstances, the Respondent submitted that an Instruction fee of Kshs. 50,000/- was sufficient.

13. Secondly, the Respondent submitted that Getting Up Fees are not awarded for this kind of case, in which there was no preparations for trial. It was the understanding of the Respondent that preparations for a trial entail the meetings and discussions which an advocate holds with witnesses, to prepare for the giving of *viva voce* evidence.

14. Meanwhile, on the issue of the research allegedly undertaken by the advocates, it was the view of the respondent that the carrying out of research does not necessarily imply that the matter was complex.

15. There was a possibility that the advocate had to conduct in-depth research because he was not familiar with that aspect of the law applicable to the case that he was handling.

16. I am in agreement with Njama, that an advocate may have to carry out in-depth research, not because the case was necessarily complex, but possibly because the applicable law was not already within the understanding of the particular advocate. Therefore, just because an advocate had to conduct a lot of research, would not necessarily imply tht the case was complex.

17. The Bill of costs lodged by Njama indicated that the Instruction Fee was claimed in relation the filing of an application to set aside the Arbitral Award.

18. In my considered opinion such an application does not give rise to any novel submissions.

19. The grounds upon which the court can set aside an arbitral award are specified by statute. And there have already been many cases which have interpreted the relevant statutory provisions.

20. I also find that just because one of the parties was a Government Institution which was pitted against a private citizen, would not alter the parameters set by the Arbitration Act.

21. Thirdly, the fact that the application had 1000 pages does not render the application complex. Volume or the quantity of the materials which an advocate has to read only goes to increasing the length of time needed to read through them.

22. In this case, the bulk of the documents utilized by the parties, contained;

a) The Tender Documents;

b) Bills of Quantities;

c) The Contract;

d) Particulars of the work done;

e) Photographs of the houses;

and (f) Correspondence between the parties.

23. In the event, there was no need for the advocates to conduct research on the bulk of the documentation, as they largely contained matters of fact, which were not crucial in the application to set aside the award.

24. I believe that the provisions of Schedule 6 paragraph 1 (j) (iii) of the Advocates Remuneration Order was tailored to take into account the fact that an application to set aside an arbitral award was not complex.

25. The sum provided by the scale is Kshs. 50,000/-; and that is the sum which the Taxing Officer awarded.

26. It is instructive to note that the Taxing Officer is not required to take into account the value of the subject matter when handling a taxation arising from an attempt to set aside an arbitral award.

27. That position can be contrasted to Schedule 6, paragraph 1 (a) of the Advocates Remuneration Order, which sets out the Instruction Fee awardable depending on the value of the subject matter.

28. Accordingly, I find that the Taxing Officer did not err in principle or at all, when she awarded Kshs. 50,000/- in respect to the Instruction Fees.

29. The next issue concerns Getting Up Fees.

30. This application was determined without the involvement of any witnesses who gave *viva voce* evidence. It was determined on the basis of affidavits and legal submissions.

31. Contrary to what the respondent submitted, even though there was no oral testimonies by witnesses, that did not imply that the parties or their advocates simply walked to court without preparing themselves. From the level of submissions made on the application, there can be no doubt that the parties were well prepared.

32. Does that mean that any time advocates prepare for applications they would be entitled to Getting Up fees?

33. Schedule 6 paragraph 2 spells out the scenario in which fees, known as Getting Up fees may be charged. The heading reads;

“FEES FOR GETTING UP OR PREPARING FOR TRIAL”.

34. In other words, it is only when it is demonstrated by an advocate that he prepared for Trial, that the advocate becomes entitled to Getting Up fees.

35. And the second thing which the advocate needs to demonstrate is specified by paragraph 2 of Schedule 6, as follows;

“In a case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation”.

36. In this case, there was no denial of liability. There was only a challenge to the arbitral award.

37. There was no trial: there was only an application to set aside the award.

38. In the case of **MITS ELECTRICAL COMPANY LIMITED Vs NATIONAL INDUSTRIAL**

CREDIT BANK LIMITED Misc. APPLICATION No. 429 of 2004, Kasango J. accepted the respondent's contention that a Getting Up Fee contemplates a situation in which there is a full trial, at which evidence is adduced. The learned Judge said that Getting Up Fees;

“...clearly contemplates where counsel is involved in preparation of witnesses and witness statements etc. This was not the case here. The application was supported by affidavit and no *viva voce* evidence was adduced”.

39. On that basis, the claim for Getting Up fees was disallowed.

40. A similar position was taken by Ojwang J. (*as he then was*) in **REPUBLIC Vs NATIONAL ENVIRONMENTAL TRIBUNAL *ex-parte* SILVERSTEN ENTERPRISES LIMITED [2010] e KLR**, which was a case for Judicial Review.

41. I am in agreement with those decisions, and hold that because there was no trial; no preparation of witnesses who would have given *viva voce* evidence; and no witness statements prepared by the advocate, Getting Up fees was not awardable.

42. In the result, I find no merit in the reference. It is therefore dismissed, with costs to **KALRO**.

DATED, SIGNED and DELIVERED at NAIROBI this 18th day of January 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Masivo for the Applicant

Miss Ncharo for Thuita for the Respondent

Collins Odhiambo – Court clerk