



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS CAUSE NO. 376 OF 2015

KENYA ELECTRICITY GENERATING COMPANY LIMITED (KENGEN)...APPLICANT

VERSUS

OJSC POWER MACHINES LIMITED & OTHERS.....RESPONDENT

RULING

1. This is an application to strike out the Bill of Costs dated 28th August 2015.
2. In the alternative, the applicant asks that the Bill of Costs be stayed pending the hearing and determination of the appeal **O J S C POWER MACHINES LIMITED & 2 OTHERS (ACTING JOINTLY AS A CONSORTIUM/JOINT VENTURE Vs PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD & 2 OTHERS, CIVIL APPEAL No. 28 of 2016)**.
3. The applicant told the court that the Bill of Costs in issue arose from the Public Procurement Appeals Board.
4. It added that the Tender had been awarded to the Interested Party, who was not qualified. However, the application for review was dismissed with costs; hence the Bill of Costs.
5. Miss Momanyi, the learned advocate for the applicant, submitted that the Bill of Costs was irregular and unwarranted, as the Instruction Fee is based on a subject matter which had ceased to exist. Counsel pointed out that the Respondent had cancelled the Tender.
6. She added that the Respondent had challenged the Board's decision which had compelled it to proceed to give the Tender to the Interested party.
7. Therefore, the Respondent was awarded costs. However, the applicant insisted that the sum claimed is grossly exaggerated. For that reason, the applicant asked the court to strike out the Bill of Costs.
8. In the alternative, the applicant asked the court to stay the process of taxation until the Appeal was heard and determined. According to the applicant, if taxation was not stayed, the appeal would be rendered nugatory.
9. The applicant concluded by saying that it was in the interest of justice to stay the taxation, because otherwise the applicant would suffer irreparable loss.

10. When responding to the application, Mr. Aluvale, the learned advocate for the respondent, described it as an afterthought, which was intended to delay taxation.

11. He drew the court's attention to the fact that the Board's decision is dated 21st August 2015, and that the Bill of Costs was served upon the applicant on 31st August 2015.

12. However, the current application was not lodged until 21st March 2016: That was a whole 7 months after the Bill of Costs was served upon the applicant.

13. In a quick rejoinder to that contention, the applicant said that although the Bill of Costs was filed on 21st August 2015, it was not served until 11th February 2016.

14. I have perused the record of the proceedings and noted that the Affidavit of service sworn by David Muithya, a process server, indicates that he served the ***“Notice of Taxation dated 4th February 2016, together with the bill of costs dated 28th August 2015 upon Nyachoti & Company Advocates....”***

15. I found no proof that the Bill of Costs had been served on 31st August 2015.

16. Considering that the application herein was lodged in court on 21st March 2016, I find that there was no delay in moving the court. Therefore the current application was not an afterthought as suggested by the respondent.

17. I now move on to consider the merits of the application. The starting point, in my considered opinion, is the function of a Taxing Officer.

18. He or she gives a hearing to the parties and then makes a determination on the quantum of costs to be awarded.

19. The taxing officer does not determine whether or not a party is to be awarded costs. That function would already have been performed by the court. And once the court determines that a party was entitled to costs, the Taxing Officer cannot vary or set aside that order. His or her function is to determine the quantum of costs payable.

20. In the case of **PETER KAMAU IKIGU Vs BARCLAYS BANK of KENYA LIMITED & ANOTHER, CIVIL APPLICATION No.NAI. 306 OF 2013**, the Court of Appeal expressed itself thus;

“It has been stated time and again by the courts in this jurisdiction that when it comes to matters of taxation of Bills of Costs, the taxing master is the real authority and, except in exceptional cases, courts will defer to his or her views, opinions and decisions....”

21. Therefore, if the applicant is convinced that the Bill of Costs in this case was grossly exaggerated, it should make out its case before the Taxing Officer. It should not be seeking to bar the Taxing Officer from undertaking the very task which could help it get the rightful assessment of the costs payable.

22. In the case of **PETER KAMAU IKIGU Vs. BARCLAYS BANK of KENYA LIMITED & ANOTHER, (above-cited)** the Court of Appeal said;

“With due respect to the applicant, as presented and argued, the application before us is utterly premature and speculative. Nobody knows what items the taxing master will strike off the respondents' Bill of Costs and what the final figure awarded will be. Many are the times when after taxation, the Bill of Costs as drawn cannot be recognized from the Bill of Costs as taxed. In any event, the law provides a very elaborate process for challenging the decision or the exercise of discretion by the taxing master, which in this case is yet to be invoked”.

23. Not only is that decision binding upon me, but I am totally convinced that it constitutes a correct pronouncement of the law.

24. There is thus no legal basis for striking out the Bill of Costs.

25. I also find that the process of taxation only enables the parties to become aware of the quantum of costs payable.

26. Since it is possible that the decision of the taxing officer may or may not be acceptable to the parties, it is speculative for the applicant to imagine that the determination by the taxing officer would be prejudicial to it.

27. But even if the decision which the taxing officer will render should turn out to be unacceptable to the applicant, there is an elaborate procedure for challenging it. In effect, taxation, of itself, cannot render nugatory, the pending appeal.

28. In the result, I find no reason in law or in fact for staying the taxation of the Bill of Costs.

29. The application dated 18th March 2016 is dismissed, with costs to the Respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 16th day of February 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Miring'u for Kiragu for the Applicant (Kengen).

Miss Momanyi for Nyachoti for the Respondent (OJSC).

Collins Odhiambo – Court clerk.