



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 45 OF 2011

IN THE MATTER OF: ENFORCEMENT OF THE BILL OF RIGHTS

UNDER ARTICLE 22(4) OF THE CONSTITUTION

OF KENYA

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE BILL OF RIGHTS AND
CONSTITUTION UNDER ARTICLE 22(4), 24, 27, 35, 40, 46, 47, 50 AND 10 OF THE
CONSTITUTION OF KENYA.

AND

IN THE MATTER OF: MSA HCCC NO. 652(O.S.) OF 1998 AND MSA HCCC NO. 41 OF 2009

BETWEEN

FOUR FARMS LIMITED.....PETITIONER

VERSUS

AGRICULTURAL FINANCE CORPORATION.....RESPONDENT

RULING

1. This Ruling relates to a Chamber Summons dated 6th February, 2015 filed pursuant to Rule 11(1) and (2) of the Advocates Remuneration Order 2006, (the Reference), in which the Petitioner/Applicant sought *inter alia*, the following orders:-

(1) that the Ruling on Taxation delivered by Honourable D. Wasike the Taxing Officer on 18th December, 2014 with respect to items 1 (Instruction Fees), and 17 (getting up fees) and the claim for VAT of the 2nd Interested Party's Bill of Costs dated 26th June, 2014 be set aside and/or revised.

(2) that in the alternative, this Court do remit the second Interested Party's Bill of Costs dated 26th

June, 2014 to another Taxing Officer for re-taxation;

(3) that the costs of and occasioned by this reference be provided for.

2. The Reference was supported by the Affidavit of Priscilla Mwende Onesmus sworn on 6th February, 2015, and on the grounds that –

(1) the learned Taxing Officer misdirected herself in making an assessment of Item 1 (Instruction Fees), and 17 (getting up fees) of the Interested Party's Bill of Costs which is so manifestly high so as to arrive at an error of principle with regard to the aforesaid items of the second Interested Party's Bill of Costs.

(2) without prejudice to the foregoing, the Petition, the subject of the Second Interested Party's Bill of Costs (Constitutional Petition no. 215 of 2011 between FOUR FARMS LIMITED VS. AGRICULTURAL FINANCE CORPORATION & OTHERS was determined on a preliminary point of law by Hon. Justice F. Tuiyott before the Petition had been confirmed for hearing;

(3) in the circumstances, the learned Taxing Officer has misdirected herself in allowing Item 17 (getting up fees) of the second Interested Party's Bill of Costs and made an error in principle;

(4) the learned Taxing Officer misdirected herself in allowing the second Interested Party's claim for VAT to a Party and Party Bill of Costs which does not lie in law.

3. In a Supplementary Affidavit of Priscilla Mwende Onesmus sworn and filed on 20th March, 2015, the Petitioner depones that Item 17 on getting up fees should have been re-assessed at Kshs. 110,891.60 being one third of instruction fees re-assessed at Kshs. 332,675/= by the learned Taxing Officer and that Kshs. 6,108.34 ought to have been taxed off from the amount of Kshs. 117,000/= in the Ruling by the learned Taxing Officer in respect to Item 17 on getting up fees.

4. The Reference was however opposed by the Second Interested Party which filed on 16th March, 2015 Grounds of Opposition of even date and contended to the contrary that:

(1) the learned Taxing Officer applied the correct principles and did not misdirect herself in assessing items 1 and 17 of the Bill;

(2) VAT is payable;

(3) A hearing by way of affidavit evidence is still a hearing;

(4) the application is frivolous, vexatious and an abuse of court process.

(5) the Petitioner is using the application to delay the matter hence abusing the court process.

(6) the Petitioner's conduct as shown on record at the taxation stage shows a pattern of unwarranted delays.

5. The issue raised by the Reference herein is whether the taxation of Items 1 and 17 of the Second Interested Party's Bill of Costs was in accord with the principles of taxation set in Schedule VI of the Advocates Remuneration Order. The other question raised by the Reference is whether VAT is payable on a Party and Party Bill of Costs. I will deal with these issues in turn.

6. The principles of taxation of a Party and Party Bill of Costs are set out in Schedule VI of the Advocates Remuneration Order, 2006, and the applicable Instruction Fees is provided by Schedule VI A(1) (b) of the said Order to –

“to sue in any proceedings described in paragraph (a) where a defence or other denial of liability is filed.....where the value of the subject matter was known”

7. In this case, the value of the subject matter was known and the learned Taxing Officer applied correctly the formula prescribed under Paragraph 1(b) for the determination of Instruction Fee, and declined to increase the instruction fees, and again quite correctly so, as there was no reason to warrant such **“increase”**. The figure of Kshs. 332,675/= as the basic Instruction Fees was therefore correct. There is no basis for suggesting that the Taxing Officer made an error of principle and arrived at a manifestly excessive fee. In fact a sum of Kshs. 17,325/= was taxed off from the sum of Kshs. 350,000/= in the Bill of Costs. I find no merit for the reference on Item 1 of the Bill of Costs and dismiss it.

8. Associated with the first issue was the fees charged on Item 17 of the Bill of Costs. The learned Taxing Officer did not deal with this issue in her Ruling of 18th December, 2014. The Petitioner’s counsel’s argument was that there was no trial or hearing of the Petition as the action was decided upon a preliminary point, on the basis of affidavit evidence. I agree with the Respondent’s counsel contention that a hearing may be by way of oral or affidavit evidence. It is immaterial in my respectful view whether such hearing is upon a Preliminary Objection on a point of law. It is still a hearing, and counsel on either side must prepare for it. The fee for getting up, is therefore proper. I do not with respect as already stated agree with the contention otherwise. The Reference fails on this ground as well.

9. However, having established the instruction fee at KShs. 332,675/= and getting up fees being one third of the Instruction Fees, the correct figure is Kshs. 110,891.70, and not KShs. 117,000/=. The learned Taxing Officer therefore erred in failing to correct the figure of KShs. 117,000/= to KShs. 110,891.70. This being merely an arithmetical and not an error of principle, a ground for remitting the Bill to the same or a different taxing officer, I direct that there shall be deducted from the sum of KShs. 117,000/= the sum of KShs. 6,108.30 to arrive at KShs. 110,891.70 being getting up fees. The applicant succeeds on this point, and there shall therefore be deducted from the final figure of KShs. 573,425/= the sum of KShs. 6,108.30 to reduce the final sum payable to KShs. 567,316.70.

10. The final point raised in the Reference was whether VAT

was payable upon a Party and Party Bill of Costs. To answer this question it is necessary to ask another question, namely, what is the basis of a Party and Party Bill of Costs. This question was answered by the learned Taxing Officer when she cited the decision of the court in **JASBIR SINGH RAI & 3 OTHERS VS. TARLOCHAN SINGH RAI & 4 OTHERS [2014] eKLR** where the court said:-

“the object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure. Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting the case.”

11. The **“fight”** referred to by the court is conducted by counsel for the successful litigant. It is a service rendered by counsel. The supply or rendering of services is one of the activities which attracts V.A.T. under section 5 of the Value Added Tax Act, 2013 (No. 35 of 2013). It was properly charged on the basic instruction fee of Kshs. 332,675/=. The contention to the contrary has no basis, and this leg of the reference also fails.

12. Having succeeded on one ground only, I find and hold

that the Reference herein dated 6th February, 2015 and filed on 11th February, 2015 had no merit on all other grounds and I award two thirds of the costs of the Reference to the Interested Party.

3. There shall issue orders accordingly.

Dated, Signed and Delivered in Mombasa this 7th day of May 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Ms. Onesmus for Petitioner

Mr. Adake holding brief Omondi for Respondent

Court Assistant Kaunda