IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), KARANJA & KIAGE, JJ.A.)

CIVIL APPEAL NO. 254 OF 2013

BETWEEN

R. BILLING & CO. ADVOCATES.....APPELLANT

AND
KUNDAN SINGH CONSTRUCTION LIMITED (NOW KSC

INTERNATIONAL LIMITED)..... RESPONDENT

(Being an appeal from the Ruling of the High Court at Nairobi, Commercial & Admirality Division (J.B Havelock, J) dated 15th July, 2013

in

Misc Cause No. 291 of 2010)

******

JUDGMENT OF THE COURT

The appellant filed before the taxing officer an advocate-client bill of costs arising from the proceedings in HCCC No.164 of 2009, which related to a contract between the respondent and Tanzania Roads Agency for the construction of Mbeya-Chunya-Makongolosi Road in Tanzania. The aggregate sums contained in a bank performance guarantee and 2 advance payment guarantees amounted to Kshs.534,581,100 while the total sum of the road construction agreement was given as Kshs. 1,734,581,100.00. When the two contracting parties disagreed, the respondent engaged the appellant to act for it in H.C. Civil Suit 164 of 2009, **Kundan Singh Construction Limited & another v Tanzania National**. The figures presented in this dispute are in, some instances incomprehensible and convoluted. We shall, however try to simplify them.

Based on what they believed they deserved for their services, the appellant drew a bill in which it sought to be paid a total of Kshs.39,968,752.00, less Kshs. 2,180,000.00 which it had received. This was however taxed down to Ksh.1,400,000.00 by the taxing officer, to which was added one-half, that is, Kshs. 700,000.00, in terms of Part B of Schedule VI 1(a) & (b) of the Advocates Remuneration (Amendment) Order, 2006, translating to Kshs.2,100,000.00. To that, he further added Kshs.336,000.00 being 16% VAT, resulting in a total instruction fees of Kshs. 2,436,000.00. The rest of the items amounting to Kshs. 251,247.00 were allowed. In the end the total cumulative figure came to Kshs. 2,687,247.00 from which Kshs. 2,180,000.00 which had been received was to be deducted.

This aggrieved the appellant, and in its chamber summons dated 23rd December, 2010 urged the High Court (Havelock, J.) to review the decision of the taxing officer, claiming that they were instructed to take steps on behalf of the respondent in a claim whose aggregate value was in the sum of Ksh.1,734,581,100 made up as follows:

> **a) The Bank Performance Guarantee No. GOKE86046077250C for TSH.2,746,387,500.00 (equivalent to Ksh.183,092,500.00 at the exchange rate of Tsh.15.00); and**
>
> **b) The Advance payment Guarantee No. GOKE8604607797C for USD.3,478,145.00 (equivalent to Ksh.278,251,600.00 at the exchange rate of US$80.00);**
>
> **c) The advance payment Guarantee No. GOKE86046077398C for TSH.1, 098,555,000.00 (equivalent to Ksh.73, 237,000.00 at the exchange rate of Tsh.15.00)".**

The appellant contended that the aggregate sums of (a), (b) and (c) above, being Ksh.534,581,100.00, it was entitled to minimum instruction fees in the sum of Kshs. 21,809,263.00 plus ½ advocate- client provided under Part B of Schedule VI bringing the aggregate to Kshs.32,713,895.00; and that the amount allowed by the Taxing Officer was punitive, arbitrary, unreasonable and manifestly low. In the result, it prayed to the learned Judge to review and increase it. The appellant reiterated that the respondent's instructions to it for which fees is sought were to apply for the following orders;

> **"1. That leave be granted to serve the summons and/or the Notice of Summons on the 1st defendant outside the jurisdiction through the Honourable the Chief Justice and/or the Ministry of Foreign Affairs or any orders the Court may grant.**

2. That the Honourable Court do grant the 1st defendant 21 days to enter appearance in the suit or such other time as the court may deem reasonable.

3. That and order of permanent injunction restraining the 1st defendant by its Directors officers or servants or agents or any of them or otherwise howsoever from making any demand for payment to the 2nd defendant on the Bank Performance Guarantee No. GOKE86046077250 for TSh.2,746,387,500.00 and or from calling n for the Advance payment Guarantee No. GOKE86046077397C for USD.3,478,145.00 and Advance payment Guarantee No. GOKE8604607738C for Tsh.1,098,555,000.00 pending the hearing and determination of this suit or further orders of the court.

4. That the 1st defendant be permanently restrained from removing dismantling or in any other way selling transferring, assigning, interfering, repossessing, alienating removing and/or disposing all that equipment and machinery of the plaintiff all valued at approximately Ksh. 1,2000,000,000.00 (Kenya Shillings One Billion Two Hundred Million only) as enumerated in schedule A herein pending the hearing and determination of this sit or further orders of the court.

5. Further and in the alternative, and without prejudice to the above, any damages that may be found to be due to the plaintiff.

6. A declaration that the 1st defendant by its Directors, Officers or servants or agents or any of them cannot in the circumstances of this particular case make unjustified and unreasonable demand on the Bank Performance Guarantee and the advance payment bond in breach of the terms and conditions of the contract agreement.

7. That an order be issued referring the dispute between the parties to arbitration as provided under the provisions of a particular application.

8. Interest at court rates on the sums and on the special damages sums found to be due to the plaintiff from the date when such sums ought to be paid until payment in full".

As a consequence, it was argued that the taxing officer erred in failing to first ascertain the subject matter for which instruction were issued as required by Schedule VI 1(a) & (b) of the Advocates Remuneration (Amendment) Order, 2006 ; that as a matter of fact, the true value of the subject matter of the suit was Ksh.1,734,581,100.00 which was discernible from the pleadings; that in the circumstances, and under schedule VI, the minimum instructions fees was Kshs.21,809,263.00, excluding increment of ½ Advocate- Client provided for under Part B of Schedule VI.

For the respondent, it was argued that the taxing officer applied the correct principles in arriving at his impugned decision; that all the respondent's action was seeking were orders of injunction; that the taxing officer did in fact take into account the complexity of the matter; and that ordinarily the Advocates Remuneration Order would provide for Ksh. 3,000 in relation to an application for temporary injunction or for such similar relief, if opposed, but the taxing officer still awarded the appellant Ksh. 2,000,000.00, in consideration of the relative complexity of the application. In the respondent's opinion, the principles for the grant of a temporary injunction expounded in cases like **Giella vs. Cassman Brown and Company Limited (1973) E.A. 358.** are settled; that the appellant was only able obtain an *ex-parte* interlocutory injunction, which was vacated at the *inter-partes* hearing stage.

After assessing the case for each party, the learned Judge reiterated the principles of taxation of costs as set out in the cases such as **Premchand Raichand Ltd & Anor. vs Quarry Service of East Africa Ltd & Anor.** (1972) EA 162; **Republic vs. Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W'Njuguna & 6 others** (2006) eKLR; **First American Bank of Kenya vs. shah & others**, (2002) 1 E.A. 64; and **Thomas James Arthur vs. Nyeri Electricity Undertaking** (1961) E.A. 492.

According to the Judge, the appellant was trying to justify the enhancement of its fees by "padding" the record with unnecessary and superfluous material, resulting in verbosity in the pleadings. He said;

"Bearing in mind the instruction fee under schedule VI, being costs of the proceedings in this court for the presentation of an application for a temporary injunction (if opposed is Ksh.3000, I do not consider that the taxing officer made an error of principle in the taxation of the applicant's bill of costs. On the contrary and as submitted by learned counsel for the respondent, I consider the instruction fees as adjudged by the taxing officer to be generous in the circumstances. Further I do not consider that there was any error of principle made by the taxing officer when he taxed items Nos. 2 to 121 and Nos. 122 to 140. As a result, I find that the applicant's chamber summons dated 23rd December,2010 to be unmeritorious. The same stands dismissed with costs to the respondent"

This outcome aggrieved the appellant. In this appeal, the appellant challenges the decision of the learned Judge arguing in 43 prolific(prolix)? grounds, *inter alia*, that, the learned Judge failed to appreciate, from the plaint and other pleadings that the value of the subject matter was Ksh.1,734,581,100.00; that instructions fees was based not only on the novelty, complexity and the exceptional importance of the case, but on the great public interest considering the colossal amount of money involved and the fact that it extended to two jurisdictions, Kenya and Tanzania; that the learned Judge further misdirected himself as to the applicable law and failed to consider that the instruction fees, being an independent item are earned when the defence is filed and the subsequent steps do not affect it.

Mr. Billing on behalf of the appellant highlighted these arguments which were contained in the written submissions, while Mr. Sarvia for the respondent did not file written submissions but relied on their submissions filed before the court below.

Mr. Billing urged us to be guided by the decisions in **Mutuli & Apolo Advocates vs. Hon. Cyrus Jirongo,** (2010) eKLR, where the High Court faulted the taxing officer for failure to take into account the complexity of the matter which was discernible from the pleadings; and

the case of **Green Hills Investments vs. China National Complex Plant Export Corporation,** (2004) eKLR in which the court emphasized the need for taxing officers to take into account both the public interest involved in the case and the value of the subject matter. He also relied on the provisions of Schedule VI 1(b) of the Advocates Remuneration (Amendment) Order, 2006.

And it is with Schedule VI 1(b) of the Advocates Remuneration Amendment Order, 2006 that we start our consideration of those arguments, of course, bearing in mind our mandate in first appeals, such as this one. The court in **Peters vs. Sunday Post Ltd** (1958) EA 424, stressed the duty to re-assess the entire evidence tendered at trial and make its own independent findings.

Schedule VI 1(b) aforesaid provides:

> **"(b) To sue in any proceedings described in paragraph (a) where a defence or other denial of liability is filed; or to have an issue determined arising out of inter-pleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties and-**

That value exceeds	**But does not exceed**	
Sh.	**Sh.**	**Shs.**
-	**500,000**	**49,000**
500,000	**750,000**	**63,000**
750,000	**1,000,000**	**77,000**
1,000,000	**20,000,000 fees as for Sh. 1,000,000 plus an additional 1.5 per cent**	
Over 20,000,000	**fees as for 20,000,000 plus an additional 1.25 per cent."**	

Further, Part B of the aforesaid Schedule on Advocate and Client costs provides:

> **"As between advocate and client the minimum fee shall be –**
>
> **(a) the fees prescribed in A above, increased by one-half; or**
>
> **(b) the fees ordered by the court, increased by one-half; or**
>
> **(c) the fees agreed by the parties under paragraph 57 of this order increased by one-half; as the case may be, such increase to include all proper attendances on the client and all necessary correspondences."**

It is important at this stage of our analysis of the issues in this appeal to reiterate what this Court said in **Joreth Limited vs Kigano & Associates** (2002) eKLR, regarding instructions fees.

> **"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 importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances"**

In the suit, there was no judgment or settlement between the parties, and therefore the value of subject matter of the suit could only be determined from the pleadings. The appellant based its claim on Kshs.1,734,581,100 as the value of the subject matter and asked the taxing

officer to assess instructions fees on this sum. It will be recalled, however, that the main purpose for filing the suit was to obtain injunctive and declaratory relief against the bank by restraining it, *inter alia*, from wrongfully and prematurely calling in any of the three guarantees which were set out in the plaint. In order to obtain an order of injunction, the respondent had to show, by affidavit that it stood to suffer irreparable loss and damage if the three guarantees were called. That was not to say that the sums in those guarantees constituted the value of the claim so as to demand instructions fees based on them. It was never alleged that the respondent instructed the appellant to demand recovery of any specific sum of money to be paid to it by anyone and we cannot discern any such claim from the plaint or any other pleadings.

The taxing officer was therefore entitled to exercise his discretion in assessing instructions fees and in doing so, he took into account all the factors outlined in the case of **Joreth Limited** (supra), namely, the nature and importance of the dispute, the interest of the parties, the general conduct of the proceedings and all other relevant circumstances. For example, guided by these factors, we believe, the taxing officer allowed instruction fees in the sum of Kshs. 2,000,000.00, which was by far more than the basic fee of Kshs. 3,000.00 provided for in Schedule VI.

It has been stated time without number that this Court will not interfere with the exercise of judicial discretion unless in the exercise of that discretion the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and as a result occasioned injustice. See **Coffee Board of Kenya vs Thika Coffee Mills Limited & 2 Others** (2014) eKLR. This Court in **Ouma vs Warega** (1982) KLR 288, emphasized that the judges must extend some latitude to taxing officers and avoid unnecessary interference with questions of quantum in which taxing officers have greater experience, unless, of course there is some misdirection. There was no such transgression here. After all;

> **"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, and particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low: 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"**.
>
> See: **Premchand Raichand Limited & another (**supra).

With respect, we cannot fault the learned Judge in upholding Kshs. 2,687,247 allowed by the taxing officer because that was what was proportionate to the work done. The appellant's involvement in the action was very brief and limited. Indeed, it was only involved in filing the plaint, applying for an injunction and replying to the defences, all of which were not, in our opinion, complicated.

While the practice of law, no doubt, is well-paying, it is doubtful that an advocate would earn the kind of fees demanded by the appellant for merely filling a suit for declaratory and permanent injunctive orders, simultaneously with an application for interlocutory injunction, without more. In **Paul Ssemogerere & Another vs Attorney General** SCCA No.5 of 2001, the Supreme Court of Uganda warned that it must always be borne in mind that while the successful party is entitled to be reimbursed expenses reasonably incurred in a litigation, on the other hand, the advocates' remuneration should never be at such a level as to amount to an impediment to access to justice, as high costs of litigation would make courts a preserve only of the wealthy.

In summary, while considering whether or not the taxing officer arrived at a reasonable instruction fees, the reviewing and appellate courts must always bear in mind that there is no mathematical formula by which to calculate the instruction fee; that the exercise involves intricate balancing act, weighing the diverse general principles, maintaining consistency in the level of costs; and that bearing in mind all these intricate balancing acts, the reviewing court cannot lightly interfere with what in the taxing officer's opinion is reasonable fee. There has to be a compelling reason to justify such interference.

On the basis of the foregoing, we come to the conclusion that the appeal lacks merit, and accordingly dismiss it with costs.

Dated and delivered at Nairobi this 10th day of July, 2020.

W. OUKO, (P)

……..

JUDGE OF APPEAL

W. KARANJA

……..

JUDGE OF APPEAL

P.O. KIAGE

……..

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR