IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, O'KUBASU & NYAMU, JJ.A)

CIVIL APPEAL NO.211 OF 2006

KANGETHE & CO. ADVOCATES.....APPELLANT

VERSUS

KENYA PIPELINE COMPANY LTD.....RESPONDENT

(An appeal from the ruling and orders of the High Court of Kenya at Nairobi Milimani Commercial Courts (Ransley, J.) dated April, 20th April, 2006
in

H.C.MISC.CAUSE NO.598 OF 2005)
****

RULING OF THE COURT

This is an appeal from the ruling of the High Court ***(Ransley, J.)*** given in respect of a bill of costs taxed by a taxing officer in the High Court in the sum of Kshs.24,927,407. Following a reference to him, Ransley, J., took the liberty of reducing the instruction fees awarded by the taxing officer from Kshs.13,772,937,23 to Kshs.1,000,000 thereby provoking this appeal.

At the outset we consider it important to observe that the subject matter which gave rise to the taxation in the High Court was a construction contract dated 19th October, 2000 which had an arbitration clause. By virtue of the agreement the defendant ***Messrs Kenya Pipeline Company Ltd*** had commissioned the plaintiff Messrs ***Donwoods Company Ltd*** to construct "KPC" Headquarters along ***Lunga Lunga Road***, Industrial Area Nairobi at a contract sum of Kshs.573,022,382 which sum was on 30th November, 2001 varied to Kshs.914,529,148.45 by a deed of variation. By letters dated 6th and 17th March 2003 the KPC suspended the project and in response to this action Messrs Donwoods Company Ltd filed suit on 4th October 2004 in which it sought inter-alia the following reliefs:

1.The Honourable Court do direct that the dispute between the parties be referred to arbitration in accordance with the provisions of the contract between the parties dated 19th October, 2000.

2. Injunction against the defendant by itself, its servants, agents or otherwise howsoever restraining them from recovering, dismantling, or in any other way whatsoever interfere with the plaintiff's plant, machinery, equipments, building materials, personnel from the project site or in any other way whatsoever interfering with the project site pending the Arbitrator's Award.

3. Judgment in the terms of the Arbitrators Award.

Upon service of the plaint KPC engaged the services of the appellant Messrs Kang'ethe & Co. Advocates. On 19th October 2004 the appellant filed a statement of defence and counterclaim which defence, inter-alia, denied the validity of the variation deed and counterclaimed in the sum of Kshs.228,253,596, a sum allegedly irregularly paid to Messrs Donwoods Company Ltd by the KPC. Messrs Kenya Pipeline Company Ltd thereafter terminated the services of Messrs Kang'ethe & Company advocates which in turn resulted in the advocate filing a bill of costs in court for taxation which taxation has triggered this appeal. The grounds of appeal before us were:

1. "THAT the learned Judge erred in law by holding that the suit the basis of the Bill of Costs had no monetary value and therefore reached an erroneous conclusion.

2. THAT the learned Judge erred in law and in fact by ignoring the existence of a defence on record with a monetary value and therefore misdirected himself by reducing the instruction fees from Kshs.13,702,937 to Kshs.1,000,000 occasioning a miscarriage of justice.

3. THAT the learned Judge erred in law and misdirected himself on clear provisions of the Advocates Remuneration Order when he found and held that the value of the subject matter in a suit is determined from the prayers in the suit and not pleadings and therefore reached an erroneous conclusion in law.

4. THAT the learned Judge erred in law by holding that the proper schedule for taxation was Schedule VI(L) and not (VI) (a) of the Advocates Remuneration Order and therefore reached an erroneous conclusion occasioning injustice to the appellant.

5. THAT the learned Judge erred in law in interfering with the decision of the taxing master when indeed there was no error of principle disclosed in the Taxing Master's decision to warrant any interference.

6. THAT the learned Judge erred in law when he ignored uncontroverted evidence before him that the parent suit was settled at Kshs.386,000,000 and went ahead to hold that the suit had no monetary value which contradiction occasioned a miscarriage of justice.

7. THAT the learned Judge erred in law when he failed to appreciate that the subject matter of the parent suit was the contract which had a monetary value to wit Kshs.914,529,148.45 and therefore reached an erroneous conclusion in law."

On 29th March 2011 the advocates for the appellant and the respondent entered into a consent order before the Court agreeing to have the matter heard on the basis of written submissions to be filed and served by the parties as per the timelines set out in the consent order. In compliance with the order the appellant filed written submissions on 4th April 2011 together with a list of authorities, a bundle of the authorities and on 11th April 2011 the respondent's advocates filed written submissions in reply.

The gist of the appellant's written submissions is that the taxing officer was correct in taking into account the contract sum of Kshs.914,529,148.45 plus judgment in default in respect of the counterclaim in the sum of Kshs.228,253,596, when assessing the instructions fees. On the other hand, the gist of the respondent's written submissions is that since the contract between the parties had an arbitration clause and the suit was subsequently referred to an arbitrator, any further instructions fees thereof ought to have been in the arbitration and in the result the fees payable ought to have been based on the interlocutory chamber application which ***inter alia*** sought an order of reference to arbitration including an injunction order in accordance with the main prayers as per the plaint. In particular the respondent's counsel stressed that although a suit had been filed, judgment was sought in the Arbitrator's Award.

In the challenged ruling the learned Judge delivered himself as follows:-

"The third ground was that the suit was for a declaration that the matters in dispute between the parties should be referred to arbitration pursuant to an agreement between them and an application

for injunction and as such there was no monetary value to be ascribed to the proceedings the correct schedule was therefore schedule VI(L). The fourth ground was that no instructions were given for the advocate to file a defence and counterclaim to the suit and that the taxing officer was wrong in awarding a separate instruction fee on the counterclaim."

The learned Judge concluded:

"The suit being a declaration that the matters in dispute should be referred to arbitration and for an injunction in my view until the outcome of the application there was no need to either file a defence or a fortiori a counterclaim as in the event that the matter went to arbitration the pleadings would be in the arbitration. Although there was (sic) no express instructions to file a counterclaim, the letter of 19th October, 2004 above did give instructions to file a defence. However it is the duty of an advocate to advise his client on the proper procedure and not incur costs unnecessarily."

In our view we think that the learned Judge did in the circumstances correctly appreciate the principles involved. In this regard we have fully considered the written submissions including the authorities cited.

At the outset it is not in dispute that the matter was referred to arbitration as per the intention of the parties as captured by the initial agreement and the arbitration clause and for this reason the greater portion of costs including instruction fees would arise in the arbitration. Failure on the part of a taxing officer to take into account the substance and the nature of the suit and what in law the parties had consistently bound themselves to do, would result in the parties paying costs and fees twice over for the same subject matter, a situation which would be in our view unjust.

Indeed, where there is an enforceable arbitration agreement this should put the court on notice that it ought to handle the matter in recognition of the right of autonomy of the parties to refer the matter to arbitration as provided for in ***section 6*** of the Arbitration Act 1995. The court's role in our view is to facilitate arbitration, unless a matter falls within the specified exceptions set out in the section to justify the continuation of a suit. ***Section 6*** provides:-

"A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought stay the proceedings and refer the parties to arbitration unless it finds –

(1)

(a) that the arbitration agreement is null and void, inoperative or incapable of being referred; or

(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3)……..

It is not in dispute that following the respondent's application based on ***section 6(2)*** above, the High Court did make an order of reference to arbitration pursuant to the section. In addition to the above provision we consider that all the parties including counsel should have borne in mind ***section 10*** of the Arbitration Act which states:-

"Except as provided in this Act no court shall intervene in matters governed by this Act."

In Kenya, the role of the court is limited by ***section 10*** of the Arbitration Act and its role or intervention must remain as specified in the Arbitration Act. Indeed the aim of the Act is to drastically reduce the

extent of court intervention in the arbitral process. In practice this must in turn involve balancing the right of party autonomy against abuse of process which may occur in the hands of the arbitral tribunals. Courts and arbitration must of necessity remain close partners in the situation such as those described in this matter for reasons which include, inter-alia, the observation by Lord Mustill in the Kenyan originated arbitration case of ***Coppee Lavalin S.A. NV Ken Ren Chemicals and Fertilizers Ltd*** [1995] I AC38 at 64:-

"It is only a court with coercive powers that could rescue an arbitration which is in danger of foundering."

For the avoidance of doubt the courts role in the matter before us should have been as set out in the Arbitration Act which role is principally facilitative.

In this regard, the High Court did quite correctly, in our view, rescue the arbitration by making a referral order in a situation where both parties without any regard to the arbitral clause in the construction agreement resulted in civil litigation in court, contrary to the enabling arbitration law. The referral order in our view brought to an end the suit and in its place gave rise to a cause in the arbitration. We agree with the High Court that the instruction fees ought to have been pegged to the nature of the matter which was within the jurisdiction of the court when the instructions were terminated. In the circumstances it is our view the big figures relating to the value of the subject or including the contract sum had nothing to do with the instruction fees.

For this reason it was wrong for the taxing master to have sanctioned the payment of a fee based on a glaring misapprehension of the applicable process and the law. In law what was rightfully before the court is the interlocutory application seeking a referral order and therefore the instruction fees ought to have been confined to the application.

It follows therefore the appellant counsel's instructions including the steps concerning the filing of the defence and counterclaim should have had the above provisions in view. We say so, because in our view, what counsel give to their clients are skilled services in consideration of fees. For this reason, it is clear to us since the validity of the arbitration clause was not in doubt the matter ought not have progressed beyond the interlocutory application seeking a stay order, and as a result any fees payable as stated above ought to have been based on the chamber application because the court had in law no jurisdiction to entertain any other claim. In the circumstances the filing of defence and counterclaim in the suit was in our view a misapprehension of the law. As at the time the appellants received the instructions they did not have a suit to defend but only had a reference to arbitration application to respond to and therefore the appellant's contention that the fees ought to have been based on the contract sums, is in our view, without justification whatsoever.

The upshot is that in the circumstances we cannot fault the High Court's exercise of its discretion to award an instruction fee of Kshs.1,000,000 million and we accordingly uphold the ruling in its entirety.

The appeal is dismissed. In the circumstances described both parties came to court contrary to a valid arbitration agreement and for this reason we make no order as to costs.

It is so ordered.

Dated and delivered at Nairobi this 29th day of July 2011.

R.S.C. OMOLO
.....
JUDGE OF APPEAL

E.O. O'KUBSU
.....
JUDGE OF APPEAL

J.G. NYAMU
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR