IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

TAXATION NO.2 of 2010

Prof. Anyang'-Ny'ong'o and Others…………………………………………………..... Applicant

VERSUS

The Attorney-General of the Republic of Kenya……………………………………....Respondent

RULING

22ND JUNE 2010

DR. J. E. RUHANGISA, TAXING OFFICER

This taxation arises out of two applications, which were argued before this court subsequent to the taxation. One was Application No. 4 of 2009 filed by the Attorney-General seeking extension of time to file reference arising out of the decision of party and party costs taxed by this court. That application came before Hon. Justice Busingye, Principal Judge of the Court of the First Instance Division. It was argued inter parties and a ruling was made. The second one was Application No. 1 of 2010, which came before Lady Justice Stella Arach-Amoko, Deputy Principal Judge. In that application, the Attorney-General of the Republic of Kenya was seeking extension of time within which to serve the memorandum and record of appeal out of time.
In both applications, the Attorney General of the Republic of Kenya lost the battle and as is normally the case the Court ordered him to bear the costs incurred by the other party. This taxation cause which was filed by Kilonzo & Co Advocates and argued by Mr. Kajwang' learned Advocate seeks to implement the two Court orders as to costs arising out of the two above-mentioned applications.
In the bill of costs filed by Kilonzo & Co Advocates, Counsel for the Applicant, a total of USD 1,091,745.00 is claimed as costs incurred by the applicants in the course of conducting the said two applications. While Mr. Kajwang' appeared before the Court as Counsel for the Applicants, Mr. Anthony Ombwayo, Senior State Counsel represented the Attorney General of the Republic of Kenya, the Respondent/Judgment Debtor.

The claims leveled against the Attorney General of the Republic of Kenya, related specifically to the following: the instruction fee, reimbursement for actual expenses incurred on the bill of costs as charges for stationary, conducting exhaustive research in relation to the References and

Application, travel and upkeep expenses between Nairobi the Applicants' home and work place and Arusha where the East African Court of Justice usually seats.

Counsel for the Applicant and the Counsel for the Respondent informed the Court that they had agreed on claims regarding most items namely, 2-23 and 25 - 35. Since the foregoing items are not disputed, the cost thereof totaling to **<u>USD 5,864.00</u>** are consequently taxed accordingly as presented and the Applicant is hereby awarded the same as claimed without any further discussion on them.

Whereas, the Judgment Debtor does not dispute most items as listed above as genuine claims for reimbursement, a quite challenging exercise still remains, to determine whether or not items, 1 and 24, are reasonably claimed. The above-mentioned two items 1 and 24 of the Bill of Costs that form the biggest portion of the claims filed are disagreed upon and consistently disputed by the Counsel for the Respondent for being on the higher side. On the other hand, the Counsel for the Applicant consistently maintained that the claim was a reasonable charge for the services rendered.

In his arguments before the Court Counsel for the Respondent attempted a number of times to convince the Presiding Taxing Officer, to tax the bills of costs in question at a lower figure than the one claimed. He argued that if they were taxed highly the Court would be considered as a court for the wealthy. He insisted that the extra research done by the Counsel for the Applicant and the novelty of the case as he claims should not be key factors to guide the wisdom of the Taxing Officer as to him; these were simple applications for extension of time. This view was contradicted by his own admission of the complexity of the applications when he said as recorded at page 9 of the typed proceedings, and I quote:

> *'…in fact the two applications were the first of their kind'*

The Counsel for the Respondent proposed that each claim of USD 540,540.00 be taxed off a much bigger potion and that only USD 10,000 be awarded in items 1 and 24 respectively. He continued to show how excessive the applicant's claim in items 1 and 24 were. The learned State Counsel was of the opinion that a total of USD 20,000.00 would sufficiently represent the work that was done by the two Counsels in the two Applications. In sum, the learned Counsel found no convincing reasons enough to justify the charge of the instruction fee claimed in items 1 and 24 totaling USD 1,081,080.00.

On the other hand, Mr. Kajwang' the Counsel for the Applicants regretted that there was no agreement on items 1 and 24 filed as part of the entire claim. He prayed that the Court should look into and consider the complexity of the case, greater professional and legal responsibility undertaken, conducting research and examining numerous complex and important documents and taking into consideration that this is a case, which was novel, and land mark in the development of jurisprudence in the East African Community.

Mr Kajwang' went on to remind the Court of its own finding in Taxation Cause No. 6 of 2008 at page nine of the ruling, where the Taxing Officer said, I quote,

> "*Much as the Court should bear in mind the fact that the costs should not be a hindrance to the general public to access it or portray the image that the Courts are only for the wealthy, we cannot ignore the fact that the Court is charged with the responsibility to do justice and to do justice includes awarding costs to a successful party in order to indemnify him for expense to which he was put through having been unjustly compelled either to initiate or to defend the litigation. If the Court does not fully indemnify the party*

for all the costs reasonably incurred by him or her claim or defense, then it will have failed to discharge its function".

The Counsel for the Applicant said all this to persuade the Taxing Officer to consider all the factors, guiding principles in the Rules and the circumstances of the case raised as he determines his fate of his claim.

The determination of the reasonableness of the claim by the Applicant is what the Taxing Officer is tasked with and it is all left to his wisdom and discretion to decide basing his decision on the already established principles of taxation including the profession burden, diligence and the amount of interest placed on a litigant.

I quite agree with the reasoning behind the ideas and views of the Counsel for the Respondent that the Rules of the Court should be a measuring scale that should be complied with in this taxation exercise except when there are serious reasons to justify departure from them. However, It is my view that the Scale provided by the Rules of the Court cannot operate in isolation of other principles and factors. I will also rely on the discretion vested in me by Rule 9 of the Second Schedule to the Rules of Procedure of the East African Court of Justice which states that '*…the fee to be allowed for instruction institute a suit or oppose any application shall be such sum* ***as the Taxing Officer shall consider reasonable*** *but shall not be less that USD 100.00*'. (Emphasis added)

In this taxation exercise, I will consider and be guided, by the finding of our learned Judge, R.O Kwach in *Joreth Limited vs. Kigano & Associates Civil Appeal No. 66 of 1999, Nairobi High Court Registry* when he said:

> *"...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 proceedings, any discretion by trial Judge and all other relevant circumstances."*

I do not find it necessary and relevant to discuss in detail every single principle cited by the learned Judge. Nevertheless, what is obvious is that the Applicants' wish and prayer is that the instruction fee be awarded as claimed, and it is the wish of the Respondent that the instruction fee be taxed as lowly as the Taxing Officer can find it reasonable. As for the complexity of the matter and work involved, it is also true that the Applicant would like to be understood and taken to have worked extremely hard although his counterpart the Respondent challenges his argument by saying that nothing like hard work was involved in his research.

I find that the Applicant's Counsel has successfully convinced the Court that the matters that gave rise to this taxation cause were of huge magnitude in which the professional responsibility was not ordinary. This view is finding is supported by, among other things, the research and number of authorities that were presented by the parties in the course of hearing those applications, which required a high level of analysis. However, as Mr. Ombwayo submitted, the amount claimed USD 540,540.00 in each of Items 1 and 24 is on the higher side. In my considered view, I find USD 225,000.00 a reasonable and fair amount to cover instruction fee in Item 1 and the same amount to apply in Item 24 of the Bill of Costs. Items 1 and 24 are taxed at a total of USD 450,000 plus USD 5,864.00 the undisputed amount in Items 2 to 23 and 25 to 35 plus USD 72,938.24 being 16% VAT. In Total, this bill is taxed at USD 528,802.24 (United States Dollars Five Hundred Twenty Eight Thousand Eight Hundred and Two Twenty Four Cents) only.

I so Tax.

Dated at Arusha this day of 2008

DR. JOHN EUDES RUHANGISA
TAXING OFFICER
22nd June 2010