THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

(Coram: John J. Mkwawa, Judge)

REFERENCE NO.1 OF 2009

MODERN HOLDINGS (EA) LIMITED……CLAIMANT

VERSUS

KENYA PORTS AUTHORITY……RESPONDENT

Date: 15TH JANUARY 2010

RULING OF THE COURT

By Notice of Motion under Rule 114 of the Rules of Procedure, Kenya Ports Authority, who I shall hereby refer to as the Applicant, is moving this Court to set aside the Ruling of the Taxing Officer dated August 7, 2009. Further to the foregoing the Applicant prays that items 1, 2, 25 and 26 of his Bill of Costs dated March 16, 2009 be taxed as prayed or as may be ordered by this Court.

The Applicant's matter was advocated upon by Mr. Wetangula whereas the Respondent's matter was advocated upon by Mr. Sang'ka. I find it pertinent to mention right from the out set that when the matter was before me November 30, 2009 Mr. Wetangula Learned Counsel, on his own volition abandoned all items and preferred to proceed with only item no.1 of his Bill of Cost, namely, the one that is related to the instruction fee.

Mr. Wetangula succinctly submitted to the effect that the award in the said item was inordinately low and that it amounted to misdirection in law by the Taxing Officer. Secondly, that the Taxing Officer failed to take into account

the nature and the amount in subject matter involved, the complexity, and importance of the matter in the Reference namely, Reference No. 1 of 2008 between the instant applicant who was the respondent (Kenya Port Authority) and the instant respondent who was the applicant (Modern Holding E.A. Limited).

Thirdly, that the Taxing Officer took into account irrelevant matters and thus failed to consult the legal principles in reaching his decision.

Fourthly, that the Taxing Officer failed to consider the submissions of the applicant.

Mr. Wetangula, in sum, was of the view that the Taxing Officer exercised his discretion injudiciously thus warranting this Court to interfere on the question of quantum. It was also his argument that the Taxing Officer erred in invoking sub-rule 1 instead of sub-rule 2 of Rule 9 of the Second Schedule of the Court's Rules of Procedure. He contended that the said sub-rule is only applicable to application and not references, as was the case in the matter before the Court. In this regard, this was a fundamental misdirection on the part of the Learned Taxing Officer.

On his part, Mr. Sang'ka Learned Counsel, countered by submitting to the effect, if I may put his arguments in a nutshell, that the Taxing Officer did not in any way err in Principle nor did he allow a sum which by any stretch of imagination can be described as inadequate having regard to the fact that the Reference was not in any way involving. He further invited this Court to adopt the reasoning in the case of *Jareth Limited v. Kigano & Associates* – a decision of the Court of Appeal of Kenya in Civil Appeal No.66 of 1999. It was Mr. Sang'ka's view that though that decision does not bind this Court, it is highly persuasive and that the Taxing Officer did not in any way stray away when he used it in arriving at his decision.

Having had a close and sober look on the able arguments of both Learned Counsel to whom I am grateful, pitied with the Ruling of the Taxing Officer, I have the following to say:

Firstly, that the Reference before this Court, namely, Reference No. 1 of 2008 was not at all involving and that the matter never took off the ground but ended with the Ruling on the preliminary objection that the Reference was misconceived for want of jurisdiction. In other words, the Reference did not stand the jurisdiction test. Consequently, the calculation or assessment of the instruction fee can not be based on the amount which goes beyond 1/8 of the amount initially claimed by the respondents in the

said Reference. Not surprisingly, the Taxing Officer gave the following reasons on line 30 at pg. 6, and of para's 1 and 2 of pg.7, of his typed Ruling, for acting as he did:-

> "If the case had proceeded and been heard on the merits and the judgment dismissed the Respondent's claim with costs, it would have been only just and fair to follow the scale provided for in the Court's Rules ….
>
> It is in the strength of the foregoing that, I agree with the Respondent that one eight of the amount claimed as instruction fee by the Applicant in items No.1 of the Bill of Costs is more than enough to be taxed.
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> The amount to be taxed on item No.1 shall therefore be 1/8 of USD 326, 581 plus VAT 16% which is USD 40,822.6 + 6,531.6 = 47,354.2 (United States Dollars Forty Seven Thousand Three Hundred Fifty Four and Two Cents)."

Secondly, that I am not travelling in a virgin land in this legal field, as there is a plethora of persuasive authorities from the highest Courts of the land in Tanzania and Kenya, namely, their Courts of Appeal which say the following:

> "… the allowance for instruction fees is a matter peculiarly on the Taxing Officer's discretion and Courts are reluctant to interfere into that discretion unless it has been exercised unjudicially …, it will do so where he has acted upon wrong principles or applied wrong consideration in coming to his decision."

That is what was said in the case of *Hotel Travertine Ltd v. National Bank of Commerce*, Taxation Civil Reference No. 9 of 2006 which quoted with approval the cases in The Attorney General v. Amos Shavu, Taxation Reference No.2 of 2000 at p.3 following *Rahim Hasham v. Alibhai Kadershai (1938) 1 T.L.R (R) 676 and Premchand Raichand v. Quarry Services of East Africa Ltd [1972] E.A. 162.*

The same has also been said by Law J.J.A (as he then was) in the cases of *Rogan – Kamper v. Lord Grosvenor (*No.3) [1976-80] K.L.R p.665-668 at p.666 paras 25 and 30 and also in the case of *Devshi Dhanji and Others v. Kanji Naran Patel and Others* (No.2) [1976 – 80] K.L.R. p.1024 – 1029 at p.1026 and p.1027 paras 35 and 10, respectively.

I find it pertinent to mention that though this Court is not bound by those decisions, but as they are from eminent Judges, I have no reason at all, let alone a good one, to tempt me to disregard them. I look at them to be very persuasive authority and I will therefore, follow them as they are good law.

Having regard to the foregoing, I venture to say that in the instant case it can not be seriously disputed that the award was fair and more than reasonable. This factor alone, leaving other things aside, is sufficient reason for this Court not to interfere in the award which is now in question. All in all, the award in my pious and considered view was *not injudicious* as contended by Mr. Wetangula: and in the result should be allowed to stand, as I have endeavoured to show.

Before I conclude, it behooves me at this stage to say that it is common practice which has now almost become law, as the cases I have stated in my ruling have shown, that a Court has power in proper cases to interfere with the instruction fee allowed by the Taxing Officer, where he has acted upon wrong principles or applied wrong considerations in coming to his decision; which was not the case in the instant matter now before me.

I wish also to be on record, as was *inter alia* stated by the defunct Court of Appeal for East Africa in the often quoted case of *Premchand Raichand v. Quarry Services of East Africa Ltd [1972] E.A. 162* that costs be not allowed to rise to such a level as to confine access to the Courts to the wealthy and that the successful litigant ought to be fairly reimbursed for the costs he had to incur.

In the premises, I hereby decline Mr. Wetangula's invitation to set aside the Taxing Officer's decision.

I, therefore, do hereby dismiss his application with costs. It is so ordered.

Dated and delivered at Arusha this----------day of----------2010.

JOHN J. MKWAWA
JUSTICE OF THE Court of First Instance (EACJ)