IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

TAXATION REFERENCE NO. 5 OF 2010

ARISING FROM TAXATION CAUSE NO. 2 OF 2010

IN THE MATTER OF REFERENCE UNDER RULE 114 OF THE EAST AFRICAN COURT OF JUSTICE RULES OF PROCEDURE

BETWEEN

1. ATTORNEY GENERAL OF KENYA ..... APPLICANTS

VERSUS

PROF. PETER ANYANG NYONG'O
ABRAHAM KIBET CHEPKONGA
FIDLEIS MUEKE NGULI
HON. JOSEPH KAMOTHO
MUMBI NGARU
GEORGE NYAMWEA
DR. PAUL SAOKE
HN. GILBERT OCHENG MBEO
YVONNE KHAMATI
HON. ROSE WARHIU ..... RESPONDENTS

RULING OF THE COURT

This is a taxation reference by the Attorney-General of Kenya, who I shall hereinafter refer as the Applicant, from the taxing officer of costs dated December 17, 2008. The Applicant moved this Court by way of Notice of Motion dated July 5, 2010 under Rule 114 of the Rules of Procedure of the Court.

It behoves me at this stage to mention that the Applicant's matter was advocated upon by Mr. Ombwayo who is a Senior Principal State Counsel in the Office of the Applicant. On the other hand, the Respondent's case was advocated upon by Mr. Kajwang.

I think I should also mention at this juncture that on October 12, 2010 both Counsel had craved for the Court's indulgence, which I readily granted, to be permitted to explore an amicable resolution of the matter now before me for consideration and determination. Unhappily, the parties were not able to reach an amicable settlement of the matter and we were then left with the only remaining option of hearing arguments from both of them. This they did on January 25, 2011.

I also find it pertinent, for ease of reference and appreciation of what this Reference is all about, to reproduce in extension the grounds for the application as set out in the Notice of Motion. They are as follows:

(a) the award is too excessive in the circumstances;

(b) there is no legal basis for the award;

(c) the award is punitive in nature and not compensatory;

(d) the award is not commensurate with any international practice in awarding fees;

(e) the taxing officer misdirected himself in taxing items No. 1 and 24 of the said bill of costs in the sum USD 450,000;

(f) the said sum of USD 450,000 is grossly and/or manifestly excessive as to be indicative of error in principle;
(g) the learned Judge (sic) erred in law and principle in taxing two bills in one simple cause.

For the reasons which will be apparent later to this ruling, it will not be necessary to give a historical background of the case. Suffice it to say that the facts are very clear in the suppporting affidavit. It can be gleaned from the latter, that on November 7, 2006 the Respondents lodged a reference in this Court, namely, Reference No. 1 of 2006. There was an application which was heard on November 17, 2006 and November 25, 2006. Its Ruling was delivered on November 27, 2006. The Reference, on the other hand, was heard and its judgment was delivered on March 30, 2007. Some bill of costs were filed but were later on withdrawn. However, the most important bill of costs is that one whereby the Respondents claimed a sum of USD 5,622,528.69. That bill was taxed and the ruling of the taxing officer was delivered on December 19, 2008. The Applicant being dissatisfied with the award and that bill lodged a reference, though out of time. With the reference, an application was filed for extension of time, namely, Application No. 4 of 2009. This application was heard and dismissed with costs by the Hon. Mr. Justice Busingye, Principal Judge. The Applicant did appeal from that reference, and there was a problem in serving the record of appeal. Another application was filed to extend time to appeal out of time. These two applications are the genesis of the bill of costs taxed by the taxing officer.

The aforesaid matter, namely taxation, is the subject matter to the instant reference. The instant Respondent filed taxation cost No. 2 of 2010, in respect of the two applications and after hearing both parties, that bill was taxed at USD 528,802. 24. It is common ground between the parties that for both applications, the instruction fees were taxed at USD 450,000, a figure which is now the gravamen of the Applicants complaint, that it is injudicious.

Mr. Ombwayo succinctly submitted to the effect, if I may put his arguments in a nutshell, that the taxing officer was not properly guided by the rules on taxing instruction fees for the two applications at USD 450,000. It is Mr. Ombayo's submission that the applicable scale should have been the scale of charges under Rule 9 (1) of the Second Schedule. He further submitted that the taxing officer ought to have been guided by Rule 1 (b) of the Second Schedule which would ultimately have led this taxing officer to award the Respondent an approximate figure of USD 28,000 to be precise. The aforesaid award being based on the value of the subject matter which is USD 2 million plus security, even if the taxing officer was to base his figure on the matter being technical and complicated the amount of money awarded to the Respondent was still excessive, because what was before the Court, were two applications for the extension of time. Besides, Mr. Ombwayo further contended that, the authorities relied by both parties were East African authorities, and that there was no demonstration by the claimant that time was spent to search for those authorities in the reseach work that ensued thereto.

Thirdly, the award is punitive in nature and not at all compensatory. It was Mr. Ombwayo's further contention that this Court has been giving awards that range between USD 50,000 and USD 100,000 in complicated matters. But, in matters that the law is clear the awards did not exceed USD 28,000. It is against the aforementioned background that Mr. Ombwayo submitted that the award of USD 450,000, was by any stretch of imagination punitive.

In support of his stance, Mr. Ombwayo invited the Court to give its decision in light of the principles followed, interalia in the following cases:

(a) JORETH LTD V. KIGANO & ASSOCIATES (2001) EA 92 at pg 93
(b) BUNSON TRAVEL V. KENYA AIRWAYS – Civil Case No. 304 of 2004 at Milimani High Court (K).
(c) MABOKO DISTRIBUTORS LTD V. CO-OPERATIVE BANK OF KENYA & ANOTHER – Civil Case No. 690 of 2002 – Milimani High Court (K).

(d) F. M. MULWA ADVOCATES V. PATRICIA MUTHIKE NDETI – Civil Case No. 789 OF 2005 – Milimani High Court (K).
(e) KIBET & COMPANY ADVOCATES V. CENTRAL BANK OF KENYA – Misc. No. 1489 of 2001 Nairobi High Court (K)
(f) PREMCHAND RAICHAND LTD V. KUARRY SERVICES OF EAST AFRICA LTD [1972] EA. 162.

Mr. Kajwang, learned counsel for the Respondents, on his part, in his usual zeal and industry with the ability of a Chinese acrobat countered submitted to the following effect:

(a) That the applicant has not disclosed any error of principle on the part of the taxing officer warranting this Court to review the awarded costs.
(b) That the award is consistent with judicial practice within legal jurisdictions of East Africa.
(c) That in the instant matter, the two applications were not only involving, but had raised novel points of law that entitled the taxing officer to grant a higher figure than the USD 100 that had been provided in the Rules.
(d) In questions of a quantum, the Judge is not nearly as competent as the taxing officer/master to say what the proper amount to be allowed is; the Court will not interfere unless the taxing officer/master is shown to have gone wholly wrong. Consequently, a Judge will not alter a fee allowed by a taxing officer, merely because in his opinion he should have allowed a higher or lower amount.
(e) That although there is no mathematical formula to be used by a taxing officer, he must exercise his discretion judiciously and not whimsically.

I have carefully and anxiously considered the rival submissions by both learned counsel to the parties in this reference. I now feel in ernest duty bound to say that their able arguments were not only illuminating but refreshing and that I am grateful to both of them. Having so said by way of reference, I now have the following to say:

Firstly, that I am not travelling in a virgin land in this legal field, as there is a plethora of persuasive authorities from national courts which say the following:

(a) As a general rule the allowance for instruction fee is a matter pecuriarly in the taxing officer's discretion and courts are reluctant to interfere into that discretion unless it has been exercised injudiciously. As stated in the PREMACHAND's Case (supra) and by this Court in January 15, 2010 MODERN HOLDINGS (EA) LIMITED V KENYA PORTS AUTHORITY – Taxation References No. 4 of 2010 (KENYA PORTS AUTHORITY V MODERN HOLDINGS LTD)

(b) A judge will not alter a fee allowed by a taxing officer merely because in his opinion he should have allowed a higher or lowe amount (See: KENYA PORTS AUTHORITY's Case (supra) which had followed the decision in BANK OF UGANDA V. BANCO ARABI ESPANIOL, Application No. 29 of 1999 of the Supreme Court of Uganda.

(c) Even if it is shown that the taxing officer erred on principle, the judge should interfere only o being satisfied that the error substantially affected the decision of quantum and that upholding the amount allowed would cause injustice to one of the parties (See BANK OF UGANDA's case (supra) and KENYA PORTS AUTHORITY (supra) to mention just a few decisions on this point.

Secondly, with the aforestated principles in mind and upon reading Rule 9 (1) of the Court's Rules which reads as follows:

"The fee to be allowed for instruction to make, support or oppose any application shall be the sum that the taxing officer shall consider reasonable but shall not be less than USD 100."

I am of the settled view that:

(a) the drafters of the Rules in their wisdom made USD 100 as the **minimum fees** (the floor) allowable under the Rule and that the 'cealing' is left to the taxing officer to determine. In other words, the taxing officer is left to exercise his discretion judiciously. This is where the test of reasonableness now comes

into play. In deciding what is reasonable insturction fee one has to follow the four (4) principles enunciated/laid down in the PREMCHAND RAICHAND's Case (supra). These are:

(i) that costs be not allowed to rise to such a level as to confine access to the courts to the wealthy;
(ii) that the successful litigant ougth to be fairly reimbursed for the costs he had to incur;
(iii) that the general level of remuneration of advocates must be such as to attract recruits to the profession and
(iv) that there should be consistency in the award made.

With these principles in mind, I shall now consider the grounds of reference. It is needless to say that not all the above factors may exist in any given case, and it is therefore open to the taxing officer to consider only such factors that may exist in the actual case before him.

In the case now before me, I find that the learned taxing officer did consider some of the factors and the legal principles which were in his view relevant to the matter before him. These included the complexity and time spent, among others.

I am, however, respectfully in agreement with Mr. Ombwayo that it is evident from the Ruling that the learned taxing officer made no serious attempt to justify or to explain how he arrived at the figure which is over USD 225,000 from the basic fee of USD 100 prescribed by the drafters of the Rules.

It is on the basis on the foregoing that I am as sure in my mind as I am that 99 precedes 100, that the learned taxing officer's assessment is not "reasonable" as Rule 9 (1) requires, and therefore arrive at the reflected conclusion that the assessment is not a fair and reasonalbe fee. I believe that were the taxing officer not misled on the applicable provisions and his attention been drawn

to Rule 9 (1), he would have not allowed the fee he had allowed. This in my candid view is sufficient reason for this Court to interfere in the taxation, but it is necessary to go further.

There is another ground for intervention. This is the issue of consistency within the meaning of the case in PREMCHAND RAICHAND (supra) and the ruling of this Court in KENYA PORTS AUTHORITY (supra). In the latter's case my learned sister, namely, Lady Justice Arach-Amoko, Deputy Principal Judge in her last paragraph at pg. 8 and 9 whose views I wish to adopt in this ruling, had the following to say:

" By way of comparison, let me illustrate this point by listing down some of the various bills that the learned taxing officer has so far taxed in the short history of this Court. In Taxation Cause No. 1 of 2006, CALIST ANDREW MUNTELA AND TWO BROTHERS V THE EAC, the total bill was USD 23,076, and the taxing officer awarded USD 13,337. In taxation Cause No. 5 of 2008, JAMES KATABAZI AND 21 OTHERS V THE ATTORNEY GENERAL OF UGANDA, the bill was USD 176,305 and the taxing officer awarded USD 70,105. In Taxation Cause No. 6 of 2008, ANYANG NYONGO AND OTHERS V THE ATTORNEY GENERAL OF KENYA, the bill was USD 5,622,528.69 he awarded USD 2,033,165. In Taxation Cause No. 2 of 2010 between the same parties he awarded USD 528,802.24 where the bill was USD 1,091,745. In Taxation Cause No. 1 of 2010, MODERN HOLDINGS V KENYA PORTS AUTHORITY, the bill was USD 380,812.3 he awarded USD 48,097 .... The bottom line in my judgment, is that the cost of doing business in the Court should be as far as possible, kept to a level that is reasonable, affordable and that should not deter any citizen of East Africa from seeking justice from this Court, and at the same time be proportionate for the purpose of remunerating the advocate.

According to holding No. (ii) in **PREMCHAND RAICHAND** (supra) the Court will only interfere when the award of the taxing officer is so high or so low as to amount to injustice to one party. (The underlining is supplied for emphasis)

In light of the decision in **D'SOUZA V FERRAO [1960] E.A. 602** and **DEVSHI DHANTI AND OTHERS V KANTI NARAH PATEL AND OTHERS (No. 2) [1976 –** 80] pg. 1024 – 1029 where it was stated interalia that "*Through the general principle is as laid down in the foregoing passages (to refer the matter to another taxing officer) the reviewing judge can and sometimes does deal with the matter himself".*

In the instant case, not unlike the cases I have cited, I find and hold that having regard to the history of this unusual case, that it would be more convenient to finalise the matter which has become protracted. If this matter is remitted to the taxing officer for re-assessment, there is bound to be another reference to this Court.

In fine, after giving the matter careful consideration, I think a total sum of USD 250,000 instead of USD 450,000, not excluding VAT would in the circumstances, meet the justice of the case, and this I would subsititute. For the same reasons, I have forestated (supra), namely, having regard to the history of this unusual case, I find it meet and just, that parties bear their own costs. It is so ordered.

DATED and DELIVERED at Arusha this 23rd day of February, 2011.

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JOHN MKWAWA

JUSTICE OF THE COURT OF FIRST INSTANCE DIVISION