IN THE EAST AFRICAN COURT OF JUSTICE

AT ARUSHA

TAXATION CAUSE NO.6 OF 2008

(Originating from Reference No. 1 of 2006)

IN THE MATTER OF KENYA REPRESE3NTATIVES TO THE EAST AFRICAN LEGISLATIVE ASSEMBLY

BETWEEN

1. PROF. PETER ANYANG NYONGO ..... APPLICANTS
2. ABRAHAM KIBET CHEPKONGA
3. FIDELIS MUEKE NGULI
4. HON. JOSEPH KAMOTHO
5. MUMBI NGARU
6. GEORGE NYAMWEYA
7. HON. JOHN MUNYES
8. DR. PAUL SAOKE
9. HON. GILBERT OCHIENG MBEO
10. YVONNE KHAMATI
11. HON. ROSE WARUHIU

VERSUS

1. ATTORNEY GENERAL OF KENYA ..... RESPONDENT
2. CLERK OF THE EAST AFRICAN LEGISLATIVE ASSEMBLY
3. SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY

AND

1. ABDIRAHIN HAITA ABDI ..... 1st INTERVENERS
2. SARA GODANA TALASO

3. CHRISTOPHER NAKULEU

4. REUBEN ONSERIO OYONDI ..... 2ND INTERVENER

5. SAFINA KWEKWE TSUNGU ..... 3RD INTERVENERS
6. CATHRINE NGIMA KIMURA
7. CLERKSON OTIENO KARAN
8. AUGUSTIVE CHEMONGES LOTODO
9. GERVASE BULUMA KAFWA AKHAABI

10. HON. UHURU KENYATTA ..... 4TH INTERVENERS
11. HON.WILLIAM K.S.RUTO
12. HON.BILLOW KERROW

RULING

19th December 2008

DR. JOHN EUDES RUHANGISA, TAXING OFFICER

In this bill of costs filed by Professor Peter Anyang'Nyong'o and ten others as applicants, a total of USD 5, 622,528.69 is claimed as costs incurred by the applicants in the course of conducting the suit, namely Reference No. 1 of 2006. The claims leveled against the Judgment debtor, the Attorney-General of the Republic of Kenya and two others relates to the reimbursement for actual expenses incurred by the applicants, to wit, costs for filing the reference and the bill of costs as charges for stationary, travel and upkeep expenses between Nairobi and Arusha where the East African Court of Justice is headquartered. The bill of costs filed attempted to comply with the Court order for costs that the bill of costs by the applicant and the taxing officer should limit the taxation thereof to those disbursements claimed.

Mr. Kajwang spent quite deal of time leading the court through the jurisprudence developed in various authorities on the principles that he

requested the Court to take into account when considering issues of taxation of bill of costs. Among the authorities cited included the famous case of *Premchand Raichand Ltd & Another v. Quarry Services of East Africa Ltd and Others (1972) EA 162; James Katabazi and Others v. Secretary General of East African Community and Another (EACJ Taxation Cause NO. 5 OF 2008; First American Bank of Kenya v. Shah and Others (2001) 1 EA 64; Simpsons Motor Sales (London) Ltd v. Hendon Corporation (1964) 3 All ER 833; President of the Republic of South Africa and Others v. Gauteng Lions Rugby Union (2001) ZACC 5; (1) BCLR 1 and City of Cape Town v. Arun Property Development (PTY) Ltd and Another (2008)ZAWCHC.*

The learned counsel for the applicants asked the Court to consider the volume and magnitude of the documentary evidence, the urgency of a brief, absence of developed jurisprudence on the subject in the region, the importance of the case, the pleadings, authorities and everything that was laid before the Court during hearing of the reference. He went on to refer to the number of interlocutory applications that were generated by the reference, the research work involved, the period of time employed in business, the value of the subject matter and the caliber of counsels involved as guiding principles to the Court in determining the professional fee chargeable. In other words Mr. Kajwang was attempting to give an impression that the above principles were reflected in his reference and therefore in the circumstance the amount of money US$ 4,339,416.89 ascribed into instruction fee in item 1 is reasonable.

Mr. Anthony Ombwayo, Principal State Counsel representing the Respondents conceded to the validity and basis of most of the claims by the claimants but disputed some of the items in the claim saying that they were either excessive or did not make any sense or that they lacked supportive documentary evidence. Initially, specific items 86 to 105 were disputed by the Principal State Counsel representing the Respondents on

grounds of lack of documentary evidence, whereas item 109 did not make any sense to him, and item 116 lacked credible receipts. However, upon listening to Mr. Kajwang's submission and clarification on some items making reference to an Invoice Annexture B1 and Receipt Annexture B2, Mr. Ombwayo reviewed his stand on items 86, 88, 90, 93, 94 and 95 which contained claims for mileage expenses. The burden of proving the authenticity of an Invoice for printing and binding expense Annexture A1 and the corresponding Receipt Annexture A2 was put on the Counsel for the Applicants.

Mr. Ombwayo strongly disputed the professional fee charges US $ 4,339.416.89 referred to in item 1 on ground that they were highly excessive and the rules of the Court on taxation provided only USD 50 for this particular item. However, the learned State Counsel admitted that the Taxing Master has discretion, as demonstrated by this Court's previous rulings on applications for taxation of bills of costs, to award more than US$ 50 depending on the nature and complexity of the case. It was against this background that he abandoned his argument of strict adherence to Rule 1 (f) of the Scale of Charges and requested the Court to award US$ 5,000 on item one, the amount he considered reasonable.

Counsel for the applicants regretted that an agreement could not be reached by the two sides on items in the bill of costs that was filed for taxation despite the attempts made. He prayed that the Court 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 and integration of the East African Community in the general jurisprudence, look at the receipts whether or not they tally with the claimed expenses. He went further to say that he is ready to concede that the Taxing officer can tax off excesses which shall have been in

excess of what he actually used or decrease whenever he finds that an item is manifestly excessive to that extent and it will cause injustice or was unreasonably incurred as a result of over caution or negligence on the part of the Counsel for the Applicants.

On taxing exercise itself, that is, the actual calculation of the costs to be awarded to the Applicants, the Counsel for the Applicants argued that, when the principles of taxation have been followed the taxing officer has a free hand to make an impression on the amount of costs which the Court would think would compensate the Counsels on a party and party taxation. To back his prayer and persuade the Court, the Counsel for the applicants made reference to the Rules of Procedure of the East African Court of Justice, principles of taxation thereon, and prior Court decisions where the principles referred to were followed. Those principles of taxation he suggested should be the basis and foundation of the amount to be allocated by the Taxing Master. In particular the Counsel found Rule 9 of the Second Schedule of the Rules of the East African Court of Justice to have made considerable Jurisprudence around the subject of taxation, and also emphasized that the urgency of the brief is an important principle that a Taxing Officer would want to look into to assess the amount of instruction fees. On that score Mr. Kajwang reminded the Court that given the urgency of the brief, the matter was brought under certificate of urgency thereby weighing heavily on the counsels. This culminated into the Court granting interim reliefs that restrained the Kenya members to the East African Legislative Assembly from being sworn in until the main reference was concluded.

Much as most items in the bills of costs were agreed upon by both parties giving a sign that taxation exercise may be easy and smooth, the taxing officer still has a very involving work to rule on the disputed items especially item 1 that relates to professional fee which was vehemently

disputed by the Counsel for the Respondent for being excessive while Mr Kajwang maintains the view that it is a reasonable charge.

As Mr. Kajwang rightly observed, the reference gave birth to other nine applications which were equally demanding and time consuming as the main reference itself. Five of those applications were intervener applications where by a Consent Order dated 17th January 2007, all the applicants were allowed to participate in the proceedings as interveners. The said five applications included *East African Law Society and the Law Society of Kenya v. Prof. Peter Anyang'Nyongó and Ten Others, Application No. 1 of 2006, Abdirahim Haither Abdi and 2 Others v. Prof. Peter Anyag'Nyongó and Ten others, Application No. 3 of 2007, Reuben Onserio Oyondi v. Prof. Peter Anyang'Nyongó and Ten Others, Application No. 1 of 2007, Mrs Safina Kwekwe Tsungu and 4 Others v Prof. Peter Anyang'Nyongó and Ten Others, Application No. 2 of 2007 and Hon Uhuru Kenyatta and 3 Others v. Prof. Peter Anyang'Nyongó and Ten Others, Application No. 4 of 2007.* Others were *George Nangale v. Prof. Peter Anyang'Nyongó and Ten Others, Application No. 2 of 2006* which was for the correction of the Court Order dated 27/11/2006; *Prof. Peter Anyang'Nyongó and Ten Others v. Attorney General of Kenya and 3 others, Application No. 3 of 2007* for leave to institute contempt proceedings against the Republic of Kenya, the Attorney General of Kenya and Hon. Koech, the application was on 30th May 2007 withdrawn; *The Attorney General of Kenya v. Prof. Peter Anyang'Nyongó and Ten Others, Application No. 5 of 2007* was an application to have two Judges of the Court disqualify themselves from further hearing of the reference. The application was on 6th June 2007 dismissed with costs to the respondents; and *The Attorney General of the Republic of Kenya v. Prof. Peter Anyang'Nyongó and Ten Others, Application No. 6 of 2007* was an application for expunging from the reference the entire Hansard of the National Assembly of Kenya. The application was never pursued.

It is not in dispute that the reference from which this bill of costs originated was one of its kind in the history of the Court. It was this particular reference that lead to the amending of the Treaty thereby dividing the Court into two divisions. Indeed the reference and the amount of work involved measure to the principles of taxation as very well elaborated by Mr. Kajwang in his submission and from the authorities that he cited. However, it is my humble view that by any standard, the amount charged in item 1 as professional fee is on the high side and excessive. In the same vein, I find it unreasonable and too wanting the US$ 5,000 proposed by Mr. Ombwayo to represent a reasonable professional fee in this case. Given the complexity of the case, the time it took and the amount of work it involved, this court would be subscribing to mockery of justice if it taxes the bill in item 1 at the tune of US$ 5,000 as proposed by Mr. Ombwayo. In the strength of the foregoing this court considers USD 1,300,000 (US Dollars One Million Three Hundred Thousands) a reasonable amount for instruction fee chargeable, plus 16% VAT US$ 208,000. I therefore tax the professional fee chargeable in item 1 of the Bill of Costs at the tune of US$ 1,508,000 (United States Dollars One Million Five Hundred and Eight Thousand) only VAT Inclusive.

Item 2 of the bill of costs that represents what the applicant refers to as getting up fees for preparing for trial, normally calculated as one third of the instruction fee was not objected to by Mr. Ombwayo. However, the amount quoted in that item consequently goes down since it is calculated on the basis of the professional fee which has been taxed at US$ 1,508,000. One third of 1,508,000 is US$ 502,666 and item 2 of the bill of costs is therefore taxed at US$ 502,666.

Items 3 to 85 are not disputed and I find them to reflect the genuine costs reasonably incurred by the applicants and I taxi them as presented in the bill of costs.

Initially Mr. Ombwayo disputed the claims on mileage as reflected in items 86, 88, 90, 93 and 95 but after Mr. Kajwang made clarification on them as supported by receipts Annex C1, Mr. Ombwayo reviewed his stand and withdrew his objection. I therefore taxi the amount claimed in items 86, 88, 90, 93, and 95 as presented in the bill of costs as genuine claims that were reasonably incurred by the applicants. Likewise, items 87, 89, 91, 94, 96 on accommodation and meals expenses incurred by counsels and applicants at Ngurdoto Mountain Lodge, were not disputed by Mr. Ombwayo as they were supported by Invoice Annex C1 and receipt Annex C2. Accordingly, the aforementioned items are taxed as presented in the bill of costs.

Items 97, 98, 107, 109, 110, 115, 116,118, 121 and 124 on photocopying expenses were not disputed as such by Mr. Ombwayo but his concerned was on the credibility of the receipts Annexes A1 and A2 which bore no physical address of the company that provided the services. In other words the learned counsel for the Respondents was questioning the genuineness and authenticity of the receipts issued by Speed Wings Limited the company that provided photocopy services to the applicants.

With all due respects to Mr. Ombwayo the Principal State Counsel representing the Respondents, it is not proper in law to put the burden of proving the genuineness of the receipts to the applicants who just happened to receive services from the company which issued receipts as proof of payment for the services that were provided. I do not think Mr. Ombwayo was suggesting that the applicants should have either rejected the receipts issued to them or should have taken it upon themselves to print another receipt book on behalf of the company showing its physical address. His objection would weigh heavily on the applicants if he had done some investigation for example with the Registrar of Companies and found that such company by the name of Speed Wings Ltd did not exist.

In the absence of such proof by the Respondent, I find his objection to the receipts rather baseless. I therefore taxi the aforementioned items on photocopying costs as presented in the bill of costs as the reasonably incurred expenses.

Whereas most of the items in the bill of costs were supported by documentary evidence to show that they were costs incurred by the applicants, others could not be supported by any receipts. Such claims (totaling US$ 3743) are those for travelling, meals and accommodation expenses for the clerk when he came to Arusha to file various documents with the Court. They are shown in the bill of costs as items 92, 99 – 105. In the absence of receipts there is no other way that this Court can satisfy itself that they were expenses which were incurred by the applicant, and I taxi them off accordingly.

I have been satisfied that the applicants have followed the direction given by the Court on the filing of the bill of costs. Instead of each group of applicants bringing a separate bill of costs, only one global application was filed bearing in mind that a single applicant would have presented the reference as directed by the Court in its judgment at page 43.

Much as the court should bear in mind the fact that the costs should not be a hindrance of the general public to access it or portray the image that courts are only to the wealthy, we cannot ignore the fact that the court is charged with responsibility to do justice. To do justice includes awarding costs to a successful party in order to indemnify him for the 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 costs reasonably incurred by him or her in relation to his or her claim or defense then it will have failed to discharge its function. This ruling on taxation of the bill of costs took into consideration the need for balancing these two propositions. Indeed the taxing of costs is

not a mathematical exercise but a matter of opinion based on experience and laid down principles.

It should be noted that on 16th May 2008 when the matter came for hearing of a preliminary point of objection filed by Mutula Kilonzo Advocates against the bills of costs filed by the counsels for applicants in Taxation Causes No 1, 2, 3, 4, of 2008, a consent order was filed in Court to the effect that notices of change of advocates were withdrawn and consequently all notices of preliminary objection were also withdrawn. The bills of costs were agreed to be taxed together for all claimants within the bill filed by Mutula Kilonzo and Company Advocates. In clause 5 of the Consent Order it was stated that the Respondent's expenses for Court attendance KShs 200,000 be taxed off from the claimants' bill of costs. This was prompted because of the respondents traveling expenses for the two occasions when the matter came up for hearing but was adjourned. I therefore tax off KShs 200,000 equivalent of US$ 2,857 (at the exchange rate of KShs 70 per One Dollar). When this is added on the costs in items items 105, and 99 – 105 (US$ 3,743), the amount taxed off sums to US$ 6,600 (United States Dollars Six Thousand Six Hundred) only

After deducting the amount taxed off, in total this bill is taxed at USD 2,033,164.99 (United States Dollars Two Million Thirty Three Thousand One Hundred Sixty Four Ninety Nine Cents) only

I so tax

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DR. JOHN EUDES RUHANGISA

TAXING OFFICER

19th December 2008