IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

TAXATION REFERENCE NO. 4 OF 2010

KENYA PORTS AUTHORITY.....}APPLICANT

VERSUS

MODERN HOLDINGS LTD.....} RESPONDENT

DATE: 29th OCTOBER, 2010

RULING

JUSTICE M.S. ARACH-AMOKO, DEPUTY PRINCIPAL JUDGE

Kenya Ports Authority, the Applicant, applied to this Court under Rule 114 of the Rules of Procedure of this Court for orders that:

a) The Ruling of the Taxing Officer dated 22nd June 2010 be set aside.
b) Item No. 1 of the Respondent's Bill of costs be taxed as pleaded by the Applicant or as may be ordered by this Court.
c) Costs of the application be provided for.

The grounds for the application are set out in the Notice of Motion as follows:

1. The award of costs was manifestly excessive in the circumstances as to amount to a misdirection in law by the Taxing Officer.

2. The Taxing Officer failed to calculate the basic instruction fees on the basis of the value of the subject matter.
3. The award of costs by the Taxing Officer is in contravention of Rule 9(1) on Taxation of costs under the 2nd Schedule.
4. The Taxing Officer took into account irrelevant matters and failed to consider the legal principles in reaching his decision.
5. The Taxing Officer failed to consider the submisions of counsel for the Applicant.

The Background:

The instant application arose from Reference No. 1 of 2008 filed by the Respondent against the Applicant claiming over USD 31,000,000. Court struck out that Reference with costs on a preliminary objection by the Applicant that it lacked the jurisdiction to determine the Reference. The Applicant then filed a Bill of Costs which the Registrar taxed and allowed at US$ 48,097.47.

However, the Applicant was dissatisfied with the taxation amount on the grounds that it was inordinately low and filed Taxation Reference No. 1 of 2009 under Rule 114 to set aside that award and re-tax item 1 on instruction fees. Hon. Justice J. Mkwawa heard the Reference, found no reason to set aside the Taxing Officer's decision and dismissed that application with costs to the Respondent.

This time it was the turn of the Respondent to file a Bill of Costs which it promptly did and the Registrar taxed the bill vide Taxation cause No. 1 of 2010 allowed US $ 48,116.This time the learned taxing officer included VAT of USD 8,660.88.(Being 18% of USD 48,116), which gave a total of USD 56,776.88.

Using his powers under Rule 14 of Schedule Two of the Rules of procedure of this court, he adjusted the figure by setting off the USD 48,097.47 he had awarded the Applicant in Taxation Cause No.1 of 2009 from USD 56,777.88. This leaves the Applicant to pay to the Respondent the difference between the two awards which is 8,679.41. It is this order that prompted the Applicant to institute the instant proceeding.

Submissions:

The complaint as can be summarised from the supporting affidavit and Mr Wetangula's submissions in Court is that the Taxing officer applied the wrong Rule, namely, Rule 9(2) which applies to references, instead of Rule 9(1) which applies to applications. He also applied wrong principles and failed to take into account and to appreciate that the issue in dispute was the value of the subject matter of the application which was quantifiable at US $ 48,097.47. This resulted into the award of instruction fees to oppose an application which was ironically higher than the sum awarded for dismissal of the main Reference where the value of the subject matter was US$ 33 million. The award was therefore manifestly excessive and should be set aside and the bill retaxed properly.

Learned counsel for the Respondent Mr Sang'ka strongly supported the award and denied that the award was manifestly excessive. He contended that this is a continuation of the original reference between the parties. In the original reference, the Applicant objected to the jurisdiction of the Court. The work done in dismissing the original Reference was little. On the other hand there was a lot of work before Justice Mkwawa in Taxation Reference No. 1 of 2009. He had to consider many authorities. Under Rule 9(2), which he contended applies to that reference; the main consideration is the amount of work done by the lawyer. The learned Registrar exercised his discretion judiciously in arriving at his decision. He was consistent throughout from the first Bill of Costs to the last one. There is nothing outrageous. The only exception is that this time he added VAT which goes to the coffers of the Government in any case. The application should be disallowed as the Applicant is merely speculating.

Principles:

The principles regarding review of taxation orders by the courts is well settled. According to a wealth of authorities some of which were cited by both counsel, this court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an interference that it was based on an error.See:**Premchand Raichand & Anor v. Quarry Services of**

E.A Ltd. & Others (1972) E.A ; Steel Construction Petroleum Engineering (EA) Limited v Uganda Sugar Factory[1970]EA 141. Of course it would be an error of principle to take into account irrelevant factors or omit to consider relevant factors.

Justice Mulenga of the Uganda Supreme Court, as he then was stated the principles clearly in **Bank of Uganda vs Banco Arabe Espaniol , Supreme Court Civil Application No. 29 of 1999 in the following words:**

"Before consideration of those grounds, however, I should reiterate briefly some pertinent principles applicable to review of taxation as I am called upon to do in this reference. The first is that save in exceptional cases, a judge does not interfere with the assessment of what the taxing officers considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs, are matters with which the taxing officer is particularly fitted to deal, and in which he has more experience than the judge. 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.

Secondly, an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the taxing officer exercised or applied a wrong principle. In this regard, application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or manifestly low.

Thirdly, even if it is shown that the taxing officer erred on principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties."

With these principles in mind, I shall now consider the grounds of reference.

It is not in dispute that Taxation Reference No. 1 of 2009 was instituted on behalf of the Applicant by virtue of Rule 114 which reads:

"Any person who is dissatisfied with a decision of the taxing officer may within fourteen days apply for any matter to be referred to a single judge of the Court whose decision shall be final..."

Although it is described as a ‘’**reference** ” in the aforesaid Rule in practice, the procedure used to move court under that Rule is by Notice of Motion supported by affidavit. The procedure for filing references to this court is set out in Rule 24. It is clearly different from the one prescribed under Rule 114 in respect of taxation references. From perusal of the Ruling the subject of this application, I find that the Learned Registrar was alive to this fact when he stated on page 3 of his Ruling as follows:

"Much as there may be a technical difference between a reference and an application, when it comes to complexity and time spent and the amount of concentration on the part of the lawyers involved, I do not see any such distinction as Mr Imende would like me to believe. A reference is considered by the Court in the same way it considers an application and the costs involved cannot be distinguished basing on the nature of the dispute. Some applications may be more than or equally involving as references depending on the subject matter under consideration. A lawyer sails in dangerous waters when he grades the matters that are before the court to the extent of doing less or more research. Such grading would make one case look more important than another. I find it very difficult and odd to base my decision on this distinction. I realise the fact that various authorities were presented to the judge in arriving at the decision and this fact on the applicant's lawyer cannot be ignored or disregarded."

This was in response to the submissions of the Applicant's lawyers (who were respondent's in that Taxation cause) which the learned Taxing officer had summarised on page 2 of the impugned Ruling as follows:

"Specifically item No. 1 was disputed by Counsel representing the Respondents (now Applicant) on the grounds of exaggeration and that the amount of USD 60,000 was manifestly excessive as it exceeded the USD 48,000 which had given rise to the reference and therefore a subject matter of the reference. According to the learned counsel the costs of defending an

application should be lower than the costs for defending a reference." (Underlining is for emphasis)

On the next page, the Learned taxing officer continued and stated once more as follows:

"Let me revert to the submissions on item one of the Bill of costs. The Counsel for the Respondents did not only strongly dispute charges referred to in item 1 as charges worth USD 60,000 but went on to suggest that instead of Court awarding that amount which he finds to be highly excessive, it should consider awarding not more than USD 1,000.That if at all there is an award to be awarded, it should be between USD 500.00- USD 1000.00 which he considered sufficient reimbursement for the Applicant."

It is therefore clear to me from the foregoing quotations that the taxing master did consider the submissions of counsel for the applicant in reaching his decision. He also considered the submissions by the opposite counsel on page 3 of the Ruling where he stated that:

"The counsel for the applicant (now Respondent) prayed that the court should examine and consider the complexity of the case, the time taken and the legal responsibility undertaken in preparation of the filing of the suit and all that goes with it."

What is not clear is, however, is the Rule under which he carried out the taxation because he stated on page 4 of the Ruling that:

"I am guided by Rule 1(1) of the Rules of procedure in arriving at the final decision in this matter".

This Rule does not exist in the Rules of Procedure of this Court. Counsel for the Applicant faulted him on this, but if this statement is read in context of the Ruling as a whole as I have done, it appears to be and I am of the view that it is a typographical error. What the Registrar must have meant was Rule 9 (1) of the Second Schedule since Taxation Reference No. 1 of 2009 which Justice Mkwawa dealt with was an application, and the Learned Registrar had stated so in his Ruling.

According to Rule 9(1):

"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 US $ 100".

In Joreth **Ltd vs Kigano & Associates (2002) 1 EA 92** cited by counsel for the Applicant, Learned Judge R.O Kwach 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 of the cause or matters, the nature and importance of the subject matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and other relevant circumstances."

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 before me I find that the taxing officer did consider some of the factors and the legal principles which were in his view relevant to the matter before him as evidenced by the part of his Ruling quoted earlier on. These included the complexity and time spent, among others. Besides the allegation that he took onto account irrelevant matters and failed to consider the legal principles in arriving at the decision is not substantiated or supported by any evidence.

However, where the injustice is manifest is the fact that the Applicant was the successful party in the original Reference No.1 of 2008, where the value of the subject matter was a whooping USD 31,000,000! In that case the Applicant presented a bill of costs of USD 330,000. That sum was taxed down to USD 48,000. The Applicant instituted Taxation Reference No 1 of 2009 to complain about that award as too low. The applicant lost that application and has been assessed to pay USD 56,000.This is ridiculous as Mr Watengula rightly pointed out because the end result is that the winning party is now being ordered to pay the losing party for dragging it to this Court in a bogus case by the admission of Mr Sang'ka who stated in his submission that he had actually advised the

Respondent against instituting those proceedings since it was not an institution of the EAC. Secondly, 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 over USD 48,000 from the basic fee of USD 100 prescribed by the drafters of the Rules in their wisdom.

This leads me to the irresistible inference that the assessment is not ***"reasonable"*** as Rule 9(1) requires and therefore manifestly excessive. It also raises the issue of consistency. The basic principles on this issue were stated by the East African Court of Appeal in the case of **Premchand Raichand v Quarry Services of EA Ltd. [1972] EA 162** followed by Manyindo DCJ in the case of **Patrick Makumbi And Another v Sole Electrics Civil Appeal No 11 of 1994 (SC)** where it was stated inter alia that although there is no mathematical formula to be used by a taxing officer, he must exercise his discretion judicially and not whimsically. While a successful litigant should be fairly reimbursed for costs incurred, the taxing officer owes it to the public to ensure that costs do not rise above a reasonable level so as to deny the poor access to court. The level of remuneration must be such as to attract new recruits to the profession. So far as practicable, there should be consistency in the awards made. There is no consistency if the sum of USD 31 million attracts less instruction fees than a simple application complaining about the sum of USD 48,000.

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 Mwatela And Two Others 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 USD176,305 and the taxing officer awarded USD 70,105. In **Taxation No.6 of 2008,Anyang'-Nyong'o and others v. The AG of Kenya,** the bill was USD5,622,528.69 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 330,812.3 and he awarded USD 48,097.45.

The above list shows at a glance that the bills have generally been taxed and reduced to at least half of what was presented, which was not the case in the Taxation cause the subject of this ruling. That amounted to an injustice to the Applicant in my view because it was entitled to similar treatment as the other litigants before this Court. The bottom line in my judgment, is that the cost of doing business in this 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 **Pramchand 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.''***

In the circumstances, I am persuaded by Mr Wetangula that this is one of those exceptional cases where misdirection in the guiding principles can safely be inferred, and the interference by the Court is justified in that to uphold such an amount would cause injustice to the Applicant.

That being the case, I allow the application on orders that:

1) The order of the taxing officer in the Ruling dated 22nd June 2010 on item 1 is set aside.

2) The order is substituted with the order of USD 15,000(fifteen thousand US Dollars only), as instruction fees payable by the Applicant excluding VAT.

JUSTICE M.S.ARACH-AMOKO

DEPUTY PRINCIPAL JUDGE