Case Number:	Civil Case 75 of 2005
Date Delivered:	07 Aug 2014
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)
Case Action:	Ruling
Judge:	Jonathan Bowen Havelock
Citation:	Terra Craft Limited v Kenya Pipeline Company Limited [2014] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Commercial Tax & Admiralty
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application allowed.
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 75 OF 2005

TERRA CRAFT LIMITED ……PLAINTIFF

VERSUS

KENYA PIPELINE COMPANY LIMITED …… DEFENDANT

R U L I N G

1. The Advocate/Applicant filed a Reference dated 8th August 2012 seeking to set-aside, in its entirety, the decision of the Taxing Officer made on 4th October 2011. The Application was brought before Court under the provisions of *paragraph 11 (2)* of the *Advocates (Remuneration) (Amendment) Order 2009*. The Advocate/Applicant also asked that the party/party Bill of Costs dated 8th July 2010 be referred back to the Taxing Officer with appropriate directions or the Court to make such orders as it considers just and fair in the circumstances. The grounds upon which the Application were founded were that:

"1.THAT the Taxing Officer acted contrary to the provisions of the Advocates Remuneration Order in assessing instructions costs at Ksh 2,307,608/-.

2. **THAT the Taxing Officer failed to take into account the Plaintiff's Submissions in arriving at the said figure of Ksh 2,307,608/-.**

3. **THAT the Taxing Officer failed to consider that the suit herein did not proceed to hearing but instead was dismissed for want of prosecution.**

4. **THAT the Taxing Officer failed to consider that the matter herein was referred to arbitration for final consideration.**

5. **THAT the Taxing Officer failed to take into account that the arbitration was still ongoing at the time of taxation."**

The Application before Court was supported by the Affidavit of **Henry Ndung'u Kinuthia** sworn on even date, who described himself as the Managing Director of the Plaintiff Company. The deponent noted that the Taxing Officer had delivered her Ruling on 4th October 2011. On 13th October 2011, the Plaintiff's advocate on record had written to the Deputy Registrar seeking reasons for the taxation on the instruction fees. Reminders were written to the Deputy Registrar on 24th January 2012, 26th March 2012 and 4th July 2012. He noted that its advocates had been informed that the reasons for the taxation were contained in the said Ruling. This remark was noted on the face of the advocates' letter dated 4th July 2012. In the deponent's view, the Taxing Officer had erred in failing to consider the Plaintiff's submissions when she was taxing the said Bill of Costs. The suit herein had been dismissed for want of prosecution on 30th October 2009.

3. This matter came before Court on 13th February 2014 when the advocate for the Defendant herein detailed that she had filed Grounds of Opposition on 27 August 2012. I noted that such Grounds did not appear on the Court file and requested counsel to provide a copy thereof which she did. Such Grounds detailed that the Application lacked merit, was misconceived, bad in law and an afterthought. Further, it was frivolous and vexatious as well as being an abuse of the Court process. The Defendant detailed that the Taxing Officer had considered the submissions of both parties in relation to the taxation. The suit had been defended and was dismissed not referred to arbitration as the Applicant contended. Moreover, the Defendant filed submissions in relation to the Reference on 20th June 2014 following upon the filing of the Applicant's submissions on 13th of June 2014.

4. Those submissions of the Applicant set out the orders sought in the Application before Court and detailed that it was the Applicant's position that the Taxing Officer failed to consider the Applicant's submissions filed on 6th April 2011. The Applicant noted that the various letters had been written to the Deputy Registrar seeking reasons for the taxation but it was only on 26th July 2012 that the Deputy Registrar indicated that the reasons for the taxation were contained in the said Ruling. The Applicant stated that it had received a copy of the Ruling on 27th July 2012 and filed the Application before Court on 8th August 2012. It was the Applicant's submission that the Taxing Officer erred in assessing the instruction fees in view of the fact that the suit was dismissed for want of prosecution. A copy of the notice to show cause in that regard had been annexed to the Plaintiff's submissions to the lower Court as well as letters confirming that the suit was now subject to arbitration.

5. Thereafter, the Applicant referred the Court to the case of **Kipkorir, Titoo & Kiara, Advocates (2005) 1 KLR 528** in which the **Court of Appeal** had declared:

"An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles."

The Applicant noted that the prayers in the Plaint sought an order of injunction, a declaration that the purported notices of termination of the contract between the parties were unlawful, null and void, costs of the suit and any other relief that the Court may deem fit to grant. In the Applicant's view such were declaratory orders and, as a result, it was erroneous to base instruction fees on the value of the subject matter. The Taxing officer did not consider the prayers in the Plaint at all but only the subject matter. The Applicant felt that a reasonable instruction fee based on the prayers sought would be Shs. 85,000/-.

6. The Defendant maintained that the Taxing Officer did not err in the taxing of the party/party costs. It was evident from the Ruling that she had considered the parties' written submissions and she had used the correct subject matter to determine the instructions fees. The Defendant submitted that *Schedule VII (b)* applicable when a matter is being defended provided:

"……..where the value of the subject matter can be determined from the pleadings, judgement or settlement between the parties……".

The subject matter in the suit had been t he phase 1 and II Contract as between the parties and the suit had sought to restrain their termination and to nullify termination notices. The value of the two contracts was spelt out in the Plaint at paragraph 3 thereof. The losses that the Applicant was apprehensive of suffering were set out in paragraph 6 of the Plaint. The Defendant maintained that the decision of the Taxing Officer should not be interfered with, as she had not increased the fee but awarded in accordance with scale. It was not correct that the suit was subject to arbitration. The Court record would confirm that, at no time, did the Applicant indicate to the Court about arbitration except in its submissions as regards the party/party Bill of Costs. The Applicant, in its submissions as regards the taxation proceedings dated 5th April 2011 and filed on 6th April 2011, had detailed that the subject matter was at paragraph 6 of the Plaint being the losses that the Applicant was apprehensive of suffering. The Defendant did not consider that the Applicant was being sincere in now submitting that the Taxing Officer should only have looked at the prayers in the Plaint. It also noted that the **Kipkorir Titoo** case had been cited before the Taxing Officer. In the Defendant's view there was no error in principle made in taxing the Bill of Costs and the reasons were given as was evident from the Ruling.

7. Prayer a. of the Application before Court seeks to set aside in its entirety the decision of the Taxing Officer made on 4th October 2011. (Underlining mine). However, the letters exhibited to the Affidavit in support of the Application only requests for reasons as to how the Taxing Officer arrived at her decision in respect of Item No. 1 of the Bill of Costs – instruction fees to defend the suit. It seems, as a result, that this Ruling need only concentrate upon the instruction fees awarded by the Taxing Officer and not the rest of the Bill of Costs. This was a party/party Bill of Costs and, in my view, was correctly taxed under the provisions of *Schedule VI* of the *Advocates (Remuneration) (Amendment) Order 1997 and 2006*. Under the heading "Instruction Fees", paragraph 1 (b) reads:

"To sue in any proceedings described in paragraph (a) where a defence or other denial of liability is filed; or to have an issue determined arising out of interpleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgement or settlement between the parties…..." (Underlining mine).

I have perused the Ruling of the learned Taxing Officer dated 4th October 2011. She details therein that the parties, by consent agreed to argue the Bill by way of written submissions. As a result, she had considered the Bill of Costs, as well as the parties' written submissions and compared the Advocates (Remuneration) (Amendment) Orders 1996 and 2006. She noted the Order of the Court dated 20th October 2009 when the Plaintiff's suit was dismissed with costs to the Defendant. The Taxing Officer further noted that the value of the subject matter was the termination of two contracts worth (together)

Shs. 152,507,210/-. She had been pointed to the contents of paragraph 3 of the Plaint in this connection. Based on the above figure, she had proceeded to tax the Bill arriving at the total amount for Item No. 1 at Shs. 2,344,741/-.

8. In its submissions before the Taxing Officer, the Plaintiff had noted that the subject matter could be ascertained from paragraph 6 of the Plaint in which the total sums sought from the Defendant amounted to Shs. 60,865,980/-The Plaintiff also observed that the prayers sought in the Plaint were an order of injunction and a declaration that the purported notices of termination of the contracts were unlawful, null and void. The Plaintiff also specifically pointed out that the matter did not go for full hearing. Indeed, this point was touched upon by the Defendant in its submissions before the Taxing Officer when in the 6th paragraph, it detailed:

“The defendant is asking for 75% of the instruction fees as per the Remuneration Order as the suit did not proceed to full hearing.”

9. In my view, the Taxing Officer has erred on a matter of principle. I concur with the Plaintiff’s submissions before her that the value of the subject matter herein is not as per paragraph 3 of the Plaint being the value of the two contracts as between the parties but the losses that the Plaintiff feared that it was going to incur being Shs. 60,865,980/-. This is the figure that the Taxing Officer should have taken into account when making her assessment of the instruction fees under Item No. 1 of the Bill of Costs dated 8th July 2010. Further, I believe that the Taxing Officer has erred in her Ruling in not taking into account that this suit had not proceeded to hearing. The Defendant itself, in its submission before the Taxing Officer, as above, conceded that the instruction fees should be at 75%.

10. The upshot of the above is that I set aside (as regards Item No. 1 only), the decision of the Taxing Officer dated 4th October 2011. I direct that the Party/Party Bill of Costs dated 8th July 2010 be put before another Taxing Officer for the re-taxation of that one item only. The new Taxing Officer should take into account what I have detailed in my Ruling as above in relation to the value of the subject matter of the suit and the fact that it did not proceed to hearing. In all the circumstances, I make no order as to costs as regards the Application before this Court.

DATED and delivered at Nairobi this 7th day of August, 2014.

J. B. HAVELOCK

JUDGE