REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: O'KUBASU, J.A. (IN CHAMBERS))

CIVIL APPEAL NO. 315 OF 2005

BETWEEN

KENYA PORTS AUTHORITY.....APPELLANT

AND

KUSTRON (KENYA) LIMITED.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Osiemo, J.) dated 10th February, 2005.

in

H.C.C.C. NO. 93 OF 1995)

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R U L I N G

This is a reference on taxation from the ruling of the Deputy Registrar of this Court delivered at Nairobi on *21st December, 2010*. The appellant's bill of costs against the respondent was drawn at ***K.Shs.2,955,066*** and was itemized in a total of 49 items. The contested items in the bill are ***Nos.1, 7, 18, 46, 47*** and ***49***.

The appellant's counsel Mr. Gachuhi submitted before the Deputy Registrar that the bill related to general damages which were computed in the bill in a total sum of ***K.Shs.380,225,365.77***. It was the counsel's submission that the sum be taxed at ***K.Shs.2,200,000.00/=***. He also asked ***K.Shs.733,333/=*** as getting up fees.

On her part Ms. Migiro who appeared for the respondent referred to the third schedule ***paragraphs 9(1)*** and ***9(2)*** of the Court of Appeal Rules and submitted that the taxing master had discretion to allow instruction fee of such sums as he considers reasonable. She was of the view that the sum of ***K.Shs.2,200,000.00/=*** was manifestly excessive and she proposed a sum of ***K.Shs.350,000/=*** for instruction fee.

The Deputy Registrar considered the rival submissions and in the course of his ruling expressed himself thus:-

"The appeal herein involved a huge sum of money awarded and decreed in US dollars. I take judicial

notice that the value of currencies fluctuate on daily basis and find that if the appeal had not succeeded the appellant would have been entitled to be paid the decreed judgment sum at current rates. However, having carefully perused the judgment of the Court of Appeal, I find that the appeal was not complex as to require extensive research on the part of the appellant's counsel as novel issues of law were not raised and determined in it. In stating this, I am not, however, casting aspersions on the level of research undertaken by the parties herein.

Weighing the factors above against the provisions of paragraph 9(2) of the third schedule of the Court of Appeal rules, I tax the appellant's instructions fee at Kshs.800,000/=. In arriving at the instruction fee, I am also guided by all the principles of taxation of costs set out in the case of Premchad & Another vs. Quarry Services of East Africa Limited & Others (1972) EA 162 namely:-

(a) That costs be not allowed to rise to such a level as to confine access to the court to the wealthy.

(b) That a successful litigant ought to be fairly reimbursed for the costs incurred.

(c) That the general level of remuneration of advocates must be such as to attract recruits to the profession and;

(d)That so far as practicable there should be consistency in the awards made."

The Deputy Registrar then went into other items of the bill most of which were uncontested and concluded his ruling thus:-

"The total costs awarded above add up to K.Shs.820,440. The second schedule part V paragraph 20 of the Court of Appeal Rules provide for fees in connection with the taxation of costs. The said paragraph provides that for applying for the certificate for the result of taxation a fee of K.Shs.500 and K.Shs.5 for each K.Shs.100 or part thereof of the amount allowed excluding the fee. This means that an amount equivalent to 5% of the total sum allowed upon taxation shall be added to the final sum. This translates as follows:-

5% of Kshs.820,440	***Kshs. 41,022***
Plus	***Kshs.820,440***

GRAND TOTAL	***Kshs.861,462"***

It is the foregoing that has given rise to this reference which came up for hearing before me on *29th September, 2011* when Mr. Gachuhi appeared for the appellant while Ms. Migiro appeared for the respondent.

In his submissions before me, Mr. Gachuhi argued that had the taxing officer considered the judgment in its entirety he would have come to a different conclusion. Mr. Gachuhi went on to submit that this was an exceedingly complex matter and for that reason he asked me to interfere with the sum awarded and give a reasonable figure which must not be less than 1 million.

In opposing the reference, Ms. Migiro submitted that no sufficient material had been placed before me to show that the sum was grossly inadequate. It was her submission that the taxing officer set out the correct principles. She went on to argue that the subject matter was determination of liability and hence the matter was not one of great complexity. She, therefore, supported the ruling of the Deputy Registrar.

In this reference it would appear that the main issue is item 1 of the appellant's bill of costs in the sum of ***K.Shs.2,200,000.00.*** This relates to instructions to appeal against the judgment and decree passed in favour of the plaintiff.

Paragraph 9(2) of the Third Schedule of the Court of Appeal Rules provides:-

"(2) The fees to be allowed for instructions to appeal or oppose an appeal shall be such sum as the taxing officer shall consider reasonable, having regard to the amount involved in the appeal, its nature, importance and difficulty, the interest of the parties, the other costs to be allowed, the general conduct of the proceedings, the fund or person to bear the costs and all other relevant circumstances."

The Deputy Registrar had to be guided by the foregoing and the principles set out in ***Premchad & Another vs. Quarry Services of East Africa Limited and Others*** (Supra).

Having considered the background to this matter and the ruling of the Deputy Registrar, I am of the view that the Deputy Registrar adopted the correct approach and applied appropriate principles in reaching his decision. I have not been presented with any material that would justify my interfering with the discretion of the Deputy Registrar. That being my view of the matter, I find no merit in this reference and hence it is dismissed with costs.

Dated and delivered at NAIROBI this 7th day of October, 2011.

E.O. O'KUBASU
.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR