

22 June 2010

Taxation Reference No. 1 of 2010

EAST AFRICAN COURT OF JUSTICE

**KENYA PORTS AUTHORITY
v.
MODERN HOLDINGS LIMITED**

RULING

BEFORE: TAXING OFFICER: Dr. John Eudes Ruhangisa

Citation: Kenya Ports Authority v. Modern Holdings Limited, Tax. Ref. No. 1, Ruling (EACJ, June. 22, 2010)

[1] In this bill of costs filed by Mr. S.A.Sang'ka, Counsel for the applicant, a total of USD 60,220 is claimed as costs incurred by the applicant in Reference No 1/2009 whereby the respondent had filed a reference contesting award of costs of USD 48,097.47 given by the Taxing Officer in Taxation Cause No. 1 of 2009. In this Party and Party Bill of Costs the claims are specifically for receiving instruction to file the bill of costs on behalf of the Applicant, attending hearing of Court Reference and Court Ruling, attending Court Registry for collecting the Ruling and for filing the Bill of Costs, making photo copies, and cost of fuel. The claims leveled against the Respondent, the Kenya Ports Authority also include the reimbursement for actual expenses incurred by the Applicant, Modern Holdings East African Limited as detailed above.

[2] Whereas Mr. S.A.Sang'ka learned advocate appeared for the Applicant, Mr. G. Imende appeared as Counsel for the Respondent in this matter.

[3] Mr.G. Imende conceded to the authenticity and basis of some of the claims by the claimant but disputed some of the items in the claim saying that they did not make any sense or that they did not have documentary evidence such as receipts and requested that unless supporting evidence is produced the Court should tax them off. Specifically item No. 1 was disputed by the Counsel representing Respondents on grounds of exaggeration, and that the amount of USD 60,000 was manifestly excessive as it exceeded the USD 48,000 that 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 reference. On item No. 3 Mr. Imende requested the Taxing Officer to tax off \$4 because making 4 copies of 2 folios each was done at USD 0.5 and this totaled to USD 4 not

USD 8. This fact was also admitted by Mr. Sang'ka in his response and I therefore tax off USD 4 on item No. 3. Item 4 of the Bill is taxed at USD 40 as presented since the Court records confirm that the applicant's advocate attended the session on that day.

[4] Items 5 to 7 were not disputed by Mr. Imende and I tax them as presented accordingly. The learned Counsel had no objection to items 8, 9, 10, 11, 12, and 13 provided the applicant presented the receipts as proof of those expenditures so as to qualify for disbursement under Rule 4 of the Second Schedule of the Rules of Procedure. As Mr. Sang'ka rightly said, items 8 and 9 are not the type of items about which receipts are required at the time of hearing. The Court takes judicial notice for example of the fact that filing fee was paid to the Court before the application could be admitted in court. I therefore tax items 7 and 8 at USD 10 and USD 10 respectively as presented. Mr. Sang'ka was not hard on the submission by Mr. Imende that lack of receipts would warrant the taxing off of items 10 to 13. I agree with Mr. Imende that items 10 to 13 do not satisfy the requirements of Rule 4 of Second Schedule of the Rules of Procedure as disburseable due to lack of receipts and should be taxed off as I hereby do. The burden of arguing convincingly for the reimbursement is upon the Counsel for the Applicants and it is still weighing heavily on his shoulders.

[5] Let me now revert to the submissions on Item No. 1 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 the Court awarding that amount which he finds to be highly excessive, it should consider awarding not more than USD 1,000.00. That, if at all there is an award to be awarded it should be between USD 500.00 – USD 1,000.00 which he considered sufficient reimbursement for the Applicant.

[6] The Counsel for the Applicant prayed that the Court should examine and consider the complexity of the case, time taken and legal responsibility undertaken in preparation of the filing of the suit, and all that goes with it.

[7] Much as there may be a technical difference between a reference and an application, when it comes to complexity, time spent and 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 realize the fact that various authorities were presented to assist the Judge in arriving at the decision, and this fact on the part of the applicant's lawyer cannot be ignored or disregarded.

[8] On taxing exercise itself, that is, the actual calculation of the costs claimed to be awarded to the Applicants, the Counsel for the Applicants leaves the consideration and judgment of how much should be awarded to them to the wisdom and discretion of the Taxing Officer. Although some items in the bills of costs were agreed upon by both parties, I am still required to determine the fate of the applicant whose core claim was disputed and challenged by the Counsel for the Respondent before the Court.

[9] I am guided by Rule 1 (1) of Schedule Two of the Rules of Procedure of this Court in arriving at the final decision on this matter. I am required as taxing officer to allow during taxation, such costs, charges and disbursements as it shall appear to me to have been reasonably incurred for the attainment of justice, but no costs should be allowed which appear to me to have been incurred through overpayment, extravagance, over caution, negligence or mistake. It is against this background that I find a claim of USD 60,000.00 in item No 1 of the Bill of Costs as being on the higher side and I therefore tax this particular item at USD 48,000.

[10] In conclusion, after perusing through the disputed items and challenged reimbursement on grounds of lack of receipts (items 8-12) I realized that, most items actually have all necessary backing information except items 10-13 which totals up to USD 80. Items No. 2, 4, 5, 6, 7, 8, and 9 of the Bill are therefore taxed at USD 2, USD 40, USD 30, USD 10, USD 10, USD 10, USD 10 respectively as presented. Item 3 is taxed at USD 4 after taxing off USD 4, and I hereby tax off items 10-13 on ground of lack of receipts.

[11] This bill is taxed at USD 48,116 (United States Dollars Forty Eight Thousand One Hundred Sixteen Only) without VAT. After adding 18% of USD 48,116 as Value Added Tax which amounts to USD 8,660.88, this bill is taxed at a total of USD 56,776.88 (Fifty Six Thousand Seven Hundred Seventy Six Eighty Eight Cents). However, Mr. Imende had requested the Court to invoke the provisions of Rule 14 of Schedule Two of the Rules of Procedure which provides that where a party entitled to receive costs is also liable to pay cost, the taxing officer may tax the cost which that party is liable to pay and adjust them by way of deducting or set off a direct payment on any balance. This is the time now for the Court to apply the above said provision as requested by Mr. Imende, who is aware of this Courts award to the Respondent against the Applicant of USD 48,097.47 in Taxation Cause No. 1 of 2009. By way of set off, the applicant's award of USD 56,776.88 in this cause when set off against USD 48,097.47 awarded in taxation cause No. 1 of 2009, the Respondent Kenya Port Authority still owes the applicant USD 8,679.41 (United States Dollars Eight Thousand Six Hundred Seventy Nine Forty One Cent Only).

I so tax.

Date at Arusha this day of 2010

DR. JOHN EUDES RUHANGISA
TAXING OFFICER

22nd June, 2010