

**IN THE EAST AFRICAN COURT OF JUSTICE
AT ARUSHA
TAXATION CAUSE NUMBER 3 OF 2010
(Originating from Reference No. 1 of 2006)**

The Clerk of the National Assembly of Kenya.....Applicant

Versus

Prof. Anyang' Nyong'o.....1st Respondent
Abraham Kibet Chepkonga.....2nd Respondent
Fidelis Mueke Nguli.....3rd Respondent
Hon. Joseph Kamotho.....4th Respondent
Mumbi Ngaru.....5th Respondent
George Nyamweya.....6th Respondent
Hon. John Munyes.....7th Respondent
Dr. Paul Saoke.....8th Respondent
Hon. Gilbert Ochieng Mbeo.....9th Respondent
Yvonne Khamati.....10th Respondent
Hon. Rose Waruhiu.....11th Respondent

RULING

DATE: 26th JULY 2011

DR. JOHN EUDES RUHANGISA, TAXING OFFICER

In this bill of costs filed by the Clerk to the National Assembly of Kenya who was the 2nd Respondent in Reference Number 1 of 2006 that was presented by the Respondents in this cause is for a total sum of USD1,305,475.80 as costs incurred by the Applicant herein for conducting the suit namely Reference Number 1 of 2006. Mr. George Ng'ang'a Mbugua Advocate of Ngatia and Associates appeared

in Court on behalf of the Clerk to the National Assembly of Kenya, the Applicant while Mr. Tom Kajwang' Advocate from Kilonzo and Company Advocates represented the Respondents. The claim against the respondents herein, relates to instruction fee, reimbursement for actual expenses incurred by the Applicant, to wit, costs for filing the bill of costs, costs for stationary, travel and upkeep expenses between Nairobi and Arusha where the East African Court of Justice is headquartered.

Whereas the Respondents counsel conceded to items No. 2, 3, 4,8,9,10,11 and 13 in the bill of costs, items No. 5, 6, 7 and 12 lacked supporting documents.

Since items 2, 3, 4, 8, 9, 10, 11 and 13 of the bill of costs were not disputed, the costs thereof amounting to USD 254.35 are consequently taxed accordingly and awarded to the Applicant/2nd Respondent without any further discussion on the same.

The applicant was not able to produce receipts for items 5, 6, 7 and 12. These items are accordingly taxed off. In arriving at this decision I am guided by the rules of procedure governing litigation in East African Court of Justice, rule 4 of the Second Schedule in particular which states that 'receipts for disbursements shall be produced to the taxing officer at the time of taxation'. The applicant did not comply with this mandatory requirement of the law.

An attempt was made later after court session by Mr. George Ng'ang'a to send by courier, photocopy of the log book of a motor vehicle that was used by the applicant to travel from Nairobi to Arusha to attend the Court Session. This

attempt was unprocedural as it denied the respondent opportunity to examine and comment on the said document. I could not verify the authenticity of such document that was not produced in Court. Further the document could not itself be proof of expenditure on the part of the applicant in the absence of evidence that the motor vehicle crossed the border, if at all it was to be of any assistance to the applicant.

The only remaining contentious item is item No. 1, that is, “to professional fees for receiving instructions to represent the 2nd respondent namely the Clerk to National Assembly of Kenya in Reference No. 1 of 2006 when the claimants therein represented by seven advocates contested the nomination of 9 members and sought a declaration that the said purported nomination of the said persons were in contravention of the Treaty for the Establishment of the East African Community particularly Article 50 thereof was null and void; preparing and settling all necessary pleadings particularly, in reply to the Certificate of Urgency, Notice of Motion Application; to preparing for hearing of the application. Having regard to incidental processes, the number and length of documents perused, photocopied, exhibits perusal and bundles of authorities; to travelling to Arusha Tanzania and defending the 2nd Respondent against the Certificates of Urgency at the East African Court of Justice and obtaining orders, to preparing for inter parties hearing to preparing all appropriate responses and dispatching them; to disbursements drawing filling and serving notice of appointment and responding to various correspondences for and on behalf of the claimants and making an application for the Court to discharge the 2nd Respondents from proceeding as a result of which the names of the 2nd, 5th and 6th were struck out with costs”.

For ease of reference, let me at this stage pay visit to the background of this Taxation. A Reference Number 1 of 2006 was filed on 9th November 2006 by the Respondents herein against The Attorney General of the Republic of Kenya 1st Respondent, the Clerk of the National Assembly of Kenya 2nd Respondent, The Clerk of the East African Legislative Assembly 3rd Respondent, The Secretary General of the East African Community 4th Respondent, Hon. Moody Awori Vice President of the Republic of Kenya and Leader of Government Business 5th Respondent and Dr. Mukhisa Kituyi sued as the Chairman of the National Rainbow Coalition Party of Kenya (NARC-Kenya) 6th Respondent. The subject of the reference as stated above was interpretation of Article 50 of the Treaty for the Establishment of the East African Community on the process of nomination and election of Kenya's representatives to the East African Legislative Assembly. An application under certificate of urgency for injunction to restrain the members of assembly from being sworn in pending the hearing and determination of the reference was filed in the reference.

Because the application was urgent the court fixed it for inter-parties hearing on 24th November 2006 before the closure of pleadings. At the hearing of the application the court decided that it would combine all preliminary issues raised by the parties and hear them together. The issues that the court heard on 24th November 2006 were first, the application by the applicants for an interim order, second was the jurisdiction of the Court and third was the issue of the parties that were objecting to their being made party to the suit. The Court heard submissions on the issues and delivered its ruling on 27th November 2006 that the matter fell within its jurisdiction, that the 2nd, 5th and 6th Respondents were wrongly joined to the reference and that they be struck out with costs and granted an interim

injunction restraining the 3rd and 4th Respondents from recognizing the mentioned members of EALA or permitting them participate in any function of the EALA until the final determination of the reference. At this stage the reference against the 2nd 5th and 6th Respondent was terminated. It is against this ruling that the Applicant herein who was the 2nd Respondent in the reference has filed the bill of costs under consideration.

Counsel for the applicant submitted that under Rule 9(2) of the Second Schedule of the East African Court of Justice Rules of Procedure the Taxing Officer has discretion when it comes to assessment of instruction fee and that the fee to be allowed for instructions to institute a suit or reference or oppose a suit or reference shall be such sum as the Taxing Officer shall consider reasonable having regard to the amount involved in the reference, its nature, importance, complexity, the interest of the parties, the other costs to be allowed, general conduct of the proceedings, the person to bear costs and all relevant circumstances. Counsel for the Applicant also highlighted the principles upon which the Taxing Officer had previously been persuaded by when it comes to exercising this discretion. Counsel for the Applicant further submitted that the work that was involved in preparation to defend the reference was a lot and that the level and intensity of the research that the particular reference warranted the instruction fee claimed in his bill of costs and that it was not a matter that had been previously litigated on. Counsel for the applicant also submitted that since the Respondents herein were awarded costs of USD \$1.3million as instruction fees in a taxation cause arising from the same reference he is also entitled to the same costs.

Counsel for the Respondents submitted that before the reference was heard there was an application filed under certificate of urgency which was on record and that it was this application which led to a long discussion between counsels and the panel of judges, after which a ruling was made in which the names of the Clerk of the National Assembly of Kenya and others were struck off from the record. He further submitted that the business that was handled in respect of the Clerk of the National Assembly was that of the application not the reference and that he did not take part or participate in the hearing of the reference.

Counsel for the Applicant in response to my question whether the Clerk of the National Assembly was removed from the matter at an application level or he had a role to play in the main reference when it was heard he replied:

“Your Worship, certainly, the moment the preliminary objection regarding them being parties to the suit was determined in their favor, they certainly did not have any participation in the main reference, but the point I was making is that the order of costs that they were awarded at page 7 of the ruling, what I gather from this ruling is that when the judges were to consider the issue of, one, the jurisdiction of the court to determine the reference, it also thought it prudent to determine whether these other parties who were raising preliminary objections as to whether they should be parties ought to be heard together. So, what I gather from this ruling is that their Lordships were persuaded that all those preliminary points ought to be heard together. But what I gather my learned friend to suggest is that our cost emanates from an application. Certainly, not. Our cost emanates from the fact that the second respondent, the Clerk of the National Assembly, was enjoined in the main reference and the Lordships were persuaded that he ought not to be a party to that reference and proceeded to strike out the name of the Second Respondents with costs.”

In my view the applicant raised a preliminary objection at the interim stage of the Reference that was before the Court and when the application for injunction that was filed in the reference came up for hearing the court decided to deal with the

preliminary issues together with the application for interim orders before going to the merits of the reference and made a ruling striking off the name of the applicant herein therefore the applicant did not participate in the hearing of the main reference.

As regards the principles of taxation and the discretion applicable by the Taxing Officer both counsels were in agreement as to the principles governing the discretion of the Taxing Officer and I believe it is not relevant to discuss them.

The importance and complexity of the matter would have been interesting for discussion if the objection to being joined as parties would have failed and the reference as against the parties struck off proceeded to hearing. As regards the parties interest it is obvious that the Applicants wish is that the instruction fee be awarded as claimed. The Respondent's interests, on the other hand, consist of getting the proposed instruction fee reduced to a maximum USD 10,000.00. Although the case proceeded for hearing on merits as against the respondents who were not struck off, this is not a reason for putting the instruction fee at a comparable level as the applicant whose name was struck off at the preliminary stage tried to advocate. I cannot therefore base the calculation of the instruction fee on the amount initially claimed by the Applicant.

It is in the strength of the foregoing that, I agree with the Respondents submission that the amount of USD \$1.3 million for instruction fees on a matter that ended at the preliminary stage as against the applicant herein being beyond what is reasonable. In arriving at this, I have also been guided by my ruling awarding USD \$48,097.42 as costs in **Taxation Cause No. 1 OF 2009 Kenya Ports Authority Vs Modern Holdings (EA) Limited** arising from **Reference No. No. 1 of 2008 Modern Holdings (EA) Limited Vs Kenya Ports Authority** that was terminated

in its preliminary stages, costs which were upheld by the ruling of Honorable Mr. Justice John Mkwawa following a **Taxation Reference No. 1 of 2009 Kenya Ports Authority Vs Modern Holdings (EA) Limited** from my said ruling. In **Taxation Reference No. 4 of 2010 Kenya Ports Authority Vs Modern Holdings (EA) Limited** arising from **Taxation Cause No. 1 of 2010 Modern Holdings (EA) Limited Vs Kenya Ports Authority** the Deputy Principal Judge Honorable Lady Justice Mary Stella Arach Amoko in her ruling stated that the court should maintain consistency in its awards. Honorable Mr. Justice John Mkwawa also in his ruling in **Taxation Reference No. 5 of 2010 Attorney General of Kenya Vs Prof. Peter Anyang Nyongo and 10 Others** applied consistency that had been applied by his sister Lady Justice Mary Stella Arach Amoko.

For the purpose of being consistent and in view of the fact that this is a matter similar to that of Modern Holdings mentioned above, the amount to be taxed therefore in item No. 1 shall be USD 40,000.00 plus non disputable costs in items No 2, 3, 4, 8, 9, 10 and 11 USD 254.35, plus VAT 16% on the total.

In total this bill is taxed at USD \$40,254.00 plus USD 6,441.00 being VAT at 16%, that is, a total of 46,695.00 (United States Dollars Forty Six Thousand Six Hundred Ninety Five) only

I so tax.

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DR. JOHN EUDES RUHANGISA
TAXING OFFICER