



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CORAM: D. S. MAJANJA J.

MISC. CIVIL APPLICATION NO. 232 OF 2019

BETWEEN

SHOWCASE PROPERTY LIMITED.....CLIENT/APPLICANT

AND

MUGAMBI & COMPANY ADVOCATES.....ADVOCATES/RESPONDENT

RULING NO.2

1. The matter for consideration is a reference under **Rule 11(1)** of the **Advocates Remuneration Order**. It is from the ruling of the Deputy Registrar dated 6th November 2019 arising from an advocate/client bill of costs dated 17th July 2019 emanating from **Milimani HC COMM No. 305 of 2013 (Showcase Properties Limited v Kenya Commercial Bank Limited)**. The Advocate claimed Kshs. 34,957,368.00 but was awarded Kshs. 23,899,864.40 only.

2. Following certification of the costs, the respondent filed the Notice of Motion dated 25th November 2019 seeking judgment against the Client for the amount taxed and certified. In the meantime, after several false starts, the Client managed to file the Amended Chamber Summons dated 7th April 2020 supported by the affidavit of Francis Muhoro Gachanja sworn on 7th April 2020. It seeks the following orders:

[1] THAT the Taxing Officer's decision dated 6th November 2019 with respect to the taxation of the Advocates/Client Bill of Costs dated 17th July 2019 be set aside and be substituted with an order striking out the bill of costs.

[2] THAT in the alternative to prayer 1 above the Taxing Officer's decision dated 6th November 2019 with respect to the taxation of the Advocat/Client Bill of Costs dated 17th July 2019 be set aside and the Bill of Costs dated 17th Julyh 2019 be referred back for taxation before any Taxing Officer other than Elizabeth Tanui, Deputy Registrar.

[3] Costs of this application be provided for.

3. Together with the Bill of Costs, the Advocates filed a bundle of documents. The Client relied on the affidavit of Diana Wangui Ndirangu, an Advocate in the firm on record for it at the time, *Kidenda, Onyango Anami and Associates Advocates*, sworn on 2nd September 2019. John Mugambi of the firm of Advocates swore a supplementary affidavit on 18th September 2019. Both parties filed extensive written submissions.

4. In the ruling of 6th November 2019, the Deputy Registrar dealt with the issue of instruction fees, getting up fees, drawing and attendances and taxed the bill accordingly. The reference raised two issues; first, whether there was a retainer and second, whether the Deputy Registrar erred in assessing the instruction fee.

5. I propose to dispose of the issue of the retainer agreement as it is straightforward. It was held in **Wilfred N. Konosi t/a Konosi and Company Advocates v Flamco Limited NKU CA Civil Appeal No. 154 of 2014 [2017] eKLR** that the taxing officer has jurisdiction to determine whether there was a retainer agreement as a preliminary issue. The Court stated as follows:

As a Judicial Officer sitting to tax a bill of costs between an advocate and his or her client, a taxing officer must determine the question whether he/she has jurisdiction to tax a Bill if the issue of want of advocate/client relationship is raised. An allegation that the advocate/client relationship does not obtain in taxation of an advocate/client Bill of Costs must be determined at once. The Taxing Officer has jurisdiction to determine that question. A decision in taxation where an advocate/client relationship does not exist is a nullity for want of jurisdiction.

6. I have read the documents filed before the Deputy Registrar and in none of them did the parties raise the issue of lack of a retainer. The Client chose to respond to the Bill of Costs through its affidavit and the issue of a retainer, which is an issue of fact, was not raised. The issue was also not broached in the detailed written submissions on the matter. It is only when the Client denies the retainer that the Advocate is called upon to prove it (see ***Omulele Tollo and Company Advocates v Mount Holdings Ltd MSA CA Civil Appeal No. 75 of 2015 [2016] eKLR***). In this case the issue of the retainer was not in contention before the Deputy Registrar, it cannot be raised in the reference. The reference is in the nature of an appeal and the High Court determining a reference cannot entertain a matter that was not raised before the Deputy Registrar. This position is confirmed by the fact that letter seeking reasons for the taxation dated 17th January 2020 was only in relation to the instruction fee and not whether or not there was a retainer. Prayer 1 of the application is accordingly dismissed.

7. I now turn to the issue of instruction fees. According to the Bill of Cost before the Deputy Registrar, the Advocates claimed instructions fees for filing suit against Kenya Commercial Bank seeking the following reliefs:

(1) A Declaration that the Statutory Notice dated 4th April 2013, is null and void as it does not comply with the form prescribed.

(2) Declaration that there were no valid notices sent in variation of interest rates.

(3) An order extending the period of time for compliance by the Plaintiff with the notice served under section 90 of the Land Act/ or other notice served thereof.

(4) An order substituting a different remedy than one propose by the defendant, i.e., instead of foreclosure an order to appoint a receiver.

(5) A permanent injunction restraining the Defendant, its servants or agents or auctioneers or any other person acting for or on their behalf from; advertising for sale, disposing of, selling by public auction, completion of any conveyance or transfer of any sale concluded by auction or private treaty and or continuing to offer for sale LR NO. 2/61 on the strength of the Notice dated 4th April 2013 where the subject property is valued in excess of Kshs. 1,074,800.00

(6) Costs of the suit.

8. The Deputy Registrar assessed the instruction fee of Kshs. 12,549,500.00 based valuation of LR No. 2/61 (“the suit property”) by Roma Valuers being Kshs. 1,074,800,000.00. In coming to this conclusion, the Deputy Registrar stated as follows

The argument by the Respondent that the value of the subject matter should be based on what was owing by the Respondent to the Bank, is watered down by the fact that the Bank intended to foreclose on the entire property.

The value of the subject matter is therefore the value of LR No. 2/62 which was valued at Kshs. 1,074,800,000/- by Roma Valuers.

9. It is this determination that precipitated this reference.

10. The parties relied on written submissions which they highlighted briefly. The Client’s case was outlined in the deposition and written submissions. It complained that the Deputy Registrar put the value of the suit property using the valuation by Roma Valuers instead of using the amount of Kshs. 212,468,118.26 which is the sum indicated the statutory notice dated 14th April 2013 issued by KCB. It pointed out that the Deputy Registrar failed to consider that the value of the subject matter was set out in para. 4 of the plaint which showed that the Client procured a loan facility with KCB securing a second further mortgage amounting to Kshs. 200,000,000 by charging the suit property. It was further submitted that there were in fact two conflicting valuation reports in the main suit, one which was filed by KCB done by Centenary Valuers dated 13th February which put the value of the suit property at Kshs. 700,000,000.00.

11. The Client also complained that the Deputy Registrar was wrong to rely on the report by Roma Valuers which was not part of the record in the main suit and there was no pleading which showed that the suit property was valued in excess of Kshs. 1,074,800,000.00.

12. On its part, the Advocates supported the decision of the Deputy Registrar and contended that instruction fee was properly based on the value of the suit property with had been determined by valuation prepared by the Client.

13. As the issue in contention is the instruction fees, the matter should be determined from first principles. The parties do not dispute that the instruction fees are to be calculated on the basis of the, “value of the subject matter” to be, “determined from the pleadings, judgment or settlement between the parties.” In this regard the Court of Appeal in ***Joreth Ltd v Kigano & Associates [2002] 1 EA 92*** stated as follows concerning the determination of the value of the subject matter:

We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a Bill of costs ought to be determined from the pleadings, judgement or settlement (if such be the case) but if the same is not so ascertainable 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 and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any

direction by the trial judge and all other relevant circumstances.

14. In **Peter Muthoka and Another v Ochieng and 3 Others NRB CA Civil Appeal No. 328 of 2017 [2019] eKLR** the Court of Appeal expounded further on its decision in the **Joreth Case (Supra)** as follows:

It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court.

Where, however, a suit is settled, then, from a literal and practical reading of the provision, the subject matter value must be sought by reference, in the first instance, to the terms of the settlement. Just as one would not start with the pleadings in the face of a judgment, it is indubitable that one cannot start with the pleadings where there is a settlement.

It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily provided: either the pleadings, the judgment or the settlement. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three. It is not open to the taxing officer to choose one or the other or to use them in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive. [Emphasis mine]

15. In this case, the starting point was the pleadings and based on the submissions, the issue was whether the value of the subject matter was the amount borrowed, that is Kshs. 200,000,000.00 or the amount sought to be recovered by the Bank in the statutory notice Kshs. 212,468,118.26 as contended by the Client or the actual value of the land as submitted by the Advocates. On this score the Deputy Registrar came to the conclusion that the value of the subject matter was the value of the suit property as it the property that Client was seeking to protect from sale. In other words, if the court refused an injunction, the bank would sell the suit property. I hold that the Deputy Registrar did not err in holding that the subject matter was the suit property which, as the prayers in the plaint show, the Client instructed the Advocates to protect.

16. What then was the value of the suit property? On this issue, the Client submits that there were two valuation report before the court. The first one which was part of the record in the suit was prepared by KCB and showed the market value as Kshs. 700,000,000.00 as at 13th February 2015. Second valuation by Roma Valuers Ltd dated 21st November 2014 which was relied on by the Deputy Registrar, was commissioned by the Client.

17. Although the Client complained that the valuation by Roma Valuers was not part of the record in **HC COMM 305 of 2013**, it was tabled before the court by the Advocates. The Client did not object to it at hearing. It was the basis of the Advocates submissions and it was material before the court upon which the Deputy Registrar could consider in assessing the value of the suit property. Moreover, it is not lost to the court that this report was commissioned by the Client hence it cannot run away from it.

18. As this is a reference, it is important to recall the principle that governs exercise of the court's jurisdiction so well summarized in **Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR** where the Court of Appeal distilled the principle as follows

*On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs. In **Arthur v Nyeri Electricity Undertaking [1961] EA 497**, the predecessor of this Court said at page 492 paragraph I: "where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases".*

19. Based on the principle I have outlined, I do not detect any error on the part of the Deputy Registrar in determining the subject matter of the suit and assessing the value thereof.

20. I therefore dismiss the Amended Chamber Summons dated 7th April 2020 with costs to the respondent.

DATED and DELIVERED at NAIROBI this 24th day of AUGUST 2020.

D.S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Mungai instructed by Mungai Kalande and Company Advocates for the Client/Applicant.

Mr Otenyo with him Mr Mugambi instructed by Mugambi and Company Advocates.