



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 122 OF 2015

LUCY WANJIKU MUKU (suing as a Director of

Karl Salzmann Limited).....PLAINTIFF

VERSUS

1. KARL SALZMANN LIMITED

2. KARL SALZMANN.....DEFENDANTS

R U L I N G

1. This ruling is on a reference brought on behalf of the plaintiff by a Chamber Summons dated 30/11/2017. It essentially seeks that the determination of costs between party and party made on the 16/11/2018 as concerns as item 2 & 3 be set aside and the said items be remitted back to another taxing officer for re-taxation. The only ground of the reference is that the taxing officer erred in approximating the value of the subject matter when the same would not be ascertained from the pleadings. The Application was supported by the Affidavit of GIKANDI GIBUINI which other than setting out when reasons for taxation were sought and grounds of objection lodged reiterated the fact that the taxing officer erred when she assigned to the taxation a value which was not revealed in the pleading of the subject matter of the suit.

2. The application was opposed by the defendants/respondents by grounds of opposition dated 8/2/2018 and filed in court on the same day. Those grounds besides restating the position that item 3 was taxed off in total defended the taxing officer from wrong doing while asserting that there was no demonstrated error in principle to warrant re-taxation and that the taxing officer correctly exercised her discretion in a judicious manner by taking into account the nature of the suit and the interests of the parties while correctly observing that the value was not readily ascertainable for the pleadings. In summary it was contended that there had not been laid a basis to allow the reference.

3. On 12/02/2018, it was directed by consent of the parties that the reference would be canvassed by way of written submissions. Pursuant to such directions, the plaintiff, as the judgment debtor/applicant, filed submissions on the 8/5/2018 the same day the defendants as decree holders/Respondents also did so.

4. Before I delve into the standpoints by the parties in the written submissions, it is important to outline the brief history of this matter.

5. The suit was filed on the 10/9/2015 by a plaint dated the same day complete with witness statement by the plaintiff as well as list of witnesses and list of documents. Contemporaneously with the plaint was filed a Notice of Motion under certificate of urgency seeking injunctive orders against the defendant and seeking to restrain dealing with the funds and motor vehicles of the company by the defendant, pending the determination of the Application and ultimately the suit. That application was placed before the court on

11/9/2015 when interim orders were granted in terms of prayers 2 & 3 and directed to be served for hearing *inter-partes* on the 25/9/2015.

6. Come the 25/9/2015, the parties intimated to court that they would attempt an out of court settlement within a period of 3 days and come back on the 28/9/2018 and further that the status quo ante as at 11/9/2018 concerning the control of the defendant would be maintained. Thereafter, the plaint was amended to add another director of the company as a second defendant by which time there were now three applications on record two by the defendant and one by the plaintiff together with notices of preliminary objection by both sides. However, the matter did not proceed to have the application heard because, Mr. Gikandi Advocate had come on record for the plaintiff and on the 12/10/2015 indicated to court that he was taking instructions with a view to reconsidering the need to continue with the suit. On that day Mr. Gikandi based his application for adjournment on a power blackout which he said had disabled him from filling an application whose tenure however he did not disclose.

7. The matter was then stood over to the 14/10/2018. On the 14/10/2018 Mr. Gikandi was more affirmative and confirmed the court that the matter had been withdrawn entirely with costs to the defendant. It also became known to court that by that date a winding up cause had been filed. The matter was then marked withdrawn with costs to the defendants. That order of withdrawal terminated the litigation and gave rise to the taxation proceedings before the Deputy Registrar which have now yielded this reference. As said before, the reference is on one item only, Item 2, being instructions fees.

8. From the plaint filed, the dispute was about control of a company with a nominal share capital of Kshs.1,000,000/= in its operation and assets whose value was not disclosed. The company shares are held by the plaintiff and 2nd defendant at 49 and 51 shares respectively.

9. In the same plaint, it is disclosed that the two directors lived together till around the time the dispute arose when they stopped such cohabitation. The crux of the matter is there was no value of the subject matter capable of being discerned from the pleadings hence to this court schedule 6 paragraph 1 did not apply for the taxation of the bill. But even if it was to apply the fees chargeable in terms of note b) thereof is that only 75% of the scale fees is recoverable. To the extent that the taxing master treated the nominal capital and the undisclosed value of other properties and settled on 75,000, the taxing officer was clearly in error. Having proceeded on that original error all else that proceeded and grounded on the error were themselves erroneous.

10. The applicable provision that was due for application by the taxing master was schedule 5 paragraph A 1, sub paragraph k which provides:-

“To sue or defend in any case not provided for above such sum as may be reasonable but not less than

(i) if undefended Kshs.45,000/=”.

11. The result is that the taxing master committed an error in principle when she relied and applied an inappropriate provision of the law to the matter before her. That is a valid reason for the court to interfere and reverse the decision thereby reached. That finding together with the relationship between the parties, as spouses or partners and co-directors of the 1st defendant, was a matter the court needed to have taken into account but I find were not adequately taken into account.

12. Having so reversed the decision of the taxing officer, I direct that the bill be remitted back for taxation before another taxing officer for purposes of taxation of item 2 only.

13. I award to the plaintiff/applicant the costs of the Application dated

30/11/2017.

Dated and delivered at Mombasa this 30th day of August 2018.

P.J.O. OTIENO

JUDGE