



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPLICATION NO. 1358 OF 1998

HARAMBEE CO-OPERATIVE SAVINGS &

CREDIT SOCIETY LIMITED.....CLIENT/RESPONDENT

VERSUS

MUNIKAH & COMPANY ADVOCATES.....ADVOCATE/APPLICANT

RULING

1. The subject matter of this ruling is the summons dated 2nd August 2013 in which Munikah & Co. Advocates, the Applicant herein sought for:

- a. ***THAT the ruling and/or decision of the taxing officer in respect of the Bill of costs dated 22nd April, 2009 and delivered on 9th July, 2013 be set aside.***
- b. ***THAT the Respondent/Applicant's Bill of Costs be remitted for taxation afresh before any other taxing master other than Honourable F. R. Wangila.***

2. The summons is supported by the affidavit of Kennedy Asinuli. When served, Harambee Cooperative Savings and Credit Society Ltd, the Respondent herein, filed the replying affidavit of Gladys N. Gichohi to oppose the summons. When the summons came up for hearing, learned counsels recorded a consent order to have it disposed of by written submissions.

3. I have considered the grounds stated on the face of the summons plus the facts deponed in the affidavits filed in support and against the summons. The history behind the summons is fairly straightforward.

4. It is apparent from the material placed before this court that Harambee Cooperative Savings and Credit Society Ltd, had instructed the firm of Munikah & Co. Advocates to act on its behalf in a sale transaction of a housing project established in 1992 referred to as Ushirika Estate Main title no. Nairobi/Block 360/273.

5. It would appear a dispute arose between the client and their advocate prompting the Applicant to seek for the intervention of court to force the advocate to deliver an account vide the originating summons dated 4th December 1998. In the aforesaid summons, the Respondent sought for the following orders:

- a. ***Deliver a cash account and/or statement of account of Ushirika Housing Estate Nairobi/Block 360/273, L.R.104/309, L.R.104/519, LR.104/307 and LR 104/440 between the Respondent and the Applicant.***
- b. ***Pay forthwith Kshs.91,039,564.35/= and interest as at 30th September, 1998 being money***

wrongful held by the Respondent on account of the Applicant and any other money that the court may deem fit and due to the Applicant.

- c. **The delivery to the Applicant of a list of the money and securities which the Respondent is holding on Ushirika Estate Main Titles LR.104/273, LR.104/519, LR.104/40, LR.104/309 104/307 and 360/273) or control on behalf of the Applicant.**
- d. **The delivery up of papers and documents to which the Applicant is entitled on Ushirika Estate more particularly all Sale Agreements, Documents of Company incorporated, titles and generally all documents that came in possession of the Respondent whilst acting for the Applicant.**

6. The Applicant filed a replying affidavit of opposition to resist the summons. The originating summons was eventually dismissed for want of prosecution. The Applicant then filed his bill of costs. The advocate-client Bill of costs was in the end taxed by Hon. F. Wangila. The taxing officer awarded the Applicant a sum of Kshs.500,000/= as the instructions fees. Being dissatisfied the advocate filed this reference to challenge the award on instructions fee.

7. It is the submission of the advocate/Applicant that the taxing officer misdirected herself when she failed to take into account the value of the subject matter of the suit. The Applicant argued that the taxing officer failed to appreciate the fact that an originating summons should be treated as a substantive suit and not as an application. He pointed out that the value of the claim stated on the face of the originating summons was Kshs.91,039,564/35.

8. The client/Respondent on the part is of the view that the learned taxing officer did not commit any error of principle when making the award on instruction fees. The client further argued that the value of the subject matter of the originating summons was misascertainable, hence the taxing officer correctly appreciated the fact that the instructions fees claimed was excessive and unjustifiable.

9. The factors to be considered when assessing instructions fees are clearly spelt out in the Advocates (Remuneration) Order. They include inter alia:

- a. **The care and labour required.**
- b. **Number and length of papers to be perused.**
- c. **Nature or importance of the matter.**
- d. **Amount or value of the subject matter involved.**
- e. **Interest of the parties.**
- f. **Complexity of the matter.**
- g. **All other circumstances of the case.**

10. The question which should be answered is whether or not the value of the subject matter of the originating summons can be ascertained. It is the submission of the advocate/Applicant that the value is specifically stated in paragraphs 1(b) and ground (c) of the originating summons as Kshs.91,039,564/35. The client is of the view that the main prayer which comes out of the dispute is that the client had sought by way of an application to have the advocate render statements of accounts pursuant to the provisions of Order LII rule 4 of the then Civil Procedure Rules and for an order also directing the advocate to account for money which came to his possession while acting for the client. In short, the subject matter was not the value of the transaction. After a careful consideration of the rival submissions, I am convinced by the submissions of the client. A critical examination of the originating summons will reveal that the client was merely asking for statements of accounts and for the surrender of documents. The client had done reconciliation of its accounts and found that the advocate was still holding Kshs.91,039,564/35. In my humble view, the aforesaid figure could have gone up or down if the matter had seen the light of the day.

11. Even assuming that the figure at the end of the day is confirmed to be the correct figure, the finding will not translate into a decree. The succeeding party will have to apply for the same to be entered as a judgment vice a separate application. For this reason the originating summons under the aforementioned order cannot be treated as a substantive suit but as an application. In this case, it is important to note that the suit did not proceed to hearing but was instead summarily dismissed for want of prosecution. I am

satisfied the taxing officer properly exercised her discretion in assessing instructions fees. In the end, the summons dated 2nd August 2015 is found to be without merit. It is dismissed with costs to the client/Respondent.

Dated, Signed and Delivered in open court this 11th day of December, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendant