



REPUBLIC OF KENYA
IN THE HGIH COURT OF KENYA

AT ELDORET

HCC NO. 137 OF 2009

DANIEL CHEBET.....	1 ST PLAINTIFF/APPLICANT
ESTHER CHEMJOR.....	2 ND PLAINTIFF/APPLICANT
WILLIAM KIPTUM.....	3 RD PLAINTIFF/APPLICANT
JOSEPH KIHAR.....	4 TH PLAINTIFF/APPLICANT
JOSEPH MUYA.....	5 TH PLAINTIFF/APPLICANT
CHARLES KACHUHI.....	6 TH PLAINTIFF/APPLICANT
LUCY NJERI.....	7 TH PLAINTIFF/APPLICANT
NANCY NJERI.....	8 TH PLAINTIFF/APPLICANT
VIOLAH KORIR.....	9 TH PLAINTIFF/APPLICANT
BENJAMIN CHEMOYAI.....	10 TH PLAINTIFF/APPLICANT
JONATHAN KIPRONO.....	11 TH PLAINTIFF/APPLICANT
PATRICK RONO.....	12 TH PLAINTIFF/APPLICANT
SALINAH CHEPCHIRCHIR.....	13 TH PLAINTIFF/APPLICANT

=VERSUS

MUNICIPAL COUNCIL OF ELDORET.....DEFENDANT/RESPONDENT

RULING

This is a reference to this court from the ruling of the Taxing Officer on the defendant's party and party bill of costs. The reference is by the plaintiffs who have moved the court mainly under the provisions of Rule 11 (2) of the Advocates Remuneration Order. The brief facts of the matter are as follows:-

On 22nd July, 2009, the plaintiffs instituted suit against the defendant claiming the following reliefs:-

- (a) A permanent injunction stopping the defendants, their officers, agents or servants from alienating, demolishing, and or evicting the plaintiffs from their respective plots duly allocated to them;

- (b) That in the alternative, the defendants fully compensate each plaintiff at the current market value of

their premises to be determined by a registered valuer agreed by both parties;

(c) Costs;

(d) Any other relief this court may deem fit to grant.

The defendant entered appearance and delivered a defence through **M/s Gicheru and Company Advocates**. It denied the plaintiffs' claims. In paragraph 10, the defendant expressly averred that the plaintiffs' structures were on a way leave contrary to the law and that the defendant had been offered a grant of Kshs 33,000,000/= by National Housing Corporation to enable it construct and modernize the storm water drainage.

On 14th October, 2009, the parties recorded the following consent order before **P.M. Mwilu J.**

“ (1) That the plaintiffs shall provide the area and space for the construction of the drainage system in terms of the engineer's design;

(2) That the plaintiffs who have constructed lock-up shops and have encroached on the drainage system shall remove them within seven (7) days from today;

(3) That the lock up shops which we (sic) – open drainage for water disposal be connected to the sewer line so as to avoid pollution of river Sosian;

(4) The plaintiffs/applicants shall bear the costs of this suit”.

Following the consent order, the defendant filed its party and party bill of costs on 21st October, 2009. The bill was on 12th November, 2009 taxed by **I. Maisiba**, the Deputy Registrar of this Court in the sum of Kshs 600,117.00/= which taxation triggered this reference.

On 18th May, 2011, when the reference came up before me for hearing, counsel agreed to file written submissions which were duly in place by 5th October, 2011. The plaintiffs have challenged the Taxing Master's taxation of item (6) (instructions fees) and items 4, 10, and 24. Item 4 relates to perusing 53 folios; item 10 relates to copies and item 24 relates to attendances.

Counsel for the defendant contends that the value of the subject matter was Kshs 33,000,000/= which was the grant given by M/s National Housing

Corporation to construct and modernize the storm water drainage. That sum was accepted by the taxing Officer as the value of the subject matter. He therefore determined instructions' fees on that basis.

I have set out at the beginning of this ruling, the reliefs which the plaintiffs sought from the court and the defendant's response to the same. The plaintiffs sought an injunction and in the alternative, compensation at a rate to be determined by a registered valuer. It is plain therefore that it was not possible to determine the value of the subject matter from the plaintiff. The defendant on the other hand pleaded that the plaintiffs' structures were illegally on a Way leave and that M/s National Housing Corporation had granted it Kshs 33,000,000/= for constructing and modernizing its storm water drainage. The defendant was not claiming the said sum from the plaintiffs. Indeed it raised no counter-claim. The sum was raised in an attempt to demonstrate where the balance of convenience lay. To my mind, it is clear that the said sum could not and

was not the subject matter of the suit.

Then there is the consent order recorded before **Mwilu J.** on 14th October, 2009. I have already cited the consent in full. The consent did not mention any figure. Indeed, it could not mention any figure because that was not what the dispute was all about. So, even the settlement of the parties did not disclose the value of the subject matter.

In those premises, I find and hold that the value of the subject matter could not be ascertained from the pleadings and / or the settlement of the parties. The finding by the taxing officer that the value of the subject matter was Kshs 33,000,000/= was therefore clearly unsupportable. This court cannot interfere with the Taxing Officer's decision on taxation unless it is shown that either the decision was based on an error of principle or that the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle. See **Steal & Petroleum (E.A) Ltd =vrs= Uganda Sugar Factory [1970] E.A 141**. In this case, I find the finding of the Taxing Officer on the value of the subject matter to be an error of principle. That erroneous determination obviously affected the Taxing Officer's Taxation of instructions' fees due to the defendant.

With regard to the other items under challenge, I have found as follows:-

v Item 4 (perusals) depended on the actual folios of pleadings or documents perused.

I cannot fault the decision of the learned Taxing Officer thereon since I trust that he ascertained the folios physically.

With regard to copies filed, the same entailed a physical determination which the Taxing Officer I trust undertook. I cannot therefore interfere with his decision on item 10.

With regard to attendances, I agree with counsel for the plaintiffs that attendances for mentions would not possibly take a half a day. I accept the submissions of counsel for the plaintiffs with regard to the applicable paragraph.

The upshot of my above consideration of the plaintiffs' reference is that the same is allowed in part. The defendant's party and party bill of costs is remitted back for taxation before a different Taxing Officer with directions to determine the instructions fees due to the defendant on the basis that the value of the subject matter of the suit cannot be ascertained from the pleadings or the settlement of the parties.

I need not remind the Taxing Master that in doing so, he/she is bound to consider the nature and importance of the mater, the interest of the parties, the general conduct of the proceedings and all other relevant factors.

Costs shall be in the cause.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 16TH DAY OF NOVEMBER, 2011.

F. AZANGALALA

JUDGE

In the presence of:-

Mr. Chemoiyai for the plaintiffs and

Mr. Gicheru for the Defendant.

F. AZANGALALA

JUDGE
16/11/2011