



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Suit 80 of 2006

MUIGAI COMMERCIAL AGENCIES LIMITED.....PLAINTIFF

VERSUS

JACKSON MUGO MATHAI.....DEFENDANT

RULING

This chamber summons was filed by the plaintiff/applicant pursuant to the provisions of **rule 12(2) of the Advocates Remuneration Order**. The applicant seeks to set aside the respondent's bill of costs which was taxed by the Deputy Registrar on 11th March 2008 in the sum of Ksh 1,273,333/=. The application is supported by the affidavit of Mr. Dominic Mukui Kimatta who is on record as advocate for the plaintiff/applicant. The gist of the application is that the learned Deputy Registrar erroneously based the assessment of the value of the subject matter being parcel of land Kampi ya Moto Block 3/23 on the value of the land instead of basing the assessment on the prayers for declaration of agency which was the subject matter and born of contention.

The learned Deputy Registrar delivered a ruling on 11th March 2008 and the following day the applicants requested to be given the reasons for the taxation. On 19th March 2008 counsel wrote another letter to the Deputy Registrar and on 25th March 2008 the applicant was informed that the court delivered a ruling on 11th March 2008. The applicant then filed this chamber summons on 4th April 2008. He contends the application was filed within 14 days as provided for under **rule 11(2) of the Advocates Remuneration Order**.

The applicant contends that they object to all the items that were taxed by the Deputy Registrar, more specifically the instruction fees and getting up fees. The instruction fees should be based on the value or the cause of action of the suit. According to the plaint, the applicant's prayers are that on or about September 1999 the respondent appointed the appellant as the sole agent through an irrevocable authority letter of the same day to market and sell the suit premises approximately 585 acres for a sum of Kshs 58.5 million. The authority letter empowered the applicant to negotiate and sign any agreement thereof in accordance with the Law Society Conditions of Sale. The applicant therefore sought for the following prayers:

(a) A declaration that the plaintiff is and remains the lawful agent of the defendant to sell L.R. No. Kampi ya Moto Block 3/23 unless the agency is terminated.

- (b) *A declaration that the defendant is legally bound to honour all sales transactions executed by the plaintiff to third parties in enforcement of the agency agreement.*
- (c) *A declaration that any sale of a plot initially sold by the plaintiff to third parties and paid for and subsequently sold by the defendant is null and void.*
- (d) *All transactions on the property be stopped forthwith until determination of the case.*
- (e) *Costs of the suit.*
- (f) *Damages for loss of goodwill and or breach of contract.*
- (g) *Any other relief that this honourable court may deem fit and expedient.*

According to counsel for the applicant these were merely declaratory orders between an agent and the principal and determination of whether there was a breach of contract between them. The applicant was not seeking to recover the value of the property in question. He was merely seeking to protect his position as an agent. That is why even the court fees were assessed at Kshs 9,555/= based on the prayers. The Deputy Registrar was faulted for awarding Kshs 917,000/= as instruction fees instead of awarding Kshs 3,000/= for each of the prayers sought.

This application was opposed. Counsel for the respondent relied on a preliminary objection on points of law and a replying affidavit sworn by Mr. Waiganjo Mwangi counsel for the respondent. Counsel defended the ruling by the taxing master which was based on the value of the subject matter which was declared in the plaint. The applicant obtained an order of injunction in this matter which stopped any dealings. There is no other value of the subject matter that could guide the court other than what was disclosed in the plaint. On the merit of this application, counsel submitted that the chamber summons herein did not comply with the requirements of **rule 11(1)(2) of the Advocates Remuneration Order** which requires that a notice be given to the taxing officer. The chamber summons was not filed within the stipulated period. The reference herein was filed after the 14 days had lapsed and the applicant did not obtain leave to file the reference out of time. Thus the reference is incompetent.

On the submission that the court should assess and award Kshs 3,000/= to the respondent, counsel submitted that this was a gross underestimation of the respondent's bill of costs since the applicants had even offered to settle the bill and paid Kshs 400,000/= but withheld Kshs 300,000/=. Moreover by a letter dated 17th July 2008 counsel for the applicant applied to pay the taxed costs by instalments and sought a reduction to Kshs 700,000/=.

I have considered the ruling by the learned Deputy Registrar. The bill of costs was taxed under the provisions of **schedule VI (1)(b) of the Advocates Remuneration Amendment Order 1997** which provides for the fees chargeable in suits or proceedings where the value of the subject matter can be determined from the proceedings, judgment or settlement between the parties. The learned Deputy Registrar was guided by the pleadings especially paragraph 4 of the plaint. The subject matter was a parcel of land and the claim was over an alleged breach of contract for the sale of the suit premises. It is on that basis the court proceeded to assess the instruction fees at Kshs 917,500/=. This suit did not proceed to hearing. It was compromised even before the interlocutory application was heard. In deed on 12th November 2007 the plaintiff wrote a letter withdrawing the entire suit against the defendants and costs were awarded to the defendants. In this case therefore it was not necessary to add $\frac{1}{3}$ as getting up fees. I find that the sum of Kshs 305,833/= should not have been awarded to the respondent. All the other items were properly assessed according to the Advocates Remuneration Order.

Counsel for the respondent raised the legal issue touching on the competency of this application. It was argued that the applicant did not give notice in writing to the taxing officer of the items of taxation to which he is objecting. The ruling was delivered on the 11th day of March 2008. I see a letter on record dated 12th March 2008 in which the applicant sought to be furnished with the reasons. The letter was

replied to on 25th March 2008 and it was received on 28th March 2008 by a person by the name Gitau who signed on behalf of Kimatta and Company Advocates.

This application was filed on 4th April 2008 which is within the 14 days provided for. In the result the reference is allowed to the extent that item number two (*getting up fees*) of Kshs 305,833/= are taxed off the bill. The party and party costs is therefore Kshs 967,500/=. The applicant is also allowed $\frac{1}{3}$ of the costs of this application.

It is so ordered.

Ruling read and signed on 8th day of April, 2009

M. KOOME

JUDGE