



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 54 of 2006

ALLIANCE DEVELOPMENT LTD

T/A JADINI BEACH HOTEL & SAFARIS BEACH HOTEL.....PLAINTIFF

VERSUS

NATIONAL INDUSTRIAL CREDIT BANK.....DEFENDANT

RULING

This is a reference from a decision of the Taxing Officer on the defendant's bill of costs. The reference is under Rule 11 (2) of the Advocates (Remuneration) Order. The other provisions of the Law invoked are not relevant for the reference. The reference is on the Taxing Officer's award of Kshs. 1,586,079.00 as instruction fees.

From the record the basic facts of the matter are as follows:

On 27th March 2006 the plaintiff instituted the suit against the defendant and sought injunctive reliefs restraining the defendant from repossessing, selling, disposing, transferring or otherwise holding or dealing with certain generators at the plaintiff's Jadini Beach Hotel and Safari Beach Hotel. The plaintiff also claimed general damages for a wrongful repossession notice and a declaration that the Hire Purchase Agreement in respect of the said generators was illegal and had been terminated by the plaintiff.

Simultaneously with the filing of the plaint, the plaintiff lodged an application for *inter alia* a temporary injunction. In the affidavit in support of the application the plaintiff annexed auctioneer's proclamations which showed that the repossession amounts were Kshs. 57,119,170.05 and Kshs. 45,954,165.34.

The defendant delivered its defence on 4th April 2006 denying liability to the plaintiff. It appears that the suit was then subsequently dismissed with costs for want of prosecution on the defendant's application. The dismissal led to the filing of a bill of costs by the defendant which was taxed by the Taxing Officer of this court on 26th October 1007.

Counsel for the defendant submitted before the Taxing Officer that the bill had been drawn to scale and urged him to allow the same as drawn. Counsel for the plaintiff on his part opposed the bill on grounds that it had not been drawn to scale and that the wrong paragraph of the Remuneration Order had been applied. In his view the value of the subject matter could not be determined from the pleadings and

the correct paragraph to apply was paragraph L of schedule 6 (1). He further argued that the matter was not complex and the suit never took off. He therefore offered Kshs. 100,000/= for instructions fees.

In his response to the submissions of the plaintiff's counsel, counsel for the defendant argued that the value of the subject matter was ascertainable from the pleadings and the matter was very complex and required intensive research.

The ruling of the Taxing Officer was delivered on 26th October 2007 as aforesaid. The Taxing Officer stated that the dispute between the parties was over a hire purchase agreement under which the defendant instructed an auctioneer to repossess the subject of the hire purchase agreement. From the annexures to the plaintiff's application the repossession sums had been given as Kshs. 57,119,170.05 and Kshs. 45,954,165.34. The Taxing Officer concluded that the value of the subject matter was the aggregate of the two figures i.e. Kshs. 103,071,936.34. He then found that instruction fees of that figure was Kshs. 1,586,079.00.

That decision is what has prompted this reference. I have considered the record, the submissions before the Taxing Officer and the relevant Law. It is trite that a judge will normally not 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 the amount awarded was, so manifestly excessive as to suggest an error of principle. (There is a plethora of authorities on the issue. See for example **Steel & Petrol EA – v – Uganda Sugar Factory [1970] EA 141**).

The plaintiff's claim as stated herein before was for injunctive reliefs, a declaration and damages. The plaintiff did not state the value of the subject matter of the suit. The defence filed too did not give the value of the subject matter. The suit was dismissed for want of prosecution. The value of the subject matter could therefore not be ascertained from the pleadings and the judgment.

The sums given in the auctioneer's proclamations cannot in my view be the value of the subject matter. The proclamations were exhibited not to give the value of the subject matter but to show the property threatened with repossession. Indeed, the auctioneer gave the values of Kshs. 5,000,000/= and 10,000,000/= for the items which he had proclaimed. The plaintiff was not seeking recovery of Kshs. 103,071,939.34 or any quantified sum. It sought the orders I have referred to above.

What happened in this case is similar to what happened in **Joreth Ltd – v – Kigano & Associates [2002] 1EA 92**. In that case the cause of action was founded in trespass, general damages, injunctive reliefs and mesne profits at the rate of Kshs. 300,000/= per month and repossession. The Court of Appeal agreed with the Taxing Officer that the plaint did not contain the value of the subject matter. In other words the value of the subject matter could not be determined from the pleadings.

This decision was cited to the Taxing Officer in this case but it is apparent that he did not appreciate its relevance to the matter before him. The result is that the Taxing Officer committed an error of principle. He determined the value of the subject matter of the suit from a document which was neither a pleading nor reflected a settlement between the parties. The sum he determined to be the value of the subject matter was not neither claimed in the plaint nor in the defence. I am therefore entitled to interfere.

The upshot is that the reference is allowed and the defendant's bill of costs is remitted back for taxation before a different Taxing Officer with directions to tax the same on the basis that the value of the subject matter of the suit cannot be determined from the pleadings. The Taxing Officer of course is duty bound to consider the nature and importance of the matter, the interest of the parties, the general conduct of the proceedings and all other relevant factors. As this reference proceeded in the absence of representation for the plaintiff, I make no order as to costs in the reference.

Order accordingly.

DATED AND DELIVERED AT MOMBASA THIS 20TH DAY OF MAY 2008.

F. AZANGALALA

JUDGE

Read in the presence of:

Obura Ms for Simiyu for the Plaintiff.

F. AZANGALALA

JUDGE

20TH MAY 2008