



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**Misc Civil Appli 530 of 2007**

**AGRICULTURAL SOCIETY OF KENYA.....APPLICANT**

**VERSUS**

**C. W. WANJIHIA & CO. ADVOCATES.....RESPONDENT**

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**RULING**

This reference was filed by M/S Agricultural Society of Kenya (hereinafter “the client”) through their advocates M/S H.N. Njiru & Company. The reference seeks that the Deputy Registrar’s Ruling of 13.7.2007 on items 1, 60 and 77 of the Bill of Costs dated 28.8.2006 as between the client and C.W. Wanjihia & Company (hereafter “the advocate”) be set aside and the said items be taxed or be remitted to a different Deputy Registrar for retaxation.

The main reasons for the reference are that the Deputy Registrar (hereinafter “The Taxing Master”) misdirected himself as to the relevant schedule to be applied in taxing item I aforesaid. That he also misdirected himself as to the relevant legal and statutory provisions applicable and that there is an error apparent on the face of the record.

The reference is supported by an affidavit sworn by one Peter Lusaka the Manager of the client. In the affidavit it is deponed inter alia that there is nothing in the pleadings to suggest that the value of the subject matter is Kshs.50,000,000.00 which figure was accepted by the Taxing Master as the value of the suit property. In the client’s view there was therefore no justification or basis to accept the said value. It is also deponed that the reliefs sought in the plaint were orders of injunction and no claim was made for Ksh.50,000,000.00. It is further deponed that the advocates did not even file a defence to the Plaintiff’s claim and judgment was entered against the Respondents ex-parte. In the premises, according to the client, the advocates did not offer any substantive representation to the client and in the interests of justice, the ruling of the Taxing Master should be set aside on the items stated.

The reference is opposed and there is a replying affidavit sworn by Caroline Wairimu Wanjihia the proprietor of the firm of advocates whose bill was taxed by the Taxing Master the ruling whereof is being challenged in this reference. In the affidavit, the advocate has deponed that the client instructed his firm in Mombasa HCCC NO. 51 of 2005 wherein judgment had already been entered. The instructions were then abruptly withdrawn when substantial work had been done. He therefore filed his bill of costs in Mombasa Misc. Appl. No. 892 of 2006 which bill was taxed exparte as the client failed to attend without explanation. It is also deponed that the subject property was valued at Kshs.1,000,000/- in 1995 when the parent suit was filed and the value thereof increased with time and further that the reliefs granted went beyond orders of injunction. In the premises the value of the subject matter is Ksh.50,000,00.00 as stated in the Bill of Costs. With regard to the failure to file defence, the advocates blame the client’s former

legal advisors and the client's sudden withdrawal of instructions from the advocates. However, before the withdrawal, the advocates filed numerous applications to protect the client's interests which applications required research and time to prepare. In the advocates view therefore, the items complained of were properly taxed and the ruling of the Taxing Master should not be disturbed.

I have now considered the reference, the submissions of counsel and the authorities cited. Having done so, I take the following view of this matter. At the hearing of this reference, counsel for the client abandoned the client's objection to taxation in respect of item 60. The remaining objection is therefore against taxation in respect of items 1 and 77. Item 77 is however dependent on what happens to item 1. Substantially therefore this reference is in respect of the Taxing Master's ruling on instructions fees. The Taxing Master awarded Kshs.790,000.00 under that item. He said that schedule VI paragraph 1(b) was applicable and as the value of the subject matter was given as Kshs.50,000,000.00 she taxed the item as drawn. Item 77 was taxed at half the instructions fees as provided under part B of schedule VI. From the outset I reject the client's submission that the Taxing Master applied the wrong schedule of the Advocates Remuneral Order. Indeed in his oral submissions before me, counsel for the client did not identify a different schedule that should have been applied. His primary complaint was that the Taxing Master accepted the value of the subject matter as given by the advocate. Yet that was not the true value of the subject matter. Counsel referred to the plaint in the parent suit which indicated the value of the subject matter as Ksh.1,000,000.00 and disclosed the reliefs sought in the suit which could not amount to the sum of Ksh.50,000,000.00 given by the advocates as the value of the subject matter of the suit.

However, it has now transpired that no defence was filed and judgment was entered ex parte. In response to that contention, the advocates have deponed that the failure to file defence was due to the advocates that were previously on record but on their part, they successfully sought to set aside the default judgment but could not deliver a defence due to the client's sudden decision to withdraw instructions from them.

An issue therefore arises as to the relevant paragraph to apply in view of the discovery that there was no defence or other denial of liability filed. Yet the advocates claimed their fees for instructions on the defended scale. Indeed the letter of the Taxing Officer giving reasons puts the issue beyond dispute. He clearly stated that he applied paragraph 1(b) of schedule VI of the 1997 Advocates (Remuneration) Order which was then applicable.

Schedule VI A (1) in regard to instructions fees reads as follows:-

**"1 Instruction fee**

**The fee for instruction in suits shall be as follows, unless the taxing officer in his discretion shall increase or (unless otherwise provided) reduce it:**

**(a) To sue in any proceedings (whether commenced by plaint, petition, originating summons or notice of motion) in which no defence or other denial of liability is filed: where the value of the subject matter can be determined from the pleading judgment or settlement, between the parties .....** "

And proviso (i) to the same paragraph reads as follows:-

**"The taxing officer in the exercise of his discretion, shall take into consideration the other fees and allowances to the advocate (if any) in respect of the work to which any such allowance applies, the nature and importance of the matter, the amount involved, the interest of the parties, the general conduct of the proceedings, a direction of the trial judge and all other relevant circumstances;"**

The letter of the Taxing Master referred to above, does not show that he did anything more than accept what the advocates presented. I am aware that the Taxing Master was dealing with the matter ex parte and he may have found no reason to go beyond what was presented to him. In my view however, the Taxing Master does not lose his discretion merely because the other side is not represented. Indeed I

dare say, it is in such proceedings that the Taxing Master should be extra cautious.

It is now not in dispute that the dispute in the parent suit related to a transfer of a property for a sum of Kshs.1,000,000.00 and the Plaintiff sought inter alia a declaration that it was the lawful registered owner of the suit premises. There were other reliefs for orders of injunction but to my mind the sum of Ksh.1,000,000.00 given in the Plaint furnished the best guide as to the value of subject matter of the suit. No other valuation is given in the plaint. It is clear that the sum of Ksh.50,000,000.00 given by the advocates had absolutely no basis at all. That valuation was the opinion of the advocates which the Taxing Master accepted without question. As the Court of Appeal observed in **Jureth Ltd -v- Kigano and Associates [2002] 1 EA 92 at page 99**, counsel's opinion of value is not evidence. In any event as the Advocates (Remural Order) clearly provides and as was restated in the said case, the value of the subject matter of a suit for purposes of taxation of a bill of costs ought to be determined from the pleadings judgment or settlement (if such be case).

In the premises, I find and hold that the Taxing Master erred in taxing the advocates instructions fees on the basis that the value of the subject matter was Kshs.50,000,000.00. He also committed another error in applying paragraph 1 (b) of schedule VI when there was no defence or other denial of liability filed. Those errors in my view were errors of principle.

The upshot of the above considerations is that the client's reference dated 29.11.2007 is allowed in terms of prayer 1. The order of the Taxing Master dated 13.7.2007 in respect of instructions fees (item 1) is hereby set aside and so is the order in respect of item 77. The items are remitted back for taxation a fresh before a different Taxing Officer with a direction that the Taxing Officer in taxing the said items should have regard to the pleadings and other proceedings in Mombasa **HCCC NO. 51 of 2005 between Pearl Beach Hotels Limited -v- Agricultural Society of Kenya**. The advocates shall pay the costs of the reference.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 5<sup>TH</sup> DAY OF MAY 2008.

**F. AZANGALALA**

**JUDGE**

READ IN THE PRESENCE OF Machira holding brief for Kipsang for the Respondent.

**F. AZANGALALA**

**JUDGE**