

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Case 84 of 2008

JANENDRA RAICHAND SHAH & 2 OTHERSPLAINTIFFS

VERSUS

MISTRY VALJI NARAN MULJI
.....DEFENDANT

J U D G M E N T

The plaintiffs herein, Janendra Raichand Shah, Virchand Mulji Malde and Ratilal Ghela Samat filed a reference by a Summons dated 8th April 2008 pursuant to Rule 11(2) of the Advocates (Remuneration) Order in which they beseeched this court to set aside the taxing officer's decision on the bill of costs dated 29th September 2006 and to order for the Bill to be taxed afresh before another taxing officer. The defendant, Mistry Valji Naran Mulji, opposed the reference by filing grounds of opposition.

The facts leading to the filing of this reference appear to have started on 5th July 2006. By the plaint dated 10th May 2005, the plaintiffs asked to be given judgment for Kshs.156,086,545/75 on account of mesne profits, general damages plus interest and costs against the defendants for what they called wrong occupation of the parcel of land known as Mombasa/Block XII/4. Mr. Khatib, learned advocate for the defendant argued a preliminary point against the suit before the Hon. Mr. Justice Njagi on 5th July 2006. The notice of preliminary objection is dated 15th May 2006 sought for the plaint to be struck out for the reason inter alia that the suit is time-barred. In the end Justice Njagi upheld the preliminary objection on 14th September 2006 thus striking out the suit. Costs of the preliminary objection was given to the defendant. The defendant filed a party and party Bill of Costs dated 29th September 2006 in which it prayed to be awarded a total of Kshs.13,452,061/70. The bill was taxed exparte before Mr. M.K. Mwangi, learned Senior Resident Magistrate. The learned taxing officer taxed the bill at Kshs.3,185,125/-, on 6th September 2007. Upon obtaining the reasons from the taxing officer, the plaintiffs filed this reference the subject matter of this judgment.

On the instructions fees, the plaintiffs have accused the taxing officer of awarding a sum of Ksh.2,337,298/10 on instructions yet the suit had been struck out. Mr. Kaluma, learned advocate for the plaintiffs argued that the award was excessive because the suit never went for trial. Mr. Khatib, learned advocate for the defendant was of the view that the taxing officer did not go wrong in making the award because the parties had prepared for the hearing of the suit prior to the raising of the preliminary objection. I have considered the submissions of learned counsels from both sides. I have also perused the bill dated 29th September 2006. On item 1 of the bill, the defendant had asked to be awarded Kshs.10,055,000/- as instructions to defend the plaintiff's claim of Kshs.156,086,545/75 being mesne profits and general and punitive damages for trespass. On this item, the learned taxing officer taxed the fee at Kshs. 2,337,298/10 on the basis that he considered the items stated in the bill vis-a-vis the Advocates (Remuneration) Order. In the reasons forwarded to the plaintiffs, the learned taxing officer cited Schedule VI A paragraph 1(b) as the provision he applied in assessing the award on instructions. I am convinced that the taxing officer did not commit any error of principle in assessing item 1. I dismiss the reference in respect of that item. He applied the correct provision of the law hence he cannot be faulted.

The plaintiffs also took issue with the award given in item No. 26 of the bill. It is the submission of Mr. Kaluma that the taxing officer should not have awarded Kshs.775,432/70, being getting up fees yet

the matter did not go for trial. It is argued that the matter having been adjourned by the defendant, then it can be said that the defendant was not prepared for trial. Mr. Khatib on the other hand was of the view that despite the various adjournments made, nevertheless the parties and particularly the defendant was ready for trial. The taxing officer stated in his reasons forwarded to the plaintiffs' counsel that he taxed item no. 26 as per the provisions of schedule VI A paragraph 2 of the Advocates (Remuneration) Order. He found that the defendant was entitled to getting up fees despite the fact that the hearing of the case was adjourned on 22/3/06, 11/05/06 and 31/5/07. I have considered the arguments of Mr. Kaluma and Mr. Khatib, learned counsels for the plaintiffs and defendant respectively. I have also perused the provisions of Schedule VIA paragraph 2 of the Advocates (Remuneration) Order. It is a fact that when the suit came up for hearing on 22/3/06 the same was adjourned at the instance of the defendant. In fact what came up for hearing on 11/05/2006 was the application dated 3rd May 2006 in which the firm of Tutui, Adogo Advocates applied to be granted leave to cease acting for the defendant. When the suit came up for hearing on 5th July 2006, the defendant argued his preliminary objection which led to the striking out of the suit. It is said that because the case was struck out fees for getting up or preparing for trial should not be allowed. The record shows that the suit came up for hearing on 5th July 2007. Parties indicated they were ready for hearing and that is when Mr. Khatib raised and argued the preliminary objection. It cannot be inferred that the defendant was not ready for hearing. The record does not indicate that the defendant applied for an adjournment so that one could say that the defendant not ready. It is obvious that the taxing officer erred when he concluded that the defendant was ready for hearing on 22/3/06 and on 11/05/06. He cannot however be faulted on his finding that the defendant was entitled to getting up fees on 5th July 2007. I am also convinced that he applied the correct provisions of the law in assessing item No. 26 in accordance with schedule VI A paragraph 2 of the Advocates (Remuneration) Order.

The plaintiffs have also complained that the taxing officer erred when he taxed items Nos. 2 – 25, 27 – 48 to the scale whereas the law state otherwise. Mr. Khatib did not address his mind to this submission. I have considered the complaint and I am convinced it has merit. The reference shall succeed on these items. I set aside the order of taxation on items 2 – 25, 27 – 48 and direct that the items be re-taxed by another taxing officer other than Mr. M.K. Mwangi under Advocates (Remuneration) Order of 1997.

I dismiss the reference in respect of items No. 1 and 26. After a careful consideration on costs, I am convinced that a fair order in the circumstances of this case is to direct that each party to bear its own costs.

Dated and delivered at Mombasa this 23rd day of June 2008.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Khatib for the respondent.

Mr. Mkan h/b Kaluma for plaintiffs.