



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 673 of 2004

**TERA WAIGWA WAIHENYA1ST
DEFENDANT**

**DAN KAMUNYA WAIHENYA2ND
DEFENDANT**

VERSUS

**CO-OPERATIVE BANK OF KENYA
.....DEFENDANT**

RULING

This is a reference by the defendant seeking to set aside the Taxing officer’s decision delivered on 8th July 2005, as it relates to item No. 1 of the Party & Party Bill of costs.

The plaintiff filed this suit and simultaneously filed an injunction application to restrain the defendant in the exercise of its statutory power of sale.

The injunction application and indeed the whole suit were not defended and the suit was eventually concluded by consent order whereby this suit was marked as settled with costs being awarded to the plaintiff.

The plaintiff did not disclose the value of the subject matter and in taxing the plaintiff’s Bill of Costs the taxing officer stated:

“Although the value was (not) disclosed in the plaintiff in the above matter. The amount owed to the bank is extracted from the notification of sale addressed to the borrower.”

The defendant in the supporting affidavit to the present application stated:

“The defendant’s objection is premised on the fact that there is no value of the subject matter disclosed in the plaintiff and the figure of kshs 17, 380, 000/- relied on by the Taxing master was in fact the amount owed to the defendant and was extracted from the notification of sale addressed to the deceased.”

The defendant is of the view that that was not the proper basis for assessing the instruction fees and that accordingly the taxing master mis directed himself on the principles of law of arriving at the value of

the subject matter. Defendant relied on the authority of JORETH LTD – V – KIGANO ASSOCIATES [2002] 1 EA 92, and quoted the following:

“Where the value of the subject matter of a suit could not be determined from the pleadings, judgment/or settlement, a taxing master was entitled to use his discretion in assessing the instruction fee and in doing so the factor to be taken into account included the nature and importance of the cause, the interest of the parties, the general conduct of the proceedings, any directions of the trial judge and all other relevant circumstances.”

The plaintiff opposed the application on the basis that there was no error in principle in the taxation. That the taxation was not excessive, that the instruction fees are earned the moment the suit is filed. Plaintiff supported the taxation and stated that the taxing master was alive to the principle to guide him. That just because the defendant finds the figure taxed to be high was not a reason to set aside the taxation; and that since the defendant did not object to the matter being in the High court the amount to be awarded ought to take into account that fact and on amount so awarded should also reflect the dignity of an advocate.

I have considered the arguments of counsel the affidavits and authorities cited. The Hon Justice Azangalala made a finding in HCCC Misc No. 975 of 2003 KAMUNYORI & CO. ADVOCATES – V – DEVELOPMENT BANK OF KENYA LTD, which I find it captures the gist of my finding in this case. The learned ruled.

“There was no claim for value of the properties. In my view the figures given in the charge or debenture documents could not constitute the value of the subject matter of the suit.”

That indeed is the case in this matter. There was no value of the subject matter in the pleadings and the taxing officer was not justified to pluck the figure from the Notification of sale to regard it as the subject value. Once the taxing officer stated in his ruling that the pleadings did not disclose the value of the subject matter he was obliged to follow the guideline in JORETH LTD – V – KIGANO AND ASSOCIATES (Supra) that is to use his discretion in assessing instruction fees and in so doing to take into account nature and importance of the cause, the interest of the parties and the general conduct of the proceeding. The taxing officer, in taking the figure from the Notification of sale was indeed not exercising his discretion. I do therefore find that the taxing officer indeed erred in principle in his taxation on 8th July 2005 in respect of item No. 1.

The orders of this court are:

- (1) The taxation of item No 1 of bill of costs dated 2nd June 2005 delivered on 8th July 2005 is hereby set aside and the bill of costs is hereby remitted back for taxation of that item by another taxing officer.**
- (2) That the costs of the application dated 29th March 2006 are awarded to the defendant.**

MARY KASANGO

JUDGE

Dated and delivered this 15th June 2006.

MARY KASANGO

JUDGE