



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 304 of 2004

BUNSON TRAVEL SERVICES & OTHERS.....PLAINTIFFS

VERSUS

KENYA AIRWAYS.....DEFENDANT

R U L I N G

This is a reference from the decision of the learned taxing officer, Hon. Mrs H. A. Omondi.

It is contended that the decision ought to be upset because it ignored the well settled principles of determining instruction fees. By so doing, the learned taxing officer is said to have misdirected herself, so that she assessed the fee at a level which was manifestly low.

The applicant points out that in the plaint, there was a claim for a declaration that the plaintiffs be entitled to a refund of 9% commission, in overall terms.

As the plaintiffs had filed an affidavit in which Mr. Roger Sylvester had deponed that the plaintiffs' business was worth KShs. 15.5 billion, the plaintiffs calculated the commission which they were claiming back, to be in the sum of Kshs. 1.5 billion. Therefore, the instruction fees should have been KShs. 21,780,400/=, according to the calculations of the applicant.

It is the applicant's case that the learned taxing officer erred by holding that the subject matter of the suit had not been clearly pleaded. It is said that if only she had given due consideration to the ruling which the Hon. IBRAHIM J. delivered on 10th June 2004, the taxing officer would have noted that the matter was not simple at all. Indeed the learned judge had described the matter as being intricate, complex and sensitive, with ramifications of great financial magnitude.

The applicant contends that the suit was not just for declaratory and injunctive reliefs. That contention is founded in the close scrutiny of the prayers in the plaint, which the applicant argues, clearly indicate that the plaintiffs were demanding the refund of vast sums of money.

In answer to the application, the respondents submit that the value of the subject matter of the suit ought to be determined from the pleadings, the judgement or the settlement. That submission is backed by the decision of the Hon. AZANGALALA J. in MABOKO DISTRIBUTORS LTD & 2 OTHERS V THE CO-OPERATIVE BANK OF KENYA LTD & ANOTHER, MILIMANI HCCC No. 690 of 2002, whereat, the learned judge quoted with approval the following words of the Court of Appeal in the case of JORETH LIMITED V KIGANO & ASSOCIATES, CIVIL APPEAL No. 66 of 1999, at page 14;

"We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgement or settlement (if such be the case)

but if the same is not ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”

With that in mind, the respondents said that the sum of KShs. 15.5 billion was not to be found in the plaint.

And as no Defence was ever filed in the case, the respondents submit that the only pleading which was before the learned taxing officer, was the Plaint. Therefore, it is contended that the applicant is not right to suggest that the taxing officer should have delved into affidavits that had been filed in support of an application for an injunction.

The respondents emphasized that as soon as it became impossible to tell, from the pleadings, what the value of the subject matter was, the taxing officer was entitled to assign it a reasonable value, in accordance with paragraph 1 (1) of Schedule 6, to the Advocates Remuneration Order.

The respondents believe that the taxing officer did exactly that, and that she cannot therefore be said to have erred at all.

As I understand it, the real question for determination herein is whether or not the learned taxing officer should have looked beyond the plaint when ascertaining the value of the subject matter of the suit.

On the one hand, the applicant insists that she should have looked at the affidavit of Roger Sylvester, because the same was in evidence, which was already before the court. On the other hand, the respondent states that the learned taxing officer should not have looked beyond the pleadings.

The other issue that needs to be determined is whether or not the case herein was for more than declaratory and injunctive reliefs. In particular, was the case also for the refund of money to the plaintiffs?

A perusal of the reliefs sought in the plaint, reveals that prayers (a) to (f) were all for declaratory reliefs. Prayer (g) was for a permanent injunction to restrain the defendant from breaching the contract. Prayer (h) was for a declaration. Prayers (i) and (j) were for orders that the defendant refunds commission at the rate of 6%. Finally, prayer (k) was for general damages.

To my mind, any plaintiff who wishes to obtain a monetary judgement is required to set out the sums he is seeking, if the same were quantifiable. Therefore, if one did not seek judgement for a specified sum, the court could not award the same, as special damages. It is only general damages which the plaintiff would not be expected to quantify from the outset.

From the submissions of the applicant, it would appear that the sum of KShs 15.5 billion was easily quantifiable. In other words, I understand the applicant to be saying that the said sum could have been easily claimed, as special damages.

However, the truth is that there was no prayer in the plaint for judgement to be entered for any specified sum. Therefore, in my considered view, even if the plaintiffs' claims had succeeded, that would not have resulted in a money decree, against the defendant. In effect, the suit does appear to have been for only declaratory and injunctive reliefs, plus general damages for breach of contract.

The respondents had submitted that in **KIPKORIR, TITOO AND KIARA ADVOCATES V DEPOSIT PROTECTION FUND BOARD, MISC. APPLICATION No. 888 of 2003**, the Court had held that it was wrong for the taxing officer to apply a value extracted from documents. By that submission, I understood the respondents to be saying that the taxing officer should not look beyond the pleadings, judgement or settlement, to ascertain the value of the subject matter of a suit.

After a careful perusal of the ruling in that case, I did note that the advocate therein had drawn the court's attention to the fact that the plaintiff who had sued his erstwhile client was owed KShs. 116,344,489.30. Notwithstanding that sum, the taxing officer did find that that was not the subject matter of the suit, and the said suit was not one for a money claim. It was held that the subject matter of the suit was an injunction.

Therefore, when the taxing officer went ahead to peg the calculation of the instruction fee to the sum of KShs. 116,344,489/30, the client filed a successful reference.

In this case too, the learned taxing officer came to the conclusion that the plaint in issue, only sought injunctions, general damages and declarations.

Having gone through the pleadings on record, I too have verified that the suit herein was not for a money claim.

At this point in time, I feel it is appropriate to make reference to the decision of the Court of Appeal in **JORETH LIMITED V KIGANO & ASSOCIATES, CIVIL APPEAL No. 66 of 199.**

In that case, the learned taxing officer had declined to take note of the "**opinions of value**" proffered from the bar, by Mr. Kigano. He then went on to assess the instruction fee based on the importance of the matter to the parties, the complexity and responsibility placed on the should of counsel.

When the advocate filed a reference, the learned judge reversed the decision of the taxing officer. Instead, he accepted the valuation as evidence of the value of the subject matter.

Later still, the client appealed to the Court of Appeal, who overturned the decision of the High Court. As I understand it, the decision to reject the superior court's reliance on the valuations was based on the finding that the said "**opinions of value**" were not evidence, but only opinions.

Similarly, I find that insofar as the depositions in the affidavit of Roger Sylvester were never subjected to substantive evaluation by the court, the same constituted no more than the considered opinion of the deponent. Perhaps if the suit had gone through a full trial, the court may have had an opportunity to ascertain the veracity of the financial statements made by the deponent. However, this suit was dismissed on a technicality, without the opinion being put to the test.

I therefore find nothing wrong in the decision of the learned taxing officer, rejecting the sums of KShs. 15.5 billion as the value of the subject matter.

After rejecting that figure, the taxing officer agreed with the applicant that;

"the matter was of enormous impact and the issues raised in the pleading impacted heavily on the parties involved. From the plaint it appears to have been a complex one and the importance of this litigation to the parties and the pressure they exerted on counsel should and is taken into account. I therefore consider the industry, skill and labour of the applicant."

In a nutshell, the learned taxing officer appears to have taken into account all the relevant factors in law and the circumstances prevailing in the case. I detected no misdirection on her part.

Therefore, I hold that the taxing officer did not err in principle as alleged by the applicant. Accordingly, there is no merit in the reference. It is thus dismissed, with costs to the respondents.

Dated and Delivered at Nairobi, this 24th day of November 2006.

FRED A. OCHIENG

JUDGE