



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

Civil Case 224 of 2005

SANDE INVESTMENTS LIMITED

T/A WESTLANDS COTTAGE HOSPITAL.....1ST PLAINTIFF
SAMSON OMOLLO RADING.....2ND PLAINTIFF
A.W. RADING OMOLLO.....3RD PLAINTIFF
MIRIAM MUKWALA.....4TH PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED

KENYA COMMERCIAL FINANCE CORPORATION.....1ST DEFENDANT
GRAHAM JAMES CREER SILCOCK.....2ND DEFENDANT
P. H. SHAH3RD DEFENDANT
ADRIAN SPENCER DEARING.....4TH DEFENDANT
WESTLANDS RESIDENTIAL RESORT LTD.....5TH DEFENDANT
JOSEPH NJOKA.....6TH DEFENDANT

RULING

This is a reference against the ruling of the taxing officer dated 8.8.2006 by which she awarded KShs.1,105,000.00 as instruction fees. The primary complaints are that the said sum is manifestly excessive in the circumstances; that the taxing officer applied the wrong principles of law; that the taxing officer failed to consider relevant factors that she ought to have taken into consideration; that the taxing officer erred by increasing the said instruction fees by half and that she erred in failing to consider the fact that as at the time of filing the bill of costs the 5th defendant was yet to file its appearance and defence.

The application is supported by an affidavit sworn by Samson Omollo Rading the 2nd plaintiff who has deponed that on the 5th defendant’s preliminary objection, the plaintiff’s suit was struck out with costs to the 5^h defendant. The 2nd plaintiff has further deponed that the taxing officer found the sum of KShs.70,000,000.00 to be the value of the subject matter which was not the case as in his view the subject

matter, was whether the 1st defendant's power of sale had arisen and whether the 1st plaintiff was entitled to an injunction to restrain the exercise of that power of sale. In the premises the instruction fees should have been determined under Schedule VI(1) (L) of the Advocates **(Remuneration)** Order and should not have been increased by one half.

The application is opposed on the basis of Grounds of Opposition filed by the advocates for the 5th defendant on 30.8.2006. The 5th defendant contends that the subject matter of the suit was ascertainable and the taxing officer was entitled to apply Schedule VI paragraph 1(a) of the Advocates **(Remuneration)** Order. That is because the substantive prayer as against the 5th defendant was cancellation of the transfer in favour of the 5th defendant of L.R. NO.1870/VI/53 whose value was pleaded in the amended plaint. The 5th defendant further contends that none of the injunctive prayers were directed at the 5th defendant and the plaintiffs' suit was not limited to declarations and injunctive reliefs as contended by the plaintiffs. In the premises the 5th defendant urged me to dismiss the reference with costs.

The reference was debated before me on 4.10.2006 by Mr. Simiyu, Learned counsel for the plaintiffs and Mr. Havi Learned counsel for the 5th defendant. Both counsels reiterated their respective clients' positions before the taxing officer. I have considered their submissions. I have further considered the application, the supporting affidavit, the Grounds of Opposition and the cases relied upon. I will not refer to all the cases relied upon but I will have the principles enunciated therein in mind in determining this application. Those principles are well settled. In **Thomas James Arthur -vs- Nyeri Electricity Undertaking [1961] E.A. 492**, the predecessor of the present Court of Appeal held that where there has been an error in principle the court will interfere, but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases.

So, has there been an error in principle? The plaintiffs' claims are pleaded in their amended plaint dated 5.4.2005. As against the 5th defendant the plaintiffs seek a declaration that the transfer of L.R. No.1870/VI/5 Nairobi to it is null and void and further seek an order for the cancellation of the transfer and restoration of the plaintiffs as the owner thereof. It is plain therefore that not just a declaratory order is sought against the 5th defendant but also an order that the registration of the suit property in the name of the 5th defendant be cancelled and the property be restored to the plaintiffs. It is that property that was also the subject of the injunction application. It is the registration of the property in the name of the 5th defendant that was the subject of the Preliminary Objection that ended in the striking out of the amended plaint against the 5th defendant.

Was the value of the property ascertained or ascertainable from the pleadings judgment or settlement between the parties? The value is not stated in the ruling striking out the suit against the 5th defendant. There has been no settlement between the parties. The amended plaint however gives various valuations. At paragraph 17 it is averred that as at the time of the take over by the Receivers, the assets of the first plaintiff were valued at KShs.71,000,000.00 in accordance with a valuation given by M/s Mwako Musau consultants. In paragraph 20 it is averred that as at the same time the 1st plaintiff's Hospital had chattels, Equipment and furniture worth at least KShs.40,000,000.00. In paragraph 28 the plaintiffs averred that the 2nd defendant had been nominated by the 1st defendant to sell the suit property at KShs.21,000,000.00. In paragraph 31(a) (i) it is averred that the said sale agreement was at a gross under value in that:-

(a) By the valuation of Mwaka Musau consultants dated September, 1996 and conducted upon the instructions of the first defendant, the property was valued at KShs.71,000,000.00.

(iv) That as per the valuations the property which was built only 10 years ago, has depreciated on paper from its value of KShs.71,000,000.00 to KShs.22,000,000.00 whereas the property market is on the rise.

(v) That the 1st defendant has not sought the best market price through an auction and is abusing with impunity the provisions of Section 69 I.T.P.A. which allows sale by Private Treaty by selling at below the forced sale value.

It is obvious from those averments that the plaintiffs' own valuation of the suit property is upwards of KShs.71,000,000.00. The taxing officer in her ruling on taxation said that the value of the subject matter was specifically given in the pleadings as KShs.71,000,000.00. That figure is below the plaintiffs' own valuation of the suit property. In the premises and in view of what I have said above, I find and hold that the taxing officer was entitled to determine the value of the subject matter as KShs.71,000,000.00. She was therefore entitled to tax the 5th defendant's instruction fees (**item 1**) under Schedule VI paragraph 1(b) of the Advocates (**Remuneration**) Order as in my view the Preliminary Objection was a denial of liability.

The complaint that the taxing officer increased the instructions fees by one half is not borne by the record and the complaint is rejected as having no merit.

The cases relied upon by the plaintiffs are all distinguishable from the present case. In **Rosafrik Limited & Another – vs – The Central Bank of Kenya: HCCC No.1389 of 2001 (UR)** Ringera J as he then was found that the subject matter was declaratory and injunctive reliefs in relation to fraud in the sum of KShs.273,323,000.00. The Learned Judge held that that sum could not constitute the subject matter of the suit. There was no issue of ownership, possession or entitlement to any legal interest capable of being valued and whose value could be determined from the pleadings, judgment or settlement. In the instant case ownership of the suit property is in issue and the value of the suit property was clearly determinable from the pleadings as analyzed above.

In **Joreth Limited –vs – Kigano & Associates: C.A. No.66 of 1999 (UR)**, the Court of Appeal found that the value the subject matter could not be determined from the pleadings, judgment or settlement. The cause of action in the suit was based on trespass upon land whose value was not in the pleadings. The court rejected valuation letters given at the time of taxation. Those are very different circumstances from the position in the matter at hand where as stated above the valuation is in the amended plaint.

In **Gichuki Kingara & Company Advocates –vs- Mechanised Cargo Systems Limited HC. MISC. APPL.NO.185 of 2005 (UR)**, Ransley J as he then was found that the value of the subject matter of the suit could not be ascertained from pleadings.

With regard to the complaint that the 5th defendant was not entitled to the full instruction fees, I have found as follows:-

The 5th defendant's preliminary objection determined the entire suit as against it. I see no reason why it could not earn the full instruction fees. The case of **First American Bank of Kenya Limited –vs – Gulap P. Shah & 2 others: HCCC No.2255 of 2000 (UR)** does not in my view advance the plaintiffs' case significantly. In that case Ringera J as he then was held that the full instructions fees to defend a suit is earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees. The Learned Judge's authority for saying so was the decision of the Court of Appeal in **Joreth Limited –vs- Kigano & Associates (Supra)**. That decision however did not mention the filing of a defence. The Learned Judges stated as follows:-

“By the first ground thereof the respondent states that Instruction Fee is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached. In principle that is correct.”

On that authority therefore, it is clear to me that the 5th defendant earned full instruction fees especially as the suit was struck out as against it at its behest.

From my above analysis of the matter, it must now be obvious that my conclusion is that the taxing officer did not err in principle and that the sum she awarded as instruction fee is not manifestly excessive. I have detected no other basis upon which the decision of the taxing officer may be interfered with. This reference is declined.

The applicants shall bare the costs of the 5th defendant.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 7TH day of NOVEMBER, 2006.

F. AZANGALALA

JUDGE

7/11/2006

Read in the presence of:-