



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL DIVISION – MILIMANI**  
**MISC.CIVIL CASE NO.975 OF 2003**

**KAMUNYORI AND COMPANY ADVOCATES.....PLAINTIFF**

**VERSUS**

**DEVELOPMENT BANK OF KENYA.....DEFENDANT**

**RULING**

I have before me two references under the Advocates Remuneration Order from a decision of the Taxing Officer on taxation dated 2nd April, 2004. The first reference was filed on 24th September, 2004 by M/S Kamunyori and Company Advocates (hereinafter referred to as the Advocates) whose Advocate/client bill of costs had been the subject to the taxation on 2nd April, 2004.

The Advocates seek an order that the decision of the Taxing Officer to tax off and disallow items 2 and 3 of their bill of costs dated 31.12.2003 be set aside on the principle grounds that the Taxing Officer misdirected herself and acted contrary to the letter and spirit of Rules 4 and 5 of the Advocates (Remuneration) Order and introduced extraneous matters and considerations in her decision. Item 2 related to additional remuneration under Part 1 Rule 4 for exceptional dispatch in a matter which was complex and of high monetary value. Item 3 related to special fee under Part 1 Rule 5(1) of the Remuneration Order as the matter was of exceptional importance and unusual complexity. The second reference was filed by M/S Riunga Raiji and Company Advocates for the client (hereinafter called the client's reference). This reference seeks an order that the decision of the Taxing Officer to allow item 1 of the bill of costs dated 31.12.2003 be set aside. The main reasons for the reference are that the Taxing Officer misdirected herself and exercised her discretion wrongly in finding that the value of the subject matter was Kshs 359,602,000/= and further misdirected herself in failing to reduce the basic instructions fees as the matter was determined on a preliminary issue that was not complex. The two references were argued together.

On behalf of the client it was argued that the value of the subject matter of Kshs 359,602,000/= which the Taxing used in determining instructions fees was not part of any documents filed in the suit before the suit was struck out. It was also not in the pleadings. Counsel for the client argued that the subject matter of the suit as between the client and the Plaintiff was a sum of Kshs 95,000,000/= which was the sum lent to the Plaintiff by the client and was pleaded in paragraph 9 of the plaint.

Responding to the arguments made on behalf of the client the Advocates submitted that the Taxing Officer did not misdirect herself in finding that the value of the subject matter was Kshs 359,602,000/= because that was based on a professional valuation of the property and assets of the Plaintiff and was in fact contained in a sale agreement dated 25th July, 2003. In the Advocate's view the sale agreement constituted settlement among the parties and the Taxing Officer was perfectly entitled to base the instruction fees on the said value. It did not matter that the suit was struck out on a Preliminary Objection.

In respect of the reference made by the Advocates it was argued by the advocate that the Taxing Officer was wrong to tax off items 2 and 3 of the bill of costs as she had failed to appreciate that the matter had been attended to urgently and with exceptional dispatch and that the matter was complex and involved voluminous documentation and the advocate had attended to the matter outside normal business hours.

Opposing the reference Counsel for the client submitted that there was no warrant for additional remuneration under Rules 4 and 5 of the Advocates Remuneration Order since the matter was not complex and was in any event struck out on a Preliminary Objection.

I have now considered the references, the submissions and the reasons given for taxation by the Taxing Officer. Having done so, I take the following view of the matter. The Advocates reference is not merited. The Taxing Officer had the right principle in mind. She rejected the advocates arguments that the matter was complex and of high monetary value. She also rejected the advocate's argument that he had handled the matter with exceptional dispatch. She gave her reasons for her decision. The Learned Taxing Officer was exercising her judicial discretion. In my view she did not err. In the result I have not found any misdirection in disallowing items 2 and 3 of the advocates bill of costs. The Advocates reference is dismissed with costs.

Turning now to the client's reference I have found as follows. The Learned Taxing Officer found the value of the subject matter in the sale agreement dated 25.7.2003. This Sale Agreement was introduced by the advocate in his written submissions presented to the Taxing Officer. The value given in the sale agreement was not part of the consent order which was recorded on 1st October, 2003. The consent order reads:-

**“By consent this suit be marked as settled with no orders as to costs.”**

It is significant that the consent seems to have been entered into after the suit was struck out on a Preliminary Objection. I have perused the pleadings in this suit, the value of Kshs 359,602,000/= appears nowhere. In my view the Taxing Officer was not entitled to use a value which could not be determined from the pleadings, judgment or settlement between the parties as per the, record of the Court. The Plaintiff's cause of action in the suit was injunction, declarations, ejectment of receivers, return of premises and properties in the possession of the receivers, cancellation of securities, damages and costs. There was no claim for the 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.

In the result I find and hold that the Taxing Officer misdirected herself in finding that the value of the subject matter was Kshs 359,602,000/= and in determining the instruction fee based in this figure she erred in principle. The upshot of the above considerations is that the client's reference dated 13th October, 2004 is allowed in terms of prayer 1 of the reference. The order of the Taxing Officer of 31st December, 2003 in respect of instructions fees is hereby set aside. Item 1 of the bill of costs is remitted back for taxation a fresh before a different Taxing Officer. The costs of this reference shall be in the cause.

**DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY 2005.**

**F. AZANGALALA**

**JUDGE**