



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

MISC APPLICATION 185 OF 2005

GICHUKI KING'ARA & COMPANY ADVOCATES.....APPLICANT

VERSUS

MECHANISED CARGO SYSTEM LTD.RESPONDENT

RULING

This is a reference from the decision of the learned taxing officer herein in that he allowed an instruction fee of Shs.1,952,500.00 in an Advocate and Client bill filed by the Advocate in this application.

Mr. Singh submitted that the taxing officer had misdirected herself by applying wrongly Schedule 6 1(b) of the advocates Remuneration Order (the order) as the value of the subject matter could not be ascertained from the pleadings. He relied on the case of **Joreth Limited v Kigano & Associates CA** No.66 of 1999 a case in which the learned court of Appeal upheld a finding of Mr. C. K. Njai, the taxing officer, who stated:

“As we do not know the capital value of the property in dispute, one I believe is left to determine the matter on the general discretion donated to the taxing officer to tax a bill, based on the importance of the matter to the parties, complexity and the responsibility placed on shoulders of counsel”.

In the judgement at page 14 the learned Court of Appeal stated;

“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 so 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”.

The question, which arises in this reference is, did the learned taxing officer apply the correct provision of the Schedule VI of the Order. Schedule 1(b) states:-

(I) Instruction fee The fee for instruction in suits shall be as follows, unless the taxing officer in his

discretion shall increase OR (unless otherwise provided) reduce it:

“(b) To sue in any proceedings described in paragraph (a) where a defence or other denial of liability is filed; or to have an issue determined arising out of interpleader or other proceedings before or after suit; or to present or oppose an appeal: where the value of the subject matter can be determined from the pleadings, judgement or settlement between the parties”.

Can the value of the subject matter be determined from the pleadings, judgement or settlement between the parties? In this case there is no judgement or settlement.

The subject matter of the suit was LR. No.9042/289 whose value is capable of being ascertained.

The Applicant has annexed a valuation report of the Defendant and by Lloyd Masika in which LR.9042/289 was valued at Kshs.30,000,000/= respectively.

The average value of the 2 valuations is Kshs.127,000,000/= and this is that sum that the applicant is entitled to his instruction fee.

She then calculated the instruction fee using the scale set out in Schedule VI 1(b) and arrived at the figure of Kshs.1,952,500/=.

In order to determine what the subject matter of the suit is it is necessary to look at the Plaintiff.

The Plaintiff alleges that a charge registered in respect of the suit premises was null and void for the reason set out. It further alleges that a sum claimed by the plaintiff as being due under the charge is not the legitimate amount. Further, the plaintiff alleges that a statutory notice sent to the Plaintiff was null and void for the reasons set out.

The Plaintiff seeks the following orders:-

*“(a) An order of Permanent injunction restraining the Defendant whether by itself its servants or agents, or advocates or auctioneers or any of them or otherwise from doing the following acts or any of them, that is to say from interfering with rights of possession, advertising for sale, disposing of, selling by public auction or otherwise howsoever at any time or by completing by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting otherwise howsoever interfering with ownership of title to and/or interest in **ALL THAT** piece of land known as **L.R. NO.9042/289 NAIROBI**.*

*(b) A prohibitory order of injunction restraining the Defendant whether by itself its principals, servants or agents, or advocates or auctioneers or any of them or otherwise from doing the following acts or any of them, that is to say from interfering with rights of possession, advertising for sale, disposing of, selling by public auction or otherwise howsoever at any other time or by completing by conveyance or transfer of any sale concluded by auction or private treaty leasing letting otherwise howsoever interfering with the ownership of title to and/or interest in **ALL THAT** piece of land known as **L.R. No.9042/289 NAIROBI AIRPORT**.*

*(c) An Order under section 52 of the Indian transfer of Property Act (amendment) Act 1959 **THAT ALL FURTHER REGISTRATION** or change of registration in the ownership, leasing, subleasing, allotment, user, occupation or possession or in any kind of right title or interest in **ALL THAT** parcel of Land known as **L.R. NO.9042/289 NAIROBI AIRPORT** with any land Registry, government Department, and all other registering authorities **BE AND IS HEREBY** prohibited. (d) A Declaration that the letter dated 15th January 2001 in purported service of a statutory Notice to pay Kenya Shillings 138,006,636.62 with interest at prevailing commercial rates, penalties, costs and charges in respect of outstanding facilities is invalid as*

*a Statutory Notice to realize the Plaintiff's immovable property known as **L.R NO.9042/289 NAIROBI AIRPORT.***

*(e) A declaration that the charge dated the 19th December 1997 is null ad void and of no effect and not binding on or enforceable against the plaintiff, that the plaintiff is released and discharged from the said charge and from any liability there under, that the property purported to be mortgaged thereby is discharged from the charge and that the plaintiff is entitled to the delivery up to its documents of title relating to L.R NO. 9042/289 **NAIROBI AIRPORT** (the said property) freed, released and discharged from the charge. (f) An order directing the Director to deliver up to the Plaintiff the said documents of title duly released and discharged from the charge and an order that the defendant forthwith concurs in doing all acts and things and executes all the necessary deeds and documents in order to effectuate the orders aforesaid.*

(g) General Damages for fraud and loss of Business due to wrongful advertisement of the Plaintiff's property.

(h) Such other or further orders as this Honourable Court may deem fit to grant.

(i) Costs of this suit together with interest thereon."

The Plaintiff is seeking assistance from the court to determine the validity of certain documents. The value of the suit premises is not a relevant factor in making such determination. Mr. King'ara informed me that it had taken him one week to draw the Plaintiff. The principles set out in the Joreth case set out above allows the taxing officer to take all those matters into consideration.

From a perusal of the Plaintiff the value of the subject matter of the suit cannot be ascertained from the pleadings. As such the proper schedule to apply is Schedule VI 1(l) which states:-

"to sue or defend in any case not provided for above: such sum as may be reasonable but not less than 6000"

In view of the misdirection of the taxing officer as to the correct schedule to be applied I allow this reference. King'ara & Company Advocates v Mechanised Cargo System Ltd [2005] eKLR

In my view it is not necessary to remit the matter back to the taxing officer to reconsider the same. This court has jurisdiction to make such a determination (*Premchand Raichard Ltd & another v Quarry Services Ltd. & Others (1972) EA 162*).

The matters raised in the Plaintiff required considerable research into both fact and law and the perusal of the security documents involved. Whatever instruction fee is determined it is subject to an increase by 50% this being an advocate and client matter. The sum of Kshs.6000 referred to Schedule VI 1(l) is a minimum and not a maximum. I think this is a case where that sum should be increased substantially and I consider a basic fee of Kshs.400,000/= to be fair in the circumstances. The applicant will have the costs of the reference.

Dated and Delivered at Nairobi this 17th day of October, 2005.

P. J. RANSLEY

JUDGE