**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**

**MISC CIV APPLI 464 OF 2004**

**WAMBUGU & CO. ADVOCATES…….APPLICANT**

**VERSUS**

**SAVINGS & LOAN KENYA LIMITED…….....…..…..……..DEFENDANT**

**R U L I N G**

This is a reference arising out of the decision by the learned taxing officer, in which she awarded Kshs. 2,500,000/= on account of Instruction Fees.

It is the contention of the applicant that the taxing officer erred in calculating the said Instruction Fees on the basis of Kshs. 150,000,000/=, which she deemed to be the value of the subject matter of the suit.

In her ruling, the taxing officer expressed the following views:-

> **"I have perused a copy of the re-amended plaint annexed to the respondent's submissions. Prayer (h) was a prayer for special damages in the sum of 150,000,000/=. I agree that Plaintiff sought other prayers, but it's clear that prayer (h) is specific and shall use the sum of 150 million stated therein as a basis for taxing item1."**

Having calculated the basic instruction fee on that basis, and finding the same to be the sum of Kshs. 2,305,000/=; the taxing officer exercised her discretion, and increased it by a sum of Kshs. 195,000/= making a total of Kshs. 2,500,000/=.

The applicant feels aggrieved by the said assessment. It submits that the sum of kshs. 150,000,000/= was neither a specific claim in the pleading nor a liquidated claim to warrant it being treated as the basis for the value of the subject matter. It is further submitted that the prayer was very speculative, as it contained several variables. The applicant feels that had the taxing officer placed the sum of Kshs.150,000,000/= within the context of the whole suit, it would have become evident that that sum was not the value of the subject matter. In particular, the sum was said to be incapable of being construed as "**Special Damages**," in the manner the taxing officer did.

The applicant cited the following case as authority for the definition of the phrase "liquidated damages"**, ABDULHAMID ESMAIL V. MOHAMED KASSAM & ANOTHER, MSA HCCC NO. 442/1998.**

In that case, Waki J. (as he then was) had occasion to decide an application for summary judgement

under Order 35 rule 1 of the Civil Procedure Rules. When doing so, he expressed the following views:-

> **"I also accepted the exposition of words "Liquidated demand" as found in the Supreme Court Practice 1985 Vol. 1 and Halsbury's Laws 4th Edn. Vol. 26, thus;**
>
> **"A liquidated demand is in the nature of a debt…… If the ascertainment of a sum of money even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a "debt or liquidated demand" but constitutes "damages"**
>
> **A claim for unliquidated damages is not made a liquidated demand by the Plaintiff naming a definite figure."**

Based on those submissions, the applicant urged the court to allow this reference, and forward the Bill of Costs back to the taxing officer for taxation, afresh, on the basis of such directions as this court would have formulated.

However, the respondent feels that there are no grounds, advanced by the applicant, to warrant any interference with the taxation. The respondent submitted that the applicant had never assisted this court in establishing the value of the subject matter. Mr. Wambugu, advocate for the respondent explained that the Bank's customer had filed elaborate pleadings, seeking many prayers. By his pleadings, the customer had not only sought injunctive reliefs, but also said that the Bank had frustrated his (customer's) efforts to extend his lease. And, it was said that the customer had placed the value of his property at Kshs.150,000,000/=.

Mr. Wambugu went on to say that the Bank had issued loan facilities for Kshs.14,000,000/=, and later for a further sum of Kshs. 21,000,000/=. However, before the securities were perfected, the lease is said to have expired, hence the claim by the customer. Therefore, as far as the respondent to this reference was concerned, the claim was not simply one in respect of a debt. The respondent explained that his fees were for various services which he had provided to the applicant.

Pausing there for a moment, I think that it is important to note that this reference, as I understand it, is limited to challenging the Instruction Fees, and calculations flowing therefrom. Therefore, I hold the view that even if the respondent had provided other services to the applicant, the same are irrelevant to the reference.

In his further submissions, the respondent re-visited the assertion that the applicant had failed to assist this court in establishing the value of the subject matter of the suit. It is said that although there were valuation reports, the Bank had failed to produce them in evidence. On the other hand, the customer is said to have expressly asserted that his property was worth Kshs. 150,000,000/=.

In conclusion, the respondent submitted that the applicant had failed to make out a case to justify any interference with the decision of the taxing officer.

It is trite law that the court will only interfere with the decision of a taxing officer if there was either an error in principle, or if the sum arrived at was either so high or so low as to imply that the taxing officer applied the wrong principle.

The starting point, in an endeavour to ascertain whether or not the taxing officer erred is Schedule VI, of the Advocates (Remuneration) Order. Basically, it stipulates that the Instruction Fee be calculated on the basis of the value of the subject matter, which is to be determined **"from the pleadings, judgement or settlement between the parties."**

In this case, the taxing officer did not obtain the value of the subject matter from the judgement or settlement between the parties, for there has not been shown to be any such judgement or settlement. Secondly, this is an Advocate/Client Bill of Costs, which therefore raises the question as to what the

subject matter was. The answer is provided at part (B) of Schedule VI of the Advocates Remuneration Order, which is in the following terms:-

**"ADVOCATES AND CLIENT COSTS" As between advocate and client the minimum fee shall be–**

**(a) the fees prescribed in A above, increased by one-half; or**

**(b) the fees ordered by the court, increased by one-half; or**

**(c) the fees agreed by the parties under paragraph 57 of this Order; increased by one-half;**

**as the case may be, such increase to include all proper attendances on the client and all necessary correspondence."**

Now, we need to have a look at the pleadings, so as to ascertain whether or not the taxing officer was properly guided in determining the value of the subject matter.

At paragraph 4 of the Plaint, it is pleaded that the Bank's customer bought

> ***"the suit property for a sum of Kshs 18,000,000.00 and paid Stamp Duty and legal fees thereof, giving an aggregate of about Kshs. 21,000,000/= out of which the Plaintiff borrowed a sum of Kshs. 14,000,000/= from the first Defendant and offered the suit property as security for the said loan."***

At paragraph 13 and 16 of the plaint, it was pleaded that the Plaintiff spent a further sum of Kshs. 50,000,000/= on the suit property. However, the plaint also indicated that the Bank's valuers had valued the suit property at Kshs. 35,000,000/= as at both 11th February 1997, as well as 29th May 1998. On the other hand, the Bank's customer pleaded as follows:-

> **"the current market value of the suit property is in excess of Kshs. 90,000,000/=, and on completion of the renovations on the existing structures without the additional four new storeys, its value will be approximately Kshs. 150,000,000/="**

To my mind, prayer (h) should be placed within the context of paragraph 16 of the Plaint, part of which is set out above. In other words, the Bank's customer did not at any time state categorically that the value of the suit property was Kshs. 150,000,000/=. At best, the said customer placed the value as being **"in excess of Kshs. 90,000,000/=".** The customer also made it clear that in his understanding, the suit property's value would be enhanced to Kshs. 150,000,000/= if the construction thereof was completed in November 1999.

Apart from the customer's estimated value of the suit property, there are the two valuation reports which the Bank had procured. Both reports had placed the value of the suit property at Kshs. 35,000,000/=.

To my mind, there is no valuation report which was cited in the material before me, to justify the estimate by the Bank customer. In other words, there is no material to back the estimate of **"in excess of Kshs. 90,000,000/="** or even that of Kshs.150,000,000/= in the event that the construction of the suit property had been completed in 1999. Indeed, there is nothing to show that the said construction was ever completed. Therefore, I hold the view that the learned taxing officer erred in principle in concluding that the value of the subject matter was Kshs. 150,000,000/=.

I hold the view that the pleadings did not cite any **"Special Damages"**, within the strict meaning of that phrase, save for Kshs. 350,000/= which was payable to Ogetto and Company Advocates; and Kshs. 105,500/= which was payable to Ebony Estates. Those sums were cited at prayer (i) of the Plaint. And although the other legal fees (payable to Muthoga Gaturu & Co. Advocates), and the valuation fees (payable to Highland Valuers) could qualify to be defined as "Special Damages", the same were not

quantified. In effect, the learned taxing officer erred in holding that the sum of Kshs.150,000,000/= was for special damages. If anything, the customer seemed to be uncertain as to what the suit property would be valued at, upon completion, hence the estimate of Kshs. 150,000,000/= "or the market value of the suit property."

I would also like to make it clear that it is the responsibility of the respondent to satisfy the taxing officer as to the value of the subject matter. Therefore, there is no justification on the respondent's criticism of the applicant, for the alleged failure to help the court to establish the value of the subject matter. That criticism does not lie because the customer did tell the court that on 11th February 1997 and on 29th May 1998, the Bank did provide valuation reports. Secondly, the criticism does not lie because the burden of proving the value of the subject matter is on the respondent, in any event.

For all those reasons, the decision of the taxing officer, to award Kshs. 2,500,000/= as Instruction Fees is hereby set aside. I direct that the Advocate/Client Bill of Costs dated 23rd June 2004 be remitted to the learned taxing officer, Mrs T.W.C. Wamae for taxation afresh, on the issue of the Instruction Fees. I further direct that in calculating the Instruction Fee, the learned taxing officer should be guided by the value of the subject matter, as the respondent herein will prove.

The costs of this reference are awarded to the applicant, in any event.

Dated and Delivered at Nairobi this 11th day of October 2005.

**FRED A. OCHIENG**

**JUDGE**