



**REPUBLIC OF KENYA**

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

**COMMERCIAL DIVISION – MILIMANI**

**Civil Case 337 of 2002**

**VIJAY KUMAR MANDAL.....PLAINTIFF**

**VERSUS**

**RAJINDER KUMAR MANDAL ..... DEFENDANT**

**RULING**

This amended Chamber Summons is made by the Defendant under Rule 11 of the Advocates (Remuneration) Order. It is a reference from an Order of Taxation made by the Deputy Registrar on 15.4.2004. The Defendant objects to the decision of the Deputy Registrar in respect of instructions fees and the sums awarded for attendances on 3 occasions. No submissions were however made in respect of the sums awarded for the said attendances. The primary challenge is therefore with respect to instructions fees.

The primary grounds for the application are that the Deputy Registrar failed to appreciate that the value of the subject matter was identified in the plaint and in the Valuation Report produced during the submissions which valuation report gave the sum of Kshs 40,000,000/= as the value of the properties in dispute: that she ignored the Defendant's submission that the dispute was between four different parties and involved four different properties which had previously been referred to four arbitrators and the advocates in the conveyance had charged Kshs 450,000/= and the resultant agreement had failed to finalize the dispute and that the Taxing Officer failed to apply any of the wide powers given in the proviso (i) and paragraph 13A of the Advocates (Remuneration) Order but instead concentrated only on the Plaintiff's reference to schedule VI paragraph (L).

The application is opposed. The Plaintiff has filed a statement of Grounds of Opposition. The primary Grounds of opposition are that the Taxing Officer did not error in her decision and in fact was generous to the Defendant; that the valuation of the properties was irrelevant; that only one property was in issue and in that property the Defendant has only one third share or interest; that the matter was simple, did not involve any complicated issues of law or fact and the suit itself was dismissed on a technicality; that the Taxing Officer did not ignore the Defendant's submissions and came to her decision after careful evaluation of the rival submissions and that the Defendant was basing his fees on irrelevant matters.

The application was canvassed before me on 14.10.2005 by Mr. Anjarwalla Learned Counsel for the Defendant and Mr. Jowhal Learned Counsel for the Plaintiff. Counsel for the Defendant recited the grounds in the Amended Chamber Summons and emphasized that the matter was of enormous importance to the parties, emotions were high and the advocates took quite a beating. In these premises, the Taxing Officer should have taken into account the values given in the Valuation Reports in which

event the instructions fees would have been about Kshs 652,375/=.

Responding to the submissions by Counsel for the Defendant, Counsel for the Plaintiff recited the grounds in the Defendant's statement of opposition. He argued that there was no error of principle shown as no value of the properties was given in the plaint and in his view the figure awarded by the Taxing Officer was generous to the Defendant. Counsel further argued that the matter was not complex and a defence need not have been filed as the Defendant relied upon a technicality which was independent of the defence that was filed.

Reliance was placed upon the following authorities for the proposition that where there was no error of principle the High Court should not interfere with the Taxing Officer's exercise of discretion.

1. NANYUKI ESSO SERVICE –V- TOURING & SPORTS CARS LTD (1972) E.A. 500.
2. AMBALAL N. PATEL LTD –V- MARIETI (1967) E.A. 194.
3. ABDULREHMAN HAJI SULEMAN & OTHERS –V- BHADURALI KHETSHI HANSRAJ & ANOTHER (1964) E.A. 47
4. THOMAS JAMES ARTHUR –V- NYERI ELECTRICITY UNDERTAKING (1961) .A. 492
5. JORETH LTD –V- KIGANO & ASSOCIATES (2002) 1 E.A.92

The above are the rival positions taken by the parties to this dispute. I have considered the submissions made for and against the reference. I have also perused the record and the authorities cited. As stated above the primary dispute is over instructions fees. Paragraph 1 of schedule VIA of the Advocates (Remuneration) Order provides:

***“The fee for instructions in suits shall be as follows unless the Taxing Officer in his discretion shall increase or (unless otherwise provided) reduce it (emphasis mine).***

And proviso (i) to Schedule VI A (i) is as follows:-

*“the Taxing Officer in the exercise of his discretion shall take into consideration the other fees and allowances to the Advocate (if any) in respect of the work to which any such allowance applies, the nature and importance of the cause or matter the amount involved the interest of the parties, the general conduct of the proceedings, a direction by the trial Judge and, all other relevant circumstances”.*

The Taxing Officer found that it was not possible to determine the value of the subject matter from the pleadings or judgment. She therefore applied schedule VI paragraph 1(l) which provides for a minimum of shs 6,000/=. She then increased this figure to shs 60,000/= under proviso (i) taking into account the importance of the matter to the parties and the work put in by Counsel.

I have perused the Plaint. It does not show the value of the subject matter. I have also carefully perused the statement of defence. It too does not show the value of the subject matter. The sum of £30,000.00 introduced in paragraph 11 of the defence cannot be the subject matter as no claim is made against this property in the suit and in any event the Court would have had no jurisdiction to adjudicate over the property.

The, record shows that the Plaintiff's suit was struck out with costs. There is no doubt therefore that the value of the subject matter of the suit could not be determined from the judgment or decree.

With respect to the valuation introduced in the proceedings during submissions, I am afraid in my view the Taxing Officer was entitled to ignore the same. The value given in the Valuation Report was not called for by the Taxing Officer. It was therefore not part of the record when the Plaintiff's suit was struck out. The Taxing Officer could not use the said value as it was not a pleading judgment or

settlement between the parties as per the record of the Court. The plaintiff's cause of action in the suit was a declaration, Specific performance, an order that the Defendant executes documents, delivery of a deed of Exchange, damages and costs. There was no claim for the value of the properties. The figure given in the valuation reports introduced by Counsel for the Defendant in his written submissions could not constitute the value of the subject matter of the suit.

In JORETH LTD –V- KIGANO AND ASSOCIATES (2002) 1 E.A. 92 the Court of Appeal held *inter alia* that:

***“where the value of the subject matter of a suit could not be determined from the pleadings, judgment or settlement, a taxing master was entitled to use his discretion in assessing the instruction fee and in doing so the factors to be taken into account included the nature and importance of the cause, the interest of the parties, the general conduct of the proceedings, any directions of the trial Judge and all other relevant circumstances.”***

In the case at hand as stated above the taxing officer expressly stated that in determining the value of the subject matter of the suit she had taken into account the importance of the matter to the parties and the work put in by Counsel. It is clear in my view that the taxing officer had the correct principles in mind in arriving at the instructions fees she awarded.

The upshot of the above consideration of the matter is that I decline to interfere with the decision of the taxing officer. The Defendant's application dated 13<sup>th</sup> June 2005 is dismissed with costs.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF NOVEMBER, 2005.**

F. AZANGALALA

JUDGE