



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 83 OF 2013**

**NATIONAL BANK OF KENYA LIMITED....PLAINTIFF/ RESPONDENT**

**VERSUS**

**ROSELINE KAHUMBU.....DEFENDANT/ APPLICANT**

**RULING**

The defendant/Applicant has moved this court by way of a chamber summons dated the 23<sup>rd</sup> May, 2013 under paragraph 11(2) of the Advocates Remuneration order and Article 159 (1) (d) of the Constitution of Kenya 2010 seeking orders that;

- 1. The taxation and award made on the 9<sup>th</sup> May 2013 by Honourable Wangila (Ms) D.R. be set aside altogether.***
- 2. The Bill of Costs dated 18<sup>th</sup> February 2008 be referred back for taxation before another Taxing Officer.***
- 3. The cost of this reference be borne by the plaintiff/Respondent in any event.***

The application is premised on the grounds set out in the body of the application and it's supported by the affidavit sworn by B.G. Kariuki.

In his affidavit, the deponent states that, on the 9<sup>th</sup> May, 2013 the taxing officer taxed the Defendant's bill of costs dated the 18<sup>th</sup> February 2008 at Kshs.315,758/-. That, it is evident that the taxing officer failed and/or omitted to single out, identify or recognize the value of the subject matter of the suit which is an error in principle.

He further depones that the value of the subject matter had been clearly identified in the ruling dated the 16<sup>th</sup> day of November, 2007 delivered by Justice Lesiit and therefore, the taxing officer erred in law and in fact when she failed to make a finding based on the value of the subject matter of the suit and complexity of the matter.

The deponent contends that the taxing officer disregarded the valuation report dated the 7<sup>th</sup> day of March, 2013 which clearly provides for the value of the subject matter of the dispute and in so doing, she erred in holding that the value in dispute in the suit as presented in the valuation report could not be relied on. That she erred in her discretion to ascertain the instruction fees chargeable in a matter where the value of the suit was well elaborated in the valuation report.

The deponent also averred that the taxing officer erred when she disregarded the submissions and authorities relied on by the Defendant in support of the Bill of costs in arriving at her ruling dated the 9<sup>th</sup> May, 2013.

The plaintiff/respondent opposed the application by way of grounds of opposition dated the 29<sup>th</sup> May, 2013 and filed in court on the 30<sup>th</sup> May 2013 on the grounds that:

- 1) There is no error of principle committed by the taxing officer to warrant the setting aside of the award.***
- 2) The valuation report dated the 7<sup>th</sup> March, 2012 cannot found the value of the subject matter.***
- 3) The taxing officer properly identified the subject matter of the suit and exercised her discretion in assessing the costs due to the defendant.***
- 4) There was no complex issue raised in the defence or the suit to warrant fee increment and therefore, the award of Kshs.300,000/- is reasonable in the circumstances.***

5) *The reference is frivolous and most unmerited.*

Parties filed submissions in support and in opposition to the reference which the court has duly considered.

In his submissions, counsel for the applicant has submitted that, as a principle in law, the taxing master must be guided by the value of the subject matter which value should be determined from the pleadings, judgment or settlement between the parties and the same is set out in the plaint at Kshs.181,564,640.30cts. To support this contention, he relied on the case of **Joreth Ltd. Vs. Kigano & Associates Civil Appeal No. 66 of 1999** and that of **F.W. Mulwa Advocates Vs. Patrick Mutheke Ndeti (2006) eKLR**.

He further submitted that by virtue of schedule IV par 1(b) of the Advocates Remuneration Order, the value of the subject matter can be determined from the pleadings, judgment or settlement by the parties. Counsel relied on the ruling by Justice Lesiit that she made in the matter wherein the learned Judge identified the subject matter as the mortgage over L.R. No. 7593/41 and L.R. 7583/19 in which the Judge stated:

**“It is clear from all these proceedings and the prayers sought that the subject matter in 1336/01 was the mortgages over L.R. No. 7583/41 and L.R. 7583/19 which mortgages are alleged to have existed between the bank, and one John Francis Kahumbu. The same properties and mortgages are the subject matter in the instant suit; in which the bank is the plaintiff and the defendant is the plaintiff in 1336/01. (Emphasis added)”**

Counsel for the applicant contended that the value of the subject matter could also have been ascertained from the valuation report dated 7<sup>th</sup> day of March 2012 prepared by Altavista International Limited and submitted that the taxing officer erred in failing to take into account that valuation report.

On the part of the respondent it was submitted that, the taxing officer properly considered all the relevant factors and discretion in making the award on instructions fee and has urged the court not to interfere with the award. Counsel averred that the value of the subject matter was not the loan advanced by the Respondent to the deceased nor the outstanding loan account. According to him, the taxation arose from a suit seeking adjudication of competing claim of rights over L.R. 7583/41 Nairobi whereas the plaintiff sought vacant possession of the property, the defendant challenged the deceased husband right to charge the said property to the plaintiff bank. That the plaintiff did not seek payment of the said sums from the defendant and the defendant did not contest the indebtedness of her husband save to challenge her husband's right to offer the said property as security and therefore the figure of Kshs.181 million though mentioned in the pleadings, was not the subject matter of the suit. The case of **Kenya Wildlife Services Vs. Associated Construction Co. Ltd (2002) 2 EA 420** was relied on in which the court held thus:

**“The originating summons was not a suit for Kshs.100,480.137/- as argued by the plaintiff's Advocate, but an application to determine whether the Arbitrator had jurisdiction. Schedule VI (1) (b) was therefore not applicable in the taxation. The plaintiff's instruction fees ought to have been taxed under paragraph 1 of schedule VI which provides that the same shall be reasonable but not less than 6,000/-**

To buttress the same point, the respondent also relied on the case of **Vijay Kumar Mandal Vs. Rajinder Kumar Mandal HCCC No. 337 of 2002** where the court held:

**“I have perused the plaint. It does not show the value of the subject matter -----the plaintiff's cause of action in this suit was a declaration, specific performance, an order that the Defendant executes documents, delivery of a deed of exchange, damage and costs. There was no claim for the value of the properties. The Respondent also cited the cases of M/s Lubulellah & Associates Advocates Vs. N.K. Brothers Limited (2014) eKLR and that of Morunge & Co. Advocates Vs. Kenya Airports Authority (2014) eKLR”**

On the valuation report, it was submitted that, neither the land nor its value was an issue for determination in the suit and therefore, it cannot be taken as the determinant for the value of the subject matter of the suit. Counsel reiterated that neither the valuation report nor the purported value of the land formed part of the pleadings and the taxing officer was right to refuse to use the figures therein as the basis for determining the instruction fees.

The Respondent's counsel further submitted on the factors to consider where the value of the subject matter cannot be determined from the pleadings as espoused in the case of **Republic Vs the Minister for Agriculture Exparte Samuel Muchiri W'Njuguna & 6 others (2006) eKLR** as follows: proper value of the subject matter, fair and reasonable, not for profit, public perception, conduct of the proceedings and reasonable compensation.

The court has considered the reference together with the material before it. The applicant has sought to set aside the taxation and award made on the 9<sup>th</sup> May 2013 by Hon. Wangila (Ms) D.R and that the Bill of costs dated 18<sup>th</sup> February 2008 be referred back for taxation on the basis that she failed to take into consideration the value of the subject matter in determining the instruction fees chargeable and in holding that the subject matter of the suit was not set out in the pleadings. As stated in the case of **Joreth Limited Vs. Kigano & Associates (2002)**, the value of the subject matter ought to be determined from the pleadings, judgment or the settlement between the parties but if the same is not ascertainable the taxing officer should use his discretion to assess the instructions as he considers just taking into account the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings and any direction by the trial Judge and all relevant circumstances.

These principles have been reiterated in many cases including that of **F.W. Mulwa Advocates Vs. Patrick Mutheke Nderi (2002) eKLR and East Hotel Limited Vs. Wafula Simiyu & Co. Advocates among others**. The court has perused the plaint that gave rise to the reference herein and as rightly pointed out by the taxing officer, the main prayers are: a declaration that the legal interest of the plaintiff in

L.R. No. 7583/41 at Mwititu Estate Nairobi overrides all interest that the defendant may have, that the plaintiff be at liberty to advertise and sell L.R. 7583/41 and that the defendant do deliver vacant possession of L.R. No. 7583/41 to the plaintiff within 14 days of the order.

Though in the plaint the plaintiff has quoted an amount of Kshs.181 million, that amount was not the subject matter of the suit. As the taxing master rightly observed, the dispute between the parties is on competing rights with regard to the possession of L.R. 7583/41 and not the amounts due and owing to the defendant. The monetary value of the land was not an issue for determination by the court. I fully associate myself with the finding of the court in the case of **Vijay Kumar (supra)** and find that the plaintiff's cause of action in the suit was a declaration of the legal interest of the plaintiff in the suit premises and an order for delivery of vacant possession but not a claim for the value of the property and therefore the contention by the applicant that the value of the subject matter can be ascertained from the plaint, and that should have been used as the basis of the taxation, is not tenable.

The same argument also holds for the valuation report. As noted by the taxing officer, the valuation report dated the 17<sup>th</sup> March, 2012 was presented to the court long after the pleadings had closed and even if it had been presented earlier, this court maintains that the subject matter of the suit was not in issue in the suit.

In the circumstances aforesaid, the taxing master was entitled to use her discretion in assessing the instruction fees. In her ruling she has noted that the plaint was struck out by Hon. Justice Lesiit and the matter never went for full hearing and it was not shown to have been complex or time consuming. As noted in the case of **Republic Vs. The Minister for Agriculture (supra)** the taxation of the Advocates instruction fees is to seek no more and no less than reasonable compensation for the professional work done and should avoid any prospect of unjust enrichment for any particular party or parties.

In the end, the court finds that the application dated 23<sup>rd</sup> May, 2013 is unmerited and is hereby dismissed with costs.

**Dated, Signed and Delivered at Nairobi this 8<sup>th</sup> day of November, 2018**

.....

**L. NJUGUNA**

**JUDGE**

In the presence of:-

.....**For the Plaintiff/Applicant**

.....**For the Defendants/Respondent**