



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 166 OF 2007

ASSOCIATED WAREHOUSING LTD.....APPELLANT

VERSUS

CLARKSON & SOUTHERN LTD.....RESPONDENT

RULING

The High Court may in a reference under Rule 11 of the Advocate Remuneration Order only interfere with the decision of a taxing master where it is demonstrated that the taxing master committed an error in principle or that the fee awarded was manifestly excessive or short of that; that it was manifestly low and inadequate as to lead to an inference of error in the application of the legal principles. See **Steel Construction Petroleum Engineering East Africa Ltd -vs- Uganda Sugar Factory [1970] L.A. 141. First American Bank of Kenya -vs- Shah & Parekh [2002] CALR 64 and Kamunyori & Co Advocates -vs- Milly Children's Trust [2012]eKLR.**

In the matter before the court the Applicant has sought and prayed that the court be pleased to review and set aside the ruling on taxation of the Appellants bill of costs dated 19/3/2013 in respect of item No. 1 [instructions fees]. That in exercise of the courts inherent jurisdiction, the bill be taxed afresh in respect of instructions fees and or issue such orders at it shall deem fit.

The application [reference] is grounded on the facts that:-

- i. The taxing master erred by applying Kshs 80,000,000/- as the subject matter for instruction fees while the plaint did not indicate any amount.**
- ii. The taxing master erred by basing instruction fees on an amount that was not born our by the plaint or the defence.**
- iii. The taxing master erred by failing to apply paragraph 2 of Schedule VII of the Advocate Remuneration Order.**

The Bill of costs giving rise to the reference now before court was dated 19/3/2013. The same was taxed and allowed in the sum of Kshs 1,112,600/-. The item now challenged was claimed as follows;

1. “To taking instructions to defend this claim.

Kshs.1,112,000”.

Indeed there is no value assigned to the subject matter of the appeal in the said bill of costs. It is therefore imperative that one looks at the memorandum of appeal the judgment appealed from and the judgment on appeal to establish if the subject matter is capable of being ascertained by these documents.

The chamber summons filed with the plaint was supported by an affidavit of **WILFRED NYASIMI OROKO** which exhibited the sale agreement upon which the suit was based. That sale agreement, clearly disclosed the purchase price as Kshs 31,000,000/- at clause 3. Equally exhibited by the said affidavit was a transfer also disclosing the consideration at Kshs 31,000,000/-; These were the documents founding the application for mandatory injunction heard and granted by the trial court at *ex parte* on 7/9/2007.

When the defendant filed its statement of defence and chamber summons dated 11/9/2007 seeking to set aside *ex parte* orders, the question of jurisdiction was specifically raised in the defence at paragraph 12 and particulars given. The chamber summons for setting aside, aforesaid, also exhibited two valuation reports putting the value of the suit property at Kshs 80,000,000/-.

When the memorandum of appeal in this matter was filed ground No. 11 was equally unequivocal that the trial court had no jurisdiction to entertain a suit whose subject matter was valued at Kshs 80,000,000/-. After the appeal was argued and Prof. J.B. Ojwang Judge, as he then was, retired to give his judgment on the matter. The judge found, and I quote:-

“The appellant has annexed with the record of appeal a valuation of the suit property by M/S Dato Kithikii Ltd, Valuers, Estate Agents, Managing Agents and Development Consultants dated 5/9/2007. Insurance replacement value is given as Kshs 51,000,000/- and mortgage value at Kshs 68,000,000/- and open market value as Kshs 80,000,000/-.

Such an order of value estimate, clearly, surpasses the pecuniary jurisdiction of any category of Magistrate's Court, it is a typical case for the high court with its unlimited jurisdiction. I will therefore uphold the submissions by Mr. Kinyua that the learned Magistrate had no jurisdiction to entertain, save for the purposes of disclaiming jurisdiction, Mombasa RMCC No. 2501 of 2007. Since this fact was so obvious, a question may be raised regarding the advice of the counsel who rendered the service to the litigant.”

It is beyond peradventure that the judge in his determination, which has not been challenged, found and held that the Magistrate court did not have pecuniary jurisdiction, to entertain the suit as the market value was Kshs 80,000,000/- and therefore allowed the appeal and among other orders:- ordered the lower court suit struck out on that account.

That being the final determination on the value of the subject matter it is not difficult therefore to establish the value of the subject matter in the appeal.

Schedule VI A (b) provide as follows:-

“To sue in any proceedings..... or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties and.”

In the appeal, Judge Ojwang found, and that finding is yet to be disturbed, that the open market value of the land was Kshs 80,000,000/-. That to this court was the determined value of the subject matter. It was the value the law mandated the taxing office to use in assessing the instructions fees. That being the courts' finding there was never an error by the taxing officer in finding that the value of the subject matter was Kshs 80,000,000/-.

I would therefore find and do find that the reference was improperly taken it, lacks merit and is therefore dismissed. I award the costs of the reference to the Appellant/Respondent.

It is so ordered.

Dated and delivered this **14th** day of **September 2016**.

HON. P. J. O. OTIENO

JUDGE