



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISCELLANEOUS CASE 394 OF 2008

KAGWIMI KANG'ETHE & COMPANY ADVOCATES.....APPLICANT

VERSUS

PENELOPE COMBOS1ST RESPONDENT

ANTHONY COMBOS2ND RESPONDENT

RULING

1. In or about February, 2005 the Advocate/Respondent (hereinafter “the Advocate”) was instructed by the client/Applicant (hereinafter “the clients”) to conduct **HCCC No. 440 of 2003 Penelope Combos & Anor –vs- national Bank of Kenya Ltd.** The clients had taken some facilities from the Bank and had given their property known as LR No. 7741/71, Kitisuru Nairobi as security. The clients defaulted and the bank threatened to realize the security over an outstanding sum of US\$398,790.03. In the Plaintiff, the clients claimed several injunctive orders and declarations.

2. Midstream, the relationship between the Advocate and clients turned sour and the Advocate presented his itemized bill of costs which was taxed by the taxing master at Kshs.1,153,720/19 on 27th January, 2009. Promptly, the clients Advocates wrote to the Deputy Registrar on 29th January, 2009 applying for reasons for the award made on 29th January, 2009. On 9th November, 2011 after receiving the typed proceedings and ruling, the clients filed a motion on Notice dated 8th November, 2011 seeking the review of that award of costs. The application was brought under the Advocates Act and the Remuneration Order Rules 2, 11(1) and (2). The same was supported by the Affidavit of Lawrence Karanja sworn on 8th November, 2011.

3. In the Affidavit, it was contended that the taxing master delivered his award on 29th January, 2009 and the reasons and copies of the same were sought on the said 29th January, 2009, that a reference was filed on 3rd May, 2011 seeking that the bill of costs be taxed afresh, that the Client’s Advocates then discovered in the Replying Affidavit of the Advocate that there was a letter dated 16th June, 2011 advising of the availability of the proceedings but the firm of Singh Gitau and Company had not been served with the same. That firm of Advocates complained to the Deputy Registrar of that fact in September, 2011 and a letter to that effect was written to them on 28th October, 2011. That the clients’ Advocates were of the opinion that the taxing officer erred in law and fact in taxing items 1(a) and 1(b) of the Advocates’ bill of costs.

4. It was submitted on behalf of the clients that since the letter advising Ms Singh Gitau & Company Advocates of the availability of the proceedings was only sent on 28th October, 2011 the present

application was filed within time, that the question in the suit (HCCC No.440 of 2003) was no money but declaratory and injunctive orders, that the value of the subject matter should be determined from the pleadings, reliance was placed on the cases of **Joreth Ltd –vs- Kigano & Associates (2002) 1 EA 92, Rosafric Ltd –vs- CBK HCCC No. 1389 of 2001** and **Kenya Wildlife Service –vs- Associates Construction Company HCCC No. 247 of 2001**. Counsel submitted that the taxing officer erred in principle in basing the value of the subject matter on the amount claimed rather than the prayers in the plaint. That since the court fees paid was on declarations and not Kshs.70,000/- the value of the subject matter could not have been more than Kshs.1million. It was urged that instruction fees should have been Kshs.255,000/-

5. The Advocate filed a Replying Affidavit sworn on 28th November, 2011. He contended that the present application was an abuse of court since there was still a similar one on record dated 3rd May, 2011 which had not been determined, that the present application was filed out of time, that the application was incompetent as it was based on proceedings that were neither signed nor certified, that the Affidavit in Support of the application was vague as it did not set out the grounds whereon the taxing officer had erred and that the taxing officer had correctly applied his discretion and cannot be faulted.

6. It was submitted on behalf of the Advocate that there were no grounds to upset and/or fault the taxing officer's award. The Advocate relied on the **Joreth's case, Judicial Hints on Civil procedure, 2nd Edition by Richard Kuloba, Kamunyor & Co. Advocates –vs- Development Bank Ltd, HCCC No. Misc975 of 2003 (UR)**. Counsel urged for the dismissal of the application.

7. I have considered the Affidavits on record, written submissions and the authorities relied on. Before I consider the merits of the application, I propose first to deal with the competency of the same as raised by the Advocate.

8. The Advocate has contended that the application is an abuse of the court as there is still on record a similar application dated 3rd May, 2011. I have seen that application on record. The same was filed on 16th June, 2011. It has never been prosecuted to date. The Advocate did file a Preliminary Objection on 30th June, 2011 to the said application on the grounds that it was not a reference. That objection was never prosecuted. I note that the said application was filed before the reasons of the taxing master were supplied. For that reason, it could not be said to be a reference per se. I therefore do not think it affects the present reference. What the Advocate can only get is costs on the same. The present reference is properly before me. I reject that contention.

9. It has been suggested that the reference was filed out of time. I have seen the letter by the Deputy Registrar dated 16th June, 2011 to the parties. The clients' Advocates indicated that they never received that letter and indeed complained, though belatedly, to the Deputy Registrar in September, 2011 of this fact. Although the Advocate knew of the existence of the said letter as early as June, 2011 instead of notifying the clients' Advocates of the same in the ordinary way, he did so by way of a Replying Affidavit. He never sought to have struck out the client's application on the basis that 14 days had elapsed after 16th June, 2011. He waited until the Deputy Registrar wrote the second letter of 28th October, 2011 and this reference filed on 9th November, 2011 for him to raise this issue. He did not deny or challenge the assertion by Ms Singh Gitau & Company that the said firm did not receive the letter of 16th June, 2011. I see therefore no reason to disbelieve what is asserted by Ms Singh Gitau Advocates that they did not receive the letter of notification until 28th October, 2011. Accordingly, I hold that the application was filed within time and is properly before me for consideration.

10. As regards the application being incompetent as it is based on draft unauthenticated and unsigned proceedings, I agree with this contention. Since the proceedings before the taxing master are to be typed and brought before a judge – it is imperative that they be authenticated by way of signature or certification. However, in the proceedings before me, this defect has been cured by the fact that the Advocate himself has produced at pages 7 to 19 of the exhibit “GKK1” a certified copy of the proceedings and ruling. I have compared the certified proceedings and the draft ones annexed to the

application. They compare well and are the same. For the said reason, I do not think that the application should be dismissed or struck out for that reason. This is so because, there is already on record properly authenticated proceedings.

11. The Advocate objected to the application on the ground that the Affidavit in Support is bare and did not precisely state the basis of objecting to the taxing master's award. I have perused the Affidavit in support sworn by Lawrence Njuguna. I agree with the Advocate that the said Affidavit is bare as far as the grounds of objecting to the taxation is concerned. I associate myself with the sentiments of Richard Kuloba J in his book **Judicial Hints on Civil Procedure 2nd Edition** that a reference must contain reasons for objecting to the taxing master's award. In my view, those reasons may either appear in the summons itself and supported by evidence in the Affidavit in Support or in the Affidavit in support itself. In the case before me, neither the summons nor the Affidavit contained any reasons for challenging the taxation. On that ground alone the client's reference is for dismissal.

12. As regards merit, the principles applicable on a reference are well known. In the case of **Kipkorir Titoo & Kiara Advocates –vs- Deposit Protection Fund Board (2005) e KLR** the Court of Appeal held:-

“On a reference to a judge from the taxation by the taxing officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs.”

An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted en erroneus principals – see Arthur –vs- Nyeri Electricity Undertaking (Supra) or where the taxing officer has over emphasized the difficulties, importance and complexity of the suit (See Dershi Dhanji –vs- Kanji Naran Patel (N.2) (1978) KLR 243. We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly matters specified in proviso (1) of schedule VIA(1), that would be an error of principle.”

13. The client alleges that the taxing officer erred in principle for assessing instructions fees on the basis of the amount claimed of in excess of Kshs.34 million instead of basing the same on the value of the subject matter of the suit. That the subject matter of the suit were mere declarations, and injunctions which could not be quantified in monetary terms. The clients relied on the holding in **Rosafri Ltd –vs- CBK and Oraro & Company HCCC 1389 of 2001 (UR)** wherein the court held that a challenge to the Arbitrator's jurisdiction could not constitute the value of the subject matter.

14. I have looked at the Plaintiff. The same sought to challenge the attempted realization of the security created in favour of the bank. I agree with both the client and the taxing master that the subject matter of the suit could not be the value of the property shown. The Advocate put the value of the property at Kshs.130,000,000/-. That value was never pleaded. The same could not be ascertained from the Plaintiff and as held by the Court of Appeal in the **Joreth Case**, the taxing master is not expected to go outside the pleadings like valuations, to ascertain the value of the property.

15. What then would the value of the subject matter be in the absence of a judgment or a settlement in this matter? In the case of **Kamunyori & Co. Advocates –vs- Development Bank Ltd**, the Hon. Ochieng J held that in recovery suits, the value of the subject matter is the amount claimed by the bank. he held:-

“But then again, the lender is not entitled to claim the full value of the security just because it has been given to him as security. His claim over that property is only in relation to the debt secured thereby, to the extent that such debt remains outstanding. That is because, if the court were to hold that the security was a nullity, the chargee or the debenture-holder would only lose the sum which was secured by such security.

In this case it is common ground that the client herein gave to the Plaintiff, a loan of Kshs.95million. it is only to that extent that the client could have had any claim on the Plaintiff's

property, regardless of whether or not the said property was worth Kshs.500million.”

I do agree with that proposition of law. Applying the same to the case before me. I have seen the Amended Plaintiff. In paragraph 14, the clients claimed that the Bank had on 10th March, 2003 purported to serve a statutory notice of sale threatening to sell the security by public auction if a sum of US\$398,790.03 was not paid. The clients proceeded to claim declarations meant to nullify the charge, the statutory notice and generally that there was no amount recoverable by the bank against them. I think I am in agreement with the taxing officer that since paragraph 14 of the Amended Plaintiff ties well with prayer Nos. (b), (c) and (d) of the Plaintiff and since the value of the possible judgment is ascertainable from the pleading (the irrecoverability of US\$398,790/03 by the bank), the taxing officer did not fall into any error of judgment.

16. Let it be known that it is not necessary that the value of the subject matter be in the prayers, it is to be ascertained from the pleadings generally. My view therefore is that, since the value of the subject matter in this matter seems to have been ascertainable, there was no error of principle on the part of the taxing officer.

17. Accordingly, the reference dated 8th November, 2012 is hereby dismissed with costs.

DATED and DELIVERED at Nairobi this 10th day of October, 2012.

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A. MABEYA
JUDGE