



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO. 312 OF 2014**

**DESNOL INVESTMENTS LIMITED.....PLAINTIFF**

**VERSUS**

**LAZARUS OKELLO.....1<sup>ST</sup> DEFENDANT**

**ALPHA PETROLEUM LTD.....2<sup>ND</sup> DEFENDANT**

**ABDIRAZAK ADOW HASSAN.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. That the Plaintiff filed this reference through the chamber summons dated the 20<sup>th</sup> November 2018 seeking for:

- a) Setting aside of the Deputy Registrar's value of subject matter of Kshs. 1,154,764/= for taxation purposes.**
- b) Setting aside of items 3 to 5, 8 to 12, 14, 16, 18, 23 to 27, 30, 40, 41,45 to 48, 50 to 54 that were taxed as drawn.**
- c) An order either to disallow the above items or allow them as proposed in the Plaintiff's submissions filed on the 10<sup>th</sup> July 2018 and 7<sup>th</sup> August 2018.**
- d) Costs.**

The application is based on the four (4) grounds on its face, that the Deputy Registrar erred in law and fact by holding that items 1 and 2 were chargeable while evidence showed that by the time the 2<sup>nd</sup> Defendant was served with summons and pleadings, the suit had been concluded; that the Deputy Registrar erred in law and fact by finding the value of the suit land as between the Plaintiff and 2<sup>nd</sup> Defendant as Kshs. 56,000,000/=; that the Deputy Registrar erred in fact and law by awarding costs for services not rendered; and that the Deputy Registrar's decision was otherwise against the law.

2. The application is opposed by the 2<sup>nd</sup> Defendant through the five (5) grounds on the grounds of opposition dated 7<sup>th</sup> February 2019 summarized as follows;

- a) That the reference is incompetent, bad in law, primitive and an abuse of the process of the court.**
- b) That there is no error of principle in the taxation as the taxing master took into account all the relevant factors as by law enjoined.**
- c) That there is no evidence that the taxing master took into consideration any irrelevant factor when taxing any of the contentious items and the taxed costs were so taxed in accordance with the law.**

3. The chamber summons came up for hearing on the 4<sup>th</sup> February 2019, when directions on filing and exchanging written submissions were given. That the learned Counsel for the Plaintiff and 2<sup>nd</sup> Defendant filed their written submissions dated the 31<sup>st</sup> May 2019 and 10<sup>th</sup> May 2019 on the 6<sup>th</sup> June 2019 and 12<sup>th</sup> June 2019 respectively.

4. The following are the issues for the court's determinations;

- a) What the value of the subject matter of the suit, as between the Plaintiff and 2<sup>nd</sup> Defendant, for purposes of taxation was.**

**b) Whether the 2<sup>nd</sup> Defendant was entitled to the contested items and at what amount.**

**c) Who pays the costs of this reference.**

5. The Court has considered the grounds on the chamber summons and grounds of opposition, the written submissions by both Counsel, the record, pleadings and come to the following conclusions;

a) That the suit was commenced by the Plaintiff through the plaint dated the 28<sup>th</sup> October 2014, which at paragraphs 7 and 9 sets out the claim relevant to the 2<sup>nd</sup> Defendant as follow;

***“7. That 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, on account of the tenancy relationship that they had with the 1<sup>st</sup> Defendant, and having vacated the suit property, have threatened severally to secure occupation of the suit premises regardless of the change of ownership and have unlawfully trespassed unto the suit premises, the property of the Plaintiff thereby disrupting and interference with its lawfully and peaceful occupation and use thereof.”***

***“9. The acts of the defendants are unlawful and injurious to the proprietary rights of the plaintiff and they accordingly be restrained.”***

That the prayers in the plaint are declaratory, permanent injunction and costs. That filed contemporaneously with the plaint is the notice of motion of even date seeking for injunctive order restraining the Defendants on their own or through their authorized officers, agents and or employees from evicting the plaintiff, trespassing onto, alienating further, or in any other way howsoever, interfering with the Plaintiff's lawful use and or occupation of all that parcel of land designated as Kisumu/Kochieng/4157 with all the premises established thereon. The application was heard *ex parte* and granted in the interim on the 29<sup>th</sup> October 2014 pending the hearing and determination of the motion.

b) That M/s Ouma Njoga & Company Advocates filed their notice of appointment of advocate dated the 11<sup>th</sup> November 2014, coming on record for the 2<sup>nd</sup> Defendant. That the claim by the Plaintiff that the 2<sup>nd</sup> Defendant had not been served with summons to enter appearance by the time the matter was settled as between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, and the filing by the Plaintiff of the chamber summons dated 21<sup>st</sup> January 2015 for substituted service upon the 1<sup>st</sup> and 3<sup>rd</sup> Defendants appears contradictory to the court as the 2<sup>nd</sup> Defendant had a Counsel on record since 12<sup>th</sup> November 2014 when their notice of appointment dated 11<sup>th</sup> November 2014 was filed. That it is important and surprising to note that the Counsel for the 2<sup>nd</sup> defendant was in court on the 8<sup>th</sup> December 2014, when the Plaintiff's Counsel applied for more time to serve the 1<sup>st</sup> and 3<sup>rd</sup> Defendants, and yet claim in this reference that the 2<sup>nd</sup> Defendant had not been served with the summons to enter appearance and pleadings. That had the 2<sup>nd</sup> Defendant not have been served with the summons to enter appearance and pleadings, the Plaintiff would have included it in the chamber summons dated the 21<sup>st</sup> January 2015 for substituted service, and would not have instructed counsel to come on record for it on the 12<sup>th</sup> November 2014.

c) That the Plaintiff's counsel has in the submissions referred to the deposition of Abdisalam Maalim Ali, a director with the 2<sup>nd</sup> Defendant, specifically at paragraphs 24 and 25 as admission that the 2<sup>nd</sup> Defendant had not been served with summons. That the finding in (b) above shows clearly that is not the legal position as the 2<sup>nd</sup> Defendant Counsel had field notice of appointment dated 11<sup>th</sup> November 2014 on the 12<sup>th</sup> November 2014, and actually participated in the proceedings of 9<sup>th</sup> December 2014 among others. That the moment a party enters appearance through Counsel, service for that party are served upon the Counsel on record.

d) That the value of the suit land from which the Plaintiff wanted the all Defendants to be permanently enjoined from among others, was given by the Plaintiff at paragraph 5 of their plaint as Kshs. 56,000,000/= being the purchase price they paid to the 1<sup>st</sup> Defendant. That the value of Kshs. 2,129,000/= proposed by the Plaintiff as the value of the subject matter as between Plaintiff and 2<sup>nd</sup> Defendant for purposes of taxation does not appear anywhere in the plaint, and cannot therefore be an indicator of the value of the subject matter. That had this suit been decided in favour of the Plaintiff and against the Defendants, the Plaintiff would definitely have pegged their instruction fee at the value of the suit land at Kshs. 56,000,000/= and not the lesser figure proposed by the Plaintiff as an alternative. That value that they would have used is the same value the 2<sup>nd</sup> Defendant is entitled to use in their bill of costs for taxation.

e) That when the parties failed to take any steps to prosecute this suit after the last court appearance of 11<sup>th</sup> May 2015, the court issued notices to show cause dated 30<sup>th</sup> November 2017 under **Order 17 Rule 2 of Civil Procedure Rules** for hearing on the 13<sup>th</sup> December 2017. That the learned Counsel for the Plaintiff and 2<sup>nd</sup> Defendant were served on 6<sup>th</sup> December 2017 and attended or were represented on the 13<sup>th</sup> December 2017. That the proceedings of that day show that Counsel for the Plaintiff prayed for the suit to be marked as withdrawn, instead of being dismissed for want of prosecution. That the Counsel for the 2<sup>nd</sup> Defendant did not oppose the oral application but prayed for costs. That the court then marked the Plaintiff's suit as withdrawn with costs to the Defendants. That there is therefore nothing on record upon which to make a finding that the withdrawal was pursuant to the parties reaching a settlement as alleged by the Plaintiff.

f) That further to the findings above, it is trite law that the Judge would only interfere with the discretion of the taxing master in determining the value of the subject matter for purposes of taxation where the officer has failed to take into consideration important and relevant matters, or taken into consideration irrelevant matters. That the court finds no basis of faulting the taxing master on that aspect.

g) That the 2<sup>nd</sup> Defendant's bill of costs dated the 8<sup>th</sup> February 2018, was taxed through the ruling of 6<sup>th</sup> November 2018, at Kshs.

1,154, 000/=. That the Plaintiff's Counsel wrote to the Deputy Registrar, who is the taxing master, on the 13<sup>th</sup> November 2018 with a copy of the 2<sup>nd</sup> Defendant's Counsel, raising their objections to the listed items and seeking to be furnished with reasons to enable them file a reference before the Judge. That the Deputy Registrar responded through the letter dated the 23<sup>rd</sup> November 2018 that the reasons for the decision are as per the ruling of 6<sup>th</sup> November 2018. That by that date, the Plaintiff had already filed the reference vide their chamber summons dated and filed on the 20<sup>th</sup> November 2018. That the Counsel for the 2<sup>nd</sup> Defendant has in their ground 1 of grounds of opposition, and submissions indicated that the reference was filed prematurely. That is because the Plaintiff's Counsel filed the reference before receiving the Deputy Registrar's response to their request for reasons contrary to **Rule 11 (1) and (2) of the Advocates Remuneration Order**. That the Counsel referred the court to a number of Superior Courts decisions on the matter including **Paul Gicheru T/A Gicheru & Co. Advocates vs Karugu (K) Construction Co. Ltd Eldoret HCMCA No. 124 of 2007, Kerandi Manduku & Company vs Gathecha Holdings Limited [2006] eKLR and Evans Thiga Gaturu Advocate vs Kenya Commercial Bank Limited [2012] eKLR** in support of their submissions that the reference is incompetent having been filed before the reasons for the decisions were provided, and hence should be struck out with costs. That this court is in agreement with that findings in the said decisions. The Plaintiff's reference dated and filed on 20<sup>th</sup> November 2018 is for striking out.

6. That for reasons that the chamber summons dated and filed on the 20<sup>th</sup> November 2018, was filed before the taxing master could provide the reasons sought vide the letter dated the 13<sup>th</sup> November 2018, the same is premature and incompetent and is therefore struck out with costs to the 2<sup>nd</sup> Defendant.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 31<sup>ST</sup> DAY OF JULY 2019**

**In the presence of:**

Plaintiff Absent

Defendant Absent

Counsel Mr. Ragot for the Plaintiff

Mr. Njoga for 2<sup>nd</sup> Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**