



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 293 OF 2009 (OS)

SAFARIS UNLIMITED (AFRICA) LTD.....PLAINTIFF

- VERSUS -

MUCHANGA INVESTMENTS LIMITED.....DEFENDANT

RULING

The suit giving rise to these proceedings was brought by way of an Originating Summons dated 19th June 2009 in which the plaintiff sought among others, a declaration that the defendant held all that parcel of land known as L.R. 3586/3(hereafter referred to as “the suit property”)in trust for the plaintiff pursuant to section 37 of the Limitation of Actions Act, a declaration that the plaintiff was entitled to be registered as the proprietor of the suit property and a declaration that the right of the defendant to recover possession of the suit property from the plaintiff was barred under the Limitation of Actions Act. In summary, the plaintiff had contended that it had acquired title to the suit property by way of adverse possession and should be registered as the owner of thereof.

The Originating Summons was opposed by the defendant. The defendant filed a replying affidavit sworn on 2nd July 2009 as well as a Notice of Preliminary Objection dated 1st July 2009. In its replying affidavit and Notice of Preliminary Objection, the plaintiff contended among others that the suit was *res judicata* in light of the decisions in earlier suits involving the same parties namely, Nairobi High Court Misc. Suit No. 133 of 1998(OS)(“original suit”)and Nairobi Court of Appeal Civil Appeal No. 25 of 2002(“the appeal”).The preliminary objection was heard by Mbogholi Msagha J. who upheld the same in a ruling that was delivered on 23rd September 2009. The court held that the issue of adverse possession had been raised in the original suit and that in the Court of Appeal,it was held that since the plaintiff was a tenant in possession,its possession of the suit property could not be adverse to the defendant. The court struck out the suit with costs to the defendant.

After the plaintiff’s suit was struck out as aforesaid, the defendant filed a Bill of Costs dated 10th November 2009 in the sum of Kshs. 26,035,940/-(hereinafter referred to as “the bill”). On instruction fees, the defendant claimed Kshs. 25,863,500/- based on the value of the suit property which was stated to be in excess of Kshs. 2,025,000,000/-. The bill was taxed at Kshs. 307,730/- by Mrs. R.Ougo, Deputy Registrar (as she then was) on 27th October 2010. The taxing officer taxed the instruction fees at Kshs. 153,454/- based on rent which was said to be outstanding from the plaintiff to the defendant amounting to Kshs. 9,507,000/-. A sum of Kshs. 25,710,046/- was taxed off from the instruction fees. The taxing officer also taxed off entirely item numbers 64, 65, 66, 67, 69 and 71 from the bill.The defendant was aggrieved by the decision of the taxing officer.

What is now before the court is a reference by the defendant which was brought by way of a Chamber Summons dated 23rd November 2010 under paragraph 11 of the Advocates(Remuneration)Order seeking

the following orders:-

1. That the quantum of instruction fees in respect of the suit, that is, item 1 and the order declining to award costs under items 64, 65,66,67, 69 and 71 of the defendant's bill of costs dated 10th November 2009 be reviewed and substituted with such amount as is reasonable and just.
2. The costs of the application be provided for.

The reference was brought on several grounds. The defendant contended that the award of Kshs. 153,454/- as basic instruction fees was manifestly low and without any basis in law. The defendant contended that in considering the sum of Kshs. 9,507,000/- which was the sum claimed as outstanding rent as the basis of instruction fees, the taxing officer erred in fact and in law since rent was not the only issue in dispute between the parties. The defendant contended that the taxing officer made an error in principle in awarding Kshs. 153,454/- as instruction fees despite the finding by her that the value of the suit property was Kshs. 459,120,000/- as per the valuation report on record dated 11th April 1995. The defendant also faulted the taxing officer for her failure to direct the defendant to provide a valuation report on the suit property in support of the instruction fees it had claimed in the bill.

The defendant contended further that the taxing officer erred in law in assessing the instruction fees under Schedule VI(1)(b) of the Advocates (Remuneration) (Amendment) Order 2009. With regard to items 64, 65,66,67,69 and 71, the defendant contended that in taxing off the same, the taxing officer failed to be guided by the materiality had placed before her in support of disbursements. Finally, the defendant averred that the taxing officer failed or neglected to provide sufficient reasons or grounds to justify the quantum of costs that she awarded to the defendant. The defendant contended that the parties had by consent requested the taxing officer to provide reasons for her decision on taxation. The defendant contended that the Deputy Registrar in a letter dated 1st February 2011 indicated that her reasons for the taxation were contained in the ruling dated 27th October 2010.

The reference was opposed by the plaintiff through a replying affidavit sworn by Daniel Saidi Wamotsa advocate on 22nd March 2011. The plaintiff denied having consented to the taxing officer providing reasons for her decision on taxation. The plaintiff contended that the defendant commenced the reference without the taxing officer furnishing reasons for her decision. The plaintiff urged the court to strike out or dismiss the defendant's application with costs.

The court directed the parties to file written submissions. The advocates for the parties were thereafter allowed to highlight the submissions. In its submissions dated 12th February 2011, the defendant argued that the taxing officer misdirected herself and arrived at an erroneous conclusion. The defendant argued that the taxing officer assumed that there was no valuation report on record and that the outstanding rent was the value of the subject matter of the suit. The defendant contended that contrary to the taxing officer's finding and holding, there were four valuation reports on the suit property on record which were annexed to the replying affidavit of Horatious Da Gama Rose sworn on 2nd July 2009. The defendant contended that paragraph 13A of the Advocates Remuneration Order grants the taxing officer power to direct production of documents that may be necessary for determination of any matters in dispute before him. The defendant contended that in this case, the taxing officer never expressed doubt over the value of the suit property and that in the absence of directions for production of a further valuation report, the taxing officer was bound to rely on the pleadings by the parties that were on record.

The defendant submitted that the dispute was not in respect of outstanding rent and that the subject matter of the suit could be established from the prayers set out in the Originating Summons. It contended that the subject matter of the suit was the plaintiff's earnest desire to acquire the suit property through adverse possession. The defendant argued that under schedule VI paragraph (b) of the Advocates (Remuneration) Order, the value of the subject matter can be established from the pleadings, judgement and or settlement reached by the parties. The defendant argued that since there was no denial of the value of the suit property which was expressed to be approximately Kshs. 2,025,000,000/-, the taxing officer was bound by the pleadings in which the said value was so expressed.

With regard to the disbursements under items 64, 65,66,67 and 71 of the bill which were taxed off, the defendant submitted that the payments in respect of the said items were ascertainable from the court file. The defendant contended further that the fact that the payments for the said items were made was not disputed and that what was in dispute were the amounts to be awarded.

In its submissions dated 10th March 2011, the plaintiff raised a preliminary objection to the defendant's reference on the grounds that the defendant did not exhibit reasons for the decision of the taxing officer as required under paragraph 11(2) of the Advocates (Remuneration) Order. The other limb of the objection was that the defendant had not obtained a certificate of taxation as required by the mandatory provisions of Order 21 Rule 9(2) of the Civil Procedure Rules showing the taxed costs. The plaintiff contended that the defendant's reference was an abuse of the court process and should be struck out with costs.

The plaintiff submitted further that the taxing officer applied the correct principles in taxing the instruction fees. The plaintiff argued that item 1 in the bill of costs was based on imagined market value of the suit property and that instruction fees cannot be based on estimates or imagined values. The plaintiff contended that the valuation reports relied on by the defendant which were attached to the replying affidavit of Da Gama Rose dated 2nd July 2009 were based on purported developed subdivisions of L.R No. 3586/3. The plaintiff submitted that L.R No. 3586/3 was undeveloped and was not subdivided. The plaintiff submitted that the value and acreage of the suit property were in dispute and were never determined.

The plaintiff argued that the taxing officer correctly applied the rent owing as the basis of instruction fees since this was the amount in dispute between the parties and was the amount paid upon determination of the suit. In respect to items 64, 65, 66, 67, 69 and 71 of the bill which were disallowed, the plaintiff submitted that the taxing officer properly exercised her discretion since the amounts claimed under these items were not proved through production of receipts even after the defendant was given reasonable time to produce the same.

I have considered the defendant's reference and the opposition thereto by the plaintiff. The principles that guide the court when dealing with a reference are well settled. A judge sitting on a reference will not interfere with the exercise of discretion by the taxing officer unless the taxing officer erred in principle in assessing the costs. See, Joreth vs. Kigano & Associates (2002) EA 92 and Kipkorir, Titoo & Kiara Advocates vs. Deposit Protection Fund Board (2005) 1 KLR 528. What I need to determine in the reference before me is whether the taxing officer made an error of principle to warrant interference with her exercise of discretion.

The defendant challenged the taxing officer's taxation of the instruction fees and six items in the bill which concerned disbursements and sought a review of the same. In assessing the instruction fees, the taxing officer found that there was no valuation report on the suit property on record to support the value of the subject matter of the suit which the defendant had put at approximately Kshs. 2,025,000,000/-. The taxing officer then proceeded to assess the instruction fees based on the sum of Kshs. 9,507,000/- which was the amount being claimed by the defendant as outstanding rent as the value of the subject matter of the suit.

The factors to be considered in ascertaining the value of the subject matter of a suit were set out by the Court of Appeal in the case of Joreth vs. Kigano & Associates (supra) as follows:-

“We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances”.

See also the case of Eastland Hotel Limited vs. Wafula Simiyu & Co. Advocates (2014) eKLR where the

Court of Appeal stated that:-

“This Court’s decision in JORETH LIMITED v KIGANO & ASSOCIATES (supra) which was cited to us by both the appellant and the respondent, states that the value of the subject matter for purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement. But where the same is not ascertainable from the pleadings, judgment or settlement, the taxing officer is entitled to use his/her discretion to assess instruction fees. In so doing, the taxing officer will have to take into account, amongst other matters, the nature and importance of the cause or the matter, the interest of the parties, the general conduct of the proceedings and other relevant factors which may include the complexity of the case and its urgency. It is the value of the subject matter in dispute which determines the amount of instruction fees payable to an advocate.

Was the taxing officer able to determine the value of the subject matter from the “pleadings” on record? What are “pleadings”? Under Section 2 of the Civil Procedure Act, pleading includes:

“A petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.”

In the Originating Summons, the plaintiff sought a declaration that it had acquired the suit property by adverse possession and that it was entitled to be registered as the owner thereof in place of the defendant. The subject matter of the dispute between the parties was therefore the suit property. In assessing the instruction fees, the taxing officer was in the circumstances supposed to base the same on the value of the suit property. In its bill, the defendant had put the value of the suit property to be “in excess of Kshs. 2,025,000,000.00”. The onus was upon the defendant to demonstrate that the suit property had a value in excess of Kshs. 2,025,000,000.00.

Contrary to the defendant’s submission, paragraph 13A of the Advocates Remuneration Order does not put an obligation upon the taxing officer to direct parties to produce documents in support of the items in their bill of costs.

Paragraph 13A of the Remuneration Order provides as follows;

“For the purpose of any proceeding before him, the taxing officer shall have power and authority to summon and examine witnesses, to administer oaths, to direct the production of books, paper and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him”.

The power granted to the taxing officer under paragraph 13A of the Advocates Remuneration Order is discretionary and not obligatory. The taxing officer cannot be faulted for her failure to direct the defendant to furnish the court with a current valuation report on the suit property.

Section 109 of the Evidence Act, Chapter 80 Laws of Kenya provides that;

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.

I am in agreement with the finding by the taxing officer that the defendant did not place evidence before her in proof of the value of the suit property which it claimed to be in excess of Kshs. 2,025,000,000.00. In the circumstances, I am unable to fault the taxing officer in her decision to reject the sum of Kshs. 2,025,000,000.00 that was put forward by the defendant as the value of the subject matter of the suit. The next question is whether the taxing officer having rejected the said sum of Kshs. 2,025,000,000.00 as the value of the subject matter of the suit was entitled to adopt the sum of Kshs. 9,507,000/- which the defendant had stated as the rent that was owed by the plaintiff as the value of the subject matter of the suit. On this issue, I am in agreement with the defendant that the taxing officer fell into error. As I have

stated earlier, the dispute before the court was not over rent.

What was brought before the court for determination was whether or not the plaintiff had acquired the suit property by adverse possession and was entitled to be registered as the owner thereof. There was no basis at all for taking the value of rent which was alleged to be due from the plaintiff as the value of the subject matter of the suit. In my view which is supported by the authorities cited above, after the taxing officer rejected the sum of Kshs. 2,025,000,000/- which the defendant had put forward as the value of the subject matter of the suit, the taxing officer was supposed to go back to the record and try to ascertain the value of the subject matter of the suit from the pleadings and the decision of the court which terminated the case. If the value of the subject matter was not ascertainable from the pleadings or judgment of the court, the taxing officer was entitled to use her discretion to assess instruction fees.

The defendant had contended that the taxing officer had before her sufficient material on the basis of which she could have assessed the value of the subject matter of the suit instead of relying on the alleged rent which was said to be due from the plaintiff. The defendant had placed before the court through affidavit sworn by Horatious Da Gama Rose on 2nd July 2009 in opposition to the Originating Summons, four valuation reports dated 7th August 1981, 15th August 1990, 7th October 1993 and 11th April 1995. The defendant contended that these valuation reports should have guided the taxing officer in assessing the value of the suit property. The valuation report dated 11th April 1995 which was the latest amongst the four placed the market value of the suit property at Kshs. 459,120,000/- as at the said date. I have noted from the affidavit of Gordon Barnard Anthony Church sworn on 13th July 2009 that the accuracy of these valuation reports was contested. The plaintiff had contended that the said valuation reports were prepared on the basis that the suit property had been subdivided which was not the case. I am in agreement with the plaintiff in its submission that the issue as to whether or not the suit property had been subdivided and the value thereof was not determined by the court.

It follows from the foregoing that the taxing officer could not ascertain the value of the subject matter of the suit from the pleadings or decision of the court. In the circumstances, the only option that was left for the taxing officer was to use her discretion in assessing what was a reasonable instruction fee in the circumstances taking all factors into account.

On the issue of taxation of items 64, 65, 66, 68, 69 and 71 of the bill, I am of the view that items 64, 66, 69 and 71 were drawn to scale and should not have been taxed off by the taxing officer. The taxing officer erred in her finding that these items were not supported by receipts. On the other hand, items 65 and 67 were properly taxed off since they were not supported by receipts.

From what I have set out above, I am in agreement with the defendant that the taxing officer erred in principle in her assessment of the instruction fees which was claimed under item 1 of the bill and the disbursements which were claimed under items 64, 66, 69 and 71 and the court should interfere with her exercise of discretion. The defendant has urged the court to review the decision of the taxing officer and substitute the costs which were awarded under the said items with an amount that is reasonable and just. Having found that the taxing officer erred in principle, I have the discretion to either remit the bill to the taxing officer with appropriate direction on how it should be taxed or to proceed and tax the same. In the case of Kipkorir Titoo & Kiara Advocates vs. Deposit Protection Fund Board (supra) the court stated as follows:-

“And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see– D’Sonza v Ferrao [1960] EA 602). The Judge has however a discretion to deal with the matter himself if the justice of the case so requires (see Devshi Dhanji Naran Patel (No. 2) [1978] KLR 243).”

See also, Moronge & Company Advocates vs. Kenya Airports Authority KSM CA 262 of 2012. Having regard to the length of time the present reference has been pending in court and the fact that only the taxation of seven items in the bill was contested, the main one being the instruction fees and the rest, disbursements, I am of the view that it would be in the interest of justice for the court to exercise its

discretion in favour of taxing the bill instead of remitting the bill to the taxing officer for taxation of these items. In the case of First American Bank of Kenya Ltd vs. Gulab P Shah & Others (2002) 1 E.A. 61 (Ringera J. as he then was) stated that:-

“I have asked myself whether I should remit the bill back to the taxing officer with directions that she should determine the instruction fees ... I am convinced in my mind that that would be a waste of judicial time in the circumstances of this case. I would also saddle the parties with further unnecessary costs. I think the just course of action in this matter is for this court to exercise its discretion in a reference on taxation to determine the matter with some finality.”

I agree entirely with that statement. Before attempting to tax the items the subject of this reference, the plaintiff had raised a preliminary objection which I need to dispose of. The plaintiff's objection had two limbs. The first limb was to the effect that the defendant's reference is incompetent for failure by the defendant to attach to the application the reasons which were given by the taxing officer for the taxation. The second limb was that the reference offended Order 21 rule 9 (2) of the Civil Procedure Rules in that the same was filed before the defendant had obtained a certificate of costs. I find no merit in both limbs of the plaintiff's preliminary objection. I have noted from the record that on 1st November 2010, four days after the decision of the taxing officer, the defendant's advocates wrote to the Deputy Registrar with a copy to the plaintiff's advocates expressing the defendant's objection to the taxation of particular items in the bill. In the same letter, the defendant requested the taxing officer to furnish it with reasons for her decision on those items. The letter was received at the court registry on 2nd November 2010. The defendant seems not to have received any response from the taxing officer to the said letter and proceeded to file the reference herein on 23rd November 2010 before receiving the said reasons.

When the reference came up for hearing before Mbogholi J. on 20th January 2011, the parties agreed by consent among others that the taxing officer should respond to the defendant's advocate's letter dated 1st November 2010 by providing the reasons for her decision which the defendant had asked for. On 1st February 2011, the taxing officer wrote to the defendant's advocates pointing out that her reasons for the taxation of the items in the bill which the defendant had objected to were contained in her ruling dated 27th October 2010 a copy of which she forwarded to the said advocates. A typed copy of the said ruling is on record. I am of the view that since the plaintiff had consented to the taxing officer providing her reasons for the taxation after the reference had been filed, the plaintiff had waived its right to object to the reference for want of reasons for the taxing officer's decision. In any event, I do not think that filing of a reference after lodging objection to taxation but before obtaining reasons for the decision is fatal. That in my view is a procedural technicality which the court would ignore for the sake of substantive justice.

In the case of, Mawji -vs- Arusha General Store [1970] E. A 137 it was held that irregularity in relation to the rules of procedure does not vitiate proceedings if no injustice has been done to the parties. Sir Charles Newbold P. expressed himself on the issue as follows at page 138;

“We have repeatedly said that the rules of procedure are designed to give effect to the rights of the parties and that once the parties are brought before the courts in such a way that no possible injustice is caused to either, then a mere irregularity in relation to the rules of procedure would not result in the vitiating of proceedings.”

It has not been demonstrated that the plaintiff suffered any prejudice as a result of the taxing officer having furnished her reasons for the taxation to the defendant after the filing of the reference herein. The plaintiff's second limb of the objection similarly has no merit. There is no requirement either in the Advocates Remuneration Order or in the Civil Procedure Rules that a certificate of taxation is a condition precedent to the filing of a reference. For the foregoing reasons, the plaintiff's preliminary objection is overruled.

After the disposal of the objection, I now come back to the assessment of the instruction fees. The principles that guide assessment of costs were laid down in the case of Premchand Raichand Ltd vs. Quarry Services of East Africa Ltd (No. 3) (1972) EA 162 as follows--

- (a) Costs should not be allowed to rise to a level as to confine access to justice to the wealthy;
- (b) A successful litigant ought to be fairly reimbursed for the cost he has had to incur;
- (c) The general level of remuneration of Advocates must be such as to attract recruits to the profession; and,
- (d) So far as practicable there should be consistency in the awards made.

As I have stated earlier the value of the subject matter of this suit is the value of the suit property. I have on record four valuation reports on the suit property made between 1981 and 1995. The first one was made on 7th August 1981. This valuation report which had put the market value of the suit property at Kshs. 16,000,000/- was not disputed in that it was prepared prior to the purported subdivision of the suit property. The court takes judicial notice of the fact that the value of land generally appreciates. There is no indication that value of land in the area where the suit property is situated depreciated at any time between 1981 and the year 2010 when the decision the subject of this reference was made. The last three valuation reports on record made on 15th August 1990, 7th October 1993 and 11th April 1995 respectively gave the value of the suit property as Kshs.110,000,000/-,Kshs. 197,095,000/- and Kshs. 459, 120,000/- respectively.

I have noted that these valuation reports were not made for the purposes of this suit and that the last of them was over 15 years old as of the date of taxation. I am of the view that the value of the suit property as at the date of taxation could not be less than Kshs. 255,405,000/- which is the average of the estimated value of the suit property that was contained in the last three valuation reports referred to above. Considering the said estimated value of the suit property, the nature and importance of the matter and the interest of the parties and doing the best I can for both parties, I am of the view that a sum of Kshs. 5,000,000/- would be fair and reasonable in the circumstances as instruction fees. The suit was determined in a summary manner. Under Schedule VI(1)(ii) of the Advocates (Remuneration) (Amendment) Order, 2006, the instruction fees due to the defendant is Kshs. 3,750,000/-. As I have stated earlier, items 64, 66,69 and 71 of the bill were drawn to scale. I will allow the same as drawn in the bill of costs dated 10th November 2009. Items 65 and 67 were properly taxed off. The taxation thereof is upheld.

In conclusion, the defendant's application dated 23rd November 2010 is allowed on the following terms:

1. The decision of the taxing officer in respect of items 65 and 67 in the bill of costs dated 10th November 2009 is upheld.
2. The decision of the taxing officer in respect of items 1, 64, 66, 69 and 71 in the bill of costs dated 10th November 2009 is set aside and in place thereof, the said items are taxed as follows;
 - i. Item 1 is taxed at Kshs. 3,750,000/-. A sum of Kshs. 22,113,500/- is taxed off.
 - ii. Items 64, 66, 69, and 71 are taxed at Kshs. 2,748/-,Kshs.84/-, Kshs.3000/- and Kshs.696/- respectively.
3. The defendant shall have the costs of the reference assessed at Kshs.30,000/-.

Delivered and Signed at Nairobi this 15th day of September, 2017

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

No appearance for the Plaintiff/Respondent

Ms. Nyaga h/b for Ngatia for the Defendant/Applicant

Catherine Court Assistant