



**REPUBLIC OF KENYA**

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

**ELC CASE NO.265 of 2014**

**JITENDRA B. DHOKIA.....PLAINTIFF**

**VERSUS**

**BANK OF BARODA (KENYA) LTD ..... DEFENDANT**

**RULING**

1. Through the Chamber summons dated 18<sup>TH</sup> April 2017, Bank of Baroda (Kenya) Ltd, the Defendant, seeks to have the Deputy Registrar's ruling of 21<sup>st</sup> March 2017 on item 1 of the bill of costs dated 6<sup>th</sup> September 2016 set aside and the item taxed afresh. The application is based on four (4) grounds summarized as follows;

a) That the taxing officer erred in principle in assessing item 1 for instruction fee on the party to party bill of costs dated 6<sup>th</sup> September 2016 at Ksh.75,000/=.

b) That the taxing officer failed to seek for a valuation of Kisumu Municipality/Block 7/443 which as the charged property was the basis of the proceedings before assessing the said party to party bill of costs.

c) That the pleadings contains the sums disbursed to Jitendra B. Dhokia, the Plaintiff, and charged on the said suit property as security.

d) That the Defendant was defending the suit as provided for under schedule 6A and 6B of Advocates Remuneration order 2014, and the instruction fee should be as prescribed in schedule 6A increased by one half.

The application is supported by the affidavit sworn by Mitchell J.B. Menezes, learned counsel on record for the Defendant, sworn on the 12<sup>th</sup> April 2017.

2. The chamber summons is opposed by Jitendra B. Dhokia, the Plaintiff, through his four (4) grounds of opposition dated 7<sup>th</sup> June 2017 summarized as follows:

a) The application is incompetent, incurable and defective.

b) The application is otherwise an afterthought, untenable, unreasonable and an abuse of the courts process.

c) The Defendant has not established requirement for granting the present application.

d) The application be dismissed with costs to the “Defendant/Respondent” (sic).

3. The application came up for hearing on the 12<sup>th</sup> June 2017 when Mr. Maganga and Mweisigwa, learned counsel for the Defendant and Plaintiff respectively, made their oral submissions summarized as follows:

**A) DEFENDANTS COUNSEL’S SUBMISSIONS:**

- That **Section 27 of the Civil Procedure Act** gives court’s jurisdiction to not only award costs, but also determine the extent of the costs.
- That in assessing costs, the taxing master must be guided by the complexity of the suit and the value of the subject matter, which can be deduced from the judgment and or pleadings.
- That as there was no judgment in this case, the pleadings filed especially the notice of motion dated 8<sup>th</sup> September 2014, disclosed that about Ksh.150,000,000/= had been disbursed to the Plaintiff.
- That their bill of costs had prayed for instruction fee on item 1 of Ksh.2,353,850/39 based on the foregoing total of indebtedness.
- That the amount awarded by the Deputy Registrar of Ksh.75,000/= on item 1 based on schedule 6 should be set aside and replaced with an amount that takes into consideration the complexity of the matter and value of the property after consolidation of the facilities.
- That the application is arguable and not an abuse of the court’s process.

**B) PLAINTIFF COUNSELS SUBMISSIONS**

- The application is an afterthought, untenable and an abuse of the court’s process.
- That the charged property and the total debt claimed were not the subject matter of this suit. That the subject matter of the suit was the Plaintiff’s rights as a chargor questioning whether the Defendant’s power of sale had crystalized, which right does not have a value.
- That there is no valuation to base the instruction fee on and the taxing master exercised her discretion correctly.
- That this reference should be dismissed with costs to the Plaintiff.

4. The following are the issues for the determination by the court;

a) Whether the pleadings discloses the pecuniary value of the subject matter.

b) Whether the award of Ksh.75,000/= on item 1 of the party to party bill of costs dated 6<sup>th</sup> September 2016 should be set aside.

c) Who pays the costs of this reference.

5. The court has carefully considered the grounds on the chamber summons, grounds of opposition, the pleadings filed, oral submissions by both counsel and come to the following determinations;

a) That the suit was commenced by the Plaintiff through the plaint dated 8<sup>th</sup> September 2014 that was filed contemporaneously with the notice of motion of even date. The prayers in the plaint included injunction, taking of accounts, declaration that Defendant had charged unlawful and illegal charges, order that the Plaintiff had cleared all the loans guaranteed by a charge on Kisumu Municipality/Block 7/433, setting aside of the statutory notice dated 29<sup>th</sup> May 2014 and costs. The prayers in the notice of motion were for temporary injunction and costs.

b) That paragraphs 10 and 11 of the plaint, and paragraphs 9 and 10 of the affidavit sworn by Jitendra Ashwin Dhokia on 8<sup>th</sup> September 2014 in support of the notice of motion filed with the plaint, discloses that the amount claimed by the Defendant against the Plaintiff as at 29<sup>th</sup> May 2014 was Ksh.143,590,028/86 which is also the amount in the statutory notice marked "JAD-10".

c) That the defendant's claim against the plaintiff as of the time of filing the suit and the notice of motion was the amount set out in the statutory notice dated 29<sup>th</sup> May 2014. That amount was the total after consolidation of various facilities secured on charges on Kisumu Municipality/Block 7/433 and other properties. That was the amount the Plaintiff was challenging the Defendant on when he filed this suit which was later withdrawn under notice of withdrawal dated 8<sup>th</sup> July 2016 and entered in the court record on the 29<sup>th</sup> July 2016.

d) That it follows that the Plaintiff's suit was aimed at stopping the Defendant from executing their power of sale on Kisumu Municipality/Block 7/443, which was one of the securities charged to secure the various financial facilities totaling Ksh.143,590,028/86 as at 29<sup>th</sup> May 2014, which he disputed.

e) That the court's ruling of 30<sup>th</sup> September 2015, in respect of the Plaintiff's notice of motion for injunction dated 8<sup>th</sup> September 2014, did not deal with the money value of the subject matter of the suit. The value is apparent in the pleadings as set out in paragraph (b) above and there was no need to seek for a valuation before taxing item 1 on instruction. That it is further noted that the Defendant entered appearance through their memo dated and filed on the 16<sup>th</sup> September 2014. They also filed grounds of opposition dated 25<sup>th</sup> September 2014, replying affidavit sworn on 8<sup>th</sup> October 2014, further replying affidavit sworn on 14<sup>th</sup> January 2015, statement of defence dated 25<sup>th</sup> September 2014, list of authorities dated 3<sup>rd</sup> August 2015 and written submissions dated 1<sup>st</sup> August 2015. The foregoing documents goes to show this was a complex matter which fact the Hon. Deputy Registrar appear not to have considered in taxing item 1.

6. That the reference by the Defendant on the Deputy Registrar's ruling of 21<sup>st</sup> March 2017 is meritorious and is allowed in the following terms:

a) That the ruling of 21<sup>st</sup> March 2017, on item 1 only of the bill of costs dated 6<sup>th</sup> September 2016, be and is hereby set aside.

b) That the matter be mentioned before the Deputy Registrar for directions on taxing of item 1 of the bill of costs dated 6<sup>th</sup> September 2016 afresh taking into account the money value of the suit's subject matter as laid out in paragraph 10 and 11 of the plaint.

c) Each party bears their own costs in this reference.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

DATED AND DELIVERED THIS 8<sup>TH</sup> DAY OF NOVEMBER 2017

In presence of;

Plaintiff

Non attendance

Defendant Non attendance

Counsel Non attendance

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**8/11/2017**

**8/11/2017**

S.M. Kibunja Judge

Oyugi court assistant

Parties absent

Mr. Otieno Njoga for Defendant/applicant

Mr. Mwesigwa for Plaintiff/Respondent

Court: Ruling dated and delivered in open court in the presence of Mr. Otieno Njoga and Mr Mwasiwa for Defendant and Plaintiff respectively.

**S.M. Kibunja – Judge**

**8/11/2017**



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