Shah & 3 others v Guardian Bank Limited & another (Civil Appeal 39 of 2020) [2022] KEHC 10157 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEHC 10157 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 39 OF 2020

JM NGUGI, J

JULY 28, 2022

BETWEEN

HASMUKH R. SHAH ..... 1ST PLAINTIFF

SANJAY R. SHAH ..... 2ND PLAINTIFF

KAVIT H. SHAH ..... 3RD PLAINTIFF

FLAMCO LIMITED ..... 4TH PLAINTIFF

AND

GUARDIAN BANK LIMITED ..... 1ST DEFENDANT

JEREMIAH KIARIE MUCHENDU T/A ICON AUCTIONEERS .... 2ND DEFENDANT

RULING

1. The Plaintiff's suit sought inter alia a permanent injunction restraining the Defendants from proclaiming the Plaintiff's properties and a declaration that an earlier proclamation was illegal. On 13/10/2020, the parties herein entered a consent, whose terms were that the proclamation taken out by the Defendants would be lifted and the matter withdrawn with costs to the Plaintiffs.

2. The Plaintiffs then proceeded to file a Party and Party Bill of Costs dated 29/10/2020, in which they prayed for a total of Kshs. 1,203,162.373. In her Ruling dated 24/08/2021, the Taxing Officer taxed the Bill at Kshs. 1,167,693.75/-.

3. The Defendants objected to that amount vide the Notice of Objection dated 30/08/2021. They particularly objected to items 1, 2, 4(b), 5(d) and 10(f) and the computation of the entire Bill. The Defendants subsequently filed a Reference contained in the Chamber Summons dated 29/09/2021, in which they seek the following orders:

1. That the ruling by the Taxing Officer of this Honourable Court delivered herein on 24/08/2021 allowing the claim for party and party costs in the sum of Kshs. 1,167,693.75 be and is hereby set aside in its entirety.

2. Thatthe Honourable Court be pleased to remit the matter for taxation afresh of the party and party costs claimed herein with appropriate directions as to the correct approach to take in taxation of item 1 of the Bill of Costs dated 29/10/2020 in so far as it relates to a claim on instructions/ professional fees, item 2 thereof in so far as it relates to a claim for getting up fees and items 4(b), 5(d) and 10(f) relating to service fees on alleged service upon the 2nd Defendant.

3. Thatthe costs of this application be provided for.

4. The Application is premised on the grounds set out in the application and the Affidavit of Mary Omullo- a Legal officer the 1st Defendant's Legal Officer. The gist of the grounds therein is that the Taxing Officer misdirected herself and erred in principle by relying on the sum of Kshs. 43,420,334.65 which was not the value of the property that was to be sold by public auction and that no value of the proclaimed goods was given in the Proclamation Notice.

5. The Defendants further fault the Taxing Officer for relying on *Rachuonyo & Rachuonyo Advocates v National Bank of Kenya Limited* [2021] eKLR and contend that even if the value of the subject matter was to be 43,420,334.65, the Taxing Officer assessed instructions under Schedule 6A(1)(b) of the *Advocates Remuneration Order*, 2014 yet the suit was not defended and that the Taxing Officer ought to have applied Sub-paragraph 1(a) of the said schedule. According to the Defendants, even if Schedule 6A(1)(b) was applicable, the Taxing Officer did not properly apply the graduated scale thereunder and proceeded with assessment of instruction fees on cumulative basis against the guidelines in the scale.

6. They further fault the Taxing Officer for assessing the amount under item 1 at Kshs. 1,122,228.75 way above the sum of Kshs 851,305.02 claimed, thereby altering the bill of costs contrary to the Paragraph 71 of the Advocates Remuneration Order.

7. The Defendants contend that the above errors affected the final tally of the final amount, which constitutes an error of principle. They claim that the Taxing Officer erred in principle by failing to tax off Item 2 for getting up fees when the matter was undefended. They further claim that the Taxing Officer erred in allowing costs in respect of service when the record has no such evidence of service, or the alleged service was effected electronically. They therefore maintain that there is sufficient justification to interfere with the decision of the Taxing Officer.

8. The Plaintiffs opposed the Application through the Affidavit of Kiongo P. Murimi -Advocate dated 08/11/2021 in which he contends that the claim was instituted for the protection and enforcement of the Plaintiffs' right to own property and the prevention of unfair and unjust deprivation of the Plaintiff's property worth Kshs. 43,420,334.65, which was the amount upon which the Taxing Officer based her decision.

9. He depones that the Plaintiffs' advocates are entitled to the full instruction fees since they were earned in full when the advocates took instructions and filed the requisite pleadings. He contends that the matter having come up for hearing on 28/09/2020, Schedule 6 Paragraph 1(b) of the Advocates Remuneration Order is applicable, and the Advocates are entitled to the full instruction fees. He further contends that the Defendants advocates having appeared on 28/09/2020, 06/10/2020 and 13/10/2020, the matter cannot be said to have been undefended and that in view of the hearing on the 28/09/2020, getting up fees was duly earned.

10. Lastly, he contends that service via email is an acceptable mode of service and as such, such service is deemed as effective. He believes therefore that the Taxing Officer considered material facts in reaching her decision and the same ought to be affirmed.

11. The Application was argued by way of written submissions. The Defendants' submissions are dated 19/01/2022. The Defendants rely on the principle set out in *Peter Muthoka & Another v Ochieng & 3 Others* [2019] eKLR as to when the Court in a reference can interfere with the discretion of the Taxing Officer. They maintain that the Taxing Officer committed errors of principle that would warrant interference by this Court.

12. They reiterate that the Taxing Officer based her findings on the incorrect figure of Kshs. 43,420,334. They argue that the Taxing Officer ought to have based her finding on the value of the property to be sold at a public auction, which was never pleaded in the Plaint. They submit that the Taxing Officer's reliance on R*achuonyo & Rachuonyo Advocates v National Bank of Keny Limited* [2021] eKLR was out of context because unlike in this case, the taxation in that case involved a dispute on property.

13. The Defendants argue that the Taxing Officer ought to have considered the averments in the Plaint, appreciated the true and correct subject matter, and arrived at the finding that the subject matter was the legality of the proclamation and not the value of the attached property. They further point to the reliefs sought in the Plaint which they say were two non-pecuniary reliefs as proof that the Taxing Officer considered the wrong subject matter. The Defendants cite a passage from *Allen W. Gichuhi's Litigation, the Art of Strategy and Practice at Pages 359-360* and the case of *Kenya Wildlife Services v Associated Construction Company Ltd* [2002] eKLR in support of their argument that the value of the subject matter is to be determined by referring to the claim sought in the prayers.

14. The Defendants further rely on{{>/akn/ke/judgment/keca/2015/595 *Kamunyori & Company Advocates v Development Bank of Kenya Limited* [2015] as cited in *Otieno, Ragoti & Company Advocates v Kenya Airports Authority* [2021] eKLR for the proposition that failure to ascertain the correct subject matter for purposes of taxation is an error in principle.

15. Nevertheless, the Defendants contend that even if the Taxing Officer is taken to have applied the correct value of the subject matter, the Instruction Fees ought to have been taxed under the undefended scale in terms of Schedule 6 Part A(1)(a) of the *Advocates Remuneration Order*, 2014. This they argue is because, from the Court Record, the Defendants neither filed a Defence, denied liability nor entered appearance. They submit that from the record, they only appeared before the Court for an interlocutory application which they did not oppose. They argue that listing of a matter before the Judge is not indicative of a matter being defended. This also, they say is an error in principle.

16. The Defendants reiterate that even if the Scale for defended matters was applicable, the Taxing Officer granted Kshs. 1,122,228.75, on instruction fees, way above the sum of Kshs. 851,305, effectively amending the Bill of Costs contrary to Paragraph 71 of the Advocates Remuneration Order.

17. They submit that the Ruling was replete with arithmetic distortions and point out that the total bill as drawn was Kshs. 1,203,162.373 and that despite taxing off Kshs. 176,205,2704 and adjusting other items, the Bill of Costs still yielded Kshs. 1,167,693. They allege that the Taxing Officer did not deal with Item 2 on the Bill, and presumably, allowing it would have led to the sum of Kshs. 1,405,996.75, a figure higher than the total sum claimed in the Bill, a situation they claim is untenable.

18. Lastly, the Defendants urge the Court to find that fees for getting up and preparing for trial had not been earned because no Defence was filed, and the matter had not been confirmed for hearing and the same ought to have been taxed off.

19. The Plaintiffs' submission are dated 08/11/2021. The Plaintiffs insist that the suit was solely about the protection and enforcement of their right to own property, particularly, the prevention of unfair and unjust deprivation of their property worth Kshs. 43,420,334.65, making it the value of the subject matter. They affirm the Taxing Officer's reliance on Rachuonyo and *Rachuonyo Advocates v National Bank of Kenya Limited* [2021] eKLR and contend that in that case, the value of the subject matter was held to be the value of the land whose disposal an injunction sought to stop.

20. The Plaintiffs reject the Defendants' reliance on the Kenya Widllife Service Case (supra) and contend that that case only challenged the jurisdiction of the arbitral tribunal. This they say is different from the instant case where they sought to prevent sale of their merchandise valued at Kshs. 43,420,334.65. The Plaintiffs further rely on *Governors Balloon Safaris Limited v Skyship Company Limited & Another* [2015] eKLR and Joreth Ltd v Kigano & Associates for the proposition that the value of the subject matter should be deduced from the entire pleadings and not restricted to the part where prayers are contained and that certain parts of the pleadings should not be considered otiose. Accordingly, the Plaintiffs argue that paragraph 9 of their Plaint was the cornerstone of their cause of action and cannot be considered otiose.

21. On whether the suit was defended and consequently what section of the Remuneration Order is applicable, the Plaintiffs insist that they earned 100% of the instruction fees when their advocates received instructions and filed the requisite pleadings. They again rely on the Rachuonyo & Rachuonyo Advocates and Joreth Ltd and contend that instruction fees is a static item that is not affected or determined by the stage the suit has reached. In any case, they argue that the matter had been set down for hearing on 28/09/2020.

22. On getting up fees, they contend that an advocate appeared on behalf of the Defendants on 28/09/2020, on 06/10/2020 and on 13/10/2020 and as such, the suit cannot be said to have been undefended. They reiterate that the matter had been set down for hearing on 28/09/2020, which they contend was the most critical hearing of the dispute and rely on *Oyatta & Associates v Nilam Doshi* [2013] eKLR.

23. Lastly, on the issue of service, the Plaintiffs submit that the Defendants were served through their last known e-mail address and Schedule 6 Paragraph 9(a) & b are the only modes of assessing service of documents. They thus urge the Court to affirm the Taxing Officer's decision.

24. From the foregoing, the following issues arise for determination:

    (i) Whether the Taxing Officer considered the correct value of the subject matter.

    (ii) Whether the Taxing Officer applied the correct sections of the Remuneration Order.

    (iii) Whether the Plaintiffs earned fees for getting up and preparing for trial

    (iv) Whether the Taxing Officer properly considered costs for service.

25. The law on what constitutes the subject matter of the suit is that the same is to be derived from the judgment. In the absence of a judgment, the starting point for determining the instruction fees for party and party costs is by considering either; the pleadings or the settlement, whereafter, the taxing officer is at liberty to exercise his or her discretion to arrive at a just decision.

26. In this case, there was no judgment and as such, the Taxing Officer based her decision on the sum of Kshs. 43, 420,334.65. From the pleadings, this is the amount the Plaintiffs are said to have owed the 1st Defendant.

27. Both parties have argued on the applicability of Rachuonyo & Rachuonyo Advocates. In that case, the origin of the Bill of costs was a suit to defend a claim for a permanent injunction from selling or realising a security being a parcel of land. Although no amount was discernible from the pleadings, the Court held that the Taxing Officer correctly applied his discretion in finding that the value of the parcel of land was the value of the subject matter for purposes of taxation.

28. I find the case of *R. Billing & Co. Advocates v Kundan Singh Construction Limited (Now KSC International Limited)* [2020] eKLR to more similar to the instant case. In that case, the Advocates had represented the client is a case seeking an injunction against the realization of three bank securities. The Advocate based his claim on the value of the three securities. The Court of Appeal reasoned as follows:

> In the suit, there was no judgment or settlement between the parties, and therefore the value of subject matter of the suit could only be determined from the pleadings. The appellant based its claim on Kshs.1,734,581,100 as the value of the subject matter and asked the taxing officer to assess instructions fees on this sum. It will be recalled, however, that the main purpose for filing the suit was to obtain injunctive and declaratory relief against the bank by restraining it, inter alia, from wrongfully and prematurely calling in any of the three guarantees which were set out in the plaint. In order to obtain an order of injunction, the respondent had to show, by affidavit that it stood to suffer irreparable loss and damage if the three guarantees were called. That was not to say that the sums in those guarantees constituted the value of the claim so as to demand instructions fees based on them. It was never alleged that the respondent instructed the appellant to demand recovery of any specific sum of money to be paid to it by anyone and we cannot discern any such claim from the plaint or any other pleadings.

29. Similarly in this case, neither the bank guarantees nor the remainder thereof was the subject matter of this case. The subject matter of the case was simply a proclamation, which the plaintiffs sought to be declared illegal. The Plaintiffs neither instructed their advocates to recover the sum of Kshs. 43,420,334.65 nor to defend them in a claim for that amount, but merely to avert an impending proclamation. Differently put, these are not proceedings to recover the value of balance on the bank guarantee, but rather proceedings to halt a Proclamation. The subject matter of the suit was the legality of the proclamation when no decree has been passed against the Plaintiff. The alleged value of the proclaimed property was never the subject matter of the suit and should not, properly, be the basis for the calculation of instruction fees.

30. Consequently, it would follow that this is a matter in which the Taxing Officer was only required to apply her discretion in determining the instruction fees. In exercising her discretion in assessing instructions fees, the Taxing Officer, therefore, ought to have considered the factors set out in the Joreth Limited case: the nature and importance of the dispute; the interest of the parties; the general conduct of the proceedings; and all other relevant circumstances.

31. At the centre of the second issue is whether the matter was defended or undefended. The Defendants argue that the matter was undefended since they neither filed a Memorandum of Appearance nor a Defence. Conversely, the Plaintiffs contend that the Defendants were severally represented in Court at the hearing of the interlocutory application, which the Defendants say does not amount to defending the suit.

32. The Advocates Remuneration Order is categorical on what amounts to "defending a suit". Both Paragraphs 1(a) and 1(b) of Schedule 6 expressly mention the filing of a 'defence or other denial of liability'. In the instant case, no defence was filed and as such, the suit cannot be said to have been

defended for purposes of taxation. Be that as it may, the Defendants cannot deny having entered appearance in the matter having been represented by counsel on three occasions. Paragraph 1A(a) would equally not be applicable.

33. Closely tied to this issue above is whether the Plaintiffs were entitled to fees for getting up and preparing for trial. Paragraph 2 of Schedule 6 provides as follows

> In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation:

34. At the onset, the condition a party must meet for the award of getting up fees is the filing of a denial of liability. As stated above, there was no defence or denial of liability filed in this case and fees for getting up and preparing for the case does not therefore accrue.

35. As to the argument that the parties' advocates appeared three times for "hearings" as made by the Plaintiffs, it bears to recall the Court record: The Plaintiff's Counsel filed a Plaint and a Notice of Motion Application dated 09/09/2020 under Certificate of Urgency. The Court gave directions on the Application on 17/09/2020 in chambers. The Plaintiff was to serve the Application and return for inter partes hearing on 28/09/2020. When the parties' advocates appeared on 28/09/2020, Mr. Juma, Counsel for the Defendants, immediately informed the Court that the Defendant would not be defending the suit as the proclamation had been issued in error. During the next mention date, on 06/10/2020, Mr. Juma informed the Court that they would be recording a consent to compromise the suit. This they did on 13/10/2020 when the matter was withdrawn with costs to the Plaintiff.

36. Given this history, it is a mischaracterization for the Plaintiff to claim that their advocates appeared for hearings on three occasions. There was a hearing of the Application dated 09/09/2020 – and not the main suit - which was scheduled for 28/09/2020. On that very first appearance, the Defendant's counsel announced that the Defendant had no intention of defending the suit. It seems to me to be perverse to seek to saddle a defendant who acted with earnestness and good faith with costs for "hearings" which never were.

37. On the question of service, the Plaintiff's argue that they served the 2nd Defendant in Nairobi although they admit having served the 2nd Defendant via email. They, however, contend that the only mode of assessing service is that provided under Schedule 6, Paragraph 9 (a) and (b) of the Advocates Remuneration Order. Although the Civil Procedure Rules were amended to allow electronic service, the Advocates Remuneration Order has not been amended to cater for electronic service and paragraphs 9 (a) and (b) remain the only provision for assessing costs for service.

38. Be that as it may, it is trite that the award of costs is meant to compensate the successful party for costs incurred in the case and not to punish the losing party-see *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 others* [2014] eKLR. In my view, awarding costs for electronic service as if the same was done physically, would go against this well-established principle. This is not to say that a party should not be compensated for electronic service. I am of the view that unless there are any other compelling factors a party effecting service electronically should be given the minimum compensation available for service i.e., under Paragraph 9(a). This would go towards expenses like paying the Process Server and internet costs.

39. In view of the finding hereinabove, the application dated 29/09/2021 is merited and is allowed in the following terms:

I. The taxation of the Plaintiffs' Party and Party Bill of Costs dated 29/10/2020 and rendered on 24/08/2021 and all the consequential orders are hereby set aside.

II. The said Bill of Costs be and is hereby remitted back for taxation to be taxed by a different Taxing Master other than Hon. N. Makau. The Taxing Officer shall proceed under the following directions:

i. The value of the subject matter cannot be ascertained from the pleadings. The Taxing Master should, therefore, exercise her discretion in assessing instruction fees having regard to, inter alia, the nature and importance of the dispute; the interest of the parties; the general conduct of the proceedings; and all other relevant circumstances.

ii. There was no defence or denial of liability filed in the matter.

iii. Fees for getting up cannot be awarded.

iv. Any service effected electronically to be assessed under Paragraph 9(a) of Schedule 6.

III Each party shall bear their own costs for this Application.

40. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 28TH DAY OF JULY, 2022

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JOEL NGUGI

JUDGE