



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 64 OF 2006

VIJAY KUMAR DAVALJI KANJI GOHIL.....PLAINTIFF

VERSUS

SURESH MOHANLAL FATANIA1ST DEFENDANT

SHANTILAL KARSANDAS VARIA.....2ND DEFENDANT

TREO APARTMENTS LTD.....3RD DEFENDANT

SUNILKUMAR POPATLAL DAVDA.....4TH DEFENDANT

AMEET DIPAK BHATTESSA.....5TH DEFENDANT

CHUNILAL SHANTILAL KHIMASIA.....6TH DEFENDANT

JAYANTILAL JETHA HARJI PARMAR.....7TH DEFENDANT

JAYANTILAL K. HARIA.....8TH DEFENDANT

MAHENDRA K. PATHAK.....9TH DEFENDANT

RULING

1. Before me is a Reference from the decision of the Taxing Officer dated 5th June 2013.
2. The defendants have asked the court to set aside or to vary the said decision.
3. It is the further request of the defendants that the court should direct the Taxing Officer to have the Bill of Costs re-taxed in compliance with the provisions of the Advocates (*Remuneration*) Order.
4. The application was supported by the affidavit of **MAHENDRA PATHAK**, the 9th defendant. He noted that the Taxing Officer had assessed the costs payable by the plaintiff in the sum of Kshs. 867,486/-. The defendants were all dissatisfied with that amount, hence this Reference.
5. Pathak deponed thus;

***“3. THAT having felt dissatisfied with the amount awarded, we as among other realities incurred more legal fees than the amount awarded coupled with the fact that we stood to lose the suit property had the plaintiff been successful, we instructed our Advocate’s to file a reference in the High Court against the said taxation order?.*”**

6. The defendants' advocates then wrote to the Taxing Officer, asking her to provide them with the reasons why she had arrived at the decision she made.
7. By the letter dated 11th December 2013, the defendants' advocates made it clear that their clients objection was in relation to the decision in respect to item 1.
8. On 20th January 2016 the Reference came up for hearing. On that date, the plaintiff was absent from court. However, after satisfying itself that the plaintiff had been duly served, the court permitted the defendants to canvass the Reference.
9. Mrs. Radoli, the learned advocate for the defendants, submitted that they believed that the decision was erroneous because the Taxing Officer had failed to take into account the Valuation Report which the defendants had made available to the court.
10. The suit property had been valued at Kshs. 250,000,000/-.
11. In determining the reference, I first wish to make it clear that, pursuant to Rule 11 (2) of the Advocates (*Remuneration*) Order, the Taxing Officer is required to give reasons for his/her decision, in respect to the specific items about which there has been a notification that there was an objection. That implies that during the process of taxation, the Taxing Officer is not under any obligation to give his/her reasons for the decisions on each of the items.
12. In my considered view, it would be an extremely tedious exercise to require explanations for the decision on each and every item in the Bill of Costs.
13. But if a party had an objection to specific items on the Bill of Costs, it was only fair and just that the Taxing Officer be called upon to provide reasons for the particular items.
14. Although there was no obligation on the Taxing Officer to give reasons for each decision during the process of taxation, many Taxing Officers do give their reasons, especially where the process was very contentious. The reasons usually relate to the Instruction Fees and Getting-Up Fees.
15. In this case, this is what the Taxing Officer said in her Ruling, with regard to Item 1;

***“With respect to instruction fees, this suit was dismissed with costs to the defendants. In the plaint the prayers sought were for declaratory orders, injunctive reliefs and general damages. The value of the subject matter cannot be ascertained from the pleadings. The applicant filed a valuation report on the 24th October 2013, which in his view placed the value of the property at Kshs. 250,000,000/-. The valuation report was filed after this matter had been fixed for ruling. There is nothing on record to confirm that the said report was served upon the Respondents. Be that as it may, I shall not consider the report because the same was not part of the evidence submitted in this matter?.*”**

16. Those reasons were contained in a note dated 10th December 2013.
17. It is clear that the Taxing Officer provided the reasons for her decision. In particular, the Taxing Officer explained why she decided not to take into account the contents of the Valuation Report. The said report was not a part of the material which was before the court.
18. Secondly, the learned Taxing Officer made the point that because the advocate was acting for each of the 9 defendants, the Instruction Fees would be “static?”. The Taxing Officer made it clear that the defendants cannot each charge the plaintiff with a separate Instruction Fee.
19. The defendants have not challenged that aspect of the Ruling. Therefore, they are deemed to have acknowledged its accuracy.
20. It is only the quantum of the Instruction Fee which the defendants have an issue with. They say that because the value of the subject matter of the case was Kshs. 250,000,000/-, the Taxing Officer was obliged to peg the assessment of the Instruction Fees on that value.
21. Paragraph 1 of Schedule VI of the Advocates (*Remuneration*) Order provides guidance on how the Taxing Officer is to go about assessing the appropriate Instruction Fees, in respect to cases which were before the High Court. The said guidance is in relation to party and party costs, and it states as follows;

***“The fees for instruction in suits shall be as follows, unless the taxing officer in his discretion shall increase or (unless otherwise provided) reduce it:*”**

- a. ***To sue in any proceedings (whether commenced by plaint, petition, originating summons or***

notice of motion) in which no defence or other denial of liability is filed: where the value of the subject-matter can be determined from the pleading, judgement or settlement between the parties and....?

- 22.Paragraph 1 (b) provides the rates in cases where defences or other denials of liability are filed. But, just as in paragraph 1 (a), the value of the subject matter is to be determined from the pleadings, judgement or the settlement.
- 23.In this case, the Valuation Report dated 11th May 2013 was not a part of the pleadings. It was also not cited in any judgement or any settlement between the parties.
- 24.This was a report which, as the learned Taxing Officer stated, was filed after the court had fixed a date for the Ruling on the taxation.
- 25.In other words, the Valuation Report was not before the Taxing Officer at the time when she was carrying out the process of taxation.
- 26.If the taxation were to be contrasted with a trial, the valuation report would have been an exhibit which was never admitted in evidence. It would be the equivalent of a piece of evidence which the advocate for the plaintiff sought to place on record after the case had been closed.
- 27.Evidence in a case is either admitted or rejected during the trial or prior to the commencement of the trial. Parties can, during pre-trial procedures or during Case Management Conferences agree on the evidence to be admitted in evidence.
- 28.But once the witnesses have all testified, it would not be open to the advocates, during submissions, to introduce new evidence.
- 29.In similar vein, the advocates for the defendants in this case were out of order, by seeking to introduce the valuation report in evidence, after the taxation process had been undertaken by the Taxing Officer.
- 30.I find that the Taxing Officer was right to have excluded the valuation report from consideration, when determining the Instruction Fees.
- 31.Therefore, the Reference has no merit. It is dismissed. The defendants will pay to the plaintiff, the costs of the Reference.

DATED, SIGNED and DELIVERED at NAIROBI this 23rd day of February 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff

Khasiani for Mrs. Radoli for the Defendants

Mr. C. Odhiambo, Court clerk.