Bethsaida Resort and Spa Ltd v Gauderlot (Environment & Land Case 032 of 2021) [2023] KEMC 271 (KLR) (18 January 2023) (Ruling)

Neutral citation: [2023] KEMC 271 (KLR)

REPUBLIC OF KENYA

IN THE KWALE LAW COURTS

ENVIRONMENT & LAND CASE 032 OF 2021

ZK KAGENYO, DR

JANUARY 18, 2023

[FORMERLY MSA ELC CASE NO. 001 OF 2018]

BETWEEN

BETHSAIDA RESORT AND SPA LTD ..... PLAINTIFF

AND

JEAN PIERRE GAUDERLOT ..... DEFENDANT

RULING

1. The Bill of Costs subject of this ruling is dated 7th July 2022 and it was filed on the 14th day of July 2022 by the Plaintiff.

2. The Defendant opposed the Bill of Cost by filing the Notice of Objection, dated 26th August 2022, on the 30th August 2022.

3. Parties agreed to dispose the matter by way of written submissions. The Defendant filed their submissions on the 18th October 2022 while the Plaintiff filed theirs on the 24th October 2022,

4. The Party and Party Bill of Costs trickled from the Judgment delivered by Lady Justice A.E. Dena on the 21st day of February 2022 in favour of the Plaintiff and with costs against the Defendant.

5. The matter had been initiated by way of a Plaint dated 3rd January 2018 and filed 2 days later and therefore the applicable Advocates Remuneration Order is the Legal Notice No. 35, the *Advocates (Remuneration) (Amendment) Order*, 2014 hereinafter the ARO and more particularly under Schedule 6 for costs of proceedings in the High Court and Courts of Equal Status. The matter was contested.

6. In their Notice of Objection, the Defendant asked the Taxing Officer to allow the items 3 to 16, items 18 to 21, items 23 to 59, items 61 to 81 and items 83 to 98 of the Bill of Costs as drawn and hence the same are taxed as drawn.

7. Regarding items 99 to 119, the Defendant stated that the same could be allowed once the receipts were produced.

8. When reading through the submissions, I note that the submissions by the Defendant are in conflict with the Notice of Objection. The Defendant is bound by the latter and this court shall proceed to tax as per the said Notice of Objection and any material within the written submissions that is contra the Notice of Objection shall be disregarded.

9. Item 1 in the Bill of Costs (Instruction Fees) is drawn at Ksh. 550,000/= the Plaintiff stating that the subject matter was Ksh. 45, 000, 000/=. In passing, I note that even if that was the case, the calculation would not be below Ksh. 800,000/=. The Defendant opines otherwise and believes that the subject matter was Ksh. 4, 500, 000/= and hence the same should be taxed at Ksh. 170, 000/=.

10. It is trite that the value of the subject matter is to be determined from the pleadings, judgement or settlement between the parties.

11. I have looked at the pleadings and more particularly the Plaint and the Defence dated 22nd February 2018 and filed in court on 23rd February 2018. I find that there was no counterclaim. I am satisfied that the subject matter was a contract and what was at stake was the Ksh. 4, 500,000/= which ultimately the Hon. Judge granted in her judgment and as such, the instruction fees are to be founded on the Ksh. 4, 500, 000/=. The matter was contested and as such the *ARO*, Schedule 6 (b) is applicable and I consequently tax the instruction fees at Ksh. 210, 000/= Calculated as;

(Ksh. 120,000/=) + ($\frac{2}{100}$ ×Ksh. 4, 500,000/=) =Ksh. 210, 000 and Ksh. 340, 000/= is taxed off.

12. The Defendant proposed a calculation akin to the prorated/ clustered PAYE calculations as is his interpretation of plus an additional 2% as stated in the table under Schedule 6 Paragraph 1 (b). Whereas this would appear to be the way out from accusations of double-awarding the fees, in my interpretation of the same however, I find that the words extra or excess or their equivalent are absent and the natural meaning I got is that the 2% is to be levied on the entire value of the subject matter. For instance, the equivalent clauses in the Advocate Remuneration Order 1989 read plus ½% on the amount over Sh. 750, 000. (underline mine).

13. Item 3 on the get up fees, the Defendant does not contest that the Plaintiff is entitled the same but the disagreement is on the amount. The matter went to full trial. 1t is taxed at Ksh. 70, 000/= being a third of the instruction fees and Ksh. 113, 333.33 only is taxed off.

14. Item 17 is drawn at Ksh. 1, 250/=. Under schedule 6 paragraph 4 (h) of the *ARO*, it is taxed as at Ksh. 240/= and Ksh. 1, 010/= is taxed off.

15. Item 22 is drawn at Ksh. 1, 100/=. Under schedule 6 paragraph 4 (h) of the *ARO*, it is taxed as at Ksh. 240/= and Ksh. 860/= is taxed off.

16. Item 60 is drawn at Ksh. 1, 100/=. Under schedule 6 paragraph 4 (h) of the ARO, it is taxed as at Ksh. 240/= and Ksh. 860/= is taxed off.

17. Item 82 is drawn at Ksh. 1, 100/=. Under schedule 6 paragraph 4 (h) of the *ARO*, it is taxed as at Ksh. 240/= and Ksh. 860/= is taxed off.

18. Item 99 is taxed as drawn at Ksh. 76, 850/= on the strength of the receipt in the file dated 5/11/2018.

19. Item 101 is taxed as at Ksh. 680/= on the strength of the receipt in the file dated 24/1/2018.

20. Item 110 is taxed as drawn at Ksh. 75/= on the strength of the receipt in the file dated 17/5/2018.

21. Item 115 is taxed as drawn at Ksh. 75/= on the strength of the receipt in the file dated 2/5/2019.

22. Item 119 is taxed as drawn at Ksh. 75/= on the strength of the receipt in the file dated 22/3/2021.

23. Items 100, items 102 to 109, items 111 to 114 and items 116 to 118 are taxed off as there were no receipts furnished before the Taxing Officer for consideration to satisfy himself that indeed the monies were expended.

24. I note that the Plaintiff attached some copies of receipts at their submissions but I respectfully differ with their approach. Receipts take the form of evidence for consideration by a Court, and in this case the Taxing Officer, and submissions cannot be used to introduce evidence. It is practice that only authorities are attached on the written submissions for their completeness and the much the court would do was to consider anything attached within the submissions as authorities and whether binding to this court or not is a whole different story. The Court of Appeal in *Daniel Toroitich Arap Moi & Another v Mwangi Stephen Murithi & Another* (2014) eKLR guided us that,

> Submissions cannot take the place of evidence. The Respondent had failed to prove his claim by evidence what appeared in submissions could not come to his aid...Submissions are generally parties "marketing language....

25. It was therefore imperative that before parties took directions on having the matter disposed by way of written submissions, have the evidentially material on record which was not the case. In their Notice of Objection, the Defendant qualified the granting of these items on the production of receipts. The Plaintiff did not either seek leave to introduce the evidence which would give the Defendant a chance to challenge such evidence and what the Plaintiff did was akin to asking the Taxing Officer to unilaterally consider and make a finding on such evidence, albeit improperly introduced in court, without involving the other party.

26. On VAT, this being a party to party bill of costs, the same shall not be awarded and hence the stated Ksh. 142, 709.33 only said to be VAT shall be taxed off.

27. In the end, the Bill of Cost dated July 7, 2022 and filed on the 14th day of July 2022 is taxed at Ksh.513, 150/=. A total of Ksh. 620, 182.66/= is taxed off.

28. The Bill of Cost was drawn at Ksh. 1, 133, 332.66 only of which more than a $\frac{1}{6}$ has been disallowed and hence each party shall bear its own cost of this Bill.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA MS-TEAMS AT KWALE ON THIS 18TH DAY OF JANUARY 2023.

KIONGO KAGENYO

ENVIRONMENT AND LAND COURT, KWALE

In the presence of;

Mr. Archibald Kimbada- Court Assistant

Ms. Ochieng for the Applicant

Ms. Osewe for the Respondent.