National Bank of Kenya Limited v Tahir Sheikh Said Investments Limited & 3 others (Civil Appeal E052 of 2022) [2024] KECA 1478 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KECA 1478 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E052 OF 2022

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

OCTOBER 25, 2024

BETWEEN

NATIONAL BANK OF KENYA LIMITED ..... APPELLANT

AND

TAHIR SHEIKH SAID INVESTMENTS LIMITED ..... 1ST RESPONDENT

TAHIR SHEIKH SAID GRAIN MILLERS LIMITED.....2ND RESPONDENT KENYA COMMERCIAL BANK LIMITED ..... 2ND RESPONDENT

KENYA COMMERCIAL BANK LIMITED ..... 3RD RESPONDENT

GARAM INVESTMENTS AUCTIONEERS ..... 4TH RESPONDENT

(Being an Appeal from the ruling and order of the High Court at Mombasa (Njoki Mwangi, J) dated 28th January 2022 in Civil Suit No.10 of 2016)

JUDGMENT

1. The genesis of this appeal was a suit filed in Mombasa High Court Civil Suit No 10 of 2016 in which the appellant claimed that, at the request of the 1st respondent, it granted to the 1st respondent various banking facilities for an aggregate sum of Kshs 735,000,000 and USD 300,00 which facilities were secured by among other securities, a fixed and floating debenture creating a charge over all the assets of the 1st respondent; that the 1st respondent covenanted that it would not permit, without the appellant's consent, any security to subsist, arise or be created or extended over all or any part of the 1st respondent's assets save where such security interest is simultaneously extended equally and pro-rated to all moneys due from the 1st respondent to the appellant; that the 1st respondent defaulted in its repayment of the facility; that, on 4th January 2016, the appellant saw a newspaper advert for a planned auction by the 4th respondent on the instructions of the 3rd respondent, of a property allegedly registered in the name of "Tahir Sheikh Said Investments Ltd g/t TSS Grain Millers Ltd"

which, in the appellant's view, were the 1st and 2nd respondents; and that the properties advertised for sale were secured by a debenture in its favour.

2. The appellant therefore sought, inter alia, an order restraining the 3rd and 4threspondents from selling the said properties.

3. By an application dated 10th July 2018 brought by the 2nd respondent, it was prayed that the suit against it be struck out on the grounds that it did not disclose a reasonable cause of action. In a ruling made on 21st December 2018, P. J. Otieno,J. allowed the application expressing himself as follows:

> "I therefore accede to the application and direct that the plaintiff's suit against the 2nddefendant be struck out and the 2nddefendant [be] excluded from further proceedings in the matter. I award the costs so far incurred to the 2nddefendant to be paid by the plaintiff."

4. Following the delivery of that ruling, the 2nd respondent filed a party-and-party bill of costs against the appellant which was taxed on 7th April 2021 in the sum of Kshs 9,993,375 comprising of ,inter alia, instructions fees in the sum of Kshs 8,756,250 (being 75% of Kshs 11,675,000 due to the fact that the suit did not proceed to full hearing) and VAT in the sum of Kshs 1,225,875.

5. Aggrieved by the taxation, the appellant filed a reference before the Judge and , on 28th January 2022, the learned Judge (Njoki Mwangi, J) dismissed the reference save for the amount awarded in respect of the VAT., which she remitted to the taxing of ficer to tax of f. In arriving at her decision, the learned Judge found that a court should only interfere with the decision of the taxing of ficer where there has been an error in principle; that questions solely of quantum is an area where the taxing of ficer is more experienced and , therefore, more apt to determine; that a court can only interfere with the decision of the taxing of ficer who has not directed their mind to the provisions of the law, that is, if factors were considered that ought not to have been considered in the first place or failed to consider facts which ought to have been considered; that, in the ruling of P. J. Otieno, J., the learned Judge awarded the 2nd respondent the costs incurred up to and including the 21st day of December 2018 in defending the suit; that, on the authority of the case of *Joreth v Kigano & Associates* [2002] 1 EA 92 at 99, instructions fees are not affected or determined by the stage the suit has reached; that, from the plaint, it was evident that the subject matter of the suit was banking facilities of Kshs 735,000,000 and USD 300,00 extended to the 1st respondent, and that the appellant sought orders for permanent injunction so as not to only protect its interests but also to ensure that it recovered the money extended to the 1st respondent; that the taxing of ficer was right in finding that the 2nd respondent was required to defend himself in a matter whose value was specified; that, on the authority of the case of *Republic v Minister for Agriculture & 2 others ex parte Samuel Muchiri W'njuguna & 6 others* [2006] eKLR, the taxing of ficer relied on the correct provisions of the*Advocates (Remuneration) (Amendment) Order, 2014*(theRemuneration Order) in arriving at his decision with regard to item 1; that the appellant failed to demonstrate that the calculation of instruction fees was erroneous, illegal, incorrect and was not based on any discretionary powers vested on the taxing of ficer; that, based on the decision in the cases of *Pyramid Motors Limited v Langata Gardens Limited*[2015] eKLR and *Jasbir Singh Rai & 3 others v Tarlochan Sigh Rai & 4 others*[2014] KLR, a party and party bill of costs does not attract an aspect of taxable supply as an advocate - client bill of costs would; that where it has been proved that a successful party to a suit has hired the services of an advocate and has paid out VAT to the advocate, the said amount ought to be recouped by inclusion of a charge for VAT in the party and party bill of costs; that, in the present case, there was no evidence that the 2nd respondent had paid to its advocate VAT for services rendered, hence it was not entitled to be indemnified for amounts it never paid; and

that, in the circumstances, the taxing of ficer misdirected himself in awarding the 2nd respondent VAT on instructions fees.

6. Dissatisfied with that decision, the appellant is before us in this appeal in which it contends that the learned Judge erred: in not finding that the issue of costs was not within the purview of the taxing of ficer to determine and /or clarify when the order had not been settled and formally extracted; in failing to appreciate that a claim for the costs of the suit could not lie as the same had not been awarded; in failing to appreciate that the taxation of the item on instructions fees on the basis of a sum of Kshs 765,000,000 as representing the value of the subject matter was an error of principle since the dispute presented for determination in the suit did not involve any pecuniary claims for such an amount or any part thereof; in holding that in taxation of costs, ascertainment of the value of the subject matter of a suit is a matter to be determined on the basis of exercise of discretion in that regard on the part of the taxing of ficer; and in failing to appreciate that it was an error in principle on the part of the taxing of ficer to have determined the instructions fees on the basis of the defended scale when the suit was not defended.

7. At the plenary virtual hearing on 4th June 2022, learned counsel,Mr. Mutua Molo, appeared for the appellant, learned counsel,Mr. Gikandi Ngibuini, appeared for the 1st respondent and learned counsel,Mr. Kariuki, appeared for the 3rd and 4th respondents. However, as the appeal did not concern the 1st, 3rd and 4th respondents, the same was withdrawn as against the said respondents. Learned counsel for the appellant and the 2nd respondent relied on their submissions, which they briefly highlighted.

8. In their submissions, the appellants relied on the case of *R. Billing & Co Advocates v Kundan Singh Construction Limited (Now KSC International Limited)*[2020] eKLR for the proposition that the value of the facilities which is pleaded as the basis for declaratory and injunctive reliefs sought has no bearing on the value of the subject matter; and *Kenya Wildlife Services v Associated Construction Company Ltd* [2002] eKLR, proposing that the correct approach would have been to proceed on the basis that the pleadings in the suit did not disclose a pecuniary value that could be taken as representing the value of the subject matter.

9. On its part, the 2nd respondent relied on the case of *Samuel M. N. Mweru & others v National Land Commission & 2 others*[2020] eKLR among other cases, highlighting the consequences of the failure to comply with the court's directions regarding the filing of submissions;*Teachers Service Commission v Simon P. Kamau & 19 others*[2015] eKLR among other cases, highlighting the principle that litigation must come to an end;*Joreth v Kigano & Associates*(*supra*); and *George Arunga Sino T/A Jone Brooks Consultants Limited v Patrick J. O. & Geoffrey D. O. Yogo T/A Otieno, Yogo & Co Advocates*[2012] eKLR, submitting 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, judgement or settlement.

10. It was submitted by the appellant that, in the ruling of 21st December 2018, no order for payment of costs of the suit was made in favour of the 2nd respondent; that, instead, the 2nd respondent was awarded "the costs so far incurred"; that no formal order was ever extracted setting out a different position; that the 2nd respondent was only entitled to reimbursement of the costs it would have been in a position to demonstrate to have incurred as at that date; that the learned Judge failed to appreciate that no instructions fees on party-and-party basis could have been incurred by the 2nd respondent as at that date as to form the basis for claim in the bill of costs; and that instructions fees are not recoverable on reimbursement basis, but are compensatory in nature. The 2nd respondent did not address this issue in its submissions but, at the plenary hearing,Mr. Gikandisubmitted that instructions fees accrue immediately an advocate is instructed.

11. In our view, this issue was dealt with by this Court in*Joreth v Kigano & Associates*(*supra*) where the Court expressed itself as follows:

> "We now come to the Notice of Grounds for affirming the decision of the learned judge. By the first ground thereof the respondent states that Instructions Fees is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached. In principle that is correct."

12. In the ruling striking out the suit against the 2nd respondent, P. J. Otieno, J. awarded"the costs so far incurred to the 2nd defendant to be paid by the plaintiff".The learned Judge was clear in his ruling that he was awarding "'costs"' not "expenses" contrary to the appellant's submissions. In our view, "the costs incurred so far" included the instructions fees which are not affected or determined by the stage the suit has reached. Accordingly, instructions fees on the suit were properly found by the taxing of ficer and the learned Judge to be due and payable.

13. It was submitted by the appellant that, where the value of the subject matter is ascertainable, the taxing master enjoys no discretion in law and must locate the value from the pleadings, judgement or settlement between the parties; that the learned Judge erred in holding that the taxing master had a discretion on the matter of determination of the value of the subject matter; that the suit sought non-pecuniary reliefs in connection with certain banking facilities that the appellant had granted and did not relate to recovery of any money outstanding in relation to those facilities; that the value of the facilities, which had to be pleaded as the basis for the declaratory and injunctive reliefs sought, had no bearing on the value of the subject matter; and that the learned Judge erred in adopting the decision of the learned taxing of ficer in adopting the value of the banking facilities as the value of the subject matter when no claim for recovery of such facilities was set up in the suit. The respondent's position was that the appellant specifically pleaded that the properties under threat of sale had secured a loan which stood in the sum of Kshs 937,892,424 and USD 343,626.30 and , therefore, the value of the subject matter was clearly discernible from the pleadings.

14. The *Advocates (Remuneration) Order*gives guidance on how to determine the value of the subject matter for the purposes of taxation of bills of costs, a position that was reiterated by this Court in*Joreth v Kigano & Associates*(*supra*) where it was held that:

> "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, judgement or settlement (if such be the case) but if the same is not so ascertainable the taxing of ficer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances." See *Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W'Njuguna & 6 others* [2006] eKLR."

15. We also agree with Mabeya, J's view in the case of *Kagwimi Kangéthe & Company Advocates v Penelope Combos & another*Nbi HCCC Misc No 394 of 2008 that:

> "...it is not necessary that the value of the subject matter be in the prayers, it is to be ascertained from the pleadings generally."

16. In this case, we take the view that the value of the subject matter was what, according to the appellant, it stood to lose unless the reliefs it was seeking were granted. Clearly, the appellant's position was that, by the 3rd and the 4th respondents proceeding with their intended auction, it was likely to lose the

facility it had extended to the 1st respondent. The appellant's primary interest was not in the charged property or the securities, but the facility it had advanced to the 1st respondent. The value of that facility as at the time of filing suit was specified by the appellant in the plaint as Kshs 937,892,424 and USD 343,626.30. The instant case must be distinguished from the case of *R. Billing & Co Advocates v Kundan Singh Construction Limited (Now KSC International Limited)*(*supra*) where it was found that what was being sought were injunctive and declaratory reliefs against the bank by restraining it,inter alia, from wrongfully and prematurely calling in any of the three guarantees set out in the plaint. In view of the foregoing, we find that the learned Judge rightly found that the subject matter of the suit was determinable from the pleadings.

17. According to the appellant, Schedule 6 of the*Remuneration Order*provides scales of costs for defended and undefended suits; that the record is clear that the 2nd respondent did not file defence in the suit; that, as such, its claim for costs, even if properly due, ought to have been presented under the undefended scale in terms of Schedule 6 Part A(1) (a) of the Remuneration Order. However, the 2nd respondent did not address itself to this submission.

18. Schedule 6 rule 1(b) of the*Remuneration Order*under which the bill of costs was taxed deals with "proceedings described in paragraph (a) where a defence orother denial of liabilityis filed. In our view, that paragraph contemplates that a party may choose to deny liability by filing a defence or by taking a step aimed at frustrating the success of the suit. Such step may be by way of a preliminary objection or by seeking to strike out the suit as the 2nd respondent did in this case. It is only where the defendant has not taken any steps towards denial of liability that one may be deemed not to have defended the suit. In this case, where the 2nd respondent took a step by applying for orders to strike out the suit, which step succeeded, we are of the view that the taxing of ficer's decision to apply the scale for defended suits, albeit at an interlocutory stage, was proper and was correctly upheld by the learned Judge.

19. We find no reason to interfere with the decision of the learned Judge dated 28th January 2022 in Civil Suit No 10 of 2016, which we hereby uphold. We find no merit in this appeal which we hereby dismiss with costs to the 2nd respondent.

20. Those shall be our orders

DATED AND DELIVERED AT MOMBASA THIS 25TH DAY OF OCTOBER, 2024

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C. Arb, FCIArb

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR