Kanai v Cannon Assurance Limited (Civil Appeal 447 of 2018)
[2023] KECA 119 (KLR) (3 February 2023) (Judgment)

Neutral citation: [2023] KECA 119 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 447 OF 2018

HA OMONDI, KI LAIBUTA & PM GACHOKA, JJA

FEBRUARY 3, 2023

BETWEEN

ANTHONY THUO KANAI ..... APPELLANT

AND

CANNON ASSURANCE LIMITED ..... RESPONDENT

(Being an appeal against the Ruling and Order of the High Court of Kenya at Nairobi (E. C. Mwita, J.) delivered on 31st August 2018 in H.C.C.C Petition NO. 433 of 2013)

JUDGMENT

1. The relevant factual background of this appeal as told in the respondent's petition No 433 of 2013 is that the respondent engaged the appellant as its legal officer under and by virtue of an employment contract dated November 1, 2006; that the appellant's responsibilities were to, *inter alia*, offer legal support, advice and defence of the respondent; that such services were to be rendered through the appellant's law firm; that, over and above the appellant's agreed salary, the respondent agreed to pay to the appellant 25% of all party-appellant represented the respondent; that the terms of engagement between the parties were subject to the provisions of Rule 4 (ii) of the *Advocates (Practice) Rules*; and that those terms of engagement and remuneration were subjected to change in light of the subsequent enactment of sections 32A and 32B of the *Advocates Act* (Revised 2012), 1989.

2. On November 9, 2012, the appellant allegedly absconded from duty and was dismissed from his employment on November 13, 2012. Upon dismissal, he sent to the respondent invoices on account of legal fees for services rendered while in its employment. Thereafter, he proceeded to file Bills of Costs in various matters for assessment of his fees for work done on behalf of the respondent during the period between October 2006 and November 13, 2012.

3. In opposition to the appellant's Bills, the respondent petitioned the High Court seeking, inter alia: a declaration that the appellant, as inhouse counsel, was not entitled to claim any legal costs against the

respondent under sections 32A and 32B of the *Advocates Act* for any period prior to July 12, 2012 when those provisions came into force; a declaration that any Bills of Costs raised by the appellant against the respondent under the two sections prior to the commencement date aforesaid were null and void; a declaration that inhouse counsel could not properly raise any Bill of Costs against their employer unless and until the Chief Justice prescribed the requisite criteria for determining such remuneration in accordance with section 32B of the *Act*; a declaration that the Bills raised by the appellant were premature and without any lawful basis; a declaration that the appellant's attempt to recover legal fees through his firm while in employment for a salary amounted to unfair labour practice and, therefore, illegal and unconstitutional; an order striking out the 40 Miscellaneous causes filed by the appellant for assessment of his fees; prohibitory orders restraining the appellant from raising invoices or filing Bills of Costs on account of such fees; and costs of the petition.

4. Apart from the petition setting out the factual background as aforesaid, the record as put to us does not include the supporting affidavit or affidavit in reply to the respondent's petition, which was made under Article 22(1), 23(1), 40, 41 and 165(3) of the *Constitution*. Be that as it may, the petition was heard and determined.

5. In its judgment dated March 10, 2014, the High Court (D. S. Majanja, J.) dismissed the respondent's petition with costs to the appellant on the grounds that the procedures under the Advocates Remuneration Order for taxation of Bills of Costs were effective in addressing all the objections raised to the appellant's Bills of Costs; and that there was no need to resort to Article 22 of the *Constitution*.

6. The appellant moved to recover costs of the petition and filed a Bill of Costs, which was taxed and allowed on 9th January 2018 in the all-inclusive sum of Kshs 508,952.

7. It is noteworthy that the appellant's Bill of Costs was taxed in accordance with the provisions of Schedule VI (1) (j) of the Advocates (Remuneration) Order, which governs taxation of costs relating to "Constitutional petitions and prerogative orders".

8. Dissatisfied by the decision of the Taxing Officer to apply Schedule VI (1) (j) of the Order, the appellant filed a Reference by way of a Chamber Summons dated January 23, 2018 challenging the Taxing Officer's ruling in relation to the items specified on the face of the Summons, but which we need not recite. Suffice it to observe that the items in contention included instructions fees on account of the petition aforesaid, instructions fees to oppose the Notice of Motion dated August 29, 2019, getting up fees and service of the court process.

9. According to the appellant, the applicable provision was Schedule VI (1) (b), which governs taxation "in any proceedings whether commenced by plaint, petition, originating summons or notice of motion where a defence or other denial of liability is filed; ... where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties"

10. In his ruling dated August 31, 2018, E. C. Mwita, J. dismissed the appellant's Reference with costs to the respondent. According to the learned Judge, the Taxing Officer applied the correct schedule and paragraphs of the Advocates Remuneration Order and arrived at the correct decision.

11. The appellant then moved to this Court on appeal from the ruling of E. C. Mwita, J. on 9 grounds set out in his Memorandum of Appeal dated December 7, 2018, namely:

> " 1. That the learned Judge erred in law and fact in failing to find that Schedule VI A (1) (b) of the Advocates (Remuneration) Order, 2009 was the correct schedule to be relied on in assessing instructions fees under item No 1 of the

Appellant's party and party bill of costs in relation to Petition No 433 of 2013 that was filed on August 29, 2013."

2. That the learned Judge erred in law and fact by erroneously determining that Schedule VI (1) (j) of the *Advocates (Remuneration) Order, 2009* applied to constitutional petitions as at August 29, 2013.

3. That the learned Judge erred in law and fact by failing to find that as at August 29, 2013 when the Petition No 433 of 2013 was filed the said Schedule VI (1) (j) did not refer to nor apply to petitions whatsoever as it was confined to assessment of fees in relation to prerogative applications only.

4. That the learned Judge erred and misdirected himself in fact by holding that the taxing officer did not err in applying Schedule VI (1) (j) in determining the instructions fees under item No 1 of the Appellant's party and party bills of costs dated September 30, 2017 in Petition No 433 of 2013.

2. That the learned Judge erred and misdirected himself in fact by making an erroneous finding that there was no monetary value or value of the subject matter identifiable from the pleadings to enable the taxing officer ascertain such a value despite the explicit wording of paragraph 18 of the Petition containing the itemized value of the Appellant's 40 bills of costs with the total amount claimed specified that the Petition was seeking to strike out.

3. That the learned Judge erred in law and fact in disregarding the weight of the Appellant's submissions and in particular by disregarding the legal authorities on application of Schedule VI A (1) (b) as the basis of assessing instruction fees in petitions under *Advocates (Remuneration) Order 2009* for petitions filed in 2013 that were relied on by the Appellant in support of his reference application.

4. That the learned Judge erred in law and fact in finding that there was no justifiable complaint regarding item No 76 on getting up fees which is a third of instruction fees as a consequence of his erroneous determination that Schedule VI (1) (j) of the *Advocates (Remuneration) Order, 2009* was the correct Schedule to be relied on in assessing instruction fees under item No 1 of the Appellant's party and party bill of costs.

2. That the learned Judge erred and misdirected himself in law and fact when he failed to consider and apply his mind to the weight of evidence on record whereby the Appellant had attached to his submissions filed on November 1, 2017 before the taxing officer copies of google maps showing the distance in kilometers where the Appellant's process server effected service of documents upon the Petitioner and its Advocate on record and thereby arrived at an erroneous conclusion with regard to items No 12, 20, 33, 34, 38, 39, 47, 48, 55, 56, 73, 74 and 82 on service in the party and party bill of costs.

3. That the learned Judge erred and misdirected himself in law and fact in finding in failing to address his mind to the provisions of paragraph O (viii) of Schedule VI of the *Advocates Remuneration Order, 2009* that expressly provides for separate fees payable in respect of applications arising within a matter and thereby arrived at an erroneous conclusion that the Appellant was not entitled

to fees under item No14 of the party and party bill of costs yet it was in respect of the Notice of Motion dated August 29, 2013 that the Petitioner had relied on to obtain conservatory orders pending hearing and determination of the Petition."

12. In support of his appeal, the appellant filed written submissions dated October 25, 2019 to which we will shortly return. In response, learned counsel for the respondents, M/s. Regeru and Company, also filed their written submissions dated October 21, 2022.

13. This being a second appeal, we are mandated to confine ourselves to points of law only. As was held in *Chemangong v R* [1994] KLR p.611 and *Kenya Breweries Ltd v Godfrey Odoyo* [2010] eKLR, the appellate court will not, on a second appeal, interfere with concurrent findings of fact arrived at in the courts below unless based on no evidence, or it is clear that they misdirected themselves in relying on the wrong principles.

14. This Court in *Kipkorir Titoo and Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR observed that an appeal from the decision of a Judge on Reference from a taxing officer is akin to a second appeal and should be governed by section 72(1) of the *Civil Procedure Act*, and that such an appeal can only be allowed on any of the three grounds specified in section 72(1) of the *Act*, namely: the decision being contrary to law or to some usage having the force of law; the decision having failed to determine some material issue of law or usage having the force of law; and a substantial error or defect in the procedure provided by the Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

15. Having considered the provisions of section 72(1) of the *Civil Procedure Act*, the record of appeal as put to us, the written and oral submissions of the appellant and of learned counsel for the respondent, we form the view that the appellant's appeal stands or falls on our findings on the following four main issues: whether the impugned decision was contrary to law or to some usage having the force of law; whether the learned Judge failed to determine some material issue of law or usage having the force of law; whether in reaching his decision, the learned Judge made a substantial error or defect in the procedure resulting in error or defect upon the merits of the case; and what orders ought we to make in determination of this appeal, including orders as to costs.

16. With regard to the 1st issue, the appellant faults the learned Judge for: allegedly failing to find that Schedule VI (1) (b) of the *Advocates (Remuneration) Order, 2009* was the applicable schedule; erroneously determining that Schedule VI (1) (j) of the 2009 Order applied to Constitutional petitions as at August 29, 2013; and for failing to find that, as at the date the petition was filed, Schedule VI (1) (j) applied to "prerogative applications" only.

17. We take the appellant's reference to "prerogative applications" to mean applications for judicial review or prerogative orders, such as the declaratory and prohibitory orders sought in the respondent's constitutional petition dated August 29, 2013. The question as to which of the provisions of the remuneration order applied to the respondent's constitutional petition depends not only on the nature of the proceedings in relation to which the contested Bill of Costs was taxed, but also on whether those provisions were applicable at the material time.

18. It is common ground that the proceedings in issue were founded on a constitutional petition. Citing Kamunyori and Company Advocates v Development Bank of Kenya [2015] eKLR, the appellant argued that failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle; and that the applicable instructions fees in constitutional petitions is provided by

Schedule VI (1) (b) of the Order (see *Four Farms Limited v Agricultural Finance Corporation* [2015] eKLR).

19. The appellant's submission that Schedule VI (1) (b) of the Order read with Schedule VI (1) (a) was the applicable schedule was grounded on the reason that paragraph (a) made reference to "... any proceedings whether commenced by plaint, petition, originating summons or notice of motion" and that, therefore, the respondent's petition fell into this category of pleadings. According to him, the value of the subject matter of the proceedings contemplated in paragraph (b) was easily determinable from the pleadings so as to avoid the "error of principle" that would otherwise arise as cautioned in the case of Kamunyori and Company Advocates (supra). His case was that, the taxing officer ought to have applied Schedule VI (1) (b) because the respondent's petition enumerated 40 Bills of Costs (thereby sought to be struck out) amounting to Kshs 17,020,484.03, and in respect of which instructions fees was chargeable in excess of Kshs 500,000.

20. In addition to the foregoing, the appellant submitted that, as at the time the respondent's petition was filed on August 29, 2013, Schedule VI (1) (j) had not come into force. According to him, paragraph (j) was limited to proceedings for "prerogative orders" and not applications in the nature of the respondent's constitutional petition.

21. On their part, learned counsel for the respondent cited the High Court decision in *Kenyariri and Associates Advocates v Salama Beach Hotel Limited and 3 Others* [2015] eKLR where the court held:

> " It is I believe fairly settled now that taxation of bills of costs arising out of public law matters such as applications for prerogative orders and petitions alleging violation of constitutional rights falls under Schedule VI (1) (j)."

22. The learned Judge agreed with the taxing officer that Schedule VI (1) (j) applied to applications for judicial review and constitutional petitions, allowing a minimum instructions fees of Kshs 28,000, and which was allowed in the sum of Kshs 100,000.

23. It is noteworthy that the respondent's constitutional petition to the High Court was in opposition to the appellant's 40 bills of costs and the particular Schedule under which they were charged. The petition sought, *inter alia*: a declaration that the appellant, as inhouse counsel, was not entitled to claim any legal costs against the respondent; orders to strike out the Bills; and orders to prohibit the raising of invoices and bills of costs on the same basis.

24. We agree with the findings of the learned Judge that:

> " ... the reliefs sought in that petition as can be seen from prayers 3 to 8 of the petition, were for declarations without identifying the monetary value, while from prayer 8(i) to 8(xl), the [respondent] had sought orders striking out the Miscellaneous Causes the [respondent] had filed as identified in those paragraphs. Those paragraphs did not also identify any monetary value at all. That being the nature of the pleadings and nature of the relief sought in that petition, there would be no basis for the [appellant] to rely on Schedule VI (1) (b)
>
> ...."

25. To our mind, the nature of the prayers sought in the respondent's constitutional petition placed the proceedings squarely in the realm of applications for "prerogative orders" to which Schedule VI (1) (j) applied both before and after its amendment vide Gazette Supplement No 42 (Legal Notice No dated April 11, 2014. By this amendment, more elaborate provisions were made to the category of proceedings in respect of which costs were chargeable under that Schedule, which was amended to

read: "Constitutional petitions and prerogative orders". Its re-enactment in a more expansive provision did not stand in the way of taxation of applications for prerogative orders under the same schedule.

26. It is noteworthy that the respondent's petition sought prerogative remedies in the nature of declarations, prohibitions and the striking out of the Bills whose taxation was thereby resisted on allegations of "unfair labour practice" and unconstitutionality. Indeed, it was a petition for "... prerogative orders alleging violation of constitutional rights" (see *Kenyariri and Associates Advocates (supra) and Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W'Njuguna & 6 others*

[2006] eKLR

27. As the learned Judge correctly observed, "what was before court was a constitutional petition and not a normal civil suit." We find nothing to fault the Judge for agreeing with the taxing officer that Schedule VI (1) (j) applied to the respondent's petition. Neither do we find any error of principle nor anything to suggest that the learned Judge failed to determine some material issue of law or usage having the force of law. That settles the first and second issues before us.

28. On the third issue, we hasten to observe that the record as put to us does not disclose any substantial error or defect in the procedure that the learned Judge was mandated to follow, and which could have produced error or defect in his decision on the merits. On the specific awards in respect of instructions fees and other contested items, we say this:

29. "... the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, [and] the general conduct of the proceedings ..." (see *Joreth Limited v Kigano & Associates* [2002] eKLR).

30. As the predecessor to this Court held in *Thomas James Arthur v Nyeri Electricity Undertaking* [1961] EA p.492:

> " The principles which are applied by judges upon review of taxing officers' certificates are well known .... Where there has been an error in principle the court will interfere, but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will intervene only in exceptional cases."

We also take to mind the decision in Premchand Raichand Ltd & another v Quarry Services of East Africa Ltd & others [1972] EA p.162 where the predecessor to this Court held:

> " The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing
>
> officer, and particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other."

31. In conclusion, we find that no such injustice has been demonstrated, and also find nothing to fault the learned Judge for upholding the decision of the Taxing Officer. Accordingly, the appellant's appeal fails and is hereby dismissed. In principle, costs follow the event (*Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] **eKLR**). Accordingly, the costs of this appeal shall be borne by the appellant. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

H. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA – CI Arb, FCIARB

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR