



**Bethsaida Resort & Spa Limited v Gauderlot (Civil Appeal  
60 of 2020) [2023] KECA 628 (KLR) (26 May 2023) (Judgment)**

Neutral citation: [2023] KECA 628 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL 60 OF 2020  
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA  
MAY 26, 2023**

**BETWEEN**

**BETHSAIDA RESORT & SPA LIMITED ..... APPELLANT**

**AND**

**JEAN-PIERRE GAUDERLOT ..... RESPONDENT**

*(Being an appeal from the ruling and order of the Environment and Land Court  
at Mombasa (Omollo, J.) dated 21st November 2019 and delivered on 16th  
December 2019 by Yano, J. in ELC Miscellaneous Civil Application No. 6 of 2018)*

**JUDGMENT**

1. In this appeal, the appellant has challenged the ruling of the Environment and Land Court (ELC) (A Omollo, J) dated November 21, 2019 and delivered by C Yano, J on December 16, 2019. In that ruling, the ELC partially allowed an application by the appellant to set aside a certificate of stated costs dated February 7, 2018 issued in favour of the respondent certifying party and party costs in the amount of Kshs 1,210,475.00 inclusive of instruction fees of Kshs 1,195,000.00. In doing so the ELC pronounced that “instruction fees is awarded at 75% of the instruction fee chargeable on the amount of Kshs 45,000,000 which gives a sum Kshs 870,3750.”
2. In substance, the five grounds of appeal set out in the memorandum of appeal amount to a complaint that the learned judge misapprehended the value of the subject matter of the suit that was before the Magistrates Court in determining the instruction fees awardable to the respondent; that instead of taking the amount sued for, which was Kshs 4,500,000.00, as the value of the subject matter of the suit, the judge erroneously took the contract price of the suit property of Kshs 45,000,000.00 as the value of the subject.
3. The background in brief is that the appellant filed suit against the respondent before the Magistrate’s Court at Kwale, being Civil Suit No 507 of 2017, in which it sought judgment for a declaration that a



- sale agreement entered into between the parties dated August 2, 2017 over Land Title numbers Kwale/ Diani Complex/246 and Kwale/Diani Complex/248 (the properties) is void and unenforceable; that the respondent frustrated the completion of the same; and for a refund of the deposit of the purchase price amounting to Kshs 4,500,000.00; interest and costs.
4. The respondent, who was the defendant in that suit, filed a notice of preliminary objection challenging the jurisdiction of that court on grounds that the value of the subject matter, being the sale of the properties “is Kshs 45,000,000.00 which is well beyond the pecuniary jurisdiction” of that court. The suit was dismissed in a ruling dated January 3, 2018.
  5. The respondent then obtained a certificate of stated costs dated February 7, 2018 certifying party and party costs payable by the appellant to the respondent in the amount of 1,210,475.00 made up of party and party costs on lower scale of Kshs 1,195,000.00; attendances Kshs 10,000.00; court fees on suit Kshs 225; other disbursements Kshs 5,000.00; court fees on decree Kshs 150.00; and court fees on certificate of costs, Kshs 100.
  6. Dissatisfied, the appellant by its chamber summons application dated February 20, 2018 filed before the ELC on September 21, 2018 applied for setting aside of the said certificate of costs. It also sought an order for re-assessment of the party and party costs. There was an alternative prayer that the matter be remitted back to the trial court for fresh assessment with directions on assessment. The application was based on grounds that the Magistrate’s Court failed to consider that the amount sued for was Kshs 4,500,000.00 and not Kshs 45,000,000.00; that there was an error of principle having regard to schedule 7(1) and schedule 7(1)(b) of the *Advocates (Remuneration) Order*, 2014 in that the costs should be based on the sum sued for and that the fee should be 75% of the chargeable fees where, as here, the suit is determined summarily without going to full trial. The respondent opposed the application maintaining that there was no basis for interfering with the decision of the magistrate.
  7. The learned judge agreed with the appellant to the extent that under schedule 7(1)(b) of the *Advocates (Remuneration) Order*, 2014, the fee should have been 75% of the chargeable fees but held that the value of the subject matter, contrary to the claim by the appellant, was Kshs 45,000,000.00 and thus concluding, as already stated, that instruction fees is awarded at 75% of the instruction fee chargeable on the amount of Kshs 45,000,000 which gives a sum Kshs 870,3750.
  8. During the virtual hearing on November 30, 2022, learned counsel Miss Ngumbao, holding brief for Mr Ataka, learned counsel for the appellant relied entirely on the applicant’s written submissions dated November 28, 2022 in urging that by awarding instruction fees at Kshs 870,3750 based on the value of Kshs 45,000,000.00 instead of the amount of claim of Kshs 4,500,000.00 as pleaded in the plaint the learned Judge made an error of principle. In that regard, counsel cited the case of *Mwakio, Kirwa & Company Advocates v County Public Service Board Bome & Joshua Terer* (Miscellaneous Cause 1 of 2020) [2022] KEELRC 834 (KLR) (10 February 2022) as well as the case of *First American Bank of Kenya v Shah and Others* [2002] eKLR in support of the submission that this court is therefore entitled to interfere with the decision of the ELC.
  9. Counsel maintained that the issue in contention was a refund of deposit paid under the sale agreement and since the contract was not performed having been frustrated, the value of the properties could not be taken as the subject matter. Also cited was the case of *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR for the proposition that assessment of costs ought to be pegged on the conduct of the parties, the subject of litigation and the circumstances which led to the institution of the proceedings. It was submitted further that the suit involved a simple and ordinary question of law; that no complex or novel issues of law were involved the costs should therefore be commensurate with the work done.



10. There was no appearance for the respondent during the hearing of this appeal although written submissions in opposition to the appeal dated November 28, 2022 were filed by Cootow & Associates Advocates for the respondent. It was urged in those submissions that the learned Judge correctly determined the value of the subject matter based on the value of the properties. Counsel cited the case of *Joreth Limited v Kigano & Associates* (2002) eKLR for the proposition that the pleadings, judgement or settlement between the parties ought to inform the value of the subject matter for taxation purposes. Also cited were the cases of *Kenyariri Advocates v Salama Beach Hotel Ltd & 4 others* (2014) eKLR and *Peter Muthoka & another v Ochieng & 3 others* (2019) eKLR for the proposition that taxation involves exercise of discretion, and the learned Judge cannot be faulted.
11. We have considered the appeal and the rival submissions. The sole question in this appeal is whether the learned Judge erred by taking the value of the properties, as opposed to the amount of deposit of the purchase price of Kshs 4,500,000.00 that was claimed, as the basis for determining the value of the subject matter for purposes of taxation of party and party costs.
12. Taxation or assessment of costs involves an exercise in judicial discretion. It is settled that the circumstances a court may interfere with the exercise of discretion by a taxing officer in a reference are limited. Authorities for that proposition are many and go back many years. See for instance *Arthur v Nyeri Electricity Undertaking* [1961] EA 492 and *Premchand Raichand Limited & another v Quarry Services of East Africa Limited and another* [1972] EA 162 In the latter case, the Court expressed the opinion that:
- “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”.
13. Subsequent decisions have followed that path. See for instance, *Joreth Limited v Kigano & Associates* [2002] 1EA 92, and in *First American Bank of Kenya v Shah and others* [2002] EA 64 where the Court re-affirmed that in assessing costs, a taxing officer exercises judicial discretion which can only be interfered with, if it is established that the discretion was exercised capriciously and in abuse of the proper application of the correct principles of law; or that the decision of the taxing officer is based on an error of principle, or the fee awarded is manifestly excessive or excessively low as to amount to an injustice to one party or other. Re-affirming that position, the Court in *Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR, an appeal from a decision of a judge on a reference from the decision of a taxing officer stated:
- “...the learned judge like the taxing officer was exercising judicial discretion when...[dealing with]... the reference. This Court cannot interfere with the exercise of that discretion unless it is shown that the learned judge acted on the wrong principles of law.”
14. More recently, the court in expounding on the nature of such discretion in *Peter Muthoka and another v Ochieng & 3 others* [2019] eKLR stated that such discretion:
- “...is not a wild and unaccountable discretion, however, because it is at its core and by definition a judicial discretion is to be exercised, not capriciously at a whim, but on settled principles. When it is shown that there was a misdirection on some matter resulting in a wrong decision, or it is manifest from the case as a whole that the discretion was improperly exercised, resulting in mis-justice, to borrow the holding in *Mbogo v Shah (Supra)*, then the



decision though discretionary, may properly be interfered with. See also *Attorney General of Kenya v Prof. Anyang' Nyong'o & 10 others*, EACJ App No 1 of 2009”

15. Guided by those principles, is there a basis for this Court to interfere with the decision of the learned Judge for basing the value of the subject matter on the value of the properties? There is no contest that Schedule 7 of the *Advocates (Remuneration) Order* is applicable, and neither is there a contest that the value of the subject matter is ascertainable from the pleadings. What is in contest, and the only point of departure is whether such value is Kshs 4,500,000.00 being the amount the subject of the prayer for “refund of the deposit of the purchase price” or whether it is Kshs 45,000,000.00 being the purchase price of the properties.
16. In its amended plaint before the Magistrate’s Court, the appellant pleaded that it entered into an agreement with the respondent dated August 2, 2017 for the purchase of the properties including the hotel business operated thereon and duly paid the deposit of Kshs 4,500,000.00 while the balance of the purchase price was to be financed; that the respondent frustrated the completion and wrongly purported to issue a notice of completion and to demand the balance of the purchase price of Kshs 40,500,000.00. The appellant averred that the respondent breached the agreement for sale by, among other things, failing to provide the completion documents and unilaterally varying the terms of the contract. As already stated, the appellant sought judgment for a declaration that the sale agreement between the parties is void and unenforceable for all intents and purposes; a declaration that the respondent frustrated completion of the agreement; refund of the deposit of the purchase price of 4.5 million; and interest and costs.
17. Clearly therefore the refund of the deposit of 4.5 million was only an aspect of the suit involving the purchase agreement of the properties at the purchase price of Kshs 45,000,000.00 disclosed on the face of the amended plaint. We do not think that the taxing officer or the learned Judge can therefore be faulted for taking that value, apparent on the face of the pleadings, as the value of the subject matter. As the Court stated in *Joreth Ltd vs. Kigano & Associates* [2002] 1 EA 92, the value of the subject matter can be determined from the pleadings, the judgment, or the settlement. The Court stated:

“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, judgment or settlement (if such be the case) but if the same is not so ascertainable 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 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.” [Emphasis]
18. To the extent that the taxing officer and the learned judge determined the value of the subject matter based on the pleaded value of the properties, we can discern no error of principle that would entitle this court to interfere with the decision. Consequently, this appeal fails and is dismissed with costs to the respondent.
19. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 26<sup>TH</sup> DAY OF MAY 2023.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**



**P.NYAMWEYA**

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**JUDGE OF APPEAL**

**G.V. ODUNGA**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

