



Shah and Parekh Advocates v Kenindia Assurance Company Limited (Miscellaneous Civil Application 229 of 2018) [2024] KEHC 514 (KLR) (Civ) (31 January 2024) (Ruling)

Neutral citation: [2024] KEHC 514 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION 229 OF 2018
DAS MAJANJA, J
JANUARY 31, 2024**

BETWEEN

SHAH AND PAREKH ADVOCATES APPLICANT

AND

KENINDIA ASSURANCE COMPANY LIMITED RESPONDENT

RULING

1. Before the court for determination is the Advocates' Chamber Summons dated January 9, 2023 ("the Reference") made, *inter alia*, under Paragraph 11(2) of the Advocates Remuneration Order ("the Order"), seeking to set aside the decision of the Deputy Registrar dated May 15, 2020 ("the Ruling") in respect of Items 88, 133, 159 and 181 of the Applicant's Advocate/Client Bill of Costs dated April 9, 2018 ("the Bill of Costs") arising out of HCCC No.2842 of 1997; Margarith Dahler & Anor v Kenya Rent A Car Limited (Avis) ("the Suit") and appeals arising from the Suit in the Court of Appeal; Civil Application Nai No.67 of 1999 and Civil Application Nai No.68 of 1999. The Advocates also seeks to have the Bill of Costs resubmitted for taxation and reassessment of the aforementioned items before a different Registrar or in the alternative, the court itself does reassess the fees on the same.
2. The Reference is supported by the grounds on its face and the affidavit of Hasmukhrai Manilal Parekh, an advocate and partner in the Advocates' firm sworn on January 9, 2023. It is opposed by the Client through the replying affidavit sworn on October 12, 2023 by its Head of Legal Department, Winnie Awuor. In addition to their rival pleadings, the parties have also filed written submissions in support of their respective positions.
3. The facts giving rise to the Reference are common ground and are a matter of record. The Advocates were instructed by the Client to represent the defendants in the Suit where they had been sued for general and special damages in respect of an accident that had occurred on or about 08.01.1995. Sometime in 2006, the Advocates filed an application for dismissal of the Suit for want of prosecution,



which application was allowed by the court and thus precipitated the filing of the Bill of Costs. In the Bill of Costs, the Advocates sought inter alia under item no. 88, instruction fees of Kshs. 10,000.00 to conduct hearing of an application for security for costs, under item no. 133, instruction fees of Kshs. 1,500,000.00 to defend the 1st defendant in the suit, under item no. 159, instruction fees of Kshs. 25,000.00 for an application for extension of time and under item no.181, instruction fees of Kshs. 10,000.00 to defend an application to withdraw an application.

4. The Deputy Registrar considered the Bill of Costs and held, in part, in the Ruling as follows:

[1] do find that indeed the matter was dismissed and the Court did not have the opportunity to make a final finding in the same. The sum of Kshs.1,500,000/- is at Kshs.200,00/-. Items 88, 159, 181 and 118 are under Schedule 6 part 8 fees to present or oppose application may be reasonable but not less than Kshs.2500/-. I find that the sum of Kshs.2500/- each is sufficient in the circumstances. As for all the other items other than item 196 I find them reasonably drawn. The bill is therefore taxed as follows;

Instruction fees Kshs.200,000

½ Instruction Kshs.100,000

Other items Kshs. 51,870

Total Kshs.351,870

16 x 351,850 = Kshs. 56,299

100

= Kshs.408,169

Add Disbursement Kshs. 5,408

Kshs. 413,577

Total allowed after taxation is Kshs.413,577/-

5. It is this Ruling that has precipitated the Reference where the Applicant is principally objecting to the award of instructions fees above.

6. I have considered the reference, depositions and submissions. The Advocates protest the Client's replying affidavit and submissions were filed out of time. They urge the court to strike them out. Whereas the court frowns upon the filing of pleadings out of time and without the leave of court, the Supreme Court, in *Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others* (Election Petition 4 of 2017) [2017] KESC 30 (KLR) (Election Petitions) held that it was excusable to allow the late filing of such pleadings if no prejudice will be suffered by the opposing party. In this matter, I am of the view that substantive justice will be served if the impugned replying affidavit and submissions are deemed as properly filed and the same considered as there has been no prejudice occasioned on the Advocates. In any event, any such prejudice and inconvenience can be assuaged by an award or denial of costs. I will thus proceed to determine the substance of the Reference and the Client's response and the parties' submissions.

7. The main issue for determination is whether the court ought to set aside the Deputy Registrar's award of instructions fees under the aforementioned items in the Bill of Costs. It is now trite law that the Court will only interfere with the decision of a taxing officer in cases where there has been shown to be an error of principle (see *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005]



eKLR and *Arthur v Nyeri Electricity Undertaking* [1961] EA 497). This principle was reiterated in *Republic v Ministry of Agriculture and 2 Others; Ex-parte Muchiri W’Njuguna & others* [2006] eKLR where Ojwang’ J.,(as he was then) observed as follows:

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, particularly where he is an officer of great experience, merely because it thinks the award is somewhat too high or too low; it will only interfere if it thinks the award is so high or so low as to amount to an injustice to one party or the other.... The court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors.

8. I do not think there can be a dispute that in arriving at instruction fees, the value of the subject matter ought to be ascertained and the same can be deduced either from the pleadings, judgment or settlement, if such be the case, but if the same is not ascertainable, a taxing officer is entitled to use their discretion. This position is now trite and the same was espoused by the Court of Appeal in the *Joreth Case* (*Supra*).
9. It is common ground that the Suit was dismissed for want of prosecution and as such there was no judgment per se on its merits. In the Ruling, the Deputy Registrar implied that since there was no substantive finding on the matter, the value of the subject matter could not be determined therein and as such she had to apply her discretion. However, according to the Advocates, the Deputy Registrar could have been able to deduce the value of the subject matter from the pleadings and the general damages that could have been awarded by the court had the matter proceeded and concluded on its merits. While this argument is inviting, I reject the entreaty because doing so would be asking a taxing master to make a determination of the value of the subject matter based on a future, speculative and uncertain judgment which will be going against and illegally expanding the canons of taxation set out by the Court of Appeal in the *Joreth Case* (*Supra*). Further, the Court of Appeal in *Peter Muthoka & another v Ochieng & 3 others* [2019] eKLR stated that the judgment can only form the basis of determining the value of the subject matter if the same has already been delivered. Once a judgment has not been passed, then recourse is to be the pleadings and if the value cannot be ascertained therein, then the taxing master can apply their discretion.
10. I have looked at the pleadings in the Suit and I find that the value of the subject matter could not be ascertained therein. In the circumstances, the Deputy Registrar could only use her discretion in determining the appropriate instruction fees to award in accordance with the principles established in the *Joreth Case* (*Supra*). The Deputy Registrar was required to be guided by factors such as the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.
11. In the exercise of this discretion, the Deputy Registrar stated in respect of item no. 133 that “Kshs. 1,500,000/- is at Kshs. 200,000/-“. She never stated how she arrived at this figure by outlining the factors she considered in the exercise of this discretion. In *Republic v Ministry of Agriculture and 2 Others; Ex-parte Muchiri W’Njuguna & others* (*Supra*) the court emphasized the necessity to give reasons for arriving at a conclusion as follows:

It is necessary to ascertain how she arrived at that figure; for although the judicial review applicant’s firm position is that it was an exercise of lawful discretion which therefore, this court should uphold, the correct perception of the discretion donated by law, I believe, is that such a discretion is only duly exercised when it is guided by transparent, regular, reliable



and just criteria... and..... it was necessary to specify clearly and candidly how she exercised her discretion... it is not enough to set by attributing to oneself discretion originating from legal provision and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if these by themselves could permit assignment of mystical figures of taxed costs ...

12. In *Republic v Commissioner of Domestic Taxes ex. p Ukwala Supermarkets Ltd and Others* [2018] eKLR the court stated that “... the Taxing Officer ought to disclose what informed the decision to tax the costs in one way as opposed to another.” It is not enough for the Deputy Registrar to throw a figure at the parties and then let them engage in a reverse mathematical exercise in a bid to determine how she arrived at that figure. This was the Deputy Registrar’s duty for the sake of transparency, verifiability and certainty. I find this to be an error of principle by the Deputy Registrar as the award of Kshs. 200,000.00 as instruction fees is not verifiable and is without basis. This is a sufficient basis to set aside the decision on the instruction fees awarded under item no. 133 in the Bill of Costs.
13. As for the other impugned items in the Bill of Costs, the same were awarded at the minimum fee of Kshs. 2,500.00 as provided for by Schedule VI of the *Order* (1997). The Advocates do not oppose the applicable Order or provision but the decision of the Deputy Registrar not enhance the same as prayed in the Bill of Costs. The Deputy Registrar saw no reason to enhance the basic fee prescribed and thus felt that the sum of Kshs. 2,500.00 was sufficient in the circumstances. It has been stated time without number that this Court will not interfere with the exercise of judicial discretion unless in the exercise of that discretion the Deputy Registrar misdirected themselves in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Deputy Registrar was clearly wrong in the exercise of discretion and as a result, occasioned injustice (see *R. Billing & Co. Advocates v Kundan Singh Construction Limited (Now KSC International Limited)* [2020] eKLR). The Court of Appeal, in *Ouma vs Warega* [1982] KLR 288 emphasized that judges must extend some latitude to taxing officers and avoid unnecessary interference with questions of quantum in which taxing officers have greater experience, unless, of course there is some misdirection.
14. I fail to see any whimsical application of discretion by the Deputy Registrar in this case. Her discretion was based on established principles and guidelines on factors to consider when arriving at instruction fees and if she found no reason to enhance the basic fee, then that was within her purview and I find no reason to interfere with the same.
15. For the aforesaid reasons, I find that the only ground in the Reference that succeeds is that on Item 133. Considering the time taken by the parties in the Suit, I think it will be appropriate and time-saving that the court itself assesses the appropriate instruction fees payable therein as opposed to remitting the same back for re-taxation before another Registrar (*First American Bank of Kenya Ltd v Gulab P. Shah & 2 others* ML HCCC No. 2255 of 2000 [2002] eKLR). In *University of Nairobi & another v Moses* (Civil Appeal 119 of 2020) [2022] KECA 45 (KLR) the Court of Appeal set aside instruction fees that were awarded and substituted the same with an amount it considered fair and appropriate.
16. As stated, since the value of the subject matter could not be ascertained from the pleadings, the court has to apply its direction to determine the subject matter value. This is not to say that where there is a composite claim for special and general damages, the court cannot take into account the amount of special damages claimed in exercise of discretion. Considering the time taken by the parties in the suit, pleadings filed by the Advocates in the Suit and in the Court of Appeal and; inflation, I find that a sum of Kshs. 400,000.00 as instruction fees to defend the Suit to be appropriate in the circumstances. On the one-half increase, I agree with the Advocates that the Deputy Registrar erred in applying the same to the instruction fees as opposed to the entire fees awarded plus all proper attendances (see *D. Njogu & Company v Kenya National Capital Corporation* [2005] eKLR).



17. The Advocates' Chamber Summons dated January 9, 2023 succeeds to the extent that the Ruling of the Deputy Registrar dated May 15, 2020 is set aside and substituted with the following as the taxed costs in respect of the Bill of Costs dated April 9, 2018:

Instruction fees Kshs.400,000

Other items Kshs. 51,870

One-half -increase Kshs.225,935

Total Kshs.677,805

16% x 677,805(VAT) = Kshs. 108,448

Add Disbursement Kshs. 5,408

Total allowed after taxation is Kshs.791,661

18. As costs follow the event, I award the Advocates costs of the Reference assessed at Kshs. 50,000.00 only.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2024.

D. S. MAJANJA

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Court Assistant: Mr M. Onyango

Mr Parekh instructed by Shah & Parekh Advocates for the Advocates/Applicant.

Mr Kadu instructed by Masire Mogusu and Company Advocates for the Client/Respondent.

