



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL CASE NO. 11 OF 2018**

**AMALO COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**B. N. KOTECHA AND SONS LIMITED.....1<sup>ST</sup> DEFENDANT**

**HEMAL KOTECHA.....2<sup>ND</sup> DEFENDANT**

**RULING**

The Ruling is in respect to two references from the Taxation of the Party and Party Bill of Costs dated 10<sup>th</sup> April 2019.

1. The learned Taxing Officer had taxed the Bill of Costs in the aggregate sum of Kshs 5,110,570.07.
2. In the process of arriving at that figure, the Taxing Officer had, inter alia, taxed off items Numbered **81** and **83** in the Bill of Costs.
3. The Plaintiff felt aggrieved by the said decision, and lodged a reference, seeking the setting aside of the decision in respect to the 2 items.
4. The Plaintiff's application is dated 14<sup>th</sup> October 2020.
5. Meanwhile, the Defendant was also aggrieved by the decision of the Taxing Officer. In principle, the Defendant believes that the amount awarded by the Taxing Officer was excessive.
6. It is well settled that when a reference has been filed from a taxation, the Court cannot interfere with the decision of the Taxing Officer unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly high or so manifestly low, as to justify an inference that it was based on an error of principle.

**Item 81**

7. As the subject matter of the taxation was a Party and Party Bill of Costs, I find that the **Advocates Remuneration Order 2014, Schedule VI Part B** was not applicable to it.
8. The said provision only applies to Advocate/Client Bills of Costs.
9. Accordingly, the learned Taxing Officer was right to have disallowed the request to have the taxed costs increased by 50%.

**Item 83**

10. The claim was for VAT on the legal fees.
11. In the case of **PYRAMID MOTORS LIMITED Vs LANGATA GARDENS LIMITED [2015]eKLR** the Court held as follows;

***“The Bills herein concerned Party and Party costs and VAT could then not apply as neither party fetched nor supplied services to the other.***

***True, legal services were rendered but it is not the Advocate who was being compensated herein.***

***The Master could only have awarded VAT if the Bills were Advocate-Client Bills or if there was tendered evidence before the Master that the***

***Plaintiff paid VAT and was consequently entitled to indemnity.”***

12. I am persuaded that that was an accurate exposition on the issue, and therefore I find that the learned taxing officer was right to have disallowed the claim for VAT.

13. In effect, the Plaintiff's reference dated 14<sup>th</sup> October 2020 has no merit, and is therefore dismissed. The costs of that reference are awarded to the Defendant.

#### Copies of documents

14. The demand notices are dated 9<sup>th</sup> April 2018. The said notices are exactly the same in content, save that they are addressed separately to each of the 2 Defendants.

15. The question that arises is why the Plaintiff had to make 3 copies of each of the letters.

16. Secondly, the Plaintiff asserted that each of the letters had 3 folios.

17. A folio is a certain number of words, used as a method of measurement. Ordinarily, it has been accepted that 100 words make up one folio.

18. I have done a quick count of the words in the demand notices. I found that they are about 200 words.

19. In the event, I find that the folios were exaggerated in the Bill of Costs. I also find no justification for the claim for 3 copies of each of the letters.

20. The finding therefore impacts upon the items **2, 4, 9, 11, 13, 15, 26, 28** and **49**.

21. It is also extremely interesting to note that in respect to Item **44**, the Plaintiff deemed it necessary to make copies of an email message, on 1<sup>st</sup> November, 2018. There will be need for the Plaintiff to justify the need for making 2 copies of the email letter.

22. Items **63, 64, 51, 71** and **75** would also need to be justified.

#### Drawings

(a) The Defendant submitted that there was duplication in the pre-action demand.

23. However, I hold the considered view that as there are 2 Defendants, the Plaintiff was obliged to serve each of them with a pre-action demand.

24. Accordingly, there was no duplication on Items **1** and **3**.

#### **(b) Verifying Affidavit**

25. The Defendants submitted that there is no Plaintiff without a Verifying Affidavit. In their view, the verifying affidavit cannot be treated separately from the Plaintiff.

26. Whilst there is a mandatory requirement that a Plaintiff must be accompanied with a verifying affidavit, that does not make the said verifying affidavit a part of the Plaintiff.

27. As the provisions of **Order 4 Rule 1 (2)** of the **Civil Procedure Rules** stipulates;

***“The plaintiff shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1 (1) above.”***

28. Whereas **Order 4 Rule 1 (1)** stipulates what particulars the Plaintiff shall contain, it does not include the verifying affidavit amongst the said particulars. Instead **Rule 1 (2)** stipulates that a verifying affidavit will accompany the Plaintiff.

29. In my considered opinion, a verifying affidavit is separate and distinct document from the Plaintiff which it was verifying.

30. Similarly, the List of Witnesses; Witness Statements and List of Documents are separate and distinct from the Plaintiff.

31. I find that the Items **10, 12, 14** and **27** were properly charged for, separately from the Plaintiff.

Item 48 – Replying Affidavit drawn on

14<sup>th</sup> November 2018

32. The Defendant asserted that there was no such an affidavit on the record.

33. However, I traced the affidavit of **ANIL KUMAR D. SHAH** which was drawn, sworn and filed on 14<sup>th</sup> November 2018.

34. It indicates that it was filed in answer to the affidavit of **HARSHIL KISHORE KOTECHA**, which had been sworn on 1<sup>st</sup> November 2018.

35. Accordingly, there is no merit in the contentions pertaining to Item **48**.

Court Attendances

**(a) Item 17**

36. The Plaintiff claimed Kshs 500/= for attending at the Court Registry to retrieve copies of the Plaintiff together with the accompanying documents.

**(b) Item 18**

37. The Plaintiff claimed Kshs 200/= for receiving and perusing the Summons to enter appearance.

38. The Plaintiff submitted that those were non-existent expenses.

39. I find that if the Plaintiff was filed on 28<sup>th</sup> May 2018, and thereafter the Plaintiff attended at the registry 2 days later, to retrieve the Plaintiff together with Summons to Enter Appearance, those are legitimate claims.

**(c) Items 29, 38, 47, 52, 59, 65, 72** and **73** would be legitimate, provided the record shows that the Plaintiff attended at the registry to either file or to retrieve documents.

Letter to Oraro & Co.

40. Unless the Plaintiff can demonstrate to the Court the reason for writing to a law firm which was not representing the Defendants, it was definitely an error to allow the claim under Item **30**.

Perusals – Items 34, 45 and 46

41. It appears that the Taxing Officer placed trust on the Plaintiff's computation of the folios in the 3 documents listed as **34, 45** and **46**.

42. The Taxing Officer has to verify the number of folios; and should thereafter calculate the correct sums to be awarded in respect to those items.

43. In conclusion, the application dated 25<sup>th</sup> September 2020 is allowed in the terms specified above.

44. The Bill of Costs shall be taxed by a Taxing Officer other than Hon. Lina Akoth; and the said process shall be limited to the items whose computation have been set aside.

45. As the Defendant's reference has been partially successful, I order that the Plaintiff shall pay 50% of the costs thereof, to the Defendant.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 26TH DAY OF JANUARY 2022**

**FRED A. OCHIENG**

**JUDGE**