REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 245 OF 2018

IN THE MATTER OF PARTY AND PARTY COSTS

ILONGO TOKOLE JEAN...APPELLANT/APPLICANT

-VERSUS-

PALLET LOGISTICS LIMITED...1ST RESPONDENT

KENYA REVENUE AUTHORITY..2ND RESPONDENT

KENYA PORTS AUTHORITY..3RD RESPONDENT

RULING

(*Being a reference from the ruling of the Taxing Master Hon. J.M Nyariki,*

***Resident Magistrate, delivered on 18th November, 2019*).**

1. The application before me is a Chamber Summons dated 20th August, 2020 brought under the provisions of Rule 11(2) of the Advocates Remuneration Order, Sections 1A, 1B and 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. The appellant/applicant seeks the following orders-

(i) That this Honourable Court do set aside and/or vary the ruling delivered on 18/11/2019 by the Hon. Taxing Master J.M Nyariki towards the applicant's bill of costs dated 1/02/2019;

(ii) That the decision of the learned Taxing Master with respect to the items listed below be set aside and taxed afresh by this Honourable Court;

a) Item 1: Instructions Fees

b) Item 2: Fees for getting up for Trial

c) Item 14: Attendances; and

(iii) That the costs of this application be provided for.

2. The application is premised on the grounds on the face of it and the affidavit of Shukran Mwambonje, the applicant's Advocate. On 6th October, 2020, the 1st respondent filed grounds of opposition in respect to the said application.

3. The application herein was canvassed by way of written submissions. The applicant's submissions were filed on 12th November, 2020 by the law firm of Kyalo Matata & Co. Advocates while the 1st respondent's submissions were filed on 27th November, 2020 by the law firm of Wandai Matheka & Co. Advocates.

4. Mr. Mwambonje, learned Counsel for the applicant submitted that the Taxing Master grossly erred when he made a finding that the appeal herein was purely on interpretation of an application filed by the appellant whereas the appeal was against two rulings which touched on the

issue of stay of execution. He submitted that the applicant proposed the sum of Kshs. 188,423.78 as instruction fees since the subject value of the appeal was payment of Kshs. 4,421,189.00 but the Taxing Master erred in making a finding that there being no Record of Appeal filed, the fees chargeable was Kshs. 5,000/=.

5. He further submitted that an appeal is instituted by the filing of a Memorandum of Appeal as provided under the provisions of Order 42 Rule 1 sub-rule 1 of the Civil Procedure Rules. He stated that Schedule 6 of the Advocates (Remuneration) (Amendment) Order, 2014 provides for what constitutes instruction fees. He relied on the case of **Joe Kathungu & Co. Advocates v Wilson Kaburi Macharia & another** [2018] eKLR, where Njuguna J was in concurrence with the decision in the case of **Jeroth Limited v Kigano & Associates** [2002] 1 EA in which the Court held 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).

6. Mr. Mwambonje stated that the value of the subject matter in the appeal could be easily discerned from the pleadings since it was an appeal against a conditional stay granted by the subordinate Court, which compelled the appellant to pay Kshs. 4,421,189.00 to the 1st respondent. Mr. Mwambonje was of the view that the Taxing Master erred in adopting Schedule 6J(viii) to tax the instruction fees at Kshs. 5,000/= as the said provision is non-existent in the Advocates (Remuneration) (Amendment) Order, 2014. Counsel submitted that in the event that the appeal herein was not provided for under Schedule 6, the correct Schedule would have been Schedule 6(A)(1)(a) of the Advocates (Remuneration) (Amendment) Order, 2014.

7. Mr. Mwambonje submitted that fees for getting up for trial are provided under Schedule 6 paragraph A(2) of the Advocates (Remuneration) (Amendment) Order, 2014 and since the 1st respondent filed a denial of liability by way of a replying affidavit on 10th December, 2018, getting up fees was appropriate and indicated that a 1/3 of Kshs.188,423.00 is Kshs. 62,807.66. He submitted that the Taxing Master taxed off Kshs. 4,100.00 from the two attendances (items 11 &14), whereas Schedule 6 provides for Kshs. 7,100/= for attendances for half a day.

8. Mr. Matheka, learned Counsel for the 1st respondent contended that an appeal is the Record of Appeal, while a Memorandum of Appeal only sets out the grounds of the appeal for purposes of notifying the other party of the intention to challenge the decision. He indicated that Order 42 Rule 11 of the Civil Procedure Rules provides that once an appeal has been filed, the appellant shall within thirty days cause the matter to be listed before a judge for determination under Section 79B of the Act (Civil Procedure Act).

9. It was submitted by the Counsel for the 1st respondent that Order 42 Rule 4 of the Civil Procedure Rules, 2010 provides for proof as to what an appeal is and that it must include for all intends and purposes, a Record of Appeal. He further submitted that the applicant's appeal was rendered nugatory on 20th December, 2018 when the learned Judge issued directions *suo moto* allowing the application dated 28th November, 2018 and the appeal was never heard. He stated that the Taxing Master was right in his understanding of the bill of costs and by making reference to an application and not the appeal, thus applying Schedule 6(viii) as the appropriate and applicable scale.

10. Mr. Matheka stated that an appeal is argued based on the decision of the Trial Court and not on the pleadings, especially the interlocutory pleadings, which do not carry the weight provided under Schedule 6 Paragraph A(2). He as such submitted that the Taxing Master correctly applied himself on the provisions of Schedule 6J(viii) which provides for the sum of Kshs. 5,000/=, as what was determined *suo moto* was the applicant's application dated 28th November, 2018. He contended that since the costs were awarded summarily pursuant to an application and there was no trial, getting up fees could not be raised or awarded.

ANALYSIS AND DETERMINATION.

11. This Court has considered the issues raised in the reference herein, the supporting affidavit, the grounds of opposition and the submission of the parties. The issue that arises for determination is whether the reference herein is merited.

12. The applicant's Counsel deposed that after the ruling of the applicant's party & party bill of costs was delivered on 18th November, 2019, he wrote a letter to the Taxing Master notifying him of the applicant's objection to the ruling on taxation but the law firm on record for the applicant was yet to receive reasons for the Taxing Master's decision in line with Rule 11(2) of the Advocates Remuneration Order. He deposed that the Taxing Master failed to take into account the scale of fees prescribed under Schedule 6 of the Advocates (Remuneration) (Amendment) Order, 2014.

13. The applicant contended that the Taxing Master made serious errors in principle in taxing the said bill of costs and thereby arrived at the wrong decision. He submitted that the said taxation was irregular and the Taxing Master's decision ought to be set aside and that the bill of costs dated 1st February, 2019 should be taxed afresh.

14. The 1st respondent in its grounds of opposition averred that the application dated 20th August, 2020 was defective and bad in law and that the decision of the Taxing Master delivered on 18th November, 2019 had not been availed. He urged this Court not to set aside and/or vary the said decision.

15. It is noteworthy that through a letter dated 29th November, 2019, the applicant notified the Taxing Master of its objection to his decision. The said letter was duly received on the same day at the Mombasa Law Courts. It however, did not elicit a response.

16. The principles of taxation were outlined in the case of ***Premchand Raichand Ltd & another v Quarry Services of East Africa Ltd & Others*** *(No. 3) (1972) EA 162, where the then Court of Appeal stated thus -*

> ***"(a)That costs should not be allowed to rise to a level as to confine access to justice as to the wealthy.***

(b) That a successful litigant ought to be fairly reimbursed for the cost he has had to incur.

(c) that the general level of remuneration of Advocates must be such as to attract recruits to the profession.

(d) so far as practicable there should be consistency in the award made and

(e) The Court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party."

17. This Court can only interfere with the decision of the Taxing Master where there has been an error in principle but should not do so on questions solely of quantum as that is an area where the Taxing Master is more experienced and therefore more apt to the job. A Court can therefore only interfere with the decision of the Taxing Master in the event that while taxing the bill of costs, he considered factors that he ought not have been considered in the first place or failed to consider facts which he ought to have considered. In the case of **Kanu National Elections Board & 2 others v Salah Yakub Farah** [2018] eKLR, the Court held as follows-

"The general principles governing interference with the exercise of the taxing master's discretion were authoritatively stated by the South African court Visser vs Gubb [1981 (3) SA 753] (C) 754H – 755C as follows:-

"The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue . . . The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal."

18. In the reference herein, the applicant's Counsel stated that on item No. 1, on instruction fees, the Taxing Master erred in making a finding that there being no Record of Appeal, the fees chargeable was Kshs. 5,000/=. He posited that an appeal is instituted by the filing of a Memorandum of Appeal which the applicant had done in accordance with Order 42 Rule 1 sub-rule 1 of the Civil Procedure Rules, 2010.

19. In order to determine if the proper scale was applied to item No. 1 of the bill of costs on instruction fees, this Court must first consider what constitutes an appeal. Order 42 Rule 1 sub-rules 1 and 2 of the Civil Procedure Rules, 2010 provides as hereunder:

"(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively." (emphasis added).

20. It is not in dispute that the applicant filed a Memorandum of Appeal on 28th November, 2018 simultaneously with an application seeking *inter alia,* orders for stay of execution. This Court's understanding of the provisions of Order 42 Rule 1 sub-rule 1 of the Civil Procedure Rules, 2010, is that the bedrock of an appeal to the High Court is the Memorandum of Appeal and not a Record of Appeal as urged by the 1st respondent's Counsel.

21. The 1st respondent's Counsel submitted that the Taxing Master was right in his understanding of the bill of costs as he referred to an application and not an appeal. This Court finds the foregoing to be misleading as in the directions that Judge P.J. Otieno gave on 20th December, 2018, he awarded costs of the appeal to the appellant.

22. This Court therefore holds that the bill of costs dated 1st February, 2019 was in respect of an appeal and not an application. Schedule 6 paragraph 1 of the Advocates (Remuneration) (Amendment) Order, 2014 provides for instruction fees as hereunder:

"To sue in any proceedings described in paragraph (a) where a defense or other denial of liability is filed; or to have an issue determined arising out of inter-pleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement

between the parties and—

That value exceeds but does not exceed

Kshs. Kshs. Kshs.

- 500,000 75,000

500,000 750,000 90,000

750,000 1,000,000 120,000

1,000,000 20,000,000 fees as for Kshs. 1,000,000 plus

an additional 2%.

Over 20,000,000 fees as for 20,000,000 plus an

additional 1.5%." (emphasis added).

23. It is evident from the foregoing paragraph that instruction fees is determined by the value of the subject matter which can be determined from the pleadings, judgment or settlement, in the event that the value of the subject matter cannot be determined. The applicant's Counsel correctly relied on Schedule 6(a) of the Advocates (Remuneration) (Amendment) Order, 2014, under the sub-heading of appeals, which provides as hereunder-

> ***"To present or oppose an appeal in any case not provided for above such sum as may be reasonable but not less than Kshs 25,200."***

24. Having held that the party and party bill of costs dated 1st February, 2019 was in respect to an appeal, this Court has to determine whether the value of the subject matter in the appeal could be ascertained. It can be clearly discerned that the appeal emanated from two rulings delivered on 2nd August, 2018 and 27th November, 2018. In the ruling delivered on 2nd August, 2018, the Court issued a mandatory injunction against the 2nd respondent compelling it to convert container No. PCIU8539257 into local use upon the applicant paying the necessary dues. The Court also directed the 1st respondent to pay storage charges to the 3rd respondent after which the container would be released to Simon Ndungu Baiya, among other orders.

25. In the ruling delivered on 27th November, 2018, the Court directed the applicant to refund within 24 hours all the money that had been expended by the 1st respondent and that upon compliance, the container would be held by the 3rd respondent on the written undertaking by the applicant that he would pay all the storage and related charges pending the hearing and determination of the applicant's application dated 30th October, 2018. In the 1st respondent's replying affidavit filed on 10th December, 2018 in opposition to the applicant's application dated 22nd November, 2018, it averred at paragraph 25 that it had so far spent Kshs. 4,421,189.00 towards the release of the container.

26. This Court is of the finding that the value of the subject matter in this appeal was ascertainable. The Taxing Master therefore erred in holding that the appeal was purely on interpretation of an application filed by the applicant. It is my finding that the Taxing Master ought to have applied the provisions of Schedule 6(1)(b) of the Advocates (Remuneration) (Amendment) Order, 2014 in taxing the bill of costs dated 1st February, 2019.

27. On whether getting up fees was qualified, the applicant submitted that the 1st respondent filed a denial of liability being a replying affidavit on 10th December, 2018. The 1st respondent on the other hand submitted that the Advocates (Remuneration) (Amendment) Order, 2014, makes provision for fees for getting up and preparing the case for trial and that in the appeal, the costs were awarded summarily pursuant to an application without going to trial thus the same could not be awarded. Schedule 6(2) of the Advocates (Remuneration) (Amendment) Order, 2014 provides as follows-

> ***"In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation."***

28. In this instance, it is evident that the applicant never filed a Record of Appeal and directions were never given as to the mode of hearing of the appeal. The claim by the applicant that the 1st respondent filed a denial of liability is misleading since the replying affidavit filed by the 1st respondent was in opposition to the application dated 28th November, 2018. This Court therefore finds that in the absence of the filing of denial of liability by the 1st respondent and preparation of the appeal for trial, getting up fees does not qualify in this matter.

29. On whether the attendances were taxed to scale, the 1st respondent submitted that the same were taxed to scale. On the other hand, the applicant submitted that Schedule 6 provides for Kshs. 7,100.00 for attendance for half a day thus the same was applicable. This Court has gone through the proceedings that took place before Judge P. J. Otieno and noted that on 11th December, 2018 the application dated 28th November, 2018 came up for hearing but the same did not proceed as the Court noted that it would be important to call for the lower Court file for perusal and thereafter give directions. On 21st December 2018, the parties herein attended Court and the directions were read out.

30. Schedule 6(7)(d) of the Advocates (Remuneration) (Amendment) Order, 2014 provides the following scales for attendance-

"At court or in chambers before judge not otherwise provided for—

Ordinary Scale Higher Scale

Kshs Kshs

Half-hour or less 1,100 1,900

One hour 2,300 3,000

Half-day 5,000 7,100

Whole day 10,000 15,000."

31. In view of the scales given in the preceding paragraph, this Court finds that Kshs. 7,100.00 for attending Court for hearing of an application that did not proceed and for taking directions is on the higher side. The applicant has failed to demonstrate that the calculation of attendance fees was erroneous, illegal, incorrect and was not based on any discretionary powers vested on the Taxing Master. I therefore hold that the Taxing Master did not make an error in taxing attendance fees at Kshs. 3,000/=.

32. The upshot is that the Taxing Master's ruling delivered on 18th November, 2019 is hereby set aside for failure to apply the provisions of Schedule 6(1)(b) of the Advocates (Remuneration) (Amendment) Order, 2014 in taxing the bill of costs dated 19th December, 2018. The said bill of costs is hereby referred to another Taxing Master for fresh taxation according to the applicable Remuneration Order. The applicant is awarded the costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 24TH DAY OF SEPTEMBER, 2021.

In **view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued**

by his Lordship, the Chief Justice on the 17th April, 2020 and subsequent directions, the ruling herein has been delivered through Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Mangale holding brief for Mr. Mwambonje for the applicant

Mr. Maiga for the 1st respondent

Mr. Oliver Musundi – Court Assistant.