REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

COMMERCIAL & ADMIRALTY DIVISION

CIVIL APPEAL NO. 160 OF 2017

PARAMOUNT BANK LIMITED.....APPELLANT

VERSUS

NAQVI SYED QAMAR.....RESPONDENT

RULING

[1] This ruling is in respect of the respondent's Chamber Summons dated **30 April 2021**. The application is a reference brought pursuant to **Paragraph 11(1) and (2)** of the **Advocates (Remuneration) Order**. It is also expressed to have been filed under **Sections 1A, 1B and 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya,** for orders that the ruling dated **14 April 2021** in respect of the respondent's Party and Party Bill of Costs dated **19 October 2020** be said aside and replaced with an award of costs in such amount as the Court deems just.

[2] The respondent took issue with the fact that the taxing master taxed off **Kshs. 98,800/=** from the instruction fees and approved only **Kshs. 25,200/=** for that item. He was of the assertion that the taxing officer erred in so doing because he completely ignored **Schedule 6 Paragraph 1(b)** as to the value of the subject matter. The respondent further faulted the taxing officer for having taxed off the getting up fees in entirety, yet the same is provided for under Paragraph 3 of Schedule 6. The application was supported by the affidavit of **Mr. Michael Oloo**, Advocate, in his capacity as the advocate seized of the matter. Counsel basically relied on the grounds set out in the Chamber Summons as well as the respondent's Party and Party Bill of Costs dated **19 October 2020**.

[3] The application was canvassed by way of written submissions, pursuant to the directions of the Court issued herein on **21 September 2021**. Counsel for the respondent was of the view that, since in the appealed judgment the lower court had awarded the respondent **Kshs. 1,200,000/=** that amount ought to have formed the basis for ascertaining the value of the subject matter for purposes of determining the instructions fee. At paragraph 10 of his written submissions counsel proposed that, going by the aforestated amount, instructions fee comes to **Kshs. 124,000/=** and therefore that it was an error of principle for the taxing officer to tax off **Kshs. 98,000/=** in respect of Item 1. He further submitted that the taxing officer relied on the wrong provision of the **Advocates (Remuneration) Order,** namely **Schedule 6 Paragraph (j) (ii)(a),** instead of **Paragraph 1(b)** of **the Advocates (Remuneration) Order**. Counsel made reference to **Peter Muthoka & Another vs. Ochieng & 3 Others** [2019] eKLR and **Joreth Limited vs. Kigano & Associates** [2002] eKLR for the proposition that where judgment has been entered, that judgment, and not the pleadings, ought to form the basis for calculating the instructions fee. Counsel accordingly urged the Court to allow the reference and set aside the taxation by the lower court, and proceed to either tax the Bill of Costs or refer it to another taxing master other than **Hon. Nyariki** for taxation.

[4] On behalf of the appellant, written submissions were filed herein on **25 October 2021** by **M/s Mwaniki Gachoka & Company Advocates**. It was the argument of **Mr. Mumia** that a taxing master has wide discretion; which discretion can only be interfered with if it is shown that the taxing master acted on a wrong principle. He relied on **KANU National Elections Board & 3 Others vs. Salah Yakub Farah** [2018] eKLR and **Republic vs. Ministry of Agriculture & 20 Others, Ex Parte Muchiri w' Njuguna** [2006] eKLR to buttress his arguments. He pointed out that this was a situation in which the amount could not be ascertained from the pleadings or the judgment. Counsel further submitted that the Getting Up fee was not payable because the appeal was never certified by the High Court pursuant to **Paragraph 3** of **Schedule 6** of the **Advocates (Remuneration) Order**. Accordingly, counsel defended the decision of the taxing officer and submitted that no error of principle has been proved to warrant interference with that decision.

[5] The foregoing notwithstanding, it was the submission of **Mr. Mumia** that the taxing officer erred in awarding **Kshs. 20,770.40** for Value Added Tax. His argument was that VAT is not payable in respect of a Party and Party Bill of Costs; and in this regard he cited **Pyramid Motors Limited vs. Langata Gardens Limited** [2015] eKLR and **James Nyangiye & Others vs. Attorney General** [2020] eKLR. Consequently, counsel urged the Court to otherwise dismiss the respondent's application dated **30 April 2021** with costs.

[6] I have given careful consideration to the subject application, its Supporting Affidavit as well as the written submissions filed herein by learned counsel. I have likewise perused the record and the proceedings held herein, particularly the Judgment delivered herein on **11 March 2020,** as well as the impugned decision of the taxing master, dated **14 April 2021**. The brief background to the application is aptly captured

in the Judgment dated **11 March 2020.** It is not in dispute therefore that the respondent was the plaintiff in the lower court suit; or that he sued the appellant for damages for libel, among other reliefs, contending that the appellant maliciously forwarded his name to the **Credit Reference Bureau**; and therefore wrongly portrayed him as a person who was not creditworthy. It is clear from the court record that the lower court heard the suit on the merits and rendered its judgment on **17 August 2017** in favour of the respondent, having found that the respondent had proved his case on a balance of probabilities. The respondent was consequently awarded **Kshs. 1,200,000/=** as general damages for defamation as one of the reliefs granted by the lower court.

[7] Being aggrieved by the decision of the lower court, the appellant preferred this appeal on **7 August 2017**. The appeal was likewise heard and dismissed on **11 March 2020** with costs to the respondent. In effect, the lower court decision was upheld in its entirety. The respondent thereafter filed his Party and Party Bill of Costs dated **19 October 2020** for taxation, whereupon the taxing master delivered the impugned ruling dated **14 April 2021.** The respondent was aggrieved by the fact that the instructions fee was reduced to **Kshs. 25,200/=** only from **Kshs. 124,000/=.** He was also unhappy that the Getting Up Fee of **Kshs. 41,333.33** was taxed off in its entirety, on the ground that the appeal was not certified as complex for purposes of **Paragraph 3** of **Schedule 6** of the **Advocates (Remuneration) Order.**

[8] It is now settled that taxation is a matter best left to the discretion of the taxing master of the Court. Therefore, the Court ought not to interfere with the exercise of that discretion where all indications are that the taxing officer exercised his/her discretion judiciously. Thus, in **Premchand Raichand vs Quarry Services (No. 3)** [1972] EA 162 the Court of Appeal for Eastern Africa held thus (per **Spry, VP):**

> **"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..."**

[9] The decision was applied in **Republic vs. Ministry of Agriculture** (supra), by **Hon. Ojwang, J.** (as he then was) who then proceeded to restate that:

> **"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."**

[10] Accordingly, taxing officers have often relied on the guidelines provided by the Court of Appeal, in **Joreth Limited Vs Kigano & Associates** [2002] 1 EA 92, that:

> **"The value of the subject matter of a suit for 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 ascertainable the Taxing Officer is entitled to use his discretion to assess such instruction fees as he considers just, taking into account amongst other matters, the nature and importance of the cause or the matter, the interests of the parties, the general conduct of proceedings."**

[11] A perusal of the taxing master's ruling dated **14 April 2021** shows that, having taken into account **"...the nature of the appeal, interest of the parties, the general conduct of the proceedings and all other relevant factors..."** he came to the conclusion that an amount of **Kshs. 25,200/=** was sufficient as instructions fee. Evidently, the taxing officer relied on **Schedule 6 paragraph 1 (a) of the Advocates Remuneration Order** under the subheading on Appeals; which simply states that:

> **"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"**

[12] It is noteworthy however that, in the instant matter, the lower court proceedings were "provided for" in Paragraph 1(a) and (b) of the **Advocates (Remuneration) Order**. Paragraph 1(a) states thus:

> **"To sue in any proceedings (whether commenced by plaint, petition, originating summons or notice of motion) in which no defense or other denial of liability is filed, where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties..."**

[13] Paragraph 1(b), on the other hand, states thus, in part:

> **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..."** (emphasis added)

[14] To my mind, Judgment in this context includes the Judgment appealed from in which the respondent was given an award of **Kshs. 1,200,000/=** in general damages. Hence, in the last paragraph of the Judgment delivered herein on **11 March 2020,** the Court **(Hon. Chepkwony, J.)** endorsed the lower court's Judgment and held that:

> **"In the upshot, I am of the view there was every justification to make the said awards and I have no reason whatsoever to interfere with the same. The end result is that this appeal is dismissed with costs to the Respondent."**

[15] Accordingly, the instructions fee ought to have been pegged on the Judgment that was the subject of the appeal. It was therefore an error of principle for the taxing officer to treat the appeal as a case "**...not provided for above...**". It is instructive that, in **Peter Muthoka & Another vs. Ochieng & 3 Others** (supra), the Court of Appeal made it clear that, in the case of appeals, the discretion under **Paragraph (a),** which is what the taxing master employed, would only apply where there is no Judgment or settlement. The Court held thus:

> **"It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily provided: either the pleading, the judgment or the settlement. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three. It is not open to the taxing officer to choose one or the other or to use them in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive."**

[16] On whether the respondent was entitled to Getting Up fees on appeal, **Paragraph 3** of **Schedule 6** is explicit that:

> **"In any appeal to the High Court in which a respondent appears at the hearing of the appeal and which the court at the conclusion of the hearing has certified that in view of the extent or difficulty of the work required to be done subsequently to the lodging of the appeal the case is a proper one for consideration of a getting up fee, the taxing officer may allow such a fee in addition to the instruction fee and such a fee shall not be less than one-third of the instruction fee."**

[17] No such certification was applied for by the respondent or given by the Court at the conclusion of the appeal. Consequently, the taxing officer cannot be faulted for disallowing Item 4 in its entirety. On Value Added Tax, it is now settled that it is not payable on Party and Party Bill of Costs as no services can be said to have been rendered as between the two disputants. I therefore endorse the position taken in **Pyramid Motors Limited vs. Langata Gardens Limited** [2015] eKLR that:

> **"...Value Added Tax (VAT) is chargeable in taxable supply made by any registered person. There was no taxable supply of either goods or services made to the Applicant herein by the Respondent herein. 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 had paid VAT and was consequently entitled to indemnity. But yet again it is also debatable whether the Plaintiff was a vatable person..."**

[18] As the issues in contest are fairly straightforward, I would proceed to re-tax the respondent's Party and Party Bill of Costs along the lines aforestated at **Kshs. 234,840.33**, taking into account the following adjustments:

- Instructions Fee is hereby adjusted upwards to **Kshs. 124,000/=** based on the sum of **Kshs. 1,200,000/=** as the value of the subject matter for purposes of **Paragraphs 1(a) and (b)** of the **Advocates (Remuneration) Order;**

- Value Added Tax of **Kshs. 20,770.40** is entirely disallowed.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 30TH DAY OF NOVEMBER, 2021.

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OLGA SEWE

JUDGE