REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 74 OF 2011

DICKSON MAINA KIBIRA……...APPELLANT

VERSUS

DAVID NGARI MAKUNYA…….....…RESPONDENT/APPLICANT

RULING

By a judgment delivered by this court on 2nd October, 2015, the appellant's appeal against the judgment of the subordinate court was allowed with costs to the appellant. The appellant subsequently filed a bill for party to party costs for taxation before the taxing master. The taxing master the costs at Kshs 94,618.

The applicant objected to the bill and so he filed a reference by way of a chamber summons dated 30th March, 2017 against the taxed bill.

In the affidavit in support of the summons the applicant's counsel flagged out the following items in the bill as the major bone of contention:

1. Getting up fees;

2. Construction of the record of appeal as an item on disbursements;

3. Instructions, by the appellant, to file a notice of motion dated 3rd November, 2011, in the course of proceedings;

4. Instructions to oppose and application by the respondent dated 15th November, 2013; and,

5.. Instructions, by the appellant, to file an application dated 25th June, 2014.

Each of the last three items were taxed at Kshs 6,300/=. Counsel for the applicant submitted that the correct taxed costs for each of the items as particularised in the bill was the sum of Kshs 3,000/=. This is per Schedule 6A (o) of the Advocates' Remuneration Order, 2006 under which the bill was taxed. Counsel for the respondent conceded that the sum of Kshs 3,000/= was the proper amount applicable to each of those items and therefore it is needless for me to delve any further into the inadequacies of the taxing master with regard to her ruling on these items.

The only items that are now in contention are those relating to getting up fees and the construction of the record of appeal.

As for getting up fees, counsel for the applicant submitted, correctly in my humble view, that under the

Advocates Remuneration Order, 2006, getting up fees can only be given in an appeal if the court certifies it as worthy for such fees. Schedule 6A (3) which addresses this aspect of the fees states as follows:

> ***3. FEE FOR GETTING UP AN APPEAL***
>
> ***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. (Underlining mine).***

It is clear from this provision that in an appeal to this court, the taxing master may only allow any other fee in addition to instructions fees (or getting up fees) if, upon consideration of the extent or the difficulty of the work done after the appeal has been filed, the court is satisfied at the conclusion of the hearing that a particular party is eligible for such fees and certifies him to be so eligible. By necessary implication, the taxing master cannot allow getting up fees without the certification of the court.

It follows that the taxing master misdirected herself and erred in law when she allowed getting up fees in the absence of certification of such fees by this court.

On the final item of disbursements, all I need to say here is that preparation of a record of appeal in itself is not a disbursement; rather it is the cost that is attached to the preparation. This means that if the respondent was to prove that he spent so much in preparation of the record of appeal, the taxing master would no doubt consider awarding the actual money spent in such preparation. In the absence of such proof there would be no basis to allow such an item. Accordingly, I find that the taxing master erred in allowing the item in the bill of costs which the respondent simply referred to as "construction of the record of appeal" without any proof of the costs incurred in the alleged "construction".

In conclusion therefore, I find merits in the applicant's reference and I hereby allow it. The sum total of the amount of costs allowed over and above the legal costs is Kshs 27,148 made out as follows:

1. Getting up fees……Kshs 16,000.00

2. Construction of the record of appeal……...Kshs 1,248.00

3. Filing of the motion dated 3rd November, 2011…Kshs 3,300.00

4. Opposing application of 15th November, 2013…..Kshs 3,300.00

5. Filing the application dated 25th June, 2014…….Kshs 3,300.00

Total Kshs 27,148.00

The correct taxed costs should therefore be:

Kshs	94,618.00
Less	27,148.00
Total	67,470.00

Accordingly, the bill as taxed by the taxing master is set aside; for reasons I have given, it is instead taxed at **Kshs. 67,470.00**. It is so ordered.

Dated signed and delivered in open court this 29th day of September, 2017

Ngaah Jairus

JUDGE