Dr. Vincent Ogutu t/a Visiongate Eye Care Consultant v JP Makokha & Company, Advocates (Miscellaneous Application E067 of 2022) [2024] KEHC 745 (KLR) (2 February 2024) (Ruling)

Neutral citation: [2024] KEHC 745 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

MISCELLANEOUS APPLICATION E067 OF 2022

WM MUSYOKA, J

FEBRUARY 2, 2024

BETWEEN

DR. VINCENT OGUTU T/A VISIONGATE EYE CARE CONSULTANT ..... APPLICANT

AND

JP MAKOKHA & COMPANY, ADVOCATES ..... RESPONDENT

RULING

1. The application for determination, dated 11th July 2023, is drawn by a non-Advocate, and, therefore, it is not well framed. It expresses dissatisfaction with the way an Advocate-client bill of costs was taxed, but there are no prayers. In the grounds, the applicant complains about the taxing officer, Hon. TA Madowo, Deputy Registrar, not appreciating that the Advocate-client bill of costs was filed after he complained about the respondent at the Advocates Complaints Commission; that the taxing officer should not have taxed the bill, instead, she should have simply increased the party and party costs by 50%, and thereby arrive at a figure of Kshs. 315, 850.00, instead of Kshs. 408,346.50; the taxing officer did not consider the sum of Kshs. 171,000.00 paid to the respondent; and he goes on to mention other bills, in other causes, which are not before me.

2. My understanding of it is that the applicant seeks a review of the taxation on 2 principal grounds: that the taxing officer should have arrived at the Advocate-client fee and costs by increasing the taxed party and party costs by 50%; and that the fees previously paid should have been taken into account.

3. The response to the reference is by Joseph Paul Makokha, Advocate, the respondent in these proceedings, who swore an affidavit on 26th September 2023. He avers that he rendered services to the applicant in Busia CMCCC No. 178 of 2018 and Busia HCCA No. 6 of 2019. He avers that he had irreconcilable differences with the applicant, hence he decided to file Advocate-client bills of costs against him. For Busia HCCA No. 6 of 2019, the bill was filed in Busia HC Miscellaneous Civil Application No. E064 of 2022; and for Busia CMCCC No. 178 of 2018, he filed Busia HC

Miscellaneous Civil Application No. E067 of 2022, the instant cause. There was also Busia ELC No. 004 of 2021, in which the applicant was not a party, but was the instructing client, and the respondent avers that he was also debriefed, and he filed an Advocate-client bill of costs, being Busia HC Miscellaneous Civil Application No. E058 of 2022. He avers that the applicant contested the bills, and filed documents in defence, and the taxing officer delivered rulings, taxing the bills. He states that the applicant stated that he was satisfied with the decisions on taxation, in Busia HC Miscellaneous Civil Application No. E058 of 2022 and Busia HC Miscellaneous Civil Application No. E064 of 2022, but he was not satisfied with the decision in Busia HC Miscellaneous Civil Application No. E067 of 2022. He avers that Busia HC Miscellaneous Civil Application No. E067 of 2022 is in the nature of a reference to the High Court, but is poorly drafted, so much so that he is not able to properly respond to it. On basing the taxation on the party and party taxed costs, he argues that that would not be in line with Rule 16 of the Advocates Remuneration Order and the decision in Vipul Prechand Haria vs. Kilonzo & Company, Advocates [2020] eKLR, I believe he is referring to Vipul Premchand Haria vs. Kilonzo & Co Advocates [2020] eKLR (Karanja, Kiage & Sichale, JJA), regarding the duty of the taxing officer where the instructions fees are ascertained. He avers that the amount deposited of Kshs. 70,000.00, covered filing fees and disbursements, and that there was no evidence of payment of Kshs. 171,000.00, saying that that was a new allegation, which was not before the taxing officer. He asserts that no basis has been laid for interfering with the taxation by the taxing officer.

4. On 27th September 2023, I directed that the application be canvassed by way of written submissions. Both sides have filed their respective written submissions.

5. The applicant submits that Busia HC Miscellaneous Civil Application No. E064 of 2022 and Busia HC Miscellaneous Civil Application No. E067 of 2022 arose from Busia CMCCC No. 178 of 2018; while Busia HC Miscellaneous Civil Application No. E058 of 2022 arose from Busia ELC No. 004 of 2021, a suit involving his father. He submits that the respondent had acknowledged receiving Kshs. 41,000.00 from him, and he clarifies that what he paid was Kshs. 41,000.00, and not the Kshs. 71,000.00 earlier pleaded. He submits that he paid the respondent a total of Kshs. 141,000.00, by MPesa. He submits that his arguments relating to what was before the Advocates Complaints Commission was improperly dismissed by the taxing officer. He submits that the proper approach, by the taxing officer, should have been to simply increase the taxed costs by 50%, in terms of Rule 7-B of the Advocates Remuneration Order. That would have given a total of Kshs. 105,283.50, instead of Kshs. 408,346.00, which he describes as an anomaly that I should correct. He submits that I should consider the Kshs. 141,000.00 that he had deposited with the respondent, and what was awarded in Busia HC Miscellaneous Civil Application No. E058 of 2022, Busia HC Miscellaneous Civil Application No. E064 of 2022, and Busia HC Miscellaneous Civil Application No. E067 of 2022, should be deducted from the final figure. He submits that the amount due from him, to the respondent is Kshs. 589,262.50, being Kshs. 158,700 costs taxed in Busia HC Miscellaneous Civil Application No. E058 of 2022, Kshs. 114,712.00 being costs taxed in Busia HC Miscellaneous Civil Application No. E064 of 2022, and Kshs. 315,850.50 being costs assessed in Busia HC Miscellaneous Civil Application No. E067 of 2022. Deduction of the Kshs. 141,712.00, allegedly paid by him to the respondent, would reduce the amount to Kshs. 448,262.00, which amount should be deducted from the Kshs. 900,000.00, allegedly held by the respondent, and the respondent ought to pay the applicant a sum of Kshs. 451,737.50. He says to that figure should be added Kshs. 158,700.00, from Busia HC Miscellaneous Civil Application No. E058 of 2022, to bring the figure to Kshs. 610,437.50.

6. The respondent submits that the application seeks no specific prayers, nor reliefs, against him. He submits that the application is unmerited, as it is in respect of 3 different assessments of Advocates fees, and it ought to be dismissed. He argues that it does not present a case upon which the court can make a determination.

7. I am mindful of the fact that the applicant is an unrepresented layperson. Consequently, I shall overlook the challenges in his application, in terms of Article 159 of *the Constitution*, and in the spirit of sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21, Laws of Kenya, in order to address the substantive justice of the matter. I shall eschew the technicalities of procedure, under which I should have dismissed or struck out his application, on the ground of technical incompetence, and, instead, I shall consider the substance of his application, based on the facts deposed in his affidavit.

8. For me to properly appreciate the filings herein, with relation to the instant cause, I called for the files in Busia CMCCC No. 178 of 2018, Busia ELC No. 004 of 2021, Busia HC Miscellaneous Civil Application No. E058 of 2022, Busia HC Miscellaneous Civil Application No. E064 of 2022 and Busia HC Miscellaneous Civil Application No. E067 of 2022. The files, in all these causes, were availed, and I perused them, and I am now clear on what transpired in all of them.

9. The starting point should be with pointing out that when it comes to Advocate-client bills of costs, and also party and party bills of costs, the court assesses costs and fees in each court file, or court case, separately. The court proceeds on the principle that instructions are given for each individual matter. My understanding is that the respondent handled 3 separate briefs here, Busia CMCCC No. 178 of 2018, Busia HCCA No. 6 of 2019 and Busia ELC No. 004 of 2021. These were 3 separate cases. Never mind that Busia HCCA No. 6 of 2019 was an appeal against a decision in Busia CMCCC No. 178 of 2018. The appeal in Busia HCCA No. 6 of 2019 was a separate cause from Busia CMCCC No. 178 of 2018, and, therefore, a separate brief from that in the original cause. The respondent was entitled to be paid separately for the services that he rendered in the 3 matters, and, so, when he fell out with the applicant, he was entitled to file 3 separate Advocate-client bills of costs for taxation, 1 for each of the 3 matters. That is the practice. There was, therefore, no monkey business on the part of the respondent, in filing the 3 separate Advocate-client bills of costs. In addressing the issues relating to the fees owed by him to the respondent, the applicant should deal with the 3 matters separately, as that is the way it should be. The 3 cannot possibly be lumped together. The instant cause relates solely to work done in Busia CMCCC No. 178 of 2018, and, therefore, the issue of bringing in the other matters into the cause is not proper.

10. As regards the preliminary objection, which he says the taxing officer unfairly or irregularly dismissed, the position is that whatever the outcome of the Advocates Complaints Commission proceedings, the complaint before the Advocates Complaints Commission would have no bearing on these court proceedings. The Advocates Complaints Commission is not a court of law. Its proceedings and decisions cannot override or supersede those of courts of law. The Advocates Complaints Commission only looks into the conduct of Advocates, it does not inquire into or conduct audits into the way and manner courts of law conduct their own business. So, whether there is a matter pending before the Advocates Complaints Commission, touching on the relationship between the applicant and the respondent, should be a matter of no consequence to court proceedings, and court proceedings cannot be stayed to await the outcome of proceedings before the Advocates Complaints Commission. It is not about one of the institutions being superior to the other, but rather about the 2 institutions operating at different planes or levels. Their mandates are separate different or distinct, and there is no intersection. The taxing officer was, therefore, not on the wrong, when she declined to suspend or stay the taxation, on account of the pendency of the complaint before the Advocates Complaints Commission.

11. Related to that is the sum of Kshs. 900,000.00 that the respondent is allegedly withholding from the applicant. The applicant is lumping up that amount with these taxed costs. That is not proper. The issue of taxed costs is separate from the decree. Where an Advocate withholds a judgement amount received by him on behalf of the client, that is usually not a matter for the court. That would be a matter

for escalation to the Advocates Complaints Commission. The role of the court is to decree the amount payable to the one party by the other party. Should that amount be paid to the Advocate by the other party, and the Advocate withholds it, for whatever reason, from his own client, then that would not be a matter for the court. The withholding of such monies would not form part of the dispute in court between the one party and the other party, but a matter relating to the relationship between the party and his Advocate. The dispute relating to it should be placed elsewhere, either before the Advocates Complaints Commission or the Disciplinary Committee of the Law Society of Kenya. I believe that the applicant has already taken a step in that direction, for there is that dispute before the Advocates Complaints Commission. I have not seen the documentation relating to it, and, so, I cannot say, one way or the other, what it is exactly about, suffice it to say that the issue, relating to the withholding of the Kshs. 900,000.00 from the applicant, belongs there, and not before me or the court. In any case, it would not be proper for the court and the Advocates Complaints Commission to be addressing or investigating the same issue or complaint, to obviate conflict of decisions, which would be to the eternal embarrassment of both institutions.

12. On whether the taxing officer should not have taxed the Advocate-client bill of costs, and instead should have increased the taxed party and party costs by 50%, I note, from the Advocate-client bill filed in court, that the respondent had asked the taxing officer to increase the amount to be taxed, as per the bill, by ½ or by 50%, based on Schedule 7B. Under Schedule 7B, the taxing officer is granted discretion to increase the amount of instruction fees based either on the fees prescribed in Schedule 7A, or on taxed costs under party and party assessment, or based on the fees agreed between the parties to the suit.

13. For avoidance of doubt, Schedule 7B states as follows:

> " B — Advocate And Client Costs
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> As between advocate and client the minimum fees shall be—
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> (a) the fees prescribed in A above increased by 50%;
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> (b) the fees ordered by the court increased by the 50%; or
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> (c) the fees agreed by the parties under paragraph 57 increased by 50%, as the case may be and the increase to include all proper attendances on the client and all necessary correspondence."

14. The Advocate-client bill for taxation was filed by the respondent, and it was in that bill that he proposed that the taxed fees be increased by 50%, under Schedule 7B. The taxing officer taxed the Advocate-client bill, and increased the amount taxed by 50%. The Advocate-client bill was taxed at Kshs. 272,231.00. The increment by 50% brought the figure to Kshs. 408,346.50. The calculation was Kshs. 272,231 x 1/2, making Kshs. 136,115.5, which, when added to Kshs. 136,115.5, makes Kshs. 408,346.50. The question is, was that the proper approach to assessment of Advocate-client costs?

15. The case presented by the applicant is not idle, for the courts do not appear to have a common interpretation and application of Schedule 7B, and similar provisions in other Schedules in the Advocates Remuneration Order, like Schedule 6B.

16. On the one end of the spectrum, is the approach adopted by the taxing officer herein, which was what the respondent had proposed, that the Advocate-client costs are assessed vide taxation of an Advocate-client bill, after which the costs taxed are increased by ½ or 50%. That approach was expressed in Dennis

KN Magare & another vs. Armajit Singh Gahir & 5 others [2021] eKLR (W. Korir, J), in the following terms:

> " In the case at hand, the applicants presented an advocate and client bill of costs to the taxing officer who proceeded to tax the same and increase it by 50% as required. She cannot now be faulted for proceeding that way in circumstances where the applicants did not ask her to simply increase the already taxed party and party bill of costs by 50%. In any case the party and party bill of costs is presented to the court by the party awarded costs and the costs of the successful party cannot be exactly the same with that of the party on the other side. Therefore, the best way to arrive at a just award of costs is to tax the advocate and client bill of costs presented to the taxing officer by the advocate, as was done in this case, and increase the taxed amount by half as required by Part B of Schedule 6. In the circumstances I find that the taxing officer did not commit any error in proceeding in the manner she did."

17. The other position is the approach that the applicant argues should have been adopted, that there was no need to file an Advocate-client bill of costs, for the Advocates Remuneration Order has provided a formula for assessment of Advocate-client costs, being simply increasing the taxed party and party costs by ½ or 50%. That was the view taken in Wycliffe Chitayi Muhalya vs. Dorothy Awiti Omboto t/a DAO Associates & another [2017] eKLR (M. Onyango, J), where the court stated:

> " In this case the Party and Party Bill was taxed at Kshs.123,280. The Taxing Master should therefore have increased this sum by 50% as provided in Schedule 6 which would come to a total sum of Kshs.184,920 ... I find that the Taxing Master erred in ... taxing a fresh bill instead of adjusting the Party and Party Bill already taxed by 50% as provided under Part B of Schedule 6 for Advocate/Client Bills ... The applicant had sought orders of fresh taxation by a different Taxing Master. I find this unnecessary as the Party and Party Bill had already been taxed and the Advocates Remuneration Order sets the formula for deriving the Advocate/ Client Bill by an addition of 50% to arrive at the correct bill."

18. Similar sentiments were expressed in Mumias Sugar Company Limited vs. Professor Tom Ojienda and Associates [2019] eKLR (F. Ochieng, J), where it was said: "When a Party & Party Bill of Costs has been taxed, it is in order for the taxing officer to determine the Advocate/Client costs in that case, by simply increasing the Party costs by 50%"; and in K. Opot & Company Advocates vs. Walter Edwin Omonde [2015] eKLR (Maina, J), where it was said that " ... In the first place what was before the taxing officer was a Client/Advocate Bill of costs and not a party and party bill of costs which is increased by one half in order to get the Advocate/Client`s costs."

19. The costs taxed in party and party bill are, no doubt, relevant in assessment of the Advocates fees and costs, in an Advocate-client bill of costs, and ought not be ignored. Kinyua Muyaa & Co. Advocates vs. Kenya Ports Authority Pension Scheme & 8 others [2017] eKLR (ON Makau, J), explained how Part B of the Schedule should be applied, and it stated:

> " ... the correct position is that the instruction fees of an Advocate is depended on the choice of the advocate while drawing his bill either based on the value of the suit (the prescribed fees under part A of schedule vi of ARO), or party and party costs taxed (costs ordered by the court), or the agreement between the parties under paragraph 57 of the ARO. In either of the 3 options, the amount is increased by 50% ... "

20. There was elaboration of the explanation above, in Otieno Ragot & Co. Advocates vs. Kenya Airports Authority [2021] eKLR (Ouko (P), Gatembu & Murgor, JJA), where the court, while bringing out the relationship between the party and party costs and the Advocate-client costs, said:

> "Schedule VI Part B ... makes it patently clear that instruction fees for advocate and client costs will be one-half of the party and party costs prescribed, or as ordered by a court or agreed upon by the parties. In addition, from a further introspection of Schedule VI, it is instructive that whereas Part A allows for the exercise of discretion to increase or reduce the instruction fees, under Part B no provision was made for any further exercise of discretion to increase or reduce the advocate's fees once the one-half formula is applied to the instruction fees ascertained in Part A. It therefore stands to reason that Part B, being Advocate and client costs cannot be ascertained independently unless and until Part A is determined, since the instruction fees in Part B is an arithmetical computation derived from the instruction fees in the party and party costs determined in Part A.
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> In this case, the taxing officer was of the view that the appellant's instruction fees had yet to be ascertained. And after reasoning that they could not be ascertained from the subject matter and concluding that Advocate and client costs were independent of party and party costs, the taxing officer found it necessary to exercise her discretion to determine the appellant's instruction fees, and in turn the Advocate and client costs.
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> Yet, whether the subject matter was ascertained or not at this point was not an issue for the taxing officer to determine. I say this because, by the time of taxing the Advocate and client bill, the instruction fees were deemed to have already been determined when the respondent's party and party costs were taxed and a certificate issued on 15th July 2010."

21. The related issue is whether Schedule 7B, and Schedule 6B too, is about increment by ½ or 50% of the costs or the fees. In some decisions, the courts appear to refer to increment of costs rather than of fees, while in other cases costs and fees are used interchangeably, and in others yet the courts are of the view that Schedules 6B and 7B relate only to fees, whether minimum or relating to instructions, and not costs. In Makumi Mwangi Wang'ondu & Company Advocates vs. Invesco Insurance Company Limited [2017] eKLR (Nyamweya, J) and Olando Udoto & Okello Advocates vs. Munyoki Kitheka [2018] eKLR (Jaden, J), the courts applied the interpretation that the 50% increment was of the minimum or instruction fees. It was asserted, in Charles M. Kamweru t/a Kamweru & Co. Advocates vs. Maisha Flour Mills Ltd [2021] KEHC 443 (KLR)(Mshila, J), that Schedule 6B, which Schedule 7B replicates, relates to minimum fees, as it refers only to fees and formulas, and that the 50% increment is meant to cover attendances and services, and not costs. In Meru County Public Service Board vs. Mbogo & Muriuki Advocates [2023] KEHC 2321 (KLR)(Cherere, J), it was remarked that the 50% increment only applies to instruction fees, and does not cover disbursements. In Rachier & Amollo Advocates vs. Noble Gases International Limited [2023] KEHC 19093 (KLR)(Mong'are, J), it was said that "The taxing master upon taxing the Advocates-client Bill of Costs is by law required to increase the amount under item 1 by 50%." The decision in Otieno Ragot & Co. Advocates vs. Kenya Airports Authority [2021] eKLR (Ouko (P), Gatembu & Murgor, JJA) was abundantly clear, that the 50% increment is about instruction fees, not costs.

22. So, what do I make of all this? I agree with the position stated in Makumi Mwangi Wang'ondu & Company vs. Invesco Insurance Company Limited [2017] eKLR (Nyamweya, J), Olando Udoto & Okello Advocates vs. Munyoki Kitheka [2018] eKLR (Jaden, J), Charles M. Kamweru t/a Kamweru & Co. Advocates vs. Maisha Flour Mills Ltd [2021] KEHC 443 (KLR)(Mshila, J), Meru County Public Service Board vs. Mbogo & Muriuki Advocates [2023] KEHC 2321 (KLR)(Cherere, J) and Rachier

& Amollo Advocates vs. Noble Gases International Limited [2023] KEHC 19093 (KLR)(Mong'are, J), that the 50% increment rule only applies to the minimum or instructions fees, and not costs and disbursements. I am bound by Otieno Ragot & Co. Advocates vs. Kenya Airports Authority [2021] eKLR (Ouko (P), Gatembu & Murgor, JJA), which reflects the current jurisprudence on the matter, on the position that the instruction fees, assessed in the taxation of a party and party bill of costs, is the basis for computation of the instruction fees in the Advocate-client bill, and it is the said assessed instruction fees that ought to be subjected to the ½ or 50% increment.

23. I am persuaded, from the above review of the decisions, that the taxing officer erred in principle, in the manner she applied Schedule 7B. She applied the ½ or 50% increment to the total amount that was taxed in the Advocate-client bill, no doubt following the approach espoused in Dennis KN Magare & another vs. Armajit Singh Gahir & 5 others [2021] eKLR (W. Korir, J), which has been overruled by Otieno Ragot & Co. Advocates vs. Kenya Airports Authority [2021] eKLR (Ouko (P), Gatembu & Murgor, JJA). What should have been done was to apply it, the ½ or 50% increment, to the instruction fees in the party and party costs, as taxed. According to the certificate of stated costs, dated 2nd March 2021, in Busia CMCCC No. 178 of 2018, the party and party costs were assessed at Kshs. 168,757.00. Kshs. 168,757.00 is what should have been subjected to the 50% increment, and not the total amount that the taxing officer had taxed at Kshs. 272,231.00. The sum of Kshs. 168,757.00 excluded attendances, court fees, witness expenses, and other disbursements, for the global total came to Kshs. 210,567.00, when the costs and expenses were added to Kshs. 168,757.00, according to the certificate of stated costs, in Busia CMCCC No. 178 of 2018. The respondent had invited the taxing officer, in his Advocate-client bill of costs, to increase the costs under Schedule 7B. The taxing officer, upon that invitation, should have increased the minimum or instruction fees, by ½ of 50%, based on the party and party costs taxed in Busia CMCCC No. 178 of 2018, for there was no evidence that the parties had with them an agreement on fees. Increasing the instructions fees as per the total taxed costs in the Advocate-client bill was not an option, by dint of Otieno Ragot & Co. Advocates vs. Kenya Airports Authority [2021] eKLR (Ouko (P), Gatembu & Murgor, JJA).

24. I note from the ruling of 27th June 2023, that the taxing officer assessed the instructions fees based on Schedule 7A, and not the party and party taxed costs in Busia CMCCC No. 178 of 2018. The taxing officer arrived at a figure of Kshs. 197,169.35. If her approach were the correct one, which was not the case, in view of Otieno Ragot & Co. Advocates vs. Kenya Airports Authority [2021] eKLR (Ouko (P), Gatembu & Murgor, JJA), Kshs. 197,169.35 is the figure that she should have subjected to the ½ or 50% increment, and not the total taxed costs of Kshs. 210,567.00. ½ or 50% of Kshs. 197,169.35 would be Kshs. 98,584.70. The total instructions fees should have resolved at Kshs. 295,754.00, to which should have been added the costs and disbursements of Kshs. 25,875.00, making a total of Kshs. 319,329.00. If the taxing officer had worked with the Kshs. 168,757.00, instructions fees, worked out in the party and party costs taxed in Busia CMCCC No. 178 of 2018, the ½ or 50% increment would have been Kshs. 84,378.50, which, when added to Kshs. 168,757.00, would make Kshs. 253,135.00, being the minimum or instruction fees. When the costs of Kshs. 25,875.00, as assessed by the taxing officer, are loaded onto that figure, the global total would be Kshs. 279,010.00. When the costs and disbursements assessed in Busia CMCCC No. 178 of 2018, of Kshs. 41,810.00, are added, to Kshs. 253,135.00, the figure would be Kshs. 294,945.00.

25. So, which of these figures should I work with? The taxing officer should have assessed the Advocate-client costs based on the taxed party and party costs in Busia CMCCC No. 178 of 2018, given that there was already a ready figure on instructions fees. The other option, that is assessing instruction fees based on Schedule 7A, should have been available only where a party and party bill of costs had not been taxed. There should be no duplicity, which could produce conflicting results, as was the case here. In Otieno Ragot & Co. Advocates vs. Kenya Airports Authority [2021] eKLR (Ouko (P), Gatembu

& Murgor, JJA), it was found and held that the taxing officer has no option, when taxing an Advocate-client bill, but to apply the instructions fees already determined in taxed party and party costs. It was said:

> "In other words, unless set aside or altered, the party and party bill in respect of the same suit having already undergone the scrutiny of a taxing officer who had exercised discretion to arrive at a determination of the just party and party fees, and with it the instruction fees, the issue of the quantum of the advocates' instruction fees was effectively disposed of at that time. As such, that decision was final and binding on the concerned parties. It was therefore not a matter that was capable of being reopened by another taxing court with concurrent jurisdiction. And if Parliament had intended it to be otherwise, nothing would have been easier than for this to have been spelt out in express terms in the Order."

26. The applicant argues that he had in fact paid some amount of money to the respondent as fees, which he argues the taxing officer ought to have taken into account. He talks of an amount of Kshs. 141,712.00. He has not produced receipts to support the claim, but I have seen an MPesa statement, which demonstrates 2 payments, of Kshs. 30,000.00 and Kshs. 70,000.00, that were made on 3rd July 2018 and 2nd March 2021, respectively. I cannot tell whether these payments were made in respect of this matter, Busia CMCCC No. 178 of 2018, or either the other 2, that is to say Busia HCCA No. 6 of 2019 and Busia ELC No. 004 of 2021. I reiterate what I have stated above, for purposes of taxation, the parties hereto had 3 separate transactions, and it must be demonstrated that the payments in question were made in respect of 1 of the 3. The payment made on 3rd July 2018, can only relate to Busia CMCCC No. 178 of 2018, for the other 2 suits were not in existence at the material time of the payment, and, therefore, it could be relevant for these proceedings. I note, from the court file in Busia CMCCC No. 178 of 2018, that the plaint therein was filed on 5th July 2018. However, I cannot tell whether the latter payment, of 2nd March 2021, related to Busia HCCA No. 6 of 2019 or Busia ELC No. 004 of 2021, for I have no evidence as to when Busia HCCA No. 6 of 2019 was concluded. One thing is clear though, that the latter payment did not relate to Busia CMCCC No. 178 of 2018, for that suit had been concluded, and an appeal proffered with respect to it. If the latter payment relates to either Busia HCCA No. 6 of 2019 or Busia ELC No. 004 of 2021, the same would be of little value to the application before me, for it touches only on Busia CMCCC No. 178 of 2018. The amount of Kshs. 70,000.00 can only be of relevance to taxation proceedings relating to services rendered in Busia HCCA No. 6 of 2019 or Busia ELC No. 004 of 2021.

27. Should anything turn on the payment made on 3rd July 2018? I believe it should. The respondent argues that whatever monies he received from the applicant was expended towards filing fees and disbursements. No breakdown of the alleged filing fees and disbursements, in respect of Busia CMCCC No. 178 of 2018, was placed before me, by the respondent. However, from the impugned ruling herein, dated 27th June 2023, I note that the taxing officer found on 3 items, on filing fees and disbursements: the expenses on service of court process amounted to Kshs. 15,400.00, filing fees on the plaint and amended plaint amounted to Kshs. 6,675.00, and filing fees on the Advocate-client bill for taxation Kshs. 500.00. The total expenses on filing fees and disbursements, according to the said ruling, amounts to Kshs. 25,875.00. The total costs and disbursements in the certificate of stated costs, dated 2nd March 2021, in Busia CMCCC No. 178 of 2018, amount to Kshs. 41,810.00. The difference between Kshs. 25,875.00 and the Kshs. 30,000.00 deposit is Kshs. 7,425.00; while that between Kshs. 41,810.00 and Kshs. 30,000.00 is Kshs. 11,810.00. Going by the Advocate-client bill of costs taxed by the taxing officer, there was a balance of Kshs. 7, 425.00 from the said deposit; while the assessment by the trial court reflects that the respondent spent Kshs. 11,810.00 of his own money, over and above the deposit of Kshs. 30,000.00. Did the taxing officer have this information at the time of the taxation? I

find that a copy of the MPesa statement was lodged in court on 16th August 2021. The material was, therefore, on record, by the time the ruling was being delivered on 27th June 2023. The payment of Kshs. 30,000.00 should have been factored. See Wycliffe Chitayi Muhalya vs. Dorothy Awiti Omboto t/a DAO Associates & another [2017] eKLR (M. Onyango, J). Going by the spirit in Otieno Ragot & Co. Advocates vs. Kenya Airports Authority [2021] eKLR (Ouko (P), Gatembu & Murgor, JJA), to avoid duplicity conflict and confusion, the taxing officer ought to have relied on the assessment by the trial court, of the costs and disbursements, as per the certificate of stated costs, dated 2nd March 2021, and should have computed them, at the taxation of the Advocate-client bill of costs, at Kshs. 41,810.00, instead of Kshs. 25,875.00.

28. There is merit in the application herein, to the extent stated in paragraphs 23, 25, 26 and 27, hereabove. Based on that, I hereby set aside the orders made on 27th June 2023, taxing the Advocate-client bill of costs, dated 1st November 2022, at Kshs. 408,346.50. As a way forward, and in the interests of justice, the Advocate-client bill of costs, dated 1st November 2022, shall be taxed afresh. The said bill is hereby reverted to the taxing officer. The reference, dated 11th July 2023, is disposed of in those terms. There shall be no order on costs.

DELIVERED DATED AND SIGNED IN OPEN COURT AT BUSIA THIS.....2ND..... .....DAY OF.....FEBRUARY.....2024

W MUSYOKA

JUDGE

MR. ARTHUR ETYANG, COURT ASSISTANT.

DR. VINCENT OGUTU, THE APPLICANT, IN PERSON.

ADVOCATES

MR. MAKOKHA, PRACTISING AS JP MAKOKHA & COMPANY, ADVOCATES, THE RESPONDENT, IN PERSON.