



**Simba Platinum Limited v Wandera (Civil Appeal 26 of 2020)  
[2023] KEHC 20329 (KLR) (18 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20329 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL 26 OF 2020  
MS SHARIFF, J  
JULY 18, 2023**

**BETWEEN**

**SIMBA PLATINUM LIMITED ..... APPELLANT**

**AND**

**NICHOLAS AUMA WANDERA ..... RESPONDENT**

**RULING**

1. The respondent Nicholas Auma Wandera filed a chamber summons dated 6<sup>th</sup> April, 2022 seeking the setting aside of the taxing officer's decision given on 24/3/2022 together with all consequential orders and that the court orders a fresh assessment of the respondent's bill of costs with regard to items 1,2,3,8,13,14,15,21,30,31,39 and 48. He also prays for costs of the application.
2. The respondent through Mr. Okoth, learned counsel on record for the respondent depones in support of the summons that on item 1, the fees chargeable therein is provided for under schedule 6(1)(b) and not 6(1)(a) since the value of the subject matter was ascertainable and the proper fee ought to be Kshs 166,476.81/-
3. That on items 8,13,14,15,21,30,31,39 & 48 are on attendance before the judge and schedule 6(7)(d) provides for a rate of Kshs 1,900/- per half hour or less.
4. The appellant through Mr. Ng'ang'a, learned counsel on record for the appellant filed a replying affidavit deponing that the award in costs was proper and sound. That items 2 & 3 are not awardable as the matter was not certified as one calling for award of getting up fees. That the claim for VAT is unreasonable.
5. He depones that in instances where attendance was awarded, the same was in accordance with the court record and the respondent in bad faith amplified the same in their bill. That the items on service was rightfully awarded based on the record. That the taxing officer rightfully exercised her discretion.



6. The application was canvassed by way of written submissions. The respondent submits that the subject matter in the appeal is the sum of Kshs 3, 323,840.40/ and going by the provisions of Schedule 6(1)(b) since the value of the subject matter is known. That in the circumstances, the sum of Kshs 166,476.81 is the appropriate sum in the circumstances. Counsel cites *Kamunyori & Company Advocates v Development Bank of Kenya Limited* (2015) eKLR in support.
7. On getting up fees, counsel relies on schedule 6(3) and asserts the respondent is entitled to Kshs 55,492.27/- which is a third of the instructions fees. The authorities in *Stephen Mwangi & 2 others v Tuskeer Mattresses Ltd* (2018) eKLR, *Ngatia & Associates Advocates v Interactive Gaming & Lotteries Limited* (2017) eKLR and *Andolfo Gussini & another v Emmanuel Charo Tinga* (2016) eKLR
8. On the item falling under VAT, the respondent submits that the sum of Kshs 35,515.05 is payable pursuant to the provisions of section 5 of the *VAT Act* since the respondent will have to remit the same to government. The authorities in *Fredrick Onyango Aoro v Mary Auma Were* Siaya High Court Reference No. E019 of 2022, *Mereka & Co. Advocates v New Kenya Co-Operative Creameries Limited* (2018) eKLR and *Hezron Odhaimbo Abok v Prajapat Pravinbhai Jivabbai t/a Mitra Enterprises (K) Ltd* (2019) eKLR have been cited.
9. On the items falling under attendance, it is argued that under schedule 6(7)(d), an advocate's attendance before the judge is Kshs 1,900/- per half hour or less. That in all the items described as attendance, the taxing officer erred by adopting the sum of Kshs 1,100/-
10. The appellant on its part reiterated their affidavit and cite the decision in *Wambugu, Motende & Company Advocates v The Attorney General* (2013) eKLR and the celebrated case of *Premchand Raichand Ltd & another v Quarry Services of East Africa & ors.* (1972) EA 162.

#### **Analysis and determination.**

11. The respondent Nicholas Auma Wandera filed his bill of costs dated 10/1/2022 which ruling was delivered on 24/3/2022 in which the learned taxing officer assessed the bill at Kshs 71,515/-. The respondent being aggrieved moved this court through the instant reference seeking re-assessment of fees under the items captured above.
12. In summary, the items in contest relate to; instructions fees, getting up fees, VAT and court attendance fees. From the onset, it is trite law that assessment of an advocate's fees is based on an exercise of discretion by the taxing officer/master. The authorities on the issue are numerous; for instance, in *premand case (supra)*, which gave the following principles;
  - (a) that costs be not allowed to rise to such a level as to confine access to the courts to the wealthy;
  - (b) that a successful litigant ought to be fairly reimbursed for the costs the has had to incur;
  - (c) that the general level of remuneration of advocates must be such as to attract recruits to the profession; and
  - (d) that so far as practicable there should be consistency in the awards made;
  - (ii) 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;
13. With the above in mind, I now turn to the specific items contested by the respondent. On the issue of instructions fees, the bill of costs presented, he sought the sum of Kshs 153,096/- based on the trial court's award of Kshs 3,323,840/-. He contends that the applicable schedule is 6(1)(b) which provides;



- (b) 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....
14. The calculation of the fees therein is provided. In the circumstances, I find that the value of the subject matter is ascertainable and the learned taxing officer therefore erred by relying on schedule 6(1)(a).
15. In the circumstances, I set aside the taxing officer's award of Kshs 25,200/- and substitute with a figure of Kshs 166, 476.81.
16. On getting up fees, the respondent sought the sum of Kshs 51, 032/-. Schedule 6(3) provides;
- 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. The key word in the Schedule is that the court has to certify that the case is a proper one for the award of getting up fees. In the instant case, there was no certification by the court that the case was difficult and or extensive work was done therein.
18. On this item, I concur with the learned taxing officer that without a certification, the item is not awardable.
19. On the item of Value Added tax, the taxing officer declined to award on the ground that the same does not apply to party and party bill of costs.
20. On my part, I have appraised myself with the provisions of section 5 of the *Value Added Tax Act* and the relevant case law. I come to the conclusion that the same is not awardable. My finding as above is supported by the holding in *Pyramid Motors Limited v Langata Gardens Limited* (2015) eKLR where it was stated;
- “On the final issue of VAT, I hold the simple view that in allowing the same the Master erred under the *Value Added Tax Act*, 2013 particularly section 5 thereof. 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 that again is also debatable whether the Plaintiff was a taxable person. I would vacate the award on VAT as the Master erred. In the result, I would not return the Bills to the master for re-assessment but would direct that the item of VAT be completely and wholly taxed off”
21. On attendances, the taxing officer awarded Kshs 1,100/- for each of the items falling under attendances. Schedule 7(d) provides that half hour rate or less is Kshs 1,100/- or 1,900/- on the higher side. In this case, the taxing officer awarded the lower scale.



22. In the circumstances, I find the award of Kshs 1,100/- as proper and accords with the legal provisions.
23. For the above reasons and having analyzed each and every item challenged by the respondent I find that other than the instructions fees now assessed at Kshs 166, 476.81, the other items in the bill of costs remain undisturbed.
24. The reference being partially successful, each party shall bear its own costs.

**DELIVERED, SIGNED AND DATED AT KISUMU THIS 18<sup>TH</sup> DAY OF JULY 2023**

**MWANAISHA. S. SHARIFF**

