REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM: HON. JUSTICE R. MWONGO, J

MISCELLANEOUS CIVIL APPLICATION NO. 124 OF 2019

GEOFFREY ERIC WESONGA T/A

WESONGA MUTEMBEI & KIGEN ADVOCATES……..……APPLICANT

-VERSUS-

ARN SECURITY & TRAINING SERVICES LTD……..……1ST RESPONDENT

CONSOLIDATED WITH

MISCELLANEOUS CIVIL APPLICATION NO. 125 OF 2019

GEOFFREY ERIC WESONGA T/A

WESONGA MUTEMBEI & KIGEN ADVOCATES……..……APPLICANT

-VERSUS-

ANTHONY REBO NGURE……..……2ND RESPONDENT

RULING

1. The Applicant represented the Respondents in a defamation suit filed by them. The defamation was alleged to have emanated from a criminal case in which the 1st Respondent Company and the 2nd Respondent, its director, were allegedly maliciously prosecuted. The complainant in the criminal case was Co-operative Bank of Kenya Limited who alleged fraud by the Respondents.

2. The defamation suit is filed in Naivasha in HCCC No. 30 of 2015, ARN Security and Training Services Limited and Antony Rebo Ngure v Co-operative Bank of Kenya Limited. It is on-going.

3. After filing the pleadings in the said defamation suit, the clients replaced their counsel, the Applicant, with another counsel, E. M. Wachira of E.M. Wachira & Co. Advocates. The Applicant thus filed his Bill of Costs for legal representation of the Respondent's company in Miscellaneous Application No. 124 of 2019. They also filed, separately, another Bill of Costs for the work done for Anthony Rebo Ngure in Miscellaneous Application No. 125 of 2019. Both Bills are for work done from 17th August, 2018 to 11th December, 2018 and are dated 11th March, 2019.

4. The Advocate/Client Bill of Costs in respect of the 1st Respondent company is for the amount of Kshs 79,197,523.30. This Bill indicates that an amount of Kshs 800,000/= had been paid as a deposit. The substantive bulk of the first Bill constitutes instructions fees of Kshs 45,448,347.30, and increased by half thereof in the amount of Kshs 22,752,173.50, which together with other items in the Bill, bring the total Bill to the Kshs 79,197,523.30.

5. The Advocate/Client Bill of Costs in respect of the 2nd Respondent Antony Rebo Ngure, was for a total amount of Kshs 671,764.00. Of this amount, the instructions fee is Kshs 320,000/= which is increased by half being an amount of Kshs 137,300/=. So that, the bulk of the second fee note also represents instructions fees. No deposit is indicated as having been paid.

6. When the Bills came before the Taxing Master for taxation, she consolidated the applications. The Bills were opposed by the Respondents through the counsel presently acting for the Respondents in the defamation suit. Both parties filed written submissions for and against the Bills before the Taxing Master.

7. Upon consideration of the parties' representations, the Taxing Master found that there was no justification for the Applicant filing two separate bills as the instructions with respect to the Respondent were issued by the 2nd Respondent, its director, and all court attendances were on the same day. She noted that the bills were similar in form and figures from items 2 to 52, and that those items represented a duplication of charges. It was on this basis that she consolidated the two Miscellaneous Applications (Nos 124 of 2019 and 125 of 2019) with the lead file being Miscellaneous Application No 124. Consequently, her Ruling is for the consolidated Bills.

8. There was also a preliminary objection by the respondents. It concerned the failure by the applicant to fully comply with Paragraph 69(1) of the Advocates Remuneration Order, as to procedural requirements and format of bills; that the identity of the applicant is not properly founded; and that the Bills are stated to be premised on Schedule VI rather than Schedule 6. This objection was dismissed on the grounds that the defects did not go to the root of the root of the issues and were not sufficiently substantive to warrant striking out of the Bills.

9. The Taxing Master applied the **Advocates Remuneration Order, 2014, Schedule 6 Item 1 (b)** for instructions fees for defended proceedings which provides for situations:

> ***"Where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties."*** (Emphasis added)

10. She then stated as follows in her ruling:

> ***"……however, where the value of the subject matter cannot be determined by judgment, pleadings or settlement, - the taxing master has discretion to assess the instruction fee by considering the following factors:***
>
> ***1. The nature and importance of the cause or matter.***
>
> ***2. The amount or value of the subject matter.***
>
> ***3. The interest of the parties.***
>
> ***4. The general conduct of the parties.***
>
> ***5. The complexity of the issues raised and novel points of law.***
>
> ***6. The time, research and skill expended in the brief.***
>
> ***7. The volume of documents involved.***
>
> ***This was held in the case of Joreth Limited v Kigano and Associates [2002] EA."***

11. The Taxing Master then cited, and took into account the principles in the following authorities, viz:

> ***- Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd & Others* [1972]EA 162;**
>
> **- Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W'Njuguna & 6 others [2006] eKLR.**

She taxed down items 10b and 11, 12 of the Bill which are minor, and confirmed items 2 - 14 of the Bill, and disallowed disbursements in items 46 - 48 of the Bill. All these are not substantive figures.

12. However, the item in the Bill of costs which attracted the parties' critical focus and which received the brunt of the taxation is the Instructions Fee, item 1. As against the claimed fee of Kshs 79,197,523.30, the Taxing Master assessed the instructions fee as follows:

> ***Kshs***
>
> ***"Instruction fee 2,500,000.00***
>
> ***Increased by ½ 1,250,000.00***
>
> ***Add 16% VAT 600,000.00***
>
> ***Add Amount before disbursement 34,450.00***

Add Disbursements ***9,990.00***

Total ***4,395,410.00***

Less paid ***800,000.00***

Grand Total ***3,595,410.00*** ***"***

Having done so, the Taxing Master issued a Certificate of costs for the grand total amount she found due and payable.

13. Aggrieved, the Respondents filed a reference opposing the taxation as exorbitant. The Applicant/Advocate also filed a cross-reference challenging the taxation as inordinately low, and that the Taxing Master failed to take into account the law on taxation by invoking her discretion when the plaint clearly required that she base the fee on the appropriate schedule.

14. The Respondent/Client essentially seeks that the court:

> ***"[B]e pleased to set aside the Ruling by the Taxing Master dated 14th November, 2019 as relates to item one (1) of the respective Bill of Costs."***

Representations of Respondents/Clients

15. The Respondents/ Clients argued that the Bill as taxed by the Taxing Master was exorbitant; that she erred in law and in fact in failing to tax Item 1 at a sum of Kshs 75,000/= in accordance with the Schedule as Anthony Rebo Ngure was in fact the principal client; that Anthony Rebo was the Managing director of the Respondent company;

16. Further, the Clients argue that the Taxing Master erred in failing to uphold their Preliminary Objection, and that she made a gratuitous award. The preliminary objection has been highlighted above.

17. The client also raised a new ground, namely, that the Advocate was not qualified to practice law for failure to take out a practicing certificate at the time they filed the Further Amended Plaint dated 18th July, 2018. The client annexed a letter from the Law Society confirming that the advocate took out his practicing certificate for 2018 commencing 19th July, 2018. They also attached a copy of the Advocate's Practicing Certificate confirming that the advocate: *"is entitled to practice as such Advocate from 19th day of July, 2018"*.

18. It may be noted that this complaint concerning the Advocate not having a practicing certificate was not raised before the Taxing Master, but is nevertheless an issue of fundamental importance because of the implications to the propriety of the work and representation the Advocate rendered. I will revert to this point later.

Representations of Advocate/Respondent

19. The Advocate's reference is dated 18th December, 2019. It seeks, inter alia that:

> ***"This honourable Court be pleased to set aside the Ruling by the Taxing Master dated 14th November, 2019 as relates to item 1 of the respective Bill of costs both dated 1st March 2019 and their consolidation thereof…."***

20. The Advocate argues that the fees is chargeable under Schedule 6; that the fees is determinable from the plaint; that the value should be deduced from the entire pleadings; that it is not necessary that the advocate act for the client until the conclusion of the case before they can charge instruction fees.

21. The Advocate cited a number of authorities including the case of Nyaundi where the High Court in Eldoret stated as follows in **M/S Nyaundi Tuiyott & Co. Advocates v Tarita Development Ltd [2016] eKLR :**

> ***"21. I wholly concur with the Respondents submissions that instruction fees are an independent and static item that does not change irrespective of the outcome of the suit and that advocates earn their fees from the moment they are instructed whether the suit subsequently fails or succeeds. However, the instruction fees so earned must be based on the value of the subject matter if the same can be discerned from the pleadings, judgment or settlement between the parties if any."*** (Emphasis added)

22. Further, they argue that the applicants are distinct parties with distinct claims and should thus have been assessed separately.

Analysis and Determination

23. On the basis of the applications and documents supporting the two references, I find that the following are the issues for determination:

i. Whether the Taxing Master erred in dismissing the Clients' preliminary objection.

ii. Whether the Taxing Master erred in consolidating the Bills of costs.

iii. Whether or not the valuation of the Bill by the Taxing Master should be upheld.

On the Preliminary Objection

24. The Client's complaint in the preliminary objection was that the Bill offends the mandatory provisions of **section 69** of the **Advocates Remuneration Order** as to form; that the failure to comply with the format is fatal; that the identity of the proper applicant is unverified; and that the Bill is premised on non-existent provisions of the Remuneration Order.

25. The Taxing Master found that it was not disputed that the Bill does not conform to the Advocates Regulation Order, but held that this was not a fatal defect. She stated:

> ***".. With respect to the columns of the bill, the court takes note that they have been interchanged as to serial number and day and year and month, however the particulars inside the columns are in order. With respect to quoting the schedule with a roman number instead of numerical, this does not bar the court to know which schedule to be used. As for the name of the law firm, am (sic) in agreement that it is not strict that an individual cannot file a bill on behalf of a firm if he/she was the one instructed by the client"***

26. In their submissions, the Clients did not make any arguments against this finding.

27. Accordingly, there is nothing to be specifically determined on the issue.

On Consolidation

28. The Advocate opposed the consolidation of the Bills on the ground that there are two distinct parties that he acted for.

29. I have perused the Further amended plaint. The prayers sought are: a) for general damages for defaming the "2nd Defendant (sic)". Presumably this was intended to mean the 2nd plaintiff; b) aggravated damages in favour of the plaintiffs; c) unconditional apology; d) "compensation for loss of income/profits for the period 2014-2018; e) compensation for future loss of income.

30. Looking at the plaint in its entirety, the claims of both plaintiffs are drafted in such a way that they are so intertwined that it is virtually impossible to segregate the one from the other. In my view the plaint hardly distinguishes each claimant's claim, whilst emphasizing the 1st claimant's losses which explains why it was convenient and expeditious to consolidate the claims.

31. The issue of consolidation, though raised, was not rigorously pursued in the parties' submissions on reference. the law on whether the bills should have been consolidated, is found in **Order 11 Rule3 (I) (h)** of the Civil Procedure Rules which states as follows:

> ***"3. (1) With a view to furthering expeditious disposal of cases and case management the court shall within thirty days after the close of pleadings convene a Case Conference in which it shall—***
>
> ***(a)-------***
>
> ***(h) Consider consolidation of suits"***

32. Similarly, the case law on consolidation of proceedings is now settled and the principles that arise therefrom are that:

> **(i) the suits should have common questions of law and facts;**
>
> **(ii) the reliefs sought in both cases are in respect of or arise from the same transactions or a series of transactions; and**
>
> **(iii) there will be expedition, and cost-saving achieved, and**
>
> **(iv) that judicial consistency will be achieved in determinations on like matters, and**
>
> **(v) that no prejudice is suffered by any party due to consolidation, and**
>
> **(vi) there are any other reason desirable to make the order.**

33. Cases abound on consolidation. In **Joseph Okoyo v Edwin Dickson Wassuna (2014) eKLR**, Nyamweya J faced with a situation where the issue of ownership of the suit property was common to the two suits though the parties were seeking different remedies, held that the suits be consolidated.

34. In **Benson G Mutathi v Raphael Gichovi Munene Kabutu & 4 others (2014) eKLR** the court consolidated a suit commenced by way of Plaint and one filed by Originating Summons where one of the suits was part heard. In arriving at the decision to consolidate the suits, the

court relied on **Law Society of Kenya v The Centre for Human Rights Supreme Court Petition No. 14 of 2013** where the Supreme Court held as follows:

> ***"The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it"***

35. In **Korean United Church of Kenya & 3 Others V Seng Ha Sang (2014) eKLR**; the court held that:

> ***"Consolidation of suits is done for the purposes of achieving the overriding objective of the Civil Procedure Act, that is, for expeditious and proportionate disposal of civil disputes."***

Thus, that the main purpose of consolidation is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action.

36. In **Ngumbao v Mwatate & 2 Others (1988) K.L.R. 549** *the Court of Appeal's decision was that a part heard case can still be consolidated with a fresh case and parties who had testified can be recalled or the case can continue from the evidence earlier recorded.*

37. ***Nairobi ELC Suit No. 275 of 2009 Kenya Anti-Corruption Commission vs Wilson Gacanja & 2 Others (2014) eKLR*** in which the Court cited in its own decision in **HC ELC No. 347 of 2012 and ELC No. 223 of 2011** *(unreported)* and stated:

> ***" I am satisfied that the issue for determination in the various suits is common and in my opinion it would be expedient and time saving to try all the 5 cases together to obviate the necessity of having to hear the same evidence time and again in every suit and further to prevent the prospect of having conflicting decisions on the same subject matter….."***

38. It is therefore clear that the purpose of consolidation of suits is to save costs, time, speed up trial, eliminate duplicative trials involving the same parties, issues and evidence, for the efficient and proper administration of justice, and expeditious disposal of matters and consequently promote judicial economy. The caution being that consolidation does not result in prejudice to any of the parties.

39. I have not seen any argument of the Advocate that persuades me that any of the objects of consolidation were not achieved herein or that consolidation was prejudicial or should not have been done in this matter. I uphold the Taxing Master's decision to consolidate.

Whether the Taxation should be set aside

40. The first matter to be resolved here, is what the role of the High Court is in taxation of bills under a reference such as this. The High Court's jurisdiction to determine tax matters is not in issue. A judge of the High Court even has jurisdiction to tax the bill himself as was held in **D'souza v Ferrao [1960] 602.**

41. The Judge may even, under exceptional circumstance such as where excessive fees are awarded, vary the taxing master's decision if need be as held in **James v Nyeri Electricity [1961] EA 492, at pages 492 – 293** where the court stated:

> ***"Where there has been an error in principle the court will interfere but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will intervene only in exceptional cases. An example of such an exceptional case is that of Haiders Bin Mohamed Elmandry and Others v Khadija Binti Ali Bin Salim (4) 1956, 23 E.A.C.A. 313, in which an instructions fees of the 9,000/= was considered so excessive as to indicate that it must have been arrived at unjudicially or on erroneous principles".*** **(Emphasis added)**

42. Similarly, in **Moronge & Company Advocates v Kenya Airports Authority [2014] eKLR the Court of Appeal** stated that:

> ***"…in* Kipkorir Titoo & Kiara Advocates v Deposit Protection Fund Board [Civil Appeal No. 220 of 2004] (UR)*, this Court, differently constituted, said:-***
>
> ***"We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA, (1) that would be an error in principle. And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer …"*** **(Emphasis added)**

43. The East Africa Court of Appeal in the case of Steel **Construction & Petroleum Engineering (E.A.) Ltd vs. Uganda Sugar Factory Ltd (1970) E.A. 141** per Spry JA at page 143, stated:

> ***"Counsel for the appellant submitted, relying on D'Souza v Ferao [1960] EA 602 and Arthur v. Nyeri Electricity Undertaking [1961] EA 492 that although a judge undoubtedly has jurisdiction to re-tax a bill himself, he should as a matter of practice do so only to make corrections which follow from his decision and that the general rule is that where a fee has to be re -assessed on different principles, the proper course is to remit to the same or another taxing officer. I would agree that, as a general statement, that is correct, adding only that it is a matter of juridical discretion."***

44. In the well-known case on taxation **Joreth v Kigano & Associates (2002) EA 92** the Court clearly stated the role of a high Court Judge in taxation as follows

> ***"A High Court judge when hearing such an objection is not sitting in his capacity as a judge exercising his appellate jurisdiction as, say, would be the case when he hears an appeal against the decision of a magistrate. The taxing officer whilst taxing a bill of costs is carrying out his functions as such only. He is an officer of the superior court appointed to Tax bills of costs."***

45. Further in the same **Joreth case**, the Court gave guidance on the question as to how the taxation officer should approach the valuation of a fee note:

> ***''We would at this stage point out 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) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances. ''***

46. In light of the guidance from the authorities, we first interrogate the decision of the Taxing Master in making the decision to tax. In her Ruling, the Taxing Master stated:

> ***"This court has taken note that the applicant did not do much as to preparation for trial, to ask for an amount of Kshs 45,488,347.30 is exorbitant and unjustified. I am of the considerate view that an amount of 2,500,000/- is reasonable to award under this head."*** (Emphasis added)

There is, however, no direct indication as to whether the Taxing Master found that Schedule 6(1)(b) was or was not applicable – although this may be implied – nor is there an explanation given as to how she arrived at the figure of Kshs 2,500,000/.

47. The Advocate properly submitted, on authority, the principles that should guide the taxing officer when taxing a bill. I summarize, in an ordered and sequential manner, the principles which include the following, and I refer to them here as:

"*Specific Guidelines for Taxing Bills", viz:*

i. *Determine the value of the subject matter from the entire pleadings* - as stated in the **Joreth case** as follows :

> ***"…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"***

ii. *If there is no value determinable from the pleadings, judgment or settlement, the Taxing Master should exercise discretion* – in line with the **Joreth Case** – and move to guideline vi below.

iii. *Find or set out the Scale fee* - as stated in **Makula International v Cardinal Nsubuga & Another [1982]HCB** Uganda Court of Appeal :

> ***"The Taxing officer should in taxing a bill, first find the scale fee in schedule VI, and then consider whether the basic fee should be increased or decreased. When he has decided that the scale should be exceeded, he does not arrive at a figure which he awards by a multiplication factor, but paces what he considers a fair value upon the work or responsibility involved. Lastly, he taxes the instruction fee, either by awarding the basic fee or reducing it"***

iv. *Set out basic fee* - as stated in **First American Bank of Kenya Ltd v Shah and Another [2002] 1 EA 64** that:

> ***"The Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce [it]"***

v. *Determine with reasons whether to increase or reduce the basic fee* – as stated in **Makula (supra)** and **First American (supra);**

vi. *Place a fair value upon the work if the fee is increased or decreased* –see **Makula (supra).** This involves the exercise of the Taxing Master's discretion;

vii. *State, for purposes of ascertainment, how the figure was arrived at, that is, how the discretion leading to that figure was exercised* - as stated in **Republic v Minister for Agriculture & 2 Others Exparte Samuel Muchiri W'Njuguna & 6 Others [2006]eKLR** where Ojwang' J (as he then was) said:

> ***"It is necessary to ascertain how she arrived at that figure; for although the judicial review applicant's firm position is that it was an exercise of lawful discretion which therefore this court should uphold, the correct perception of the discretion donated by law, I believe is that such a discretion is only duly exercised when it is guided by transparent, regular, just, criteria"***

48. From my perusal of the Ruling, it is evident that the Taxing Master did not fully comply with the above requirements. In particular, steps

i and iv, above, appear to have been omitted, ignored or generally not considered. She did not categorically state whether or not a fee was determined under Schedule 6(1) (b); she did not give an indication of, or explain how she arrived at the figure of Kshs 2,500,000/ as a "reasonable" figure. I appreciate that she had discretion to reach a figure if the fee could not be determined from the pleadings, but she also had an obligation in terms of the ***Ex Parte Samuel Muchiri case*** to "ascertain how she arrived at that figure". She ought to do so. Even before doing so, she ought to have stated whether she could or did determine the instruction fee.

49. Instead, the Taxing Master when dealing with Item 1 Instruction fee, said:

> ***"This item is with respect to instruction fees, the applicant is seeking Kshs 45,488,347.30/- the justification is that the matter was comple and important to the parties and took a lot of time to have meetings to prepare the pleadings, gather all the documents required and taking interest of the client to represent him fully…."***
>
> ***….Schedule 6(1)(b) provide[s] for instruction fees where the value of the subject matter can be determined from the judgment of the court, however, where the value of the subject matter cannot be determined by judgment, pleadings or settlement, the taking master has discretion to assess the instruction fee …. "***

50. Despite being clearly aware of the how the instruction fee is determined under **Schedule 6(1)(b)** of the **Advocates Remuneration Order**, the Taxing Master did not indicate whether she perused the pleadings and decide whether or not the pleadings disclosed the value of the subject matter. She merely skipped the step of making that finding one way or another, and instead moved straight into the exercise of her discretion.

51. There is no doubt, however, that the Bill of costs indicates at item 1 that the applicant pegs his instruction fee to:

> ***" ….file suit against Co-operative Bank of Kenya Limited, for….loss of income/profits between the period 2014 to 2018 amounting to Kshs 64,186,597/= and compensation for future loss of income estimated at Kshs 2,931,036,558/= all amounting to Kshs 2,995,223,155/=….."***

52. On close perusal of the Further Amended Plaint, I see that in the prayers – that is, what the Plaintiff sought from the court – there is no indication of the value of the subject matter. However, the prayers alone in a plaint do not constitute the pleadings. The prayers in a plaint are undergirded and premised upon the other material facts in the plaint, however inaccurate or incredible. The prayers are the culmination of the sum total of the grievance or claim expressed and explained in the other parts of the plaint.

53. I note from the Advocate's submissions, and supporting documents that the 1st Respondent provided an auditor's computed estimation of losses suffered or likely to be suffered by it. The information from that document, it was stated, found its way in form of a brief factual outline of the figures of estimated compensation set out in two paragraphs in the body of the Plaint. Those paragraphs (12 & 13) read in part as follows:

> ***"Paragraph 12..….The 1st plaintiff avers that during the subsistence of the case from the year 2014 to 2018 it has suffered massive losses in business which has resulted in reduced earnings and hence a huge drop in profits that it would have earned over the period in question. According to financial statements, the plaintiff* lost *Kshs 64,186,597/= which it would have earned as profits net of all incidental expenses during the period 2014 to 2018."*** (Emphasis added)
>
> ***"Paragraph 13..….It is estimated that during the period between the year 2018 and 2022, the 1st Plaintiff is* likely *to lose Kshs 2,931,036,559/= that it would have made as profits were it not for the negative publicity that was occasioned by the defendant. The 1st plaintiff therefore prays for compensation for this estimated future loss."*** (Emphasis added)

54. The question that begs is simply whether these statements are indicative of the value of the subject matter of the claim and if it was made known to the defendant as the amount claimed. Further, was this an issue?

55. To cement and verify their belief in the accuracy of their claim, the 2nd Plaintiff who was also the Managing Director of the 1st plaintiff, filed a verifying affidavit to the Further Amended Plaint. In paragraphs 2 and 3 of the Verifying affidavit, he deposed that the contents of the Further Amended plaint were *"true"*; and confirmed the *"correctness of the averments in the further amended plaint"*.

56. In response to the Further Amended Plaint, the 1st defendant (Co-operative Bank of Kenya) stated as follows in their Defence dated 24th September, 2018:

> ***"Paragraph 9. The 1st Defendant expressly denies the contents of paragraph 13. Indeed, the 1st Defendant would like to note that the same are baseless, and unsubstantiated. In particular, the 1st Defendant notes that the rather large claim for future losses is completely unsupported."***
>
> ***"Paragraph 10. In response to paragraph 14, 15 and 16, the 1st Defendant denies the contents thereof and puts the Plaintiffs to strict proof…."***

57. The Plaintiff's filed a Reply to the Defendant's Defence dated 15th October, 2018. In their response to paragraphs 9 and 10 above of the Defence, the Plaintiffs concretised their claims for the loss of profits and asserted that they would avail witness evidence and documentary proof. Their replies were as follows:

> ***"Paragraph 12. In reply to paragraph 8 of the defence, the plaintiffs reiterate the contents of paragraph 12 of the plaint. The plaintiffs further state that the indicated loss of profits during the pendency of the criminal case was due to reputational damage that the plaintiff suffered by the false malicious and baseless allegations…"***
>
> ***"Paragraph 13. In reply to paragraph 9 of the defence, the plaintiffs reiterate the contents of paragraph 13 of the further amended plaint. The plaintiffs aver that support for this head of claim shall be availed through the witness statements and documentary evidence"*** (Emphasis added)

58. Had the Taxing Master carefully perused the file, she would have noted that both parties were in consensus concerning the amounts that were being claimed even though they were in complete disagreement as to whether it was realistic or claimable. The Taxing Master should have been able to, and can, determine from the pleadings what was the extent of the value of the subject matter not only from the plaintiff's pleadings also the defendant's pleadings.

59. I find further support for my position in the arguments of Gikonyo, J, in the case of **Governors Balloon Safaris Limited v Skyship Company Limited & another [2015] eKLR** where a similar issue arose. There, the learned Judge stated:

> ***[39] The [above] formulation of law in the case of Joreth Ltd v Kigano & Associates has not changed. The value of the subject matter of the suit should be deduced from the entire pleadings of the party and should not be restricted to the part where the prayers are contained. This follows after the fact that issues for determination will arise from the pleadings of the parties and no averment in the pleading should be seen as otiose unless it is superfluous or mere embellishment of the pleading or it has been relinquished in accordance with the law. This is the applicable law on this subject and I will accordingly be guided by it.***
>
> **……..**
>
> ***This only supports the view the court has taken that every pleading should contain every material fact and when such material fact is so pleaded, it is part of the cause of action and cannot be seen as otiose unless it is unnecessary or an adornment or has been relinquished in accordance with order 3 rule 4 of the Civil Procedure Rules or has been rendered inapplicable by operation of law or some other intervening circumstances. The pleading in paragraph 11 of the amended plaint is not unnecessary or an adornment or it has not been relinquished in accordance with order 3 rule 4 of the Civil Procedure Rules or rendered inapplicable by operation of law or some other intervening circumstances. It is part of the claim by the Applicant and was the basis of moving the court for relief. It is also a direct alleged consequence of the alleged breach of contract.***
>
> **……**
>
> ***[40] ……***
>
> ***The particulars in paragraph 11 of the amended plaint are already pleaded; they are not unnecessary detail; and they are part of the Plaintiff's claim arising out of the alleged breach of some contract in question. The Respondents defended the entire claim on a minimum loss of Kshs. 1.5 billion. The Applicant cannot now claim that the claim for Kshs. 1.5 billion in damages for breach of contract had been relinquished when it did not do so or signify intention to do so before the suit was dismissed. The suit was dismissed as is and should be treated as such even for purposes of taxation".***

60. In the present case therefore, I am of the view that the Taxing Master should have, but did not, make a finding that the subject matter in issue was clearly stated in the plaint and could be determined therefrom. In addition, the learned Taxing Master was able to know both parties' views concerning the value of the claim made.

61. It bears repeating that, following the principles in the **Joreth case**, it is only when the value of the subject matter cannot be determined from the pleadings that the Taxing Master is entitled to use his or her discretion to decide the instruction fee.

Whether the Advocate was qualified at the time of rendering the services

62. As earlier indicated this issue arose from the Respondents submissions and had not been raised before the Taxing Master. The issue having been brought to the court's attention, the court cannot will-nilly ignore it or pretend to it has no effect. Further, because of the fundamental nature and importance of the issue and the potential consequences that may arise from a consideration of the authorities on the point, it is necessary to make mention of it, briefly.

63. The Respondent/Client asserts, and it is not disputed, that the Bill of costs is based on the Further Amended Plaint dated 18th July, 2018 and filed on 25th July 2018. The Client has availed evidence from the Law Society that the Advocate did not have a practising certificate on the 18th July. Consequently, that the document is not a valid instrument having been drawn by an unqualified person.

64. It is not disputed that a practicing certificate was issued effective from 19th July 2019.

65. The Advocate submits that what is important is that the Plaint was filed on 25th July, 2018, when he had a practicing certificate. He dismisses the issue as an attempt by the Advocate to avoid his obligation to pay the due fees.

66. The law on qualification of an advocate is found in **Sections 2, 9, 21 31** and **34** of the **Advocates Act, Chapter 16 Laws of Kenya**. **Section 9** of the Act provides:

"Subject to this Act, no person shall be qualified to act as an advocate unless:

(a) he has been admitted as an advocate;

(b) his name is for the time being on the roll; and

(c) he has in force a practising certificate;

And for the purpose of this Act a practising certificate shall be deemed not to be in force at any time while he is suspended by virtue of section 27 or by an order under section 60 (4)".

Section 21 thus provides:

"The Registrar shall issue in accordance with, but subject to, this part and any rules made under this Act certificates authorizing the advocates named therein to practice as advocates".

And **Section 31** provides:

"(1) Subject to section 83, no unqualified person shall act as an advocate, or as such cause any summons or other process to issue, or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction.

"(2) Any person who contravenes subsection (1) shall:

a. ***be deemed to be in contempt of the court in which he so acts or which the suit or matter in relation to which he so acts is brought or taken, and may be punished accordingly; and***

b. ***be incapable of maintaining any suit for any costs in respect of*** anything done by him ***in the course of so acting; and***

c. ***in addition, be guilty of an offence".*** (Emphasis added).

67. As no detailed arguments were made on this issue, I need only quote the overarching interpretation of the Supreme Court in the case of **National Bank of Kenya Limited v Anaj Warehousing Limited (Sup. Ct Petition No. 36 of 2014; [2015] eKLR).** There, the Supreme Court questioned what the position is where the advocate offers a service at a time when he lacks a certificate of practice:

> ***"[58]…..if after the service, it turned out that the advocate lacked a certificate? The transgressor, in our view, is the advocate, and not the client. The illegality is the assumption of the task of preparing the conveyancing document, by the advocate, and not the seeking and receiving of services from that advocate. Likewise, a financial institution that calls upon any advocate from among its established panel to execute a conveyance, commits no offence if it turns out that the advocate did not possess a current practising certificate at the time he or she prepared the conveyance documents. The spectre of illegality lies squarely upon the advocate, and ought not to be apportioned to the client."*** (Emphasis added)

Further the Supreme Court held:

> ***"[68] The facts of this case, and its clear merits, lead us to a finding and the proper direction in law, that, no instrument or document of conveyance becomes invalid under Section 34(1)(a) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practising certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates, shall be void for all purposes.***
>
> ***[69] While securing the rights of the client whose agreement has been formalised by an advocate not holding a current practising certificate, we would clarify that such advocate's obligations under the law remain unaffected. Such advocate remains liable in any applicable criminal or civil proceedings, as well as any disciplinary proceedings to which he or she may be subject."*** (Emphasis added)

68. Concerning the attitude the court should have where it turns out that an advocate has engaged in providing regulated services without a practicing certificate, the Court of Appeal had held in the **National Bank of Kenya Ltd v. Ayah [2009] KLR 762** that:

> ***"[It] was public policy that Courts should not aid in the perpetuation of illegalities. A failure to invalidate an act by an unqualified Advocate was likely to provide an incentive to repeat the illegal Act; the interests of the innocent party should not be swept under the carpet in appropriate cases…. The innocent party has remedies against the guilty party to which he may have recourse."*** (Emphasis added).

This holding was not interfered with by the Supreme Court on appeal, and remains the guiding law.

69. In the present case, it is not disputed that at the time the Further Amended Plaint which is the basis of the Bill of costs was prepared, the Advocate did not have a practicing certificate. Whilst the Supreme Court saved from the declaration of nullity – announced by the Court of Appeal in the **Wilson Ndolo Ayah case** – instruments or documents of conveyance even if they are drawn by an advocate who did not, at the time of drawing such an instrument or document, have a current practicing certificate, it did hold that such advocate remains liable in any applicable criminal or civil proceedings, as well as any disciplinary proceedings to which he or she may be subject.

70. Given the attitude of the courts, my view is that the proper course for this court to take is merely to bring this fact of the Advocate's practice without a practicing certificate to the attention of the law Society of Kenya and the Disciplinary Committee. I need say no more on this.

Summary

71. On the claim against consolidation of the Bills of costs the Advocate's application fails.

72. On the Respondent/Clients claim that failure by the Taxing Master to uphold the preliminary objection was erroneous, the claim fails.

73. On whether or not "the value of the subject matter can be determined from the pleadings", I find that such value could be determined from the Plaint in terms of the Advocates Remuneration Order.

74. On whether the figure that emanated from the taxation was inordinately high or low, the answer will only emerge after the referral back to the Taxing Master is undertaken.

Disposition

75. The reference by the Respondent and cross reference by the Advocate succeed to the extent only that the Taxing Master's assessment of the instruction fees is hereby set aside for re-taxation;

76. The consolidated Bill of Costs is hereby remitted back to the Taxing Master to conduct the taxation in such a manner as to comply, at minimum, with the "*Specific Guidelines for Taxing Bills"* outlined above in the paragraph with that heading, without the necessity of further submissions from parties.

77. As regards the Advocate's 2018 Practising Certificate, the DR shall forward certified copies of this Ruling to the Law Society of Kenya and the Advocates Disciplinary Committee and the contents brought to their respective attention, together with a copy of her re-taxed bill;

78. Costs to abide the outcome of the entire taxation.

79. Orders accordingly

Dated and Delivered in Naivasha by teleconference this 13th Day of May, 2021.

R. MWONGO

JUDGE

Delivered in the presence of:

1. Mutembei for the Advocate/Applicant

2. Wachira for the 1st & 2nd Respondent

3. Court Assistant: Q Ogutu