REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 163 OF 2021

IN THE MATTER OF: THE ADVOCATES ACT- CAP 16 LAWS OF KENYA

IN THE MATTER OF: TAXATION OF COSTS BETWEEN PARTY & PARTY

BETWEEN

MOHANSONS FOOD DISTRIBUTORS LTD.....1ST APPLICANT

MEADOW VALE LIMITED.....2ND APPLICANT

AND

KENYA COMMERCIAL BANK LIMITED.....1ST RESPONDENT

1. FAYAZ BAKERS LIMITED.....2ND RESPONDENT

RULING

[1] This is a Reference filed by way of the Chamber Summons dated **29 July 2021.** The application was taken out by the law firm of **A.B. Patel & Patel Advocates** on behalf of the applicants pursuant to **Section 3A** of the **Civil Procedure Act** and **Rule 2 and 11 of the Advocates (Remuneration) Order** for the following orders:

> **[a]** THAT the decision of the Taxing Master delivered on **16 June, 2021**, in so far as the same relates to the reasoning and determination pertaining the applicants' Party & Party Bill of Costs dated **8 October 2020** and the consequent Certificate of Taxation issued on **2 July, 2021** be set aside;
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> **[b]** THAT this Court be pleased to refer the matter back for re-taxation of the applicant's Bill of Costs dated **8 October 2020** with proper and appropriate directions thereon;
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> **[c]** THAT in the alternative, the Court do exercise its inherent jurisdiction and be pleased to re-tax the item relating to instruction fees in the applicant's Bill of Costs dated **8 October 2020** afresh and/or make appropriate directions for taxation afresh.
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> **[d]** THAT the costs of this application be awarded to the applicant.

[2] The Reference is premised on the grounds that: -

> **[a]** The Taxing Officer's decision on taxation is based on an error of principle;
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> **[b]** As a result of the Taxing Officer's error of principle, the Taxing Officer awarded a fee that was so manifestly low as to be highly unjust and detrimental to the Applicant; and
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> **[c]** The Taxing Master exercised his jurisdiction in taxing the Applicant's Bill of Costs capriciously and whimsically instead of doing so judiciously.

[3] The application is supported by the **Affidavit** of **Sandeep Singh Kandhari**, a Director of the 1st applicant. He averred that the Applicants filed a suit against the respondents sometime on **22 January 2003** and that the cause of action arose from an alleged auction of

the 1st applicant's properties known as **Kwale/Diani Beach Block 567-572**. It was the applicants' case that the suit was heard and judgment entered in their favour on the **5 June 2020;** wherein the 2nd applicant was awarded **Kshs. 5,000,000/=** together with costs, to be settled by the 1st respondent.

[4] The applicant averred that upon being awarded costs, it proceeded to file its Bill of Costs dated **8 October 2020** for taxation; in respect of which the impugned decision was rendered on **16 June 2021** by the Taxing Master. The applicants' Party & Party Bill of Costs was consequently taxed in the sum of **Kshs. 510,879.33**; with Instructions Fee being reduced to **Kshs. 115,000/=** on the basis of the sum of **Kshs. 5,000,000/=** awarded in the judgment delivered on the **5 June 2020**. The applicants' stance was that the Taxing Master erred in principle by calculating the Instruction Fees on the basis of the sum awarded by the Court to the 2nd applicant, instead of **Kshs. 92,500,000/=,** which was the sum total of the value of the subject properties and the applicant's claim for refund.

[5] Hence, the applicants asserted that the Taxing Master misconstrued the value of the subject matter; such that he not only failed to take into account the value of the property of **Kshs. 54,000,000/=** as he was obliged to do in assessing the Party and Party costs payable, but also totally ignored their claim for refund to the tune of **Kshs. 33,500,000/=.** It was in this regard that the applicants contended that the Taxing Officer made an error of principle and therefore arrived at a figure that is so low as to amount to an injustice to the applicants; hence the Reference.

[6] Although the application was duly served on the respondents, it was neither responded to nor was there any attendance for the respondents on **25 October 2021** when the matter came up for hearing. Thus, hearing proceeded *ex parte* at the instance of **Mr. Khagram** for the applicants. He relied on the Supporting Affidavit of **Sandeep Singh Kandhari as filed in court to argue that the award of Kshs. 5,000,000.00/= was based on a nullified auction. He accordingly left it to the discretion of the court on whether to refer the Bill of Costs for re-taxation or whether to proceed and correct the error straightaway.**

[7] I have carefully considered the application in the light of the Ruling on Taxation dated **16 June 2021**. The only item in dispute is the Instructions Fee as charged in Item 1 of the applicants' Party & Party Bill of Costs dated **8 October 2020**. The Ruling on Taxation shows that the Taxing Master applied **Schedule 6** of the applicable **Advocates (Remuneration) Order, 1997.** He consequently taxed off **Kshs. 2,729,000/=** from that Item; thereby allowing a sum of **Kshs. 115,000/=** only as Instructions Fees. That figure was computed on the basis of the sum of **Kshs. 5,000,000/=** awarded by the Court in the Judgment dated **5 June, 2020**. Hence, the single issue that presents itself for determination is whether the Taxing Master erred in principle in reducing the instructions fee to **Kshs. 115,000/=** as he did.

[8] Although the application is unopposed, it is the duty of the Court to nevertheless subject it to a merit evaluation in accord with the applicable laws and principles. Indeed, in **Gideon Sitelu Konchellah vs. Julius Lekakeny Ole Sunkuli & 2 others** [2018] eKLR the Supreme Court of Kenya held that:

"…as a court of law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the Court will as a matter of cause grant the sought orders. It behooves the Court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted. The Court is under a duty to look at the application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the application a non-starter. We see no such jurisdictional issue in the application before us. Hence we have proceeded to consider the facts before us as against the jurisprudence for grant of stay orders set by this Court…"

[9] The Party and Party Bill of Costs dated **8 October, 2020** arose from the costs awarded in **Mombasa Civil Suit No. 14 of 2003: Mohanson Food Distributors Limited & another vs. Kenya Commercial Bank & another** wherein judgment had been entered by **Hon. P.J. Otieno, J.** in favour of the plaintiffs and 2nd defendant on the **5 June, 2020.** I have called for and perused the said file and ascertained that the specific orders issued in the said judgment were as hereunder: -

For the plaintiffs:

a) A declaration is hereby issued declaring that the transfer of the property by the 1st Defendant to the 2nd Defendant was unlawful and a nullity;

b) An order is hereby issued directing the rectification of the register relating to the property by canceling the registration of the transfer in favour of the 2nd Defendant.

c) For the avoidance of doubt, having set aside the sale, the rights and obligations under the legal charge, as varied by the consent judgment, are hereby restored and the rectification of the register shall include the restoration of that charge.

d) An order that in place of specific performance of the sale to the 2nd plaintiff, the 1st defendant pays to the 2nd plaintiff the sum of Kshs. 5,000,000 with interests at 14% pa from the date of payment till payment in full.

For the 2nd defendant

e) That the 1st defendant refunds the 2nd defendant the sum of Kenya Shillings Four Million Four Hundred Thousand (4,400,000) plus interest at 16.5% from 20th December 2002 until date of payment in full. The interest shall be compounded and not simple calculated for the reason that there was evidence that the 2nd defendant obtained a bank loan to finance the purchase and was charge interest at the said rate calculated in a compounded fashion

f) The 1st defendant shall bear cost of this suit and that of the claim by the 2nd defendant against it.

[10] There appears to be no dispute that the applicable guide is the **Advocates Remuneration Order, 1997,** granted that the primary suit was filed in **2003.** Hence, **Paragraph 1 (b)** of **Schedule 6** provides thus:

> **"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**
>
> **That value exceeds Sh. But does not exceed Sh.**
>
> | | | **Kshs.** | **Kshs.** |
> |---|---|---|---|
> | **500,000** | **35,000** | | |
> | **500,000** | **750,000** | **45,000** | |
> | **750,000** | **1,000,000** | **55,000** | |
>
> **Over 1,000,000 fee as for Shs. 1,000,000**
>
> **Plus an additional 1.5 percent**

[11] Thus, although the applicants posited that the value of the subject matter ought to have been premised, not on the sum awarded to the 2nd applicant of **Kshs. 5,000,000/=,** but on the value of the subject properties; that is to say, **Kshs. 92,500,000/=, Paragraph 1(b) of Schedule VI,** quoted above, is explicit that the value of the subject matter for taxation purposes ought to be premised on the pleadings, judgment or settlement between the parties and nothing else. The Court of Appeal restated as much in **Joreth Limited vs Kigano & Associates** [2002] eKLR**,** thus:

> ***"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 ascertainable the taxing officer is entitled to use his discretion to assess 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, and direction by the trial judge and all other relevant circumstances."***

[12] Where, as in this case, taxation followed a judgment of the Court, the subject matter ought to be ascertained, not from the pleadings but from the judgment itself. I am consequently in agreement with the position taken in **Kenyariri & Associates Advocates vs. Salama Beach Hotel Ltd & 4 others** [2014] eKLR that:

> **"…The taxing officer was right in awarding the instructions fee based on the amount that was allowed by the Court and not what had been pleaded. Indeed, in doing so, the taxing officer was guided by the decision of Lubellellah & Associates Advocates vs. N. K. Brother- Nairobi Misc. Application No.52 of 2012 which she quoted extensively.**
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> **If an advocate taxes his bill of costs before a matter is determined, then the taxing officer is supposed to base the instruction fees on the basis of the pleaded amount in the pleadings. However, once an award has been made by the court, then the taxing officer is supposed to use the figure awarded by the court in calculating the payable instruction fees while taking into account the other perimeters in increasing such fees, if at all…"**

[13] The same position was taken by **Hon. Mwita, J.** in **Lalji Mehji Pate & Company Limited v PCEA Foundation & another** [2020] eKLR thus:

> **"…Where a suit has been concluded and the judgment sum is discernible, that is the subject matter for purposes of determining instruction fee and not what is pleaded in the suit. The figures in the pleadings should not be used at the expense of the amount in the judgment because that is what has been found to be due. A party may plead any amount for purposes of enhancing the chances of getting higher instruction fee if this was to be allowed. The dispute having been settled for Kshs 17,000,000, that became the subject matter for purposes of the respondent's party and party bill of costs and more so item 1 on instruction fee…"**

[14] More importantly, in **Peter Muthoka & Another vs. Ochieng & 3 others** [2019] eKLR, the Court of Appeal reiterated that: -

> **"…It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court.**

Where, however, a suit is settled, then, from a literal and practical reading of the provision, the subject matter value must be sought by reference, in the first instance, to the terms of the settlement. Just as one would not start with the pleadings in the face of a judgment, it is indubitable that one cannot start with the pleadings where there is a settlement.

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 pleadings, 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…" (Emphasis supplied)

[15] A perusal of the parent file makes it plain that the sums of money referred to by the applicants at paragraph 5 of their Supporting Affidavit, if anything, were amounts that were merely set out as part of their wish list in their pleadings and therefore cannot form the basis for determining the value of the subject matter after judgment. Judgment having been delivered in **Mombasa High Court Civil Case No. 14 of 2003** in which the 2nd applicant was awarded **Kshs. 5,000,000/=,** the Taxing Master cannot be faulted for having used the sum awarded in the judgment as the subject matter for purposes of determining the instructions fee due to the applicants. There was therefore no error of principle committed by the Taxing Officer to warrant the intervention of the Court.

[16] In the result, the Reference dated **29 July, 2021** and filed on **30 July, 2021** is devoid of merit and is hereby dismissed with costs.

It is ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 3RD DAY OF DECEMBER 2021.

OLGA SEWE

JUDGE