REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISCELLANEOUS REFERENCE APPLICATION NO. 84 OF 2018

HEZRON ODHIAMBO ABOK.....APPLICANT

VERSUS

PRAJAPAT PRAVINBHAI JIVABHAI

t/a MITRA ENTERPRISES (K) LTD.....RESPONDENT

RULING

1. The reference herein is instituted by way of Chamber Summons dated 18th May 2018, in which the applicant seeks the following orders:

a) That the decision of the Deputy Registrar, as the taxing officer, dated the 6th April 2017, taxing the bill of costs dated 8th December 2016, in the sum of Kshs. 516,760.00 be set aside, reversed, reviewed and or otherwise varied;

b) The court be pleased to find that the taxing officer erred in law in taxing off Item 3, Item 47 and deducting the sum of Kshs. 400,000.00 as had been objected to in the bill of costs dated 8th December 2016 as shown in the ruling dated 6th April 2017; and

c) The court be pleased to find that the applicant was duly entitled to Items 3 and 47 in the bill of costs dated 8th December 2016 and Kshs. 400,000.00.

2. The factual background to the application is set out in the affidavit sworn in support by the applicant on 18th May 2018.

3. The reference is opposed by the respondent, through an affidavit in reply sworn by Prajapat Pravinbhai Jivanbhai, on some unknown date in 2018, but filed herein on 6th July 2018.

4. The application was urged orally on 9th July 2018 by the applicant in person, and Mr. Ombaye for the respondent.

5. The applicant's position is that the taxing officer taxed off Item 3, which, being VAT was erroneous considering that it was compulsory that the same be remitted to the government. He urged that Item 47 provided for disbursements which he had incurred while rendering services to the respondent and the same remained undisputed. He contended that the taxing officer erred in deducting Kshs. 400,000.00 in respect of payments made to the applicant by the respondent for other suits that he had represented him, a fact that the respondent agreed to. He prayed that the same be considered and that the items taxed off and the Kshs. 400,000.00 deducted be added to the amount taxed.

6. The respondent, on his part stated that the reference was incompetent and vexatious, and ought to be dismissed. He submitted that the VAT Item 3 was not provided for under the Advocates Remuneration Order and that the same ought not to be given to the applicant. He also stated that Item 47 could also not be granted as the applicant did not provide proof of any of the services he claimed to have rendered. With regard to the Kshs. 400,000.00, which had been deducted, he stated that he had made payment to the applicant with regard to Plot No. 220 which was the subject matter in Kakamega Chief's Magistrate's court civil case No. 101 of 2016.

7. The circumstances under which this court can interfere with the taxing officer's discretion in taxing a bill of costs was well elaborated in the case of *National Oil Corporation Limited vs. Real Energy Limited & Another* [2016] eKLR, where the court stated that:

> "*The circumstances under which a Judge of the High Court interferes with the taxing officer's exercise of discretion are now well known. These principles are, (1) that the Court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle;*

(2) it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge;

(3) if the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high;

(4) It is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary;

(5) The Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it;

(6) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees;

(7) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary. These principles were stated in the case of First American Bank of Kenya vs. Shah and Others [2002] 1 EA 64.

Further it has been held that the Court should interfere with the decision of the Taxing Officer where there has been an error in principle but should not do so in questions solely of quantum as that is an area where the Taxing Officer is more experienced and therefore more apt to the job; the court will intervene only in exceptional cases and multiplication factors should not be considered when assessing costs by the Taxing Officer or even the Judge on appeal; the costs should not be allowed to rise to such level as to confine access to court to the wealthy; a successful litigant ought to be fairly reimbursed for the costs he had to incur in the case; the general level of remuneration of Advocates must be such as to attract recruits to the profession; so far as practicable there should be consistency in the awards made; every case must be decided on its own merit and in every variable degree, the value of the suit property may be taken into account; the instructions fees ought to take into account the amount of work done by the advocate, and where relevant, the subject matter of the suit as well as the prevailing economic conditions; one must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel of pre-eminent reputation; then one must know that what fee this hypothetical character would be content to take on the brief; clearly it is important that advocates should be well motivated but it is also in the public interest that cost be kept to a reasonable level so that justice is not put beyond the reach of poor litigants.

8. The court went on to state that:

Further guidance if necessary may be obtained in the case of Joreth Limited vs. Kigano & Associates CIVIL APPEAL NO. 66 OF 1999 [2002] 1 EA 92 where the Court of Appeal held that the value of the subject matter for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgement 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 the 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. It is not really in the province of a Judge to re-tax the bill. If the Judge comes to the conclusion that the taxing officer has erred in principle, he should refer the bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done. The Judge ought not to interfere with the assessment of costs by the Taxing Officer unless the officer has misdirected himself on a matter of principle. In principle the instruction fee is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached. The Taxing Officer whilst taxing his 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."

9. In *Kanu National Elections Board & 2 Others vs. Salah Yakub Farah* [2018] eKLR, the court held that the taxing master's discretion will not be interfered with;

"… unless it is found that he/she has not exercised his/her discretion properly as for example when he/she has been actuated by some improper motive, or has not applied his/her mind to the matter, or has disregarded factors or principles which were proper for him/her to consider, or considered others which it was improper for him/her to consider, or acted upon wrong principles or wrongly interpreted rules of law, or gave a ruling which no reasonable man would have given."

10. The issues for determination, as raised by the parties herein in their respective filings and as emerging from their oral submissions, are:

a) whether the applicant herein is entitled to VAT on the taxed fees;

b) whether the taxing officer erred in law in taxing off Item 47, being disbursements incurred by the applicant during the course of his service to the respondent; and

c) whether the taxing officer erred in law and fact in deducting Kshs. 400,000.00 as having been payment made to the applicant by the respondent for services rendered in Kakamega CMCC Suit No. 101 of 2016.

11. I will start by considering whether the applicant herein is entitled to be paid a sum equivalent to what he is charged as VAT on instruction

fees. It is the applicant's contention that he is entitled to Item 3 as he is statutorily mandated to remit the same to the government. The respondent on his part opposes the same stating that the applicant is not entitled to the same and that there was no justification for the amount sought as the same was yet to be paid. The taxing officer in his ruling simply stated that "Item 3 is refused. The same is taxed off." He did not give a reason for refusal of the same.

12. The relevant on this is the Value Added Tax Act, Cap 476, Laws of Kenya. Section 9(3) of the said Act provides that:

> *"In calculating the value of any services for the purposes of Subsection (1) there shall be included any incidental costs incurred by the supplier of the services in the course of making his supply to his client provided that, if the commissioner is satisfied that the supplier has merely made a disbursement to a third party as an agent of his client, then such disbursement shall be excluded from the taxable value."*

13. The courts have had occasion to address the issues. In *Mereka & Co. Advocates vs. New Kenya Co-Operative Creameries Limited* [2018] eKLR, where the court said:

> *"32. In regards to the question of whether VAT should be awarded when the same was not pleaded, the court's view is premised on the case of Amuga & Co. Advocates v Arthur Githinji Maina Miscellaneous Application No. 265 Of 2012 wherein the Honourable Judge made reference to the AM Kimani & Co. Advocates vs.- Kenindia Assurance Co. Ltd holding that;*
>
> > *"…under the Value Added Tax Act an advocate is entitled to charge VAT on instruction fees and also disbursements"*
>
> *and J.P Machira t/a Machira & Co. Advocates vs. MDC Holdings Ltd & 2 others where Justice Ringera held that;*
>
> > *"As regards VAT it is a statutory requirement that legal services are chargeable with VAT."*
>
> *33. The court is guided by the aforementioned authorities in reasoning that the Advocate is entitled to VAT. The Applicant's claims in this regard is therefore unfounded."*

14. In *Ngatia & Associates Advocates vs. Interactive Gaming & Lotteries Limited* [2017] eKLR, the court observed that:

> *"105. My view is that indeed; estoppel does not operate against the law. Equally, I am in agreement with the advocate that VAT is a statutory charge on legal services rendered to the client.*
>
> *106. However, I do not agree that VAT is chargeable on the entire award. Neither do I agree that VAT is chargeable only on instructions fees.*
>
> *107. VAT is a tax levy on advocates in respect of the professional fees they charge for legal services they render to their clients. It is a charge payable to the Kenya Revenue Authority and the advocate is only but a statutory agent for KRA. The levy once collected by the advocate for the legal services rendered is then remitted on a monthly basis to KRA."*

15. From the above authorities, it is clear that VAT is chargeable on the instruction fees. Therefore, in the instant suit VAT of 16% should be chargeable on the instruction fee of Kshs. 881,400.00. Item 3 was accordingly properly presented as Kshs. 141,024,00 in the circumstances. It is my finding therefore that the taxing officer erred in principle and law in taxing off the figure on VAT.

16. I will turn to the second issue as to whether the taxing officer erred in law in taxing off Item 47, being disbursements incurred by the applicant during the course of his service to the respondent. The Applicant in his bill of costs presented Item 47 as being in respect of photocopies, postage, letters and phone calls for which he charged Kshs. 5000.00. The respondent disputed the award stating that the applicant was not entitled to the same. The taxing officer then simply taxed it off without assigning any reason.

17. In dealing with the issue raised with regard to Item 47, I shall seek guidance in the decision in *Ngatia & Associates Advocates vs. Interactive Gaming & Lotteries Limited* [2017] eKLR, where the court held that disbursements must be proved by way of receipts. In *AM Kimani & Co. Advocates vs. Trident Insurance Company Limited* [2016] eKLR, the court observed that:

> *"In respect to the disbursements, the advocate readily admitted that she did not file any receipt to confirm any of the sums claimed.*
>
> *30. In Muthoga Gaturu & Co. Advocates vs. Naciti Engineers Limited Misc. Case No. 51 of 2001, Mwera J. (as he then was) held as follows;*
>
> > *"That paragraph (74 of the Remuneration Order) reads;*
> >
> > > *"74. Subject to paragraph 74A, receipts or vouchers for all disbursements charged in a bill of costs shall be produced on taxation if required by the taxing officer."*
> >
> > *In this matter it is not shown that the taxing officer required the advocate to produce vouchers and receipts for the items of disbursements referred to above. Accordingly, the taxing officer would have done well to allow those items which totalled*

Kshs. 1,200/- only."

31. I do not understand the learned Judge to have been laying down a general rule, that if the taxing officer failed to ask the advocate to produce receipts and vouchers, the sums claimed as disbursements should be allowed.

32. In order to get a better appreciation of paragraph 74, it is necessary to compare it to paragraph 74A, which states as follows;

"1) The taxing officer shall allow reasonable charges and expenses of witnesses who have given evidence and shall take into account all circumstances and without prejudice to the generality of the foregoing, the following factors ..."

33. Thus, pursuant to paragraph 74A, there is no requirement for receipts and vouchers. The factors to be taken into account include;

"a) the loss of time of the witness;

b) if the witness is a party, the time spent giving evidence;

c) the loss of wages or salary to the witness or his employer while attending court;

34. By specifying that the taxing officer shall allow reasonable charges and witness expenses subject to the factors specified, plus any other relevant factors, the paragraph 74A of the Remuneration Order must be taken to have created an exception to the general rule of evidence, which requires the person who makes an allegation, to prove it.

35. Mwera J. appears to have been saying that if the sums claimed in respect of disbursements were not substantial, the taxing officer may consider allowing such sums and that too, if the taxing officer had not required the claimant to produce vouchers or receipts to prove the claims.

36. In this case, the advocate has submitted as follows;

"The taxing officer further erred in law and fact by failing to award us costs for disbursements for failure to produce receipts where in our submissions we had explained why we could not produce receipts and when it is clear that some expenses had been incurred by virtue of the services that we had rendered to the client".

37. In effect, the advocate had no receipts which she could have produced even if the taxing officer had asked her to produce them. Therefore, whether or not the advocate had been asked to produce receipts or vouchers to prove the disbursements incurred, the taxing officer would not have been given anything more. It is not the failure by the taxing officer which was the cause for the advocate's failure to make available the requisite proof. The inability to produce proof rests completely at the advocate's door, as she did not have evidence to support the disbursements claimed."

18. In *Maina Murage & Company Advocates vs. Mae Properties Limited* [2018] eKLR, the court declined a claim for disbursements on the basis that that the applicant did not provide receipts to prove the said disbursements and the number of folios in the photocopying had not been specifically stated.

19. On the basis of the above authorities, it is my finding that it was incumbent upon the applicant to prove the disbursements he claimed. There was no evidence by way of receipts as to how he came to the same, and I hold that the taxing officer cannot be faulted for taxing off Item 47.

20. On the issue as to whether the taxing officer erred in law and fact in deducting Kshs. 400,000.00 as having been payment made to the applicant by the respondent for services rendered in Kakamega CMCC Suit No. 101 of 2016, it is the respondent's contention that he had paid the applicant Kshs 400,000.00 for the services he had rendered in the primary suit. To support his contention he has attached six petty cash vouchers for Kshs. 50,000.00 each, dated 21st October 2016, 29th October 2016, 8th November 2016, 10th November 2016, 16th November 2016 and 19th November 2016 amounting to Kshs 300,000.00 and one for Kshs 100,000.00 dated 2nd November 2016. The cash vouchers all made reference to a Plot 220 save for the one dated 16th November 2016.

21. The applicant on their part denied the payment stating that the payments had been made in reference to other matters that the firm was handling for the respondent. He produced to evidence receipts that he issued to the respondent in terms of payments received. He produced receipts dated:

a) 10th October 2016 for Kshs. 50,000.00 for money received from the respondent in respect of Tribunal Case No. 57 of 2016;

b) 21st October 2016 for Kshs. 50,000.00 for money received from the respondent in respect of Tribunal Case No. 42 of 2016;

c) 29th October 2016 for Kshs. 50,000,00 for money received from the respondent in respect of Tribunal Case No. 66 of 2016;

d) 2nd November 2016 for Kshs. 50,000.00 for money received from the respondent in respect of Tribunal Case No. 75 of 2016; 8th November 2016 for Kshs. 50,000.00 for money received from the respondent in respect of Tribunal Case No. 57 of 2016;

e) 2nd November 2016 for Kshs. 50,000.00 for money received from the Respondent in respect of Tribunal Case No. 66 of 2016;

f) 16th November 2016 for Kshs. 50,000.00 for money received from the Respondent in respect of Tribunal Case Nos. 57, 66 and 42 of 2016; and

g) 19th November 2016 for Kshs. 50,000.00 for money received from the respondent in respect of Tribunal Case Nos. 66, 42 and 75 of 2016.

The total amount of payments came to Kshs. 400,000.00.

22. It should be noted that the same were produced during the taxation of the bill and the taxing officer based his decision on the vouchers received by the respondent. The respondent does not deny that the applicant was handling other matters for him. It is, however, too much of a coincidence that the payments were made on the same dates. The vouchers only indicate that they are for Plot 220, which is the subject matter in the primary suit. This cannot, however, be construed to mean that the payments were for the primary suit as the payment vouchers did not state the case number and other details. It should also be noted that the respondent did not deny making payments for the tribunal cases for which the applicant claims he received payment. It is, therefore, my opinion that the taxing master erred in principle in deducting the Kshs. 400,000.00 from the amount taxed.

23. In the upshot, I shall grant the application dated 18th May 2018 in the following terms:

a) That reference on Item 3 be allowed to the extent of Kshs. 141,024.00;

b) That reference on Item 47 is hereby disallowed;

c) That reference on the amount of Kshs 400,000.00 is allowed and the same shall be added back to the amount taxed;

d) That in the end the advocate/client bill of costs shall be taxed at Kshs 1,057,784.00; and

e) That a certificate of costs shall accordingly issue for that amount.

24. It is so ordered.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 14TH DAY OF JUNE 2019

W MUSYOKA

JUDGE