



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO 45 OF 2012

KENYA COMMERCIAL BANK LIMITED.....PLAINTIFF

VERSUS

STAGECOACH MANAGEMENT LIMITED.....DEFENDANT

RULING

1. This Ruling relates to a Reference arising out of the Taxation of a Party and Party Bill of Costs dated 20th April, 2016.
2. After considering the Bill, the Taxing Officer taxed the Bill on 30th August 2016 at Kshs.1,200,307.68.
3. The parties herein have identified three issues for my determination:-
 - a. Whether or not the Taxing Officer erred in allowing Getting Up Fees.
 - b. Whether or not the Taxing Officer erred in increasing the fees by 50% under the Provisions of Schedule VI B of the Advocates Remuneration Order.
 - c. Whether or not the Taxed Costs ought to have been subjected to a charge on VAT.
4. There does not seem to be a disagreement that the law applicable to the Costs herein is schedule VI of the Advocates Remuneration Order, 2006. Paragraph 2 thereof is on fees for Getting Up or preparing for Trial which reads:-

“In any case in which a denial of liability is filed in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation:

Provided that-

- i. This fee may be increased as the taxation officer considers reasonable but it does not include any work comprised in the instruction fee;
- ii. No fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not more that 15% of the instruction fee allowed on taxation may, if the judge so directs, be allowed against the party seeking the adjournment in respect of each

occasion upon which a confirmed hearing is adjourned;

iii. In every case which is not heard and taxing officer must be satisfied that the case has been prepared for trial under this paragraph.

5. This Suit was determined by the decision of Havelock J. on 7th August 2014 when he upheld the Defendants Preliminary Objection and dismissed the suit with costs to the Defendant.

6. On Getting Up Fees, this is what the Taxing Officer held:-

“Get up Fees is normally a third of the instruction fee where a matter has proceeded to hearing. The Respondent submitted that the matter did not proceed to hearing. The Applicant has stated that a Defence was filed thus they are entitled to the Getting up Fees. On attendances, the Respondent has submitted that the matter was slated for hearing on 24.2.2016. That means the matter was set down for hearing, thus the applicant is entitled to getting up fee which is a third of the instruction fee which amounts to Kshs.159,768.75”.

There seems to be error on the hearing date as the Court Records shows the correct date to be 11th March 2014.

7. The contention of the Plaintiff is that Getting Up Fees is not deserved as the matter never went to hearing and that the date of 24th February 2014 was in fact for hearing of the Preliminary Objection. The Defendant on the other hand cites the Decision of **NGURUMAN LTD VS. KENYA CIVIL AVIATION AUTHORITY & 3 OTHERS** [2014] eKLR in support of the argument that as the Defendants were fighting to be allowed to defend the matter, the Getting up fees was therefore properly allowed.

8. This is my view of the matter. The Plaintiff through a Notice of Motion dated 15th May 2013 sought to have the Defendant's written Statement of Defence struck out and Judgment entered in his favour. In response to that motion, the Defendant filed a Preliminary Objection dated 6th June, 2013. The Preliminary Objection was fixed for hearing on 11th March 2014 when it was rescheduled to 28th May, 2014 for possible highlighting of submissions which were to be filed in the intervening period.

9. The matter did not proceed on 28th May 2014 as the parties had not filed submissions. The matter was then set for mention on 19th June 2014. On 19th June 2014 the Judge acceded to a request by Counsel for the parties to determine the matter on the basis of the filed Submissions. That determination came on 7th August 2014.

10. This short history shows that the matter was neither confirmed for hearing nor came up for substantive hearing. And proviso (ii) to paragraph 2 is clear that no Getting up or preparation fees is chargeable until the case has been confirmed for hearing.

11. It is therefore apparent that the Getting Up Fees allowed by the Taxing Officer was erroneous. The decision in of **NGURUMAN LTD VS. KENYA CIVIL AVIATION AUTHORITY & 3 OTHERS** [2014] eKLR does not aid the Defendant. There the order of the Taxing Officer on Getting Up Fees was upheld because there was a hearing of the substantive matter albeit on the basis of submissions. The unique circumstances in that matter being that it was a Constitutional Petition which are often substantively disposed of on the basis of filed Affidavits and Submissions.

12. On the increment of the Fees by one-half, there can be no answer to the clear provisions of the Law as it stood (and currently stands) that this is only in respect to Advocate and Clients Bill of Costs. The Bill before the Court was on Party and Party Costs. With respect, the Taxing Officer fell into error. I must however observe that the subsidiary legislation on Party and Party Bill of Costs does not appear to be in step with the object for ordering those costs where a successful Litigant is represented by Counsel. As stated by the Supreme Court in **JASBIR SINGH RAI & 3 OTHERS VS. TARLOCHAN SINGH RAI**

& 4 OTHERS [2014] eKLR,

“The object of ordering a Party to pay costs is to reimburse the successful Party for amounts expended on the case. It must not be made merely as a Penal Measure. Costs are a means by which a successful Litigant is recouped for expenses to which he has put in fighting the case”.

The subsidiary legislation as it now stands places the successful Litigant represented by Counsel at a disadvantage by expecting the Litigant to pay Counsel substantially more than she/he could ever recover through Party to Party Costs. This in my humble view is a Rule which The Chief Justice, who makes the Rules, may wish to revisit.

13. There are divergent views as to whether Value Added Tax is chargeable on Party and Party costs. In **PYRAMID MOTORS LTD VS. LANGATA GARDENS LIMITED** [2015]eKLR Onguto J. took the following position:-

“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 an 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”.

14. A different result was reached by Emukule J. in **FOUR FARMS LTD VS. AGRICULTURAL FINANCE CORPORATION** [2015]eKLR when he held:-

“To answer this question it is necessary to ask another question, namely, what is the basis of a Party and Party Bill of costs. This question was answered by the learned Taxing Officer when she cited the decision of the court in **JASBIR SINGH RAI & 3 OTHERS VS. TARLOCHAN SINGH RAI & 4 OTHERS** [2014] eKLR where the court said:-

“the object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure. Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting the case”.

The fight referred to by the court is conducted by counsel for the successful litigant. It is a service rendered by counsel. The supply or rendering of services is one of the activities which attracts VAT under section 5 of the Value Added Tax Act, 2013 (No. 35 of 2013). It was properly charged on the basic instruction fee of Kshs.332,675/=. The contention to the contrary has no basis, and this leg of the reference also fails”.

15. Both decisions are of persuasive value and at the “T”-junction I turn with Emukule J, but add as follows. As held by the Supreme Court in **Jasbii Singh Rai** (supra) costs are a means by which a successful litigant recoups amounts expended in fighting a case. If the successful Litigant has hired the services of an Advocate and has had to pay out VAT to the Advocate then that ought to be recouped by including a charge of VAT on the Party to Party Costs. That, however, cannot arise if the Litigant acts in person.

16. In the matter at hand, the successful party was represented by Counsel and since there is no argument that the said Counsel is **not** registered to pay VAT, I cannot fault the Taxing Officer’s decision to allow VAT. However, there could be a small error on how the Taxing Officer applied the charge. She appears to have charged VAT even on Court Filing Fees.

17. Given my view of the matter, the Costs herein will have to be retaxed. And whereas a Judge has discretion to retax a Bill himself, where a fee is to be reassessed on different principles, like here, it should be remitted to a different taxing Officer (See **STEEL CONSTRUCTION AND PRETROLEUM ENGINEERING EA LTD VS. UGANDA SUGAR FACTORY LTD** [1970]EA 141.

18. These are my final Orders:-

1. I allow the Reference in part by striking out the items of Getting Up Fees and increment by ½ on the Taxation of 30th August 2016.
2. The Taxation will be remitted back to a Taxing Officer other than Hon. Caroline M. Watimah who made the Decision of 30th August 2016 for reworking in terms of Order 18(1) above and correction of the error pointed out in paragraph 16 above.
3. Costs of this Reference to the Plaintiff.

Dated, Signed and Delivered in Court at Nairobi this 10th day of February, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Ojiambo for Ndhiwafor Plaintiff

Bicherefor Defendant/Applicant

Alex - Court Clerk