Kenya Ports Authority Pension Scheme & 8 others v Kinyua Muyaa & Co. Advocates (Civil Appeal 69 of 2020) [2022] KECA 578 (KLR) (6 May 2022) (Judgment)

Neutral citation: [2022] KECA 578 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 69 OF 2020

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

MAY 6, 2022

BETWEEN

KENYA PORTS AUTHORITY PENSION SCHEME & 8 OTHERS .. APPELLANT

AND

KINYUA MUYAA & CO. ADVOCATES ..... RESPONDENT

(An appeal from the ruling and order of the Employment and Labour Relations Court at Mombasa (Rika, J.) dated 17th July 2020 in ELC Misc. Application No. 13 of 2015)

JUDGMENT

JUDGMENT OF GATEMBU, JA

1. The substantive appeal herein is brought by Kenya Ports Authority Pension Scheme & 8 others ("the Client" or "the Pension Scheme"). The said appellant has challenged a ruling delivered by the Employment and Labour Relations Court (Rika, J.) on July 17, 2020 dismissing their application to set aside a taxation by the Deputy Registrar of the Employment and Labour Relations Court (ELRC) of an advocate-client bill of costs presented by the law firm of Kinyua Muyaa & Co. Advocate ("the Advocates"). In the same ruling, the learned Judge allowed an application by the Advocates and entered judgment in their favour against the Client for Kshs.87,139,560.00 plus additional interest from April 25, 2020, being the advocate-client costs assessed by the Deputy Registrar of the ELRC.

2. The Advocates subsequently filed an application dated 14th October 2020 to strike out this appeal. The application is made under Sections 3(3), 3A and 3b of the *Appellate Jurisdiction Act* and Rules 84 and 87 of the *Court of Appeal Rules*, and is based on grounds that the record of appeal is incomplete. With the concurrence of counsel for the Advocates and the Client, the Court directed that the application to strike out the appeal be subsumed in the appeal, and that the determination thereon be incorporated in this judgment. Accordingly, this judgment relates to both, the Advocates application and the Client's substantive appeal.

3. The procedural history in this matter reveals that what started as an amiable advocate and client relationship has become strained over the Advocates remuneration. The Advocates acted for the Client in defending it in a suit, being Industrial Cause No. 116 of 2013 ("the primary suit") which had initially been filed before the High Court at Mombasa as Civil Suit No. 41 of 2007, and later transferred to the Industrial Court.

4. In the primary suit, pensioners of the Pension Scheme sought a declaration that the decision by the Pension Scheme to amend the Trust Deed, which they claimed had the effect of reducing benefits payable to them, was null and void. The pensioners also sought an order for payment of Kshs. 202,199,424.50 together with accruals; interest and costs.

5. In its judgment in the primary suit delivered on 14th February 2014, the Industrial Court (O.N. Makau, J.) declared the 2002 Deed of Amendment and Rules and subsequent Remedial Pension Plan as fraudulent, wrongful, illegal and unconstitutional, null and void and awarded the pensioners Kshs. 201,981,424.50 being aggregate pension arrears, interest and costs. Thereafter, the Deputy Registrar of the Industrial Court Mombasa taxed and allowed party and party costs in favour of the pensioners in the amount of Kshs. 5,682,828.00 and certified that amount in a Certificate of Costs dated August 22, 2014. The Advocates then submitted a fee note to the Client for work done in connection with the primary suit which the Client disputed.

6. On 6th July 2017, the Advocates filed an application against the Client before the ELRC at Mombasa, being Misc. Civil Application No. 13 of 2015, with which it presented its advocates'/client bill of costs for taxation. The total amount the Advocates claimed in the itemized bill of costs was Kshs.227,922,220.73.

7. In opposition to that application, the Client, in an affidavit sworn by a trustee, the General Manager Corporate Services of the Kenya Ports Authority, asserted that the ELRC lacks jurisdiction to tax advocate-client bill of costs; that in any event, and without prejudice to its plea on jurisdiction, party and party costs in the matter had been certified in the sum of Kshs. 5,682,828.00; that under Schedule VI Part B of the Advocates (Remuneration) Order, Legal Notice No. 159 of 2006 ("the Remuneration Order"), the advocate-client costs should be the equivalent of certified party and party costs increased by one half; and that as the Advocates had already received Kshs. 11,257,720.00, the Advocates were liable to reimburse the Client with the overpayment in the amount of Kshs. 2,733,478.00.

8. A preliminary objection on jurisdiction taken before the Deputy Registrar by the Client was overruled in a ruling delivered on 18th September 2015. The learned Deputy Registrar (A.S. Lesoota) determined that the ELRC is presided over by a Deputy Registrar designated and stationed as such, and the ELRC "thus conferred of the relevant jurisdiction to tax the applicant's bill of costs" and that:

> "...noting that the current bill relates to an ELRC matter it is the court's opinion that it is the most appropriate court to tax the current bill. Finally, therefore I find that this court indeed is possessed of the relevant jurisdiction to hear and determine the applicant's advocate-client bill of costs before it, I find the respondent's preliminary objection unmeritorious and dismiss the same."

9. Dissatisfied with that decision, the Client applied to the Judge of the ELRC by motion dated October 3, 2015 seeking orders of: stay of the taxation; review of the Deputy Registrar's ruling of 18th September 2015; and an order for the bill of costs to be struck out. After hearing the parties on that application, the learned Judge of the ELRC dismissed it in a ruling delivered on 18th November 2015. In addition to holding that the application was premature and incompetent, the Judge held that the court "should

not determine a bill of costs filed before the taxing officer unless it is referred to it on appeal or through supervisory jurisdiction". The Judge expressed that the ELRC "is a superior court with the status of the High Court" and that "its Registrar and Deputy Registrar is equal in status to that of the High Court for all purposes and intention of the law including taxation of the bill of costs whether party and party costs or advocates/clients costs"; that it was never intended to create a superior court with a deficiency in determining fees for the advocates appearing before it; and that a court that presided over court proceedings is best placed to determine costs and fees to the parties and their advocates.

10. It then fell upon the learned Deputy Registrar, A.S. Lesoota, to tax the bill of costs which he did in a ruling delivered on October 21, 2016. Taking the amount of Kshs. 201,981,424.50 decreed by the High Court as the value of the subject matter, the Deputy Registrar assessed the instructions fee at Kshs. 8,291,715 which, in exercise of his discretion, he increased to Kshs. 10,000,000.00; allowed getting up fee of Kshs. 3,333,333.33 and other items with the result that an amount of Kshs. 212,012,879.50 was taxed off from the Bill of Costs charged at Kshs. 227,922,220.73 and an amount of Kshs. 15,909,341.22 allowed. Giving credit for the amount already paid by the Client to the Advocates, the net amount payable was assessed and determined to be Kshs. 4,656,621.22.

11. Both parties, the Client and the Advocates, were dissatisfied with the taxation and filed separate references before the Judge. In its reference, the Client applied for the taxation to be set aside contending that the taxation was a nullity as the Deputy Registrar of the ELRC lacked jurisdiction to tax advocate-client bill of costs, and asserting that only the High Court had such jurisdiction. In the alternative, the Client contended that the Deputy Registrar made errors of principle while taxing the advocate-client bill of costs.

12. On the other hand, the Advocates in their reference before the Judge prayed for the setting aside of the awards by the Deputy Registrar relating to instruction fees and getting up fees on the grounds that the taxing officer erroneously took the figure of Kshs. 201,981,424.50, the judgment amount in the primary suit, as the value of the subject matter, instead of the figure of Kshs. 6,982,340,602.00. The Advocates also complained that the taxing officer had no discretion to disallow the claim for interest on fees.

13. In a considered ruling delivered on October 13, 2017, the learned Judge (O.N. Makau, J.) expressed that he had already ruled on jurisdiction in his earlier ruling of November 18, 2015, and reiterated that the ELRC is "endowed with the jurisdiction to determine both party and party and also advocate-client bill of costs just as the High Court". As regards the contention that the taxing officer made errors of principle in assessing the advocate-client costs, the Judge concluded that, "the taxing officer erred in principle by assessing the advocates instruction fees based on Kshs.201,981,424.50 as the value of the suit"; that "it is clear that the value of the suit was much higher than Kshs. 201,981,424.50 but definitely not the Kshs. 6,982,340,602.00 mentioned in the plaint as having been unremitted by the sponsor". The Judge also faulted the taxing officer for: failing to consider and determine each and every item on the bill of costs on the merits; and failing to consider and make a finding with respect to the item of interest. In the end, the Judge set aside the costs taxed and referred the advocate-client bill of costs back to the taxing officer for fresh taxation.

14. Pursuant to the said ruling of the learned Judge, the bill of costs was remitted for fresh taxation. The Deputy Registrar, after considering submissions by counsel, delivered a ruling on April 24, 2020 in which he taxed and allowed the Advocates bill of costs in the amount of Kshs. 87,139,560.45. The Client was again dissatisfied.

15. In the meanwhile, the judgment in the primary suit had been challenged in the Court of Appeal and ultimately in the Supreme Court in Petition No. 3 of 2016. In its judgment delivered on November

8, 2019, the Supreme Court determined that the ELRC had no jurisdiction to entertain the primary suit. It accordingly set aside the judgment of the Court of Appeal which had upheld the judgment of the ELRC in the primary suit. I will advert to this later.

16. On May 18, 2020, the Client filed a reference under Paragraph 11(2) of the Remuneration Order seeking the setting aside the taxation in its entirety. In the alternative, the Client prayed that certain specified items of the bill of costs be reviewed and taxed off or remitted back to the taxing officer for re-consideration. The reference was based on the grounds that the Supreme Court had set aside the judgment in the primary suit as it was given without jurisdiction; that the taxing officer erred in basing the instruction fees on a judgment that was a nullity; that getting up fees was inapplicable in an advocate-client bill of costs; that the taxing officer assessed the costs on the wrong provisions; and that the assessment should have been done under paragraph 1(i) of Schedule VI of the Remuneration Order which provides for fees payable for suing or defending "in any case not provided for above; for such sum as may be reasonable but not less than Kshs. 8,400"

17. The Advocates, on their part were satisfied with the taxation of their bill of costs by the Deputy Registrar. They filed an application on 2nd June 2020 before the judge of the ELRC seeking judgment in their favour against the Client in terms of the taxation for "Kshs. 87,139,560.45 plus further interest from April 25, 2020."

18. Those two applications were heard before Rika, J. who delivered the impugned ruling on July 17, 2020. On jurisdiction, the learned Judge held that the matter was res judicata and that he could not revisit an issue that had previously been comprehensively dealt with by a Judge of equal rank. In that regard, the Judge pronounced:

> " The clients/respondents are asking a judge of equal rank to the judge who made the ruling, to revisit an issue that was comprehensively dealt with. The matter as far as this court is concerned, is res judicata. The clients/respondents are merely retrying an issue which was previously determined. There is no reason for the clients/respondents to expect this court to depart from the main ruling made earlier by this court. No appeal against the ruling was made. No order of a superior court has been shown to this Court, staying or overturning the ruling of Judge O. Makau."

19. Re-affirming the decision of Makau, J. on the jurisdiction of the ELRC with regard to taxation of costs, the Judge stated:

> " *The Constitution* mandated Parliament to establish courts of equal status, which are intended to be self-regulating, and without any of the court seeking the aid of the other, in running its proceedings. The primary claim was transferred by the High Court to the ELRC for want of jurisdiction. Should the advocate/client bill of costs, based on the primary claim have been date redirected to the High Court? The court does not think it is the intention of *the Constitution* that justice is dispensed in this back-and-forth manner espoused by the clients/respondents. The ELRC makes orders on costs daily, in the course of hearing disputes, granting advocates and their client costs, where for instance adjournment is occasioned by the adversarial party. What is the magic in an advocate/ client bill of costs, that it must be taken out of the jurisdiction of the ELRC? The court agrees with the advocate and the ruling made earlier by Judge O. Makau, that there is sufficient legal and constitutional basis for the Deputy Registrar of the ELRC, to tax bills of costs, relating to matters dealt with by the ELRC."

20. With regard to the complaint that the taxing officer failed to heed the decision of the Supreme Court declaring that the ELRC lacked jurisdiction to adjudicate the dispute in the primary suit, the learned Judge held that the judgment of the Supreme Court in that regard did not impair accrued advocate/client obligations; that it cannot be that where advocates have acted for parties in which the court conducting the proceedings is later found to have had no jurisdiction, cannot deprive the concerned advocates of their legal fees and costs incurred in representing the clients in such proceedings. The Judge stated:

> " The judgement which was set aside did not impair accrued advocate/client obligations. It could only be said to have no legal effect, with regard to the rights and obligations of the parties to the primary claim. In the particular instance the parties were the Pension Scheme and its members, but not the advocates who represented him. The rights and obligations of Advocates and their clients, must be distinguished from the rights and obligations specific to the parties to a claim. The advocate is not trying to enforce the judgement which was overturned by the Supreme Court. If he did he would be considered in law, a trespasser. The advocate/client bill of costs was filed before any judgement was rendered. The advocate was entitled to pursue his costs from the clients/respondents, once he ceased to act for them."

21. The learned Judge also rejected the contention that the taxing officer made errors of principle. He observed that the taxation was carried out by the Deputy registrar for a second time with participation of all parties after clear guidelines by the trial court. In the result the Judge dismissed the reference by the client and entered judgement in favour of the Advocates in terms of the costs assessed by the Deputy Registrar.

22. In its memorandum of appeal before us, the Client has faulted the Judge for: holding that the issue of the jurisdiction of the ELRC was res judicata and failing to find that the ELRC lacked jurisdiction to hear and determine the advocates-client bill of costs; disregarding the decision of the Supreme Court in *Republic v Karisa Chengo & 2 others* [2017] eKLR which determined the status of the different courts; failing to find that the taxing officer ought to have considered the decision of the Supreme Court in Petition No. 3 of 2016; failing to find that the taxing officer had not set out the principles of taxation that would apply in the circumstances of this case; failing to hold that the costs assessed by the taxing officer at Kshs 87,139,560.45 was so manifestly excessive to warrant a finding that the there was an error in exercise of discretion.

23. With regard to the Advocates application to strike out the appeal dated 14th October 2020, learned counsel Mr. Kinyua Kamundi submitted that no appeal lies; that the record of appeal is incomplete and incompetent and the Court has no jurisdiction; that matters relating to the applicable Schedule of the Remuneration Order, the principles of taxation of advocate/client bills of costs, getting up fees or interest are matters that were conclusively determined in previous decisions of the ELRC that were never challenged on appeal and the Client was precluded by Section 68 of the *Civil Procedure Act* from contesting the correctness of those decisions.

24. Counsel submitted further that the omission from the record of appeal of 13 documents enumerated in the application and referred to as primary and mandatory documents, rendered the appeal incompetent; that Rule 87(1) of the Court of Appeal Rules is mandatory and the decision to exclude any primary documents is in the discretion of the Judge or Registrar upon application; and that Rule 92 of the Court of Appeal Rules does not impose an obligation upon a respondent to file a supplementary record of appeal to fill gaps in the record by bringing in primary documents intentionally omitted.

25. In support, counsel referred to numerous decisions including Salama Beach Hotel Limited and 3 others vs. Kenyariri & Associates Advocates [2017] eKLR; *Floris Pierro v Giancarlo Falasconi (as Administrator of the Estate of Santuzza Billioti alias Mei Santuzza) [2014] eKLR*; Mohamed Aden Abdi v Abdi Nuru Omar & 2 others [2007] eKLR, among others, for the proposition that the court retains inherent power to strike out an appeal where a record of appeal fails to contain one or more of the primary documents; that failure to include in the record a primary document or to formally apply to court for leave to file a supplementary record to include the same is not a procedural technicality. Counsel urged that despite communicating with counsel for the appellant pointing out the missing documents, the supplementary record filed by the appellant did not cure the omission.

26. In opposition to the application, learned counsel for the Client Mr. Peter Gachuhi submitted that it is open to the Advocates to lodge a supplementary record of appeal under Rule 92(1) of the Court of Appeal Rules if they are of the opinion that the record is incomplete. In that regard reference was made to the Court's decision in *Sacco Societies Regulatory Authority v Biashara Sacco Society Ltd* [2013] eKLR. That in any case, all material pleadings and documents pertinent to the appeal from the impugned ruling of 17th July 2020 are contained in the record; that under the proviso to Rule 87(1) of the Court of Appeal Rules, copies of documents that are not relevant to the matters in controversy should be excluded from the record; that the applicant has not demonstrated which documents that were referred to by the lower court in connection with the ruling have been omitted. Moreover, no prejudice was demonstrated on account of the alleged omission of the said documents from the record.

27. In support of the appeal, Mr. Gachuhi submitted that the suit before the ELRC concerned pension dues to pensioners and Trustees of the Scheme under the Trust Deed and its regulations; that the ELRC has no jurisdiction to hear and determine fees under an advocate-client bill of costs as the relationship between an advocate and client is not one of employer and employee; that the jurisdiction to do so lies with the High Court and the Magistrate's Courts pursuant to Section 27 of the *Civil Procedure Act*; that Section 12 of the *Employment and Labour Relations Court Act*, 2011 which sets out the jurisdiction of the ELRC, does not confer any jurisdiction on the court in relation to advocate-client bill of costs; that although Section 27(2)(b) of the Act grants powers to the court to assess costs, such costs must relate to proceedings determined under Section 12 and not advocate-client bill of costs.

28. On the contention by the Advocates that issue of jurisdiction was res judicata having been determined in previous rulings of the ELRC, counsel for the Client submitted that those rulings remain a nullity as a court cannot assume jurisdiction that it does not have under the statute that establishes it. Reference was made to the Supreme Court case of *Republic v Karisa Chengo & 2 others* [2017] eKLR for the distinction between the ELRC and the High Court; the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR1 for the proposition that without jurisdiction, the court has no power to take any steps; and *Macfoy v United Africa Co Ltd* [1961] 3All E R 1169 for the proposition that if an act is void, it is in law a nullity.

29. Regarding the principles governing assessment of costs, counsel for the Client submitted that it is not in dispute that in its judgment in *Albert Chaurembo Mumba & 7 others v Munyao & 148 others* [2019] eKLR, the Supreme Court set aside the judgment of the ELRC in the primary suit which was delivered on February 14, 2014 on the grounds that the ELRC had no jurisdiction to hear and determine the suit between the pensioners and the Trustees; that the judgment of the Supreme Court was placed before the taxing officer despite which the taxing officer delivered the impugned ruling on April 24, 2020 taxing and allowing the advocates bill of costs at an astronomical sum of Kshs. 87,139,560.45 from which references were made to the Judge of the ELRC; that it was an error to base the fees on the alleged subject matter in the primary suit which was declared a nullity; that the figure of Kshs. 2

billion used as the value of the subject matter is baseless and the Judge erred in failing to find that the taxing officer misdirected himself.

30. It was submitted that the Judge erred in failing to find that the taxing officer failed to first ascertain the basic instruction fee under the proper schedule of the Remuneration Order on the basis of which the advocate-client costs should have been assessed; that Paragraph A 1(1) of Schedule 6 of the Remuneration Order was the proper paragraph on which the taxing officer should have determined the instruction fees; that the instruction fee assessed in the amount of Kshs 25,191,500.00 based on a speculative figure of Kshs 2 billion was clearly wrong; that the judgment of the ELRC in the primary suit having been set aside by the Supreme Court for want of jurisdiction could not be a reference point to determine the value of the subject matter for purposes of assessing the instruction fees.

31. Counsel submitted further that the Judge wrongly exercised his discretion in failing to find that the award of Kshs. 87,139,560.45 was manifestly excessive; that the taxing master wrongly applied and awarded a getting up fee of Kshs 8,397,166.67; that party and party costs having been taxed at Kshs 5,682,828.00, the taxing officer should have used that as the reference for assessing advocate-client costs under paragraph B. In that regard the decision of the Court in *J. M. Njenga & Co Advocates v Kenya Tea Development Limited* Misc. Application No. 616 of 2006 was cited. It was submitted that the judgement entered against the Client for the sum of Kshs 87,139,560.45 and interest from April 25, 2020 in a suit that was declared a nullity offends public policy on assessment of fees.

32. In opposition to the appeal, learned counsel Mr. Kinyua Kamundi, submitted that the ruling of the ELRC given on 13th October 2017 determined with finality the proper Schedule and Paragraph of the Remuneration Order applicable as well as the question whether the taxing officer erred in allowing getting up fees. It was submitted that the Client did not appeal that decision and the Judge in the impugned ruling could not reverse those decisions. It was submitted that the claimants in the primary suit grossly understated their costs and the Advocates are therefore not bound by the certified party and party costs in computing their fees.

33. On jurisdiction, counsel submitted that in the ruling given on November 18, 2015, it was correctly determined that the ELRC is a superior court "with equal status and jurisdiction to conclusively and effectively adjudicate disputes falling within their sphere of jurisdiction including determination of costs between parties and also between advocates and their clients"; that the ELRC Act and the Rules made thereunder confer jurisdiction on that court to tax costs under the Remuneration Order; that under Section 2 of the *Advocates Act*, the word "costs" is defined to include "fees, charges, disbursements, expenses and remuneration" and any court with jurisdiction to determine party and party costs has similar jurisdiction to determine advocate-client fees. It was stressed that the Client is precluded from raising the matter of jurisdiction not having appealed previous rulings of the ELRC in that regard.

34. Counsel urged that contrary to the misrepresentation by the Client, the Supreme Court decision in Petition No. 3 of 2016 supports the position that want of jurisdiction to try a suit is no bar to the exercise of discretion by a court on costs; that the challenge on jurisdiction to tax costs is incompetent in light of Section 27 of the *Civil Procedure Act*; that Section 12 of the ELRC Act, Rule 29 of the *ELRC (Procedure) Rules, 2016* as read with Section 2 of the *Advocates Act* confer jurisdiction upon the ELRC to tax advocate-client bills of costs.

35. On the principles on assessment of costs, it was submitted that the taxing officer was properly guided by the ruling of the Judge of the ELRC delivered on October 13, 2017; that the taxing officer took into account: that the primary suit was representative having been filed by 149 members on behalf of 5,100 members; the judgment in the primary suit; and the value of the subject matter in the re-re amended

plaint as Kshs. 6,982,340,602.00. It was urged that the taxing officer can only be faulted for taking the value of the subject as Kshs 2 billion instead of the figure of Kshs 6.9 billion; that all the courts that handled the matter up to the Supreme Court found that to be the amount the Scheme and the Trustees had defrauded the beneficiaries.

36. It was urged that the fees awarded were justified given the complexity and importance of the matter; that advocate client fees cannot, in any event, be less than party and party costs; that contrary to the claim by the client that the taxing officer did not determine every item in the advocate-client bill of costs, the taxing officer did in fact do so in arriving at the amount that was ultimately awarded.

37. According to counsel, the determination by the Supreme Court that the ELRC did not have jurisdiction to hear and determine the primary suit is not relevant to the question whether the advocates engaged in such matter are entitled to legal fees; that even where a suit is struck out for want of jurisdiction, the court retains the discretion to award costs; and that irrespective of whether costs of a suit are awarded, the parties are obligated to pay fees to their respective advocates.

38. I have considered the application by the Advocates for the striking out of the appeal and the rival submissions thereon. I have also considered the appeal and the submissions by counsel on that behalf. There are essentially three issues for consideration. The first is a preliminary issue as to whether the appeal is incompetent on account of an incomplete record of appeal. If the appeal is found to be competent, I will proceed to address the second issue as to whether the ELRC has jurisdiction to tax an advocate client bill of costs. Related to that is the question whether that matter is res judicata. The third issue is whether the learned Judge of the ELRC erred in upholding the taxation by the taxing officer and in failing to hold that the taxing officer made errors of principle in assessing the advocate-client costs.

39. I begin with the question whether the appeal is incompetent on account of an incomplete record of appeal. Rule 87 of the *Court of Appeal Rules* on contents of record of appeal sets out, in Rule 87(1), the documents required in a record of appeal in an appeal from a superior court in its original jurisdiction. Rule 87(2), in relation to an appeal from superior court in its appellate jurisdiction, provides that the record shall contain documents relating to the proceedings in the trial court corresponding as nearly as may be to those set out in sets out in Rule 87(1). In addition, the record should contain documents relating to the appeal to the first appellate court.

40. In *Salama Beach Hotel Limited and 3 others vs Kenyariri & Associates Advocates* [2017] eKLR the Court cited with approval an earlier decision of the Court in *Floris Pierro v Giancarlo Falasconi (as Administrator of the Estate of Santuzza Billioti alias Mei Santuzza)* [2014] eKLR that "an appeal that fails to include the extracted order and or decree appealed from is incurable and the only recourse available is to strike it out" and that "as the order or decree appealed from is a primary document in terms of Rule 87(1)(h) of this Court's Rules and must form part and parcel of the record of appeal." In the latter case, the Court expressed that, "failure to include in the record of appeal a primary document or to formally apply to court for leave to file a supplementary record to include the same cannot be wished away as a procedural technicality. Otherwise, there will be no orderly conduct of business in this Court."

41. In the case of *Mucuha vs. Ripples Ltd* [2001] eKLR the Court was dealing with a similar application to strike out the appeal on grounds that essential documents in the hearing and determination of the appeal were omitted from the record of appeal. The applicable rules of the Court at the time were

Court of Appeal for East Africa Rules, 1972. Contents of record of appeal was addressed in Rule 85 of those rules with respect to which the Court stated:

> " Rule 85 (1) of our Rules, divides documents to be included in a record of appeal into two categories, namely, primary and secondary. In the primary category are those documents which if omitted from the record of appeal render the said record incurably defective. The secondary category of documents may be brought on record by either party with leave of the Court, filing a supplementary record of appeal under rule 89 of the said Rules."

42. Later in the same case, the Court went on to say:

> " By dint of the provisions of rule 85 (3) the power to exclude any document from the record of appeal lies with the Superior Court. Neither the appellant nor the respondent has the right or power to exclude any document for whatever reason. If either party wishes to exclude any document from the record of appeal, he or it is obliged to move the Superior Court for a direction in that regard, failing which the record of appeal omitting any such document shall be rendered defective. That is the position regarding the present record of appeal. The issue that logically arises from that conclusion is whether the defect is curable. Both counsel were ad idem that the documents which are omitted from the record of appeal are not of the primary category. The documents which fall into that category are set out under rule 85 (2A) of the Court of Appeal Rules. They include the pleadings, the trial judges notes of the hearing, the affidavits read and all documents put in evidence at the hearing, the judgment or order, a certified copy of the decree or order and the notice of appeal. The only document which, prima facie, falls in that category is the affidavit which was sworn by the appellant on July 26, 1993, in reply to the applicant's chamber summons dated June 24, 1993. However, as rightly pointed out by Mr Thiongo, that affidavit forms part of the record of appeal. Its annextures are, however, omitted. That notwithstanding, the fact that the affidavit in question was not read at the hearing which gave rise to the ruling appealed against, it cannot be said to be a primary document. In the result, we are of the view that the omitted documents render the record of appeal defective but not incurably defective. We, however, rule that the appellant gravely erred in omitting them from the record of appeal without the appropriate direction from the Superior Court under rule 85 (3) aforesaid."

43. Under the Court of Appeal for East Africa Rules, 1972, it seems to me that there was no question of introducing a primary document in a supplementary record. In contrast, the 2010 Court of Appeal Rules do not seem to make the distinction between primary and secondary documents. The 2010 rules are evidently less rigid and are more permissive such that, under Rule 88, an appellant can, within 15 days of lodging the record of appeal, without leave, include in a supplementary record any of the documents enumerated in rule 87(1) and (2) that are omitted from the record of appeal.

44. Indeed, under Rule 92(1) of the *Court of Appeal Rules*, a respondent who considers "that the record of appeal is defective or insufficient for the purposes of his case" is at liberty to lodge a supplementary record of appeal containing copies of any further documents or any additional documents required for the proper determination of the appeal.

45. Based on the foregoing, I take the view that the omission to include in the record of appeal, in the first instance, the documents enumerated in Rule 87 is curable within the parameters set in Rules 88 and 92(1) of the rules. The reference to "primary documents" in reference to Rule 87 of the Court of Appeal Rules 2010 in decisions of the Court, post 2010, is in my view a relic from the previous rules. It is in that light that I see the decisions of this Court in *Salama Beach Hotel Limited and 3 others v*

Kenyariri & Associates Advocates(above); *Floris Pierro v Giancarlo Falasconi (as Administrator of the Estate of Santuzza Billioti alias Mei Santuzza) (above)* which relate to appeals that were struck out because the record of appeal did not include the extracted order or decree appealed from "as the order or decree appealed from is a primary document in terms of Rule 87(1)(h) of this Court's Rules and must form part and parcel of the record of appeal".

46. The documents which the Advocates complain have been omitted from the record of appeal are: the submissions made by the parties before the taxing officer in 2015; the Client's motion of October 3, 2015 and the submissions in relation to it; a notice of appeal against a ruling of November 18, 2015; the Client's motion for leave to appeal against ruling of 18th November 2015 and for stay of taxation; replying affidavit of F. Kinyua Kamundi in opposition to leave to appeal and stay of taxation; ruling of 6th May 2016 dismissing the motion of November 23, 2015; the Client's application dated December 14, 2016 and the Advocates application dated April 10, 2017 both against the initial taxation; replying affidavit of April 11, 2017; notes of proceedings before the Deputy Registrar and before the Judge of the ELRC; the parties submissions on the references and applications.

47. The appeal in the present case, as already indicated, arises from a ruling of the ELRC relating to two applications namely, a reference by the Client dated May 12, 2020 from the decision of a taxing officer under Paragraph 11 of the Remuneration Order and an application by the Advocates dated May 28, 2020 for entry of judgment of the taxed advocate/client costs. Included in the record of appeal are, among other documents, the applications and the respective supporting affidavits; the grounds of opposition and the respective submissions thereon; the impugned ruling and the decree are all part of the record of appeal before us. A supplementary record of appeal was filed on March 16, 2021 containing the ruling of the ELRC granting leave to appeal as well as the extracted order in that regard. The issues arising in this appeal are, on the whole, issues of law determinable on the basis of the material presented.

48. Indeed, during the hearing of the appeal, there was no suggestion and neither did I get the impression that counsel was constrained or impaired from canvassing the issues in the appeal on the basis that the record was incomplete. In the circumstances of this case, it would, in my view, be disproportionate, to strike out the appeal on the basis that the documents mentioned were omitted.

49. Moreover, and with respect to counsel, I see nothing that would have prevented the Advocates, if they considered those documents needful, to file a supplementary record of appeal. I would echo the words of the Court in *Sacco Societies Regulatory Authority vs. Biashara Sacco Society Ltd* [2013] eKLR where, in declining to strike out an appeal on similar grounds, the Court stated:

> " As regards the appellant's failure to include in the record of appeal a further affidavit dated November 29, 2011, that is an omission that is curable under rule 92 of this Court. The respondent is at liberty to file a supplementary record of appeal to introduce the same. We cannot strike out a competent appeal because it is alleged that a document that ought to have been in the record of appeal was not included. If that were the case Rule 92 would serve no purpose."

50. I would therefore decline the invitation by the Advocates to strike out the appeal on the grounds urged and would dismiss the Advocates application dated October 14, 2020. I will now turn to the substantive issues arising from the Client's appeal.

51. Next is the issue whether the learned Judge of the ELRC was right in holding that the matter of jurisdiction of the Deputy Registrar of the ELRC was res judicata, and if not, whether he has jurisdiction to tax an advocate client bill of costs.

52. In *Florence Maritime Services Ltd vs Cabinet Secretary Transport, Infrastructure &3 others* [2021] eKLR, the Supreme Court of Kenya extensively examined the doctrine of res judicata stating that:

> " That the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of res judicata prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively."

53. In that decision, the Supreme Court cited with approval the words of Justice Russell of the Federal Court of Canada in the case *Sami v. Canada (Citizenship and Immigration*), 2012 FC 539 (CanLII) that the "preconditions for res judicata" are that, firstly,

> " the same question was decided in earlier proceedings. Secondly, that "the judicial decision which is said to create the estoppel was final" and third, that "the parties to the judicial decision were the same persons as the parties to the proceedings in which the estoppel was raised." The Supreme Court of Kenya then pronounced that:
>
> > " For res judicata to be invoked in a civil matter the following elements must be demonstrated:
> >
> > a) There is a former Judgment or order which was final;
> >
> > b) The Judgment or order was on merit;
> >
> > c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
> >
> > d) There must be between the first and the second action identical parties, subject matter and cause of action."

54. What then is the position here? The challenge to the jurisdiction of the Deputy Registrar of the ELRC with respect to taxation of the advocate-client bill of costs was first raised by the Client as preliminary objection upon the filing by the Advocates of the Misc. Application No. 13 of 2015. In the replying affidavit in opposition, it was deposed that "this honorable court lacks jurisdiction to tax advocate-client bills of costs. That jurisdiction lies with High Court in exercise of its civil jurisdiction under the *Advocates Act*. The respondents hereby give notice of their intention to raise a preliminary objection and the hearing of the applicants bill of costs." That objection was canvassed and determined in a ruling given by the Deputy Registrar of the ELRC on September 18, 2015. Dismissing the preliminary objection, the Deputy Registrar stated:

> " In light of Rule 10 of the Remuneration Order I wish to point out that this court is presided over by a deputy registrar designated and stationed as such at the ELRC thus conferred of the relevant jurisdiction to tax the applicant's bill of costs. Further noting that the current bill relates to an ELRC matter it is the court's opinion that it is the most appropriate court to tax the current bill. Finally therefore I find this court indeed is possessed of the relevant jurisdiction to hear and determine the applicants advocate-client bill of costs before it."

55. I have already made reference to the application dated 3rd October 2015 that the Client presented before the Judge of the ELRC challenging the decision of the Deputy Registrar dismissing the preliminary

objection. Although the Judge, in a ruling given on November 18, 2015, found that that application was incompetent, he did nonetheless pronounce that:

> " This court is a superior court with the status of the High Court. It's Registrar and Deputy Registrar is equal in status to that of the High Court for all purpose and intention of the law including taxation of the bill of costs whether party and party costs or advocates/clients costs."

56. The Judge also concurred with the Deputy Registrar that "a court which presided over court proceedings is best placed to determine the costs and fees to the parties and their advocates" before concluding "the court finds and holds that it has jurisdiction to determine the fees of an advocate in relation to legal services provided to a client in proceedings filed before the court."

57. That decision of November 18, 2015 was not challenged and the taxation proceeded before the Deputy Registrar of the ELRC. Thereafter the Client filed a reference before the Judge in which, the client again contended, among other things, that the Deputy Registrar lacked jurisdiction to tax advocate-client bill of costs.

58. In his second ruling given on October 13, 2017, Makau, J. observed that the Client had earlier moved the court to challenge the decision of the taxing officer to continue with the taxation citing lack of jurisdiction and that he had already ruled on the matter on the 18th of November 2015; and that based on that ruling the Client submitted to the taxation process before the Taxing officer. That decision of October 13, 2017 was also not appealed. The matter was remitted back for fresh taxation which again proceeded before taxing officer of the ELRC. The Client then filed a reference from that taxation and yet again contested the jurisdiction of the ELRC to tax advocate client costs.

59. There can be no doubt that the parties involved in all those rulings are the same; that the same issue was being raised, for the third time, before the same court; and that a decision was made on each occasion. Given that background, and the legal principles aforementioned as pronounced by the Supreme Court, I am fully in agreement with the learned Judge that the matter of jurisdiction of the Deputy Registrar to tax advocate-client bill of costs was res judicata as pronounced by Rika, J.

60. Being of that view, I need not address the question whether the Deputy Registrar of the ELRC has jurisdiction to tax an advocate client bill of costs. I fully agree with the reasoning and decision of Rika, J in that regard. I would only add that the fact that the Supreme Court set aside the judgment in the primary suit for want of jurisdiction does not detract from the fact that the Advocates rendered services to the Client in connection with the matter for which they are entitled to fair compensation. The decision of the Supreme Court did not in my view take way the court's power to award and assess costs of the suit. The argument by the Client in this regard appears to mix up or confuse the ELRC's jurisdiction to hear and determine disputes within its mandate with the inherent power of the court to award and assess costs.

61. I next consider the issue whether the learned Judge of the ELRC erred in upholding the taxation by the taxing officer. Did the learned Judge err in failing to hold that the taxing officer made an error of principle? In this regard, the Judge expressed that the Advocates and the Client have an undisputed retainer agreement; that a deposit of fees was made by the Client from the outset; that the bill of costs was necessitated by nonfulfillment by the Client of their obligations under the retainer and the *Advocates Act*; that the taxing officer took into account guidelines given to him by the trial court in assessing the bill afresh.

62. The Judge observed that one of the directives by the Judge to the taxing officer was in relation to getting up fees. The judge was not persuaded that the matter should be revisited or that getting up fees is not

chargeable in the Advocate/client bill of cost; that there was no merit in the proposal by the Client that the wrong Schedule of the Remuneration Order was applied; that the relevant Schedule allowed the taxing officer to assess instruction fees at a reasonable amount; that given that the pleadings were amended several times, and the matter found its way to the Supreme Court of Kenya, the importance and complexity of the matter cannot be gainsaid; and that the taxing officer took into account all relevant factors in taxing the bill. The judge concluded that the objection to taxation carried out by taxing officer after clear guidelines by the trial court and with participation of all the parties was without merit.

63. In the initial taxation (the subject of the taxing officer's ruling of 21st October 2016) the learned Deputy Registrar observed that a sum of Kshs 88,166,257.525 had been claimed as instruction fees. He considered the rival arguments regarding the value of the subject matter and concluded that "the decreed sum" of Kshs. 201,981,424.50, was "the value of the subject matter" for purposes of taxation. Applying Schedule 6 of the Remuneration Order and the scales thereunder, the taxing officer found that the "sum chargeable over this head is Kshs 8,291,715.4125" which, having regard to the importance of the matter and amount of time spent, he increased to Kshs 10,000,000.00. On getting up fee, the taxing officer rejected the submission by the Client that it was not chargeable. He found that it was provided for and "chargeable at not less than 1/3 of the instructions fees" and taxed and allowed Kshs 3,333,333.33 raising the total of the instruction fees and getting up fee to Kshs. 13,333,333.33.

64. Upon reference of the taxing officer's initial taxation, the Judge, in his ruling of October 13, 2017, found that the taxing officer erred by assessing the instructions fees based on the decreed amount of Kshs 201,981,424.50; that the taxing officer was right in assessing the instruction fees based on the value of the subject matter, which the Judge found to be "much higher than Kshs 201,981,424.50 but definitely not Kshs 6,982,340.620" (the amount in respect of which a declaration had been sought in the primary suit to the effect that the Client had failed to collect). The Judge rejected the contention by the Client that the maximum instruction fees for the Advocates is the taxed costs under the party and party bill of costs increased by 50% by reason of Part B of Schedule VI of the Advocates Remuneration Order.

65. According to the Judge, instruction fees of an advocate is dependent on the choice made by the Advocates on drawing his bill to base the same on the value of the subject matter, or party and party costs as ordered by the court, or by agreement of the parties. In the words of the judge, "if an advocate draws his bill based on the value of the suit under Part A of the VI Schedule, he is not bound by the proceedings under party and party bill of costs." The Judge identified the following specific errors of principle by the taxing officer: Using the wrong suit value in assessing instructions fees, and getting up fees; enhancing instructions fees without considering relevant factors outlined under Schedule VI A; applying the 50% increase to instruction fees alone and not the total fees assessed; assessing instruction fees at Kshs 10,000,000.00 without legal or factual basis; failing to determine on merits each and every item on the bill of costs and making a generalized determination; failing to consider item on interest.

66. On that basis, the Judge remitted the taxation back to the taxing officer with directions to "strictly comply with the provisions of the Advocates Remuneration Order and especially Schedule VI part A and B"; that he should assess the instruction fees based on Part B(a) of Schedule VI of 2006 Remuneration Order "based on correct value of the suit which can be ascertained from the documents filed with the bill or primary suit file" among other sources or upon making other considerations provided for under the Remuneration Order. The Judge further directed the taxing officer to: assess the correct getting up fee as prescribed under Part A of Schedule VI; consider and determine each and every item in the bill of costs; increase the total fees assessed under Part A of Schedule VI by 50%; order

payment of interest on the sum taxed in accordance with Paragraph 7 of Advocates Remuneration Order.

67. Thereafter, the taxing officer taxed the advocate/client bill of costs afresh and awarded the Advocates Kshs 87,139,560.45 in terms of his ruling of April 24, 2020. That, as already stated, led to the second reference by the Client which fell upon Rika, J. to determine resulting in the ruling of 17th July 2020 from which this appeal stems.

68. How then was the advocates fees in the amount of Kshs. 87,139,560.45 arrived at? Before the taxing officer, the Advocates claimed an instruction fee of Kshs 88,166,257.525 on the basis that the suit was a representative suit of more than 6,000 employees and that the value of the suit exceeded the decreed sum. The Client on the other hand urged that the value of the subject matter was ascertainable as the Court had already passed judgment that should form the basis of the value of the subject matter.

69. The taxing officer expressed that the amount claimed in the amended plaint was Kshs 6,982,340,602 while the amount awarded in the judgement was Kshs 201,981,424.50 plus further accruals till payment in full; and that the court also awarded five claimants lump sum and monthly pension arrears of their salary increment from July 1, 2007. He concluded that the value of the subject matter cannot therefore be Kshs 201,981,424.50 as that was only one of the awards by the court and the further accruals had to be taken into account. The taxing officer then had this to say:

> "What therefore is the sum on further accruals (till payment in full) and lump sum and monthly pension arrears from July 1, 2007? Following the court judgement on the November 14, 2014 the respondent deposited to the claimant's advocates client account the same of Kshs 267,819,043.20. Interest and arrears on monthly pension and arrears on monthly pension on increment. In their demand letter dated November 19, 2014 claimants demanded 6,011,690.30 as interest (at court rates) on the decretal sum, arrears on monthly pension calculated at the rate of Kshs 1,447,847.50 and arrears on monthly pension calculated at Kshs 39,911.60 per month.
>
> If sums ordered by the court as further accruals and monthly pension in arrears were to be calculated from the date the decree was issued (the 17th March 2014) to the date of this ruling (the 24th April 2020) about 6 years at the rates above the said monthly pension arrears and arrears on monthly pension increment would be Kshs 104,245,020 and Kshs.2,873,635.20 (1,447,847.50 x 12 x 6) & (39,911.60 x12 x6). If interest on the sum of Kshs 240,599,477.20 for the period at court rates (12%) were to be added to the sums above and considering that the sum above continue to increase with each passing day, guided by the decision of the superior court it is my considered view that the value of the subject matter would not be less than Kshs 2 billion."

70. The taxing officer then took that figure of Kshs 2 billion and subjected it to the formula in Schedule VI to compute and arrive at the basic instruction fee at Kshs 25,191,500.00 which he awarded. Applying item 2 of Part A of Schedule VI of the Remuneration Order, the taxing officer awarded, as getting up fees, a third of the instruction fees in the amount of Kshs 8,397,166.67. He then scrutinized the other items in the bill of costs after which he expressed:

> "Having taxed off the above items a total of Kshs. 84,032,292,855 the 1st sub-total is Kshs.34,154,423.67 (Kshs 118,186,716.525-Kshs 84,032,292.855). Further to the above 1st sub-total the applicant is entitled to an increase of the same by ½ under Part B of Schedule

VI ARO being Kshs 17,077,211.835 add the above to the 1st sub-total and the new sum is Kshs 51,231,635,505."

71. The taxing officer went on to state that the Advocates are entitled to interest as "clearly set in Rule7 of the Advocates Remuneration Order" which he computed at the rate of 14% on the amount of Kshs 51,231,635,505 for six years and awarded Kshs 33,578,089.02 resulting in an award of Kshs 84,809,724.50 to which was added VAT at 16% in the amount of Kshs 98,397,280.45. Credit was then given to the amount of Kshs 11,257,730.00 the Client had paid to the Advocates and hence the award of Kshs 87,139,560.45 for which the learned Judge entered judgment in favour of the Advocates against the Client.

72. That prompted the Client's second reference to the Judge in which, as an alternative to the prayer for the taxation to be set aside on grounds that it was a nullity, the Client prayed for a review of specific items of the bill of costs, amongst them the elements of instruction fees and getting up fees. Beyond stating, as already noted, that the taxing officer took into account guidelines given to him by the court in assessing the bill afresh, the Judge appears to have summarily dismissed the reference. In that regard the Judge stated that the court was not satisfied that the Client had made out a case why the assessment should be revisited or that the wrong Schedule to the Remuneration Order was applied. In relation to the contested disbursements awarded, the Judge expressed that the Client did not show which receipts it had demanded to be produced but were not produced.

73. In short, the learned Judge did not, as he was obligated to do, interrogate whether there was an error of principle in the second taxation by the taxing officer and was content to state that it complied with directions given by the court in the ruling in the first reference. It behooves us, therefore, to scrutinize the assessment in order to determine whether we should interfere with the decision of the Judge.

74. The circumstances in which this Court can interfere with the decision of the Judge in upholding the decision of the taxing officer are circumscribed. In *Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR the Court, in an appeal arising from a reference, as in the present case, stated that:

> "The learned judge like the taxing officer was exercising judicial discretion when... [dealing with] ... the reference. This Court cannot interfere with the exercise of that discretion unless it is shown that the learned judge acted on the wrong principles of law."

75. More recently, in *Otieno, Ragot & Company Advocates vs. Kenya Airports Authority* [2021] eKLR Ouko, JA (as he then was) stated:

> "The High Court or even this Court will not lightly interfere with an awarded of quantum by the taxing officer, unless there was an error in principle or the discretion was improperly exercised, resulting in mis-justice, to borrow the phrase used in the famous Mbogo v Shah (1968] EA 93."

76. In the same case, I observed as follows:

> "...the Court has consistently held that in assessing costs to be paid to an advocate in an advocate client Bill of Costs, a taxing officer exercises judicial discretion which can only be interfered with if it is established that the discretion was exercised capriciously and in abuse of the proper application of the correct principles of law; that the decision of the taxing officer is based on an error of principle, or the fee awarded is manifestly excessive or excessively low as to amount to an injustice to one party or other. Thus, unless the amount

awarded by the taxing officer is manifestly high or low as to lead to an injustice or unless there is a clear error of principle, the High Court should not interfere."

77. Much earlier, the Court in *Premchand Raichand Limited & another vs. Quarry Services of East Africa Limited and another* [1972] E.A 162, stated that:

> " The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, and particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low: it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other". [Emphasis]

78. Part B of Schedule VI of the *Remuneration Order* provides that

> " as between advocate and client the minimum fee shall be (a) the fees prescribed in Part A [of the Schedule] increased by one-half" or "the fees ordered by the court, increased by one-half"; or "the fees agreed by the parties under paragraph 57" of the Remuneration Order increased by one-half. The graduated scale for assessing instruction fees for suing or defending proceedings under items 1(b) and (d) Part A of the Remuneration Order relating to Party and Party Costs, is pegged on "the value of the subject matter" "determined from the pleadings, judgment or settlement between the parties".

79. I am conscious of the decision (with which I dissented) in Otieno, Ragot & Company Advocates v Kenya Airports Authority (above) where an issue arose whether, the taxing officer rightly exercised her discretion to determine the appellant's instruction fees in the Advocate and client bill notwithstanding the existence of a taxed party and party bill of cost. The majority of the Court held that, where, as here, party and party costs have been taxed, the role of the taxing officer in assessing the advocate/client costs is simply to increase the party and party costs by one half. In that regard Murgor, JA, after reviewing other decisions stated:

> " What comes to the fore from these authorities, and with which I am in agreement is that, once the instruction fee in the party and party costs are ascertained, they become the basis of the computation of the instruction fees in the Advocates and client bill. The instruction fees in the party and party bill is then increased by one-half to arrive at the instruction fees for the Advocate and client bill. No further exercise of discretion is required at this point."

80. In present case, party and party costs were assessed and taxed at Kshs 5,682,828.00 as certified in a Certificate of Costs dated 22nd August 2014. On the strength of Otieno, Ragot & Company Advocates vs. Kenya Airports Authority (above), the advocate/client costs in the present case would thus be pegged to the party and party costs. However, I do not think, in this case, that assessment of advocate/client costs on that basis would fairly compensate the Advocates for work done given the particulars of services rendered to the Client set out in their bill of costs.

81. That said, evidently, the value of Kshs 2 billion on which the taxing officer based the instruction fees in the present case is neither derived from the pleadings, the judgment or any settlement. To the decretal amount of Kshs 201,981,424.50 the taxing officer added further accruals (till payment in full) and lump sum and monthly pension arrears from July 1, 2007; the amount of Kshs 267,819,043.20 said to have been deposited by the respondent deposited to the claimant's advocates client account; interest of Kshs 6,011,690.30 demanded post judgment as interest on the decretal sum; and arrears on monthly

pension calculated at the rate of Kshs 1,447,847.50 and arrears on monthly pension calculated up to the date of delivery of his ruling at Kshs 39,911.60 per month.

82. In my view, the taxing officer went beyond the parameters set in Schedule VI by taking into account other matters extraneous to "the pleadings, judgment or settlement" in concluding that the value of the subject matter over Kshs 2 billion when in fact the value of the subject matter was ascertainable from the judgment in the primary suit. As the Court said in in *Joreth Ltd v Kigano & Associates* [2002] 1 EA 92, stated:

> " ...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 the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances."

83. Similarly, in *Kamunyori & Company Advocates v Development Bank of Kenya Limited* [2015] Civil Appeal 206 of 2006, the Court expressed that:

> " ...failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle. Authorities on taxation show that a Judge will normally not interfere with the Taxing Officer's decision on taxation unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instructions fee is arrived at on the wrong principles, it will be set aside" [Emphasis added]

84. Based on the foregoing, I take the view that the failure by the taxing officer to compute the instruction fee and the getting up fee as provided in the Schedule was an error of principle. The learned Judge of the ELRC erred in upholding the same. It was on the basis of that error that the taxing officer arrived at the patently and manifestly excessive award that is almost half of the decreed amount. I would therefore set aside the awards under items 1 and 2 of the Bill of Costs.

85. In their bill of costs, the Advocates seek Kshs88,166,257.525 as instruction fee. Kshs 29,388,086.00 is claimed as getting up fees. Under particulars of services rendered in the bill, the Advocates state that, "instructions fees derived not only from the onward but also from the pleadings, judgment of the value of the subject matter in the decree at a conservative sum of Kshs 6,982,340,602.00".

86. The re-re-amended plaint dated July 2, 2012 filed by the pensioners in the primary suit following leave granted to amend, tabulated individual monetary claims for 149 pensioners for varying amounts which were then aggregated to "grand total" of Kshs. 202,199,424.50. They prayed for judgment for that amount and interest at commercial rates which was granted in the decree. The figures of Kshs. 6,857,627,602.00 as at December 31, 2003 and Kshs. 6,982,340,602 as at December 31, 2004" were pleaded in reference to the prayer for a declaration that the Client had failed, or neglected or refused to demand that the sponsor meets or pays the deficit of those amounts.

87. In the judgment delivered on February 14, 2014 however, the Court ordered the payment of Kshs. 201,981,424.50 "being the aggregate pension arrears to all the claimants as at July 2012 plus further accruals till payment in full". The court also ordered payment of unquantified lumpsum and monthly pension arrears to five persons. In my view, the value of the subject matter ascertainable or determinable from the judgment is the decreed amount of Kshs. 201,981,424.50. That amount, in my view,

should be the basis on which the taxing officer, applying Schedule VI Part B (a) and Part A of the Remuneration Order, should assess the instruction fees and getting up fees. I would therefore interfere with the taxation to that extent. For clarity, I would not interfere with the other items as taxed and awarded by the taking officer.

88. With regard to the matter of interest, I have read and agree with the judgment of the Hon. Lady Justice Nyamweya, JA and have nothing useful to add.

89. Based on the foregoing, and as Nyamweya and Lesiit, JJA agree, the final orders of the Court are as follows:

    a. The respondent's application dated 14th October 2020 to strike out the appeal is dismissed with costs.

    b. The Client's appeal succeeds to the extent of the following orders:

        i. The ruling of the learned Judge of the ELRC dated July 17, 2020 in ELRC Mombasa Misc. Application No. 13 of 2015 is set aside in its entirety.

        ii. The ruling and orders issued by the taxing officer on April 24, 2020 in ELRC Mombasa Misc. Application No. 13 of 2015 taxing the Advocates' Advocate and Client Bill of Costs dated July 2, 2019 at Kshs. 87,139,560.45 be and is hereby set aside arising from the setting aside of the findings and taxing of item1 on instruction fees, item 2 on getting up fees, and the awards of interest and VAT.

        iii. The Advocates' Advocate and Client Bill of Costs dated July 2, 2019 shall be remitted to another taxing officer in the ELRC at Mombasa for the re-taxation of items 1 and 2 only, and award of any interest and VAT claimed in the bill of costs taking into account the applicable principles set out in this judgment.

    c. Each party shall meet their respective costs of the applications that were the subject of the ruling by the learned Judge dated July 17, 2020 in ELRC Mombasa Misc. Application No. 13 of 2015, and of this appeal.

DATED AND DELIVERED A MOMBASA THIS 6TH DAY OF MAY 2022.

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

JUDGMENT OF NYAMWEYA, JA

1. I have had the advantage of reading in draft the judgment of my brother Gatembu JA., and I fully agree with the history of this appeal that the learned Judge has ably articulated; the issues arising from the Advocates' application and Client's appeal identified by the learned Judge; and the reasoning and

conclusions on the said issues. I need to express myself albeit very briefly, on two issues identified by my brother Judge, firstly, on whether the ELRC has jurisdiction to tax an advocate-client bill of costs consequent to the Supreme Court's decision in Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the *Registered Trustees of Kenya Ports Authority Pensions Scheme) vs Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme*) [2019] eKLR (hereinafter "The Chaurembo Decision") that the ELRC had no jurisdiction to hear the primary suit; and secondly, on whether the learned Judge of the ELRC erred in upholding the taxation by the taxing officer and in failing to hold that the taxing officer made errors of principle in assessing the advocate-client bill of costs and the interest payable.

2. In this regard, this appeal is essentially in the nature of a second appeal from the ruling by the ELRC on the reference on the taxing officer's decision. Being a second appeal, Section 72 (1) of the *Civil Procedure Act* restricts this Court to consideration of matters of law only, unless it is shown that the ELRC considered matters it should not have considered or failed to consider matters they should have considered as amplified in *Stanley N. Muriithi & Another vs Bernard Munene Ithiga* (2016) eKLR and confirmed in *Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited* [2020] eKLR.

3. On the first issue, it is notable that the question of ELRC's jurisdiction consequent to *The Chaurembo Decision* by the Supreme Court was pleaded by the Client for the first time in the reference giving rise to this appeal, and was therefore not subject to the res judicata rule that has been expounded on by my brother Gatembu J.A. The law on the source and extent of a Court's jurisdiction was settled by the Supreme Court in *Samuel Kamau Macharia & another vs Kenya Commercial Bank Limited & 2 others* SC Application No. 2 of 2011 [2012] eKLR, wherein it was held that a Court's jurisdiction flows from either *the Constitution* or legislation or both, and a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law.

4. The possibility of multiple sources and bases of a Court's jurisdiction was also recognised by the Supreme Court in the said decision, and also by this Court in The Owners of Motor Vessel "Lillian S." v Caltex Oil Kenya Ltd [1989] KLR 1, which sources and bases can be either constitutional or statutory. The substantive jurisdiction that is conferred on courts in this regard by *the Constitution* and various statutes is normally by way of subject-matter jurisdiction, which involves the legal right to hear and decide cases of a particular type or seeking a particular relief.. The law can further specify the nature of this substantive jurisdiction, whereby a Court may have original and general jurisdiction to hear any case or different types of cases, or it may be limited in terms of hearing only certain types of cases such as in specialised cases, appeals, or cases arising from specified geographical boundaries. Substantive jurisdiction can also be exclusive to only certain courts or concurrent, in that a particular type of case can be heard in one of several different courts.

5. The Supreme Court in T*he Chaurembo Decision* in this regard identified the jurisdictional issues before it as being first, the Supreme Court's jurisdiction over the dispute; and second, which forum, as between the mechanisms in the Retirement Benefits Authority Act, the High Court and the Employment and Labour Relations Court had original jurisdiction in the first instance to hear and determine the dispute therein between the Pensioners and the Trustees of the Pension Scheme. In this regard, the Supreme Court considered the provisions of Articles 165 and 162(2) of *the Constitution*, section 12 of the Employment and Labour Relations Court and provisions of the *Retirement Benefits Act*. The Supreme Court's findings were that it had jurisdiction to hear the appeal before it pursuant to the provisions of Article 163(4) of *the Constitution*, and that the Employment and Labour Relations Court had no jurisdiction to hear and determine a dispute that relates to trustees of a pension scheme and members of the scheme, particularly where the said members are no longer employees

of the sponsor. Further, that the *Retirement Benefits Act* mechanisms were applicable and the High Court could not usurp the jurisdiction of a specialized mechanism provided for by statute and *the Constitution*. The Supreme Court thereby remitted the matter for adjudication by the Chief Executive Officer of the Retirement Benefits Authority under the *Retirement Benefits Act*.

6. It is evident that the Supreme Court did not address the issue of the jurisdiction of the ELRC to tax advocate/clients costs under the *Advocates Act* in its decision, which issue had already been ruled on by Makau J., and as explained by my brother Gatembu J.A. was res judicata. jurisdiction of ELRC under the *Advocates Act* in this respect was a different and separate jurisdiction from that overturned by the Supreme Court, both in terms of its statutory source and subject matter. It is also notable in this respect that there is no limitation barring ELRC assuming jurisdiction under the *Advocates Act* that is imposed by *the Constitution*, within the context of the holdings in the cases of The Owners of Motor Vessel "Lillian S." v Caltex Oil Kenya Ltd (supra) and Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others (supra) that where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. Article 162 (2) of *the Constitution* in this respect specifically states that once established, the ELRC has the status of the High Court.

7. On the second issue on the assessment of costs, I agree with my brother and can only add that the basis for instruction fees in an advocate/client bill of costs is the professional work that the advocate has done, and the costs incurred as a result of the said work. The definition of costs in the *Advocates Act* in this regard includes "fees, charges, disbursements, expenses and remuneration". For this purpose, when there is no agreement between an advocate and client as regards costs, the Advocates Remuneration Order regulates the manner of preparation and taxation of an advocate's bill of costs.

8. In the present appeal, the taxing officer noted as follows with regard to the applicable law in taxation of the advocate client bill of costs : "The suit herein was filed sometimes in the year 2007 and determined in the year 2014, as such the Advocates Remuneration Order (ARO) 2006 to 2014 applied". The various Advocates Remuneration Orders that applied during this period were specifically identified by the taxing officer in relation to each item during the taxation of the subject bill of costs. Rules 50 and 50A of the Advocates Remuneration Order in this regard provides that a bill of costs in contentious proceedings in the High Court shall be taxable in accordance with Schedule VI, and Part B of Schedule VI of the Order provided as follows in this regard:

> " As between advocate and client the minimum fee shall be –
>
> (a) the fees prescribed in A above, increased by one-half; or
>
> or
>
> (b) the fees ordered by the court, increased by one-half;
>
> or
>
> (c) the fees agreed by the parties under paragraph 57 of this order increased by one-half; as the case may be, such increase to include all proper attendances on the client and all necessary correspondences."

9. I agree with the findings of my brother Gatembu J.A. in this regard that in applying Part B of Schedule VI, the taxing officer has discretion to independently tax each item in an advocate and client bill of costs for three reasons. First, Part B provides for the minimum instruction fee, which implies a discretion on the part of the taxing officer to increase the fee depending on the items in an advocate and client bill of costs, and circumstances of each taxation. This discretion is specifically granted in the various provisos

to paragraph 1 of Schedule VI Part A, which inter alia specifically provide that the taxing officer, in the exercise of this discretion, shall take into consideration the other fees and allowances to the advocate (if any) in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings, a direction by the trial judge, and all other relevant circumstances;

10. Second, Part B provides for various alternatives in determining the instruction fees in an advocate and client bill of costs, which are mutually exclusive, and available to an advocate and client whether or not there has been a previous taxation of a party and party bill of costs. Put in in other words, there is no proviso or limitation provided for in Part B in cases where there has been taxation of a party and party bill of costs arising from the same suit.

11. Third and last, my interpretation of Part B (a) of Schedule VI is that in drawing up an advocate's and client's bill of costs the guiding fees are as prescribed in Part A, which fees shall be increased by one-half. To prescribe is defined as to "dictate, ordain or direct" by the *Black's Law Dictionary, Tenth Edition* at page 1302, and what is directed by Part A in this regard are the applicable scales of the fees for various items in a party and party bill of costs including instruction fees, getting up fees, and fees for drawing, making copies and perusal of documents and correspondence among other items, and not the amounts taxed in such a bill.

12. In my view, the wording in Part B in their plain and ordinary meaning as well as its contextual interpretation suggests and acknowledge that the while the scales of items in a party and party bill of costs may be similar to those in an advocate and client bill of costs arising from the same suit, they will not necessarily be identical, as legally, there are additional services of a personal, technical and professional nature that are required by a client of an advocate. For these reasons, I find that the taxed party and party bill of costs in the primary suit cannot be the basis for determining the instruction fees and other fees in the impugned Advocates' advocate and client's bill of costs as urged by the Client, and the majority decision in Otieno, Ragot & Company Advocates vs. Kenya Airports Authority (supra).

13. On the principles applicable in the assessment of costs by the Court, I am persuaded by the basis laid out in *Halsbury's Laws of England Volume 10, 4th Edition (Re-issue)* at paragraph 22:

> " Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs on the standard basis or on the indemnity basis, but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount. Where the amount of costs is to be assessed on the standard basis, the court will only allow costs which are proportionate to the matters in issue and will resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party. Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party. Where the court makes an order about costs without indicating the basis on which the costs are to be assessed, or makes an order for costs to be assessed on a basis other than the standard basis or the indemnity basis, the costs will be assessed on the standard basis."

14. The standard basis is in this respect are the scales set by the Advocates Remuneration Order, and Rule 16 of the *Advocates Remuneration Order* provides as follows in this respect:

> " Notwithstanding anything contained in this Order, on every taxation the taxing officer may allow all such costs, charges and expenses as authorized in this Order as appear to him to

have been necessary or proper for the attainment of justice or for defending the rights of any party, but, save as against the party who incurred the same, no costs shall be allowed which appear to the taxing officer to have been incurred or increased through over-caution, negligence or mistake, or by payment of special charges or expenses to witnesses or other person, or by other unusual expenses."

15. Running all through these principles on assessment of costs is the element of incurred costs, and one cannot therefore assess costs on the basis of future work or costs yet to accrue. It is notable in this regard that in respect of the impugned instruction fees, the taxing officer took into account future and further accruals and monthly pension arrears from the date the decree was issued on March 17, 2014 to the date of the taxation ruling on April 24, 2020, and added interest at court rates of 12% on the said sum over the said period, in arriving at the value of Kshs 2 billion of the subject matter. Quite apart from the fact that under paragraph 1 of Part A of Schedule VI, the value of the subject matter is to be determined a priori either at the time of lodging of the pleadings, or at the date of judgement or settlement (see the judgment by Ouko J.A. (as he then was) in Otieno, Ragot & Company Advocates vs. Kenya Airports Authority (supra)), the impugned value of the subject matter was not also speculative, and based on envisaged future instructions that would be given to the Advocates to obtain additional ancillary relief, contrary to the applicable principles on assessment of costs explained hereinabove.

16. On the interest awarded, the client in his memorandum of appeal claimed that the costs assessed at Kshs 87,139,50 plus interest was manifestly excessive, and that the learned judge erred in entering judgment in favour of the Advocates for the said sum together with interest from April 25, 2020. The taxing officer in this regard held as follows after taxing off all the items in the subject advocates and client bill of costs at Kshs 51,231,635,505/=:

> "On the element of 14% interest on the fee note, the applicant is entitled to interest on the amount taxed. This is clearly set in Rule seven of the Advocates Remuneration Order. This was the position as held by the superior court in Kithi & Co Advocates vs Menengai Downs Limited (2015) eklr I'm bound by the decision and accordingly guided by the same. The applicant issued a fee note to the respondent on 1st April 2014. Interest at 14% per annum started to accrue 30 days from the date of service of the fee note, in the instant case this case (sic) noting the date of delivery of this ruling seven days shy of 10 years. Interest will apply not on the sum on the fee note by the applicant but the sum of Kshs. 51,231,635.505 less the sum paid on account (Kshs. 11,257,720). The sum subject to 14% interest per annum therefore remains Kshs 39,973,915.505, which gives an interest of Kshs. 33,578,089.02 (Kshs.39,973,915.505 x14/100 x 6)."

17. The resulting sum of Kshs 84,809,724.50 was then subjected to 16% VAT of Kshs. 13,569,555.92 leading to the total sum of Kshs. 98,397,280.45, and the bill of costs was taxed at an award of Kshs 89,139,560.45/= after deducting the amount paid on account. The learned Judge consequently entered judgment for the costs assessed of Kshs 89,139, 560/= in the impugned ruling delivered on July 17, 2020, and also awarded additional interest with effect from April 25, 2020.

18. Rule 7 of the *Advocates Remuneration Order* provides for interest on the costs at 14 % until payment in full as follows:

> "An advocate may charge interest at 14 per cent per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his

bill to the client, providing such claim for interest is raised before the amount of the bill has been paid or tendered in full."

19. There are two stages of awarding interest in an advocate and client bill of costs that need to be distinguished in this regard. The first is during taxation, where an award of interest can only be made if claimed by the advocate on items of the bill of costs at the rate of 14% under Rule 7 of the Advocates Remuneration Order, and this is the interest that is reflected in the taxing officer's certificate. This was also the position held in Otieno, Ragot & Company Advocates vs. Kenya Airports Authority (supra). The second, is where costs are ordered to be paid adversely after an advocate sues for judgment upon a taxed bill of costs, and the advocate's right to interest runs from the date of the judgment or such other date that the court may specify, until payment in full under the provisions of section 27 (2) of the *Civil Procedure Act*, and is awarded by the Court granting judgment at any rate but not exceeding 14% per annum. It is notable in this respect that it was held by Murgor J.A. that such interest can also be awarded under section 26 of the *Civil Procedure Act* in *Otieno, Ragot & Company Advocates vs. Kenya Airports Authority* (supra).

20. In the present appeal, it is not disclosed that the Advocates applicant included a charge for interest at 14% per annum in the subject Bill of Costs and the basis for awarding the appellant interest at 14% per annum from the date of the bill of costs until payment in full is therefore not evident. In addition, neither the legal basis for the additional interest nor the applicable rate was stated by the learned Judge in the impugned ruling. This aspect of the award of interest in the subject bill of costs therefore needs to be clarified.

21. As regards the award of VAT, it is a statutory requirement that legal services are chargeable with the said tax under the *Value Added Tax Act*, 2013, and as recognised in *J.P Macharia T/a Macharia &Advocates vs MDC Holdings Ltd &2 others*, Milimani Commercial Courts H.C.C.C. NO. 1549 of 2001 and *Pyramid Motors Limited vs Langata Gardens Limited* [2015] eKLR. However, since the calculation and award of VAT in the subject bill of costs was based on the instruction fees awarded in error by the taxing officer, it therefore also follows that the award of the VAT was also in error.

22. In the premises, I find that the learned Judge of the ELRC erred in failing to consider and analyse the applicable principles in the taxation of the Advocates' advocate and clients bill of costs, and failed to correct the errors committed by the taxing officer in this regard in the taxation of the instruction fees, getting up fees and award of interest and VAT. The learned judge therefore also erred in entering judgment on the taxed bill of costs.

23. I accordingly agree that this appeal should be disposed of along the orders proposed by Gatembu, JA.

DATED AND DELIVERED A MOMBASA THIS 6TH DAY OF MAY 2022.

P. NYAMWEYA

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JUDGE OF APPEAL

CONCURRING JUDGMENT OF LESIIT, JA

I have had the advantage of reading in draft the judgment of Gatembu Kairu, JA and Nyamweya, JA. I am in full agreement with their reasoning and conclusions and, have nothing useful to add.

DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF MAY 2022.

J. LESIIT

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JUDGE OF APPEAL