REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 550 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

JAMES NYANGIYE AND OTHERS.....CLAIMANTS

VERSUS

THE HON. ATTORNEY GENERAL.....RESPONDENT

(AS CONSOLIDATED WITH NAKURU HCCC 395 OF 2001)

PETER B. GICHOHI AND OTHERS..... CLAIMANTS

VERSUS

THE HON. ATTORNEY GENERAL.....RESPONDENT

RULING

Before this Court is the Claimants' Chamber Summons application dated 18th December 2019 wherein the Claimants have sought the following reliefs-

a. That the decision of the taxing master Hon. Daisy C. Mutai delivered on 5th December 2019 on the Bill of Costs dated 7th February 2019 with respect to items 1, 2 and 3 be set aside, reviewed or otherwise varied.

b. That this Honourable Court be pleased to find that the taxing master erred in law and principle in failing to find that instruction fees in this matter was chargeable with regards to each Claimant's individual award.

c. That this Honourable Court be pleased to find that the taxing master erred in law and principle in completely taxing off item 2 being Valued Added Tax on instruction fees.

d. That costs of this application be provided for.

The application has been made pursuant to paragraph 11 (2) and (4) of the Advocates Remuneration Order 2014 and is supported by the grounds on the face of the motion as well as the supporting affidavit of Mutai K. Owen.

The Claimants aver that vide the ruling delivered on 10th December 2019, their bill of costs was taxed at Kshs.12,861,464.00. They aver that this was an error in law and principle hence this Court has the discretion to set aside, review and/or vary that decision.

It is the Claimants' position that each of them ought to have been awarded separate individual instruction fee as indicated in the bill of costs, since they were separate clients. Consequently, the fee for getting up for trial should be adjusted accordingly. Additionally, the sum awarded under getting up fees was not computed in the final sum and the same ought to be rectified.

It is the Claimants' case that item 2 should not have been taxed off as VAT is a statutory charge levied on advocates in rendering professional legal services to clients. They conclude that it is in the interest of justice for the application to be allowed as the Respondent will not be prejudiced in any way.

The Application was disposed of by way of written submission with both parties filing their written submissions. The Respondent made its case in its submissions.

Counsel for the Claimants submits that each Claimant gave their advocate instructions to pursue payment of their unpaid dues which varied with each Claimant thus attracting varying legal fees. They rely on the case of **Nguruman Limited v Kenya Civil Aviation Authority & 3 Others [2014] eKLR** to fortify this position. Additionally, if the instruction fees were to be calculated using the amount claimed the decision of the taxing master would still be erroneous for basing her calculation on the judgment sum rather than the amount claimed.

It is the Claimants' position that the taxing officer ought to have considered the length of the suit, the amount of work involved in perusing the numerous documents and taking instructions from 5000 Claimants. They have cited and placed reliance upon the case of **KANU National Elections Board & 2 Others v Salah Yakub Farah [2018] eKLR**.

It is the Claimants' submission that legal services rendered to a client are inclusive of VAT. It is their position that taxation enables the winning party to recover the costs they expended in fighting a case hence the Claimants should not be condemned to shoulder the VAT. They conclude by submitting that the taxing officer applied the wrong principles in making her decision on the instruction fees, getting up fees and VAT.

The Respondent submits that this Honourable Court should not interfere with the decision of the taxing officer and relies on the case of **First American Bank of Kenya v Shah and Others [2002] EALR 64** at 69 which gave the instances when a Court could interfere with the taxing officer's decision.

It is the Respondent's submissions that the order to review the instruction fees should not be granted since rule 62 of the Advocates Remuneration Order 2014 allows a taxing officer to disallow the same where they have been unnecessarily and improperly incurred. It is submitted that the taxing officer's decision to tax off VAT was right as the Advocates Remuneration Order does not provide for VAT to be chargeable on a party to party bill of costs. It is the Respondent's position that the Claimants are not entitled to the costs of this application and urges this Court to uphold the decision of the taxing officer.

Analysis and Determination

I have carefully considered the application, the submissions by parties, the bill of costs and ruling in question and I am of the view that the following are the issues for determination-

a. Whether the decision of the taxing officer to apportion the instruction fees, ought to be set aside, varied and/or reviewed for failing to charge the same to each Claimant's award.

b. Whether the decision to tabulate the getting up fees based on apportioned instruction fees, ought to be set aside, varied and/or reviewed.

c. Whether the taxing officer erred by failing to add the Kshs.4,194,608.00 she had awarded as getting up fees.

d. Whether the decision of the taxing officer of completely taxing off VAT chargeable on instruction fees, ought to be set aside,

varied and/or reviewed.

e. Who bears the costs of the application?

Instruction Fees

The Taxing Officer opted to apportion the instruction fees as opposed to taxing the same separately. The basis of her decision was as follows-

> *"The matters herein were consolidated and the judgment that was delivered took on all the Claimants in the claim. The value of the subject matter would therefore be drawn from the judgment as one whole and cannot be divided as the applicant has presented. In stating so, I have been guided by the stipulations of Rule 62 of the Advocates Remuneration Order, as well as the decision in **Grace Wangui v Wilfred Kiboro and Another (2013) eKLR** to the effect that where suits are consolidated there should be an appointment (sic) of costs including instructions fees that the Advocates for the parties cannot expect to the paid twice over the same work because he has not won three actions.*
>
> *I have also been guided by the decision in **Republic v Minister for Agriculture and 2 Others (2006) eKLR** to the effect that the taxation of Advocates instructions fees is to seek no more and no less than reasonable compensation for professional work done and to avoid an aspect of unjust enrichment upon a party. Indeed, I find that to award instructions fees to advocate as presented in the bill of costs were (sic) the advocate has presented instructions fees for each claimant would occasion an injustice and be prejudicial to the party condemned to pay costs. The same would actually lead to unjustly enriching the party granted costs.*

Schedule V1 paragraph 1 of the Advocates Remuneration Order of 1997 provides for the instruction fees to be charged except where it is varied by the taxing officer in exercise of their discretion. Further, the said paragraph allows a taxing officer to determine the value of the subject matter from the pleadings, judgment or settlement between the parties. The principles for taxation of bill of costs were highlighted in the case of **Premchand Raichand Ltd v Quarry Services of East Africa Ltd (No. 3) [1972] E.A. 162** as follows-

a. *Costs should not be allowed to rise to a level as to confine access to justice to the wealthy.*

b. *That a successful litigant ought to be fairly reimbursed for the costs he has had to incur.*

c. *That the general level of remuneration of advocates must be such as to attract recruits to the profession and*

d. *So far as possible there should be consistency in the award made.*

e. *The court will only interfere if the award of the taxing officer is so high or so low as to amount to an injustice to one party.*

The Claimants argue that the instruction fees ought to have been computed separately as set out in the bill of costs and not as apportioned by the taxing officer. I note that the proposed computations would have enriched the Claimants unjustly having been computed at Kshs.905,550,000.00 for instruction fees and Kshs.301,850,000.00 for getting up fees totalling to Kshs.1,207,400,000.00 which exceeded the Court's award of Kshs.836,254,918.80.

I find that in apportioning the instruction fees, the taxing officer balanced the interests of the two parties. In the decisions in **Grace Wangui v Wilfred Kiboro and Another (2013) eKLR** and **Warutere & Associates Advocates v Robert Kangethe Baar & 3 others [2018] eKLR,** the respective Courts were of the view that instruction fees in consolidated suits ought to be apportioned, to avoid unjust enrichment of the parties. Hence this Court will not interfere with the taxing officer's decision to apportion instruction fees.

Getting up fees

From the ruling delivered on 10th December 2019, the Taxing Officer awarded the Claimants getting up fees of Kshs.4,194,608.00. The same was however not included in the certificate of costs. Therefore, the certificate of costs is reviewed and amended to factor in the getting up fees as computed in the ruling.

VAT on Instruction Fees

The basis of the Taxing Officer's decision to tax off VAT on instruction fees was that a Party to Party Bill of Costs does not attract an aspect of taxable supply as an Advocate-Client Bill of Costs would.

Section 6 (1) of the VAT Act 2015 provides as follows-

> **Tax shall be charged on any supply of goods or services made or provided in Kenya where it is a taxable supply made by a taxable person in the course of or in furtherance of any business carried on by him.**

Section 2 of the Act defines *"supply"* to include the sale or provision of taxable services to another person and *"a taxable service"* as that which has not been specified in the Third Schedule. Legal services are not listed amongst exempt supplies in the Third Schedule of the Act.

For Party and Party Bill of Costs, the winning party is merely compensated for the costs they incurred in prosecuting or defending a case while for Advocate-Client Bill of Costs, an advocate is compensated for the services rendered to the client. The Court in the case of **Pyramid Motors Limited v Langata Gardens Limited [2015] eKLR** distinguished the two as follows-

> *"30. 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 any 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 vatable person. I would vacate the award on VAT as the Master erred.*

Similarly, the Claimants did not provide any evidence indicating that they had paid VAT on the legal fees they had paid to their advocates hence are not entitled to an indemnity. The Court in **Kenya Commercial Bank Limited v Stagecoach Management Limited [2017] eKLR** cited by the Claimants held that a winning party should be allowed to recoup VAT on the party to party bill of costs where they paid out VAT to an advocate. As such, the taxing officer's decision to tax off VAT on instruction fees was sound in law and in principle.

In the end, the application herein is dismissed with costs, with the exception of the correction of the error on getting up fees which is to be included in the certificate of costs.

Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF JUNE 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE