

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL APPEAL NO. 289 OF 2019**

**THE ANTI-COUNTERFEIT AGENCY.....APPELLANT**

**VERSUS**

**PETER MUGUCIA.....1<sup>ST</sup> RESPONDENT**

**ROSE THAARA NJUE.....2<sup>ND</sup> RESPONDENT**

**RULING AND REASONS FOR TAXATION**

What is before me for determination is the Appellant's party and party bill of costs dated 30<sup>th</sup> November, 2021 and filed in court on the same day. The bill of costs emanates from the Judgment on record (by Hon. Lady Justice L. Njuguna) dated 23<sup>rd</sup> July, 2020 where the appeal was allowed with costs to the Appeal.

The bill is opposed. Parties proceeded by way of written submissions to the Bill of costs. In response to the bill, 1<sup>st</sup> Respondent filed their written submissions on 2<sup>nd</sup> March, 2022. Appellant filed theirs on 21<sup>st</sup> April, 2022.

I have carefully read and considered both parties' respective submissions on record. I have also gone through the court file as well as the bill of costs and



documents on record. The applicable law is schedule 6 of the Advocate (Remuneration) (Amendment) Order, 2014.

The 1<sup>st</sup> Respondent in his submissions submitted that the Appellant is not entitled to instruction fees and other items in the bill as they were not represented by a practising Advocate. They submitted that the counsel for the record is an employee of the Appellant and hence was acting as an employee of the Appellant but not as a practicing Advocate. He therefore submitted that the Appellant is only entitled to disbursements. Appellant on the other hand submitted that the Appellant was awarded costs in this matter and hence is entitled to costs as the successful party in the appeal. He further submitted that he is entitled to instruction fees and all other costs having duly acted for the Appellant. Both parties have referred to several authorities which I have read and considered.

It is not in dispute that the Appellant's counsel on record is an in-house counsel employed by the Appellant. It is also not in dispute that the Appellant was awarded costs of the appeal. The issue for determination is whether the Appellant is entitled to costs having acted for the Appellant as an in-house counsel.



Section 32A (2)(b) of the Advocates Act state as follows;

**"Employment as an In-house Advocate**

- (1) A person who is qualified to act as an advocate under this Act may be employed as an in-house advocate**
- (2) A person who is employed as an in-house advocate shall—**
  - (a) be an independent professional legal advisor to his or her employer; and**
  - (b) not charge fees for services rendered below the minimum prescribed fees under section 44."**

It is clear section 32A (2)(b) of the Advocates Act allows an in-house counsel to charge legal fees at a rate not below the prescribed fees. I therefore hold that the Appellant is entitled to instruction fees and all other costs in the bill of costs having duly acted for the Appellant in the matter and proceed to tax the bill of costs on record.

The Respondent is not opposed to some of the items in the bill which will be allowed as allowed as prayed. I will deal with disputed items.

Item 1 on instruction fees; the Appellant has charged Kshs. 382,500/-. Its trite law that the instruction fees is calculated from the value of the subject matter which is discerned from the pleadings, judgment or settlement. There is no



value of the subject matter in the judgment and hence it is not possible to deduce the value of the subject. There is no value of the subject matter in the lower court as well since Appeal emanated from a ruling of the lower court.

Schedule 6 on paragraph (I)(a) of the Advocates Remuneration Order, 2014 provides that;

**"To present or propose an appeal in any case not provided for above; such sum as may be reasonable but not less than Kshs. 25,200."**

Based on the above provisions of the law, the instruction fees ought not to be less than 25,200/-. Taking into account all relevant circumstances of the case, including the nature and importance of the case to the parties, documentation involved, the general conduct of the proceedings, time taken to conclude the trial that is; 1 year amongst other factors and being guided by the principles set out in the case of **Joreth Ltd vs. Kigano & Associates Civil Appeal No. 66 of 1999 [2002] 1 EA 92**, I find that a sum of Kshs. 200,000/- as instruction fees is sufficient. I therefore tax item 1 at Kshs. 200,000/-. I tax off Kshs. 182,500/-.



Item 2 on getting up fees for appeal; the Appellant has charged Kshs. 127,500/-  
Schedule 6 (3) of the 2014 Remuneration Order provides that;

**"In any appeal to the High Court in which a Respondent appears at the hearing of the appeal and which the court at the conclusion of the hearing has certified that in view of the extent or difficulty of the work required to be done subsequently to the lodging of the appeal the case is a proper one for consideration of a getting up fee, the taxing officer may allow such a fee in addition to the instruction fee and such a fee shall not be less than one-third of the instruction fee."**

In this case, the Honourable Judge did not certify the appeal as a proper one for consideration of a getting up fee as provided under the above quoted rule. In the circumstances, I tax off item 2.

Items 3-24, 32, 39, 40, 47, 50, 52, 53, 55, 57, 58, 60, 66, 68, 70, 74 and 75 are drawn to scale and hence taxed as drawn. They are provided for under schedule 6 of the 2014 Remuneration Order.

On attending court for taxation; item 25 is taxed at 2,000/-. The Appellant Advocate attended court before the Deputy Registrar for taxation twice. Each



attendance is charged at Kshs. 1,000/- as provided for under schedule 6, paragraph (7)(a) of the 2014 Remuneration Order.

On attending court for ruling on taxation; item 26 is taxed at Kshs. 1,000/- as provided for under schedule 6, paragraph (7)(a) of the 2014 Remuneration Order.

Item 28 on 16% V.A.T is taxed off. Section 6(1) of the VAT Act 2015 provide as follows;

**"Tax shall be charged on any supply of goods and 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 further defines **"supply"** to include the sale or provision of **"a taxable service"** to another person and a taxable service as that which has not been specified in the Third Schedule. the said Third Schedule does not exempt legal services from subjection to V.A.T.

Party and party bill of costs does not attract the V.A.T as Advocates and Client Bill of Costs do because in the former, neither of the parties supplied any



services to the other as is the case in the latter. In addition, party and party bill of costs are aimed at compensating the appropriate party for the costs they incurred in the prosecution of the case.

In the case of Pyramid Motors Limited vs. Langata Gardens Limited [2015]eKLR, Hon. Mr. Justice J.L. Onguto stated as follows;

“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."

In the case of Kenya Commercial Bank Limited vs. Stagecoach Management Limited [2017] eKLR, the court also reinforced the position that a party is entitled to recoup V.A.T in circumstances where it has tendered evidence of having paid the V.A.T to their advocate.

It is therefore clear that in the present circumstances, the Appellant did not tender any proof to the effect that they paid V.A.T and they are therefore not entitled to indemnity. In the circumstances, I tax off the item on V.A.T.

Items 44 and 45 on service of Affidavit of service are taxed off. The same is not provided for under schedule 6 of the 2014 Remuneration Order.

Item 76 on miscellaneous is taxed off. There are no receipts on record to prove payment.

The total amount taxed is Kshs. 289,910/-.





I therefore tax and allow the Appellant's party and party Bill of costs dated 30<sup>th</sup> November, 2021 at Kshs. 289,910/-. (Two Hundred and Eighty Nine Thousand, Nine Hundred and Ten) only.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT  
NAIROBI THIS 4<sup>TH</sup> DAY OF AUGUST, 2022.**



.....  
**L. MBACHO**

**DEPUTY REGISTRAR**

ORIGINAL

