

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT KIAMBU  
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION  
PETITION NO. E011 OF 2021

1. ENDANA TEA PACKERS LIMITED  
2. KAGWE TEA PACKERS.....APPLICANTS

VS

THE ANTI-COUNTERFEIT AUTHORITY.....RESPONDENT

**RULING**

From the court record, judgment in this matter was delivered on 31/05/2022 whereby the Petition was dismissed with costs. It is as a result of the said judgment that the Respondent filed the Party and Party Bill of Costs dated 03/06/2022 on 17/06/2022. The said bill is the subject of this ruling. In response to the bill the Applicant filed submissions dated 10/06/2022. The Respondent also filed submissions dated 16/06/2022 in support of the bill.

Pursuant to the said judgment, the Respondent is entitled to file the subject bill.

In regards applicable scale, I note that this Petition was lodged in the high court at Kiambu on 01/04/2021. I thus find that the applicable scale in determining chargeable fees in the subject bill is Schedule 6 of the Advocates (Remuneration)(Amendment) Order, 2014 (hereinafter referred to as “the applicable scale”).

I have considered the bill, the submissions filed by parties, court record and applicable scale and proceed to tax the bill under the following heads.

### **UNDISPUTED ITEMS**

The Applicants do not dispute amount under item 3 to 13, 15, 16, 18, 19, 27, and 29. I thus proceed to tax the same as drawn.

### **INSTRUCTION FEES**

According to the Applicant Respondent is not entitled to instruction fees because the advocate who represented the Respondent is its employee as the Deputy Director Enforcement and Legal Services. That instruction fees are meant to compensate a party for expenses paid to his advocate, and since Respondent did not engage the services of an external counsel, the services offered by the internal counsel falls in the genre of a party acting in person. The Applicant also submitted that awarding instruction fees to the Respondent will lead to the money ending up in the pockets of an unqualified person thus leading to the commission of an offense as under Section 43 of the Advocates Act. The Applicant availed a printout of the Respondent's website Management Team profile which shows the counsel in who's name the respondents documents were filed is indeed an employee of the Respondent as a Deputy Director Enforcement and Legal Services. This fact is not denied by the Respondent in



its submissions. The question therefore is whether the Respondent is entitled to instruction fees when represented by inhouse counsel.

Justice George Kanyi Kimondo held in **Job Kipkemei Kilach v Director of Public Prosecutions & 2 others** [2016] eKLR that;

*“It is not contested that Mr. Olola and Mrs. Christine Natome are in-house counsel for the 2nd respondent. They represented the commission in the petition. The High Court awarded costs to the 2nd respondent. The 2nd respondent was entitled to be represented by counsel. And, there was no bar to Mr. Olola or Mrs. Natome from doing so. 8. However, instruction fees are meant to compensate a party for expenses paid to his advocate. In this case, the commission did not instruct external lawyers: it utilized the services of its salaried employees. The documents filed by the lawyers were not drawn in the names of a professional firm but in the name of the commission. See section 39 of the Advocates Act. The commission thus fell in the genre of a party acting in person. The other danger is that the instruction fees may end up in the pocket of the 2nd respondent; and, raise the specter of sharing fees with an unqualified person in violation of sections 41 and 43 of the Advocates Act. I thus readily find that it was not entitled to the item of instruction fees of Kshs 100,000. See Commissioner of Lands v Odinga [1972] E.A 125. 9. In a synopsis, the 2nd respondent was only entitled to the disbursements and other costs other than instruction fees.”*

This court is bound by the decision of the superior court in the referred matter.

It has already been determined hereinbefore that the advocate who represented the Respondent is an in-house counsel. Due to reasons advanced in the referred case, I find that the Respondent is not entitled to instruction fees. Amount under item 1 is thus taxed off.

## GETTING UP FOR APPEAL

I do note that the Respondent has submitted through its submissions that it was an error in item 2 to indicate it is an appeal and it should rather read getting up for trial.

There is no amendment to the subject bill on record. There is also no consent by parties or leave of the court or taxing master allowing the Respondent to effect amendments to the bill on item 2. Further, it is trite that a party cannot introduce new material/facts through submissions. Parties are indeed bound by their pleadings, in this case the subject bill. I thus proceed with taxation of item 2 as is.

It goes without question that the matter herein is not an appeal and thus fees for getting up for appeal cannot be applicable herein. Moreover, even in the event the said item read getting up fees for trial as submitted by the Respondent in its submissions, I note that by virtue of the amount for instruction fees being taxed off, the fees for getting up cannot be allowed since it is pegged on the instruction fees. Amount in item 2 is thus taxed off due to foregoing reasons.



## ATTENDANCES

I note that the Respondent has considered the upper scale in tabulating the court attendance costs before judge in item 14. Reference is made to Rule 50 and 50A of the Advocates (Remuneration) Order which provides as follows;

- 50. Costs in High Court according to Schedule 6**  
Subject to paragraphs 22 and 58 and to any order of the court in the particular case, a bill of costs in proceedings in the High Court shall be taxable in accordance with Schedule 6 and, unless the court has made an order under paragraph 50A, where Schedule 6 provides a higher and a lower scale the costs shall be taxed in accordance with the lower scale.
- 50A. Schedule 6 costs on the higher scale**  
The court may make an order that costs are to be taxed on the higher scale in Schedule 6 on special grounds arising out of the nature and importance or the difficulty or urgency of the case. The higher scale may be allowed either generally in any cause or matter or in respect of any particular application made or business done.

The Applicant has not availed evidence of such order as envisaged under Rule 50A. In the circumstances, the lower scale is applicable in tabulating the attendance costs. I also note from the court proceedings of 16/02/2022 there is no justification for the averments of the Respondent that the court session took half a day for a mention. I thus proceed to tax item 14 at Kshs 1,100. Amount taxed off is **Kshs 6,000**.

For attendances before the Deputy registrar under item 20, 21, and 22 are not drawn to scale. I have considered Schedule 6 Part A Paragraph 7(a) in proceeding to tax item 20 at kshs 1,000. Upon noting from the court record that

the Respondent's representative only attended one taxation session before the Deputy Registrar which has been catered for under Item 20, I proceed to tax off amount under item 21. As for item 22, I concur with submissions of Applicant that the attendance for ruling on taxation is speculative and thus tax off amount under the said item.

In regards court registry attendances under item 26, 31, 36, 39, 43, and 45, upon considering applicable scale, I find that the same have been taxed to scale. the same are thus taxed as drawn.

### DRAWING

Item 17 on drawing letter to the deputy Registrar is drawn to scale and thus taxed accordingly.

### VAT

The subject bill is a Party and Party Bill of Costs for which the Applicant submits that VAT is not chargeable.

**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 taxable person. I would vacate the award on VAT as the Master erred.”*

Similarly, the Respondent 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. Accordingly, amount under item 24 is taxed off.

### COPIES

Item 33, 34, 38, 41, and 42 on making copies of various documents are drawn to scale. The same are thus taxed as drawn.

However, Item 25 and 30 are not drawn to scale. upon considering Schedule 6 Part A Paragraph 5 I proceed to tax item 25 at Kshs 2,475. As regards item 30, I note there is no Respondents List and Bundle of Authorities dated 16/08/2021 on record. Its existence is thus in question. With no basis laid by the Respondent that the said documents actually exist and were filed, I am unable to allow the tabulated amount. I thus proceed to tax off the amount under item 30.

### **SERVICE**

The Applicant has submitted that because service was effected through email, the Respondent is not entitled to costs for service. I agree with submissions of the Respondent that service via email is recognized as a mode of service in the Civil Procedure Rules. As such, the Respondent is entitled to costs for service. Upon taking to account the applicable scale, I find that item 28, 32, 37, 40, 44, and 46 are drawn to scale. the same are thus taxed as drawn.

### **DISBURSMENTS**

The Respondent has availed a receipt to prove it incurred Kshs 600 for binding List and Bundle of Authorities dated 17/01/2022. Thus, item 35 is taxed as drawn.



However, the Respondent has failed to avail evidence/ proof of having incurred the disbursements tabulated under item 47. The amount under the said item is thus taxed off.

**CONCLUSION**

The upshot therefore is that the amount taxed off the Respondent's Party and Party Bill of Costs dated 03/06/2022 is Kshs 517,080.

In conclusion the subject bill is taxed at Kshs 79,635.40.

It is so ordered.

**DATED and DELIVERED at KIAMBU this 22<sup>nd</sup> day of September, 2023**

  
.....  
**S.K. MOTARI**

**DEPUTY REGISTRAR**

In the presence of:

I Certify this is a true copy of the original

  
.....  
Deputy Registrar Kiambu

Date:   
.....

