REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLENEOUS APPLICATION NO.67 OF 2021

SHREEJI ENTERPRISES LIMITED.....APPLICANT

-VERSUS-

JOHN MUNGA CHAI.....RESPONDENT

Coram: Hon. Justice S. M. Githinji

Kittony Maina Karanja Advocates for the Applicant

J. N Matara & Co. Advocates for the Respondent.

R U L I N G

The Applicant herein has filed a Chamber Summons dated the 31st day of August, 2021 seeking the following orders:

1. Spent.

2. That the decision of the taxing master Hon. D. Wasike delivered on 18th August, 2021 on the Bill of Costs dated 26th March, 2021 with respect to VAT be set aside, reviewed or otherwise varied.

3. That this Honourable Court be pleased to find that the taxing master erred in law and principle in finding that Party & Party costs are subject to VAT.

4. That the cost of this application be provided.

The application was supported by the grounds set out on the face of the application and the affidavit of **HADASSAH RIMUNYA**. She deposed that the taxing Master erred under the Value Added Tax Act (VAT), 2013 particularly Section 5 wherein Value Added Tax (VAT) is chargeable in taxable supply made by any registered person. That there was no taxable supply of either goods or services made to the Applicant herein by the Respondent as the bill of costs pertains to costs between parties in the suit.

She also deposed that VAT cannot apply as neither party fetched nor supplied services to the other and it is for this reason that it is necessary to challenge the finding on VAT on the Bill of Costs contained in the Ruling dated 18th August, 2021.

Court directed the Applicant to file submissions on the 9th day of November, 2022. The Applicant duly filed submissions on the 17th

day of January, 2022. She submitted that **Section 6 (1) of the VAT Act, 2015** provides that; '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.

It was her submission that that being a Party and Party Bill of Costs there were no taxable services rendered by the Applicant to the Respondent to warrant the same to be subjected to VAT charge. She relied on the authority of ***Pyramid Motors Limited vs Langata Gardens Limited (2015) eKLR where J.L. Onguto*** stated;

"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 result, I would not return the Bills to the master for re-assessment but would direct that the item of VAT be completely and wholly taxed off"

Analysis and Determination

I have carefully considered the applicant's chamber summons application dated 31st August, 2021, the submissions filed by the applicant and the authorities supplied and statutory provisions relied on. In my humble view, the main issue for determination in this reference is whether the Party & Party costs are subject to VAT.

As rightly pointed out by the Applicant, 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.

I wish to point out the important Ruling of the **Court of Appeal** in the ***Kipkorir, Titoo & Kiara Advocates V Deposit Protection Fund Board Civil Appeal No. 220 of 2004; (2005) eKLR***, in which the learned appellate judges held inter alia:

"On a reference to a Judge from the taxation by a taxing master, the judge will not normally interfere with the exercise of discretion by the taxing master unless the taxing master, erred in principle in assessing the costs."

Further, the judges determined that;

"It is true that the taxing officer did not record the reasons of the decision on the items objected to after the receipt of the respondent's notice. It seems that the taxing officer decided to rely on the reasons in the ruling of taxation dated 24th February, 2004. That ruling at least indicated the formula that the taxing officer applied to assess the instructions fees. Although there was no strict compliance with Rule 11 (2) of the Order, we are nevertheless, satisfied that there was substantial compliance. The adequacy or otherwise of the reasons in the ruling is another matter. Indeed, we are of the view, that if a taxing master totally fails to record any reasons and to forward them to the objector, as required then that would be a good ground for a reference and the absence of such reasons would not in itself preclude the objector from filing a competent reference."

Having stated the above and noting a proper reading of Section 6 (1) of the VAT Act, I am persuaded that a Party and Party Bill of Costs does not attract an aspect of taxable supply as an Advocate Client Bill of Costs would. The Court of Appeal in ***Joreth Limited –V- Kigano & Associates, Civil Appeal No. 66 of 1999 (2002) E.A, 92 (2002) eKLR*** held that unless the taxing officer has misdirected himself on a matter of principle, a Judge siting on a reference against the assessment ought not to interfere with the

findings. I agree with the Applicant and particularly the authority cited where J.L Onguto stated a taxing Master can only award VAT if the Bill is an Advocate- Client. This court cannot analyze the Ruling of the Taxing master since there is no ruling by the taxing master that can enable the court to know whether the taxation included VAT or not. Given the fact that the taxing master's notes are not in the court file and there is no ruling giving the reasons for taxation, I do find that it is quite difficult for this court to substantively deal with the reference.

The upshot is that the application dated 31st August, 2021 is merited and is hereby allowed. The Bill of Costs is hereby remitted to the taxing master for fresh taxation. Parties shall meet their respective costs of the application.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 10TH DAY OF MARCH, 2022.

.....

S.M. GITHINJI

JUDGE

In the presence of; -

1. Kittony Maina Karanja Advocates for the Applicant

2. J. N Matara & Co. Advocates for the Respondent(absent)