REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISCELLANEOUS APPLICATION NO E025 OF 2025

J A GUSERWA & CO ADVOCATES…….
…….APPLICANT

VERSUS

LUCY MOLONKET……..
……RESPONDENT

RULING

Background

1. The Applicant filed the Advocate-Client Bill of Costs dated 31st January 2025 (hereafter called ‘’the Bill’’) seeking fees of Ksh. 3,792,760.00 from the Respondent. The Bill was raised on account of legal services which the Applicant had rendered to the Respondent in ELRC Cause No. 198 of 2019 where the Respondent was a party.
2. The parties are in agreement that the said cause (ELRC Cause No. 198 of 2019) was heard to conclusion and judgment entered for the Respondent for Ksh. 15,162,783 plus costs and interest. The parties also agree that the Respondent’s costs in the suit were subsequently assessed at Ksh. 750,000.00.
3. When the Bill came up for taxation, the Respondent objected to various items including instructions and getting up fees. In addition, the Respondent contended that she had paid the

Applicant a substantial amount towards her fees to wit the following:-

a) Ksh. 50,000.00 for opening her file.

b) Ksh. 150,000.00 being deposit of fees.

c) Ksh. 400,000.00 being further deposit of fees.

4. In effect, the Respondent's case was that she had paid the Applicant a total of Ksh. 600,000.00 directly. In addition, she contended that the Applicant withheld the sum of Ksh. 750,000.00 which was awarded as costs in the parent file and a further Ksh. 600,000.00 which was part of the decretal sum in the suit. As such, it was her case that the Applicant had received a total of Ksh. Ksh1,950,000.00 in legal fees which amount she asked the Taxing Master to take into account whilst taxing the Bill.

5. In a ruling which was delivered on 9th May 2025, the Taxing Master assessed the aforesaid Bill at Ksh. 959,727.49. She further found that the Respondent had paid the Applicant a total of Ksh. 1,950,000.00 as set out above. As such, she concluded that the Respondent had overpaid the Applicant by Ksh. 990,273.00 being the difference between the taxed costs of Ksh. 959,727.49 and the amount of Ksh. 1,950,000.00 allegedly received by the Respondent. Accordingly, she ordered the Applicant to refund the Respondent the sum of Ksh. 990,273.00.

6. Aggrieved by the ruling, the Applicant filed the instant reference. She contends that the Taxing Master committed an error of principle by taxing the Bill at a figure which was

inordinately low and by ordering her to refund the Respondent Ksh. 990,273.00 on account of overpayment of her fees. As such, she prays that the taxation order of 9th May 2025 be set aside.

7. The reference is supported by the ground that are set out on the face of the application and two affidavits sworn by the Applicant. She contends that the value of the subject matter in the taxation was the judgment sum of Ksh. 15,165,782.00 in the parent suit. It is her case that the sum of Ksh. 959,727.49 which was awarded to her is too low and was not computed in accordance with the applicable law.

8. The Applicant contends that based on the value of the subject matter in the parent suit, instruction fees ought to have been assessed at Ksh. 708,255.00 and not Ksh. 423,255.66. She contends that the error in assessing the correct amount of instruction fees affected computation of getting up fees and the fees payable under part B of the applicable schedule. As such, she argues that the Taxing Master committed an error of principle in this respect.

9. The Applicant also takes issue with the Taxing Master's order directing her to refund the Respondent Ksh. 990,273.00. She contends that the order was issued without basis.

10. The Respondent is opposed to the reference. She has filed a replying affidavit dated 6th June 2025 to anchor her response to the application.

11. The Respondent avers that she indeed instructed the Applicant to represent her in ELRC Cause No. 198 of 2019.

She further confirms that the trial court entered judgment in the suit in her favour for Ksh. 15,162,783.

12. The Respondent avers that she variously paid the Applicant legal fees by cheque and through Mpesa. She also contends that she made some other payments in cash.

13. The Respondent further avers that the Applicant was paid Ksh. 1,500,000.00 and Ksh. 750,000.00 in the parent suit to cover part payment of the principal sum and costs of the suit. She contends that the Applicant only released part of the principal sum (Ksh. 900,000.00) and retained the rest including costs of the suit.

14. The Respondent avers that the Applicant was unwilling to state what her actual fees was despite several requests in this respect. Instead, she contends that the Applicant kept pursuing her for more money on account of fees.

15. The Respondent asserts that the Taxing Master followed the law and the evidence presented to her to arrive at her decision. As such, she urges the court to uphold the taxation order.

16. The Respondent asserts that the Applicant has presented the reference in bad faith in a bid to escape refunding her the sum of Ksh. 990,273.00. As such, she prays that the application be dismissed.

Analysis

17. The law on references is now fairly settled. The court hearing a reference is not entitled to interfere with the Taxing Master's order on costs unless it is demonstrated that

the Taxing Master committed an error of principle in assessing the costs. Reiterating this, the court in the case of ***M/s Lubuleliah & Associates Advocates v N K Brothers Limited [2014] KEHC 7393 (KLR)*** observed as follows:-

> *''It is trite law that the High Court should not upset a taxation by the taxing master merely because it would have awarded a higher or lower amount unless the taxing master's decision was based on an error of principle.''*

18. An error of principle may be inferred where the Taxing Master awards a figure which is inordinately low or high as to amount to an injustice to one party (see ***Premchand Raichand Ltd & Another – and – Quarry Services of East Africa Ltd [1972] EA 162)*** as quoted in ***Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board [2006] KEHC 1796 (KLR)***). It (an error of principle) may also be inferred where it is shown that the Taxing Master misdirected himself on some matter resulting in a wrong decision, or where it is manifest from the case as a whole that the Taxing Master exercised his discretion improperly resulting in injustice (***Peter Muthoka & another v Ochieng & 3 others [2019] KECA 597 (KLR)***).
19. In the instant reference, the Applicant contends that apart from the award of Ksh. 959,727.49 being too low as to result in injustice to her, the amount was not assessed in accordance with the graduated scale under the applicable schedule of *the Advocates Remuneration Order*. As such, she

contends that the Taxing Master committed an error of principle.

20. According to Applicant, the Taxing Master should have staggered the assessment of instructions fees based on the graduated figures under Schedule 6 part A paragraph 1 of *the Advocates (Remuneration) (Amendment) Order, 2014*. She contends that the Taxing Master should have begun by assessing fees for the first Ksh. 500,000.00. She avers that this should have been followed with assessment of fees for the next Ksh. 750,000.00 followed by fees for the next amount of Ksh. 1,000,000.00.

21. The Applicant contends that after the foregoing, the Taxing Master should have then assessed fees on the balance of the amount that is in excess of Ksh. 1,000,000.00 at the rate of 2% thereof before cumulating the totals. According to the Applicant, this would have yielded instruction fees of Ksh. 708,255.00 and not Ksh. 423,255.66 which the Taxing Master awarded.

22. The Applicant relies on the decision of this court (differently constituted) in ***Molonket v East Africa Portland Cement [2024] KEELRC 2573 (KLR)*** to advance her case. It is true that the learned Judge made comments in that decision to the effect that the fees under Schedule 6 Part A paragraph 1 of *the Advocates (Remuneration) (Amendment) Order, 2014* is computable on a graduated scale. However, I do not understand him to have meant that parties should compute fees as proposed by the Applicant. He was only underscoring

the fact that the Schedule has staggered the manner for assessment of fees based on the value of the subject matter.

23. My understanding of the Schedule is that where the value of the subject matter is in excess of Ksh. 1,000,000.00, the Taxing Master should ascertain the fee payable by following the formula below:-

    a) Compute fees that is payable on the first Ksh. 1,000,000.00 of the subject matter;

    b) Assess fees on the amount which is in excess of Ksh. 1,000,000.00 using a scale of 2% of the excess.

    c) Add the aforesaid two figures to come up with a global figure.

24. I have studied the impugned ruling by the Taxing Master and I note that she assessed instruction fees that she awarded the Applicant under Part A of the Schedule based on the formula I have alluded to above. As such, I am satisfied that she did not commit an error of principle in this respect.

25. The ruling shows that the Taxing Master assessed instruction fees under Part B of the Schedule by increasing the instruction fees assessed under Part A thereof by 50%. This yielded Ksh. 634,883.49.

26. The Taxing Master assessed getting up fees by adding 1/3 of Ksh. 634,883.49 on this amount. She then added other allowable items in the Bill to yield the final award of Ksh. 959,727.49.

27. In the court's view, the Taxing Master proceeded in accordance with the applicable law to arrive at the figure she awarded the Applicant. As such, the court does not see any error of principle that she committed which will entitle it (the court) to interfere with the assessment.
28. After making the aforesaid assessment, the Taxing Master found that the Respondent had paid the Applicant Ksh. 1,950,000.00 towards her fees. This figure, as mentioned earlier in the ruling, comprises of: monies paid directly to the Applicant; monies retained by the Applicant from the principal sum of Ksh. 1,500,000.00 which was deposited with her on behalf of the Respondent; and costs of the suit allegedly retained by the Applicant.
29. The court has considered the material which was placed before the Taxing Master as proof of payment of the aforesaid amounts. The court notes that in the Bill of Costs dated 31st January 2025, the Applicant stated that the Respondent had paid her Ksh. 50,000.00 to open her file. She further stated that the Respondent deposited another Ksh. 150,000.00 as fees bringing the total she acknowledged at the time to Ksh. 200,000.00.
30. When the Respondent filed her submissions on the Bill, she presented copies of cheques to show that the Respondent received Ksh. 1,500,000.00 in part payment of the principal sum in ELRC Cause No. 198 of 2019 on her behalf. She further presented bank documents to show that the Respondent released Ksh. 900,000.00 to her on 16th April

2025. As such, there was sufficient material before the Taxing Master to demonstrate that out of the sum of Ksh. 1,500,000.00 which the Applicant received on behalf of the Respondent, she released to the Respondent Ksh. 900,000.00 leaving a balance of Ksh. 600,000.00 unaccounted for.

31. The Respondent presented further evidence to demonstrate that she paid to the Applicant Ksh. 150,000.00 and Ksh. 250,000.00 by Empesa on 1st March 2025. As such, there was credible material before the Taxing Master to demonstrate that the Respondent paid the Applicant a further sum of Ksh. 400,000.00 through Mpesa.

32. The Applicant did not cogently controvert the material which the Respondent presented to demonstrate the aforesaid payments. Similarly, she did not speak to the sum of Ksh. 600,000.00 which she appears not to have disbursed to the Respondent alongside the sum of Ksh. 900,000.00 being part of the sum of Ksh. 1,500,000.00 she received on behalf of the Respondent.

33. Having regard to the foregoing, the court finds that the Taxing Master had persuasive material before her to arrive to the conclusion that the Applicant was holding a cumulative sum of Ksh. 1,200,000.00 from the Respondent comprising of: Ksh. 200,000.00 which the Applicant admitted in her Bill of Costs to have received; Ksh. 400,000.00 paid to the Applicant through Mpesa on 1st March 2025; and Ksh.

600,000.00 out of Ksh. 1,500,000.00 which the Applicant had received on behalf of the Respondent.

34. In addition to the aforesaid, the Taxing Master also found that the Applicant received Ksh. 750,000.00 on behalf of the Respondent being costs in ELRC Cause No. 198 of 2019. However, there was no evidence placed before her to confirm that this amount was indeed paid to the Applicant.

35. It should be noted that the Applicant specifically denied having been paid this amount. As such, the burden of proof lay with the Respondent to demonstrate that the Applicant was paid the amount in the same way she tabled copies of cheques to show that the Applicant was paid Ksh.1,500,000.00 in part settlement of the principal sum.

36. As the record shows, the Respondent did not table such evidence. All she did was to make a bare assertion that the Applicant had received this amount but failed to account for it.

37. Absent proof that the sum of Ksh. 750,000.00 was paid to the Applicant as costs in the parent suit, the Taxing Master ought not to have found that the Applicant had been paid this amount. As such, by making this finding, the Taxing Master committed an error of principle.

38. In principle, the only persuasive evidence that was placed before the Taxing Master demonstrated that the Applicant received Ksh.1,200,000.00 from the Respondent either directly or indirectly and not Ksh. 1,950,000.00. As such, if the Taxing Master was to give the Respondent credit for fees

paid, this ought to have been computed based on Ksh. 1,200,000.00 and not Ksh. 1,950,000.00.

39. Having regard to the foresaid, the court sets aside the Taxing Master's order which directed the Applicant to refund the Respondent the sum of Ksh. 990,273.00 being the difference between the taxed costs and the sum of Ksh. 1,950,000.00 allegedly paid to the Applicant. The court finds that the Taxing Master ought to have asked the Applicant to reimburse the Respondent the difference between the taxed costs and the sum of Ksh. 1,200,000.00 which the Applicant had received on account of the transaction between the parties. The court will issue appropriate orders at the end of the decision.

40. Ordinarily, once a court hearing a reference sets aside a taxation order, it ought to remit the matter to another Taxing Master to reassess the Bill of Costs. Nevertheless, instead of remitting the Bill for fresh taxation, the court may proceed to finalize the matter if it is apparent that the error in the proceedings does not materially affect the assessment of costs (see ***Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W'Njuguna & 6 others [2006] KEHC 3504 (KLR)*** quoted in ***Strategic Urembo Sacco Society Limited v Meli [2024] KEELC 13904 (KLR)***).

41. In ***Mwangi Keng'ara & Co Advocates v Mungai [2024] KEHC 14369 (KLR),*** the court held that where the error in the taxation order relates to failure to discount a

figure which should have been discounted from the taxed costs as opposed to the actual assessment of the Bill of Costs, the court hearing the reference may proceed to finalize the matter instead of remitting it to another Taxing Master. This is because there is no order for re-taxation.

42. In ***Moronge & Company Advocates v Kenya Airports Authority [2014] KECA 816 (KLR),*** the Court of Appeal rejected the contention that the High Court (or court of equal status) to which a reference has been presented has no jurisdiction to re-tax the Bill under dispute. The court held that the High Court (or court of equal status) had jurisdiction to re-tax the Bill instead of referring it for re-taxation before another Taxing Master.

43. In ***First American Bank of Kenya Ltd v Gulab P. Shah & 2 others [2002] KEHC 1277 (KLR),*** the court said this regarding the jurisdiction of the High Court (and courts of equal status) to tax Bills of Costs referred to them through references:-

> *''If the court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the Taxing Officer for re-assessment unless the Judge is satisfied that the error cannot materially have affected the assessment.....However, the Judge does have jurisdiction and it is within his discretion to reassess the bill himself....''*

44. In ***University of Nairobi & another v Moses [2022] KECA 45 (KLR),*** the Court of Appeal re-taxed instruction fees in an appeal from a reference without remitting the Bill to another Taxing Master for re-taxation. This affirms the fact that the court handling a reference or an appeal from a reference has jurisdiction to re-tax the Bill under consideration without the need for remitting it for re-taxation before a Taxing Master.

45. As noted earlier in the ruling, the court has not found fault with the taxation of the Bill of Costs dated 31st January 2025. What the court has faulted is the Taxing Master's finding that the Applicant had been paid Ksh. 750,000.00 being costs in the parent suit without cogent evidence to back this pronouncement.

46. It is this error which requires to be corrected by adjusting the amount to be deducted from the taxed costs in order to determine whether the Respondent has a credit or debit balance. This is a matter which does not require remitting of the matter to a Taxing Master since there will be no re-assessment of the Bill of Costs in accordance with the provisions of *the Advocates Act* as read with *the Advocates Remuneration Order*.

Determination

47. The foregoing being the case, the court makes the following findings and attendant orders:-

a) The Taxing Master did not commit an error of principle in assessing the Applicant's Bill of Costs dated 31st January 2025 at Ksh. 959,727.49.
b) As such, the assessment of costs at Ksh. 959,727.49 is upheld.
c) The court finds that the Taxing Master made an error of principle by finding that the Applicant had been paid costs of Ksh. 750,000.00 in the parent suit without cogent evidence to back the finding.
d) The Taxing Master made an error of principle by including the aforesaid sum in the amount that the Applicant had been paid thereby inflating the figure of what the Applicant had received to Ksh. 1,950,000.00 instead of Ksh. 1,200,000.00.
e) The Applicant having received Ksh. 1,200,000.00, the court offsets this amount from the amount of Ksh. 959,727.49 which was assessed as the Applicant's fees meaning that the Respondent made an overpayment of Ksh. 240,272.51.
f) As such, the Taxation Order is amended to read as follows:-
    i) The Bill of Costs dated 31st January 2025 is taxed at Ksh. 959,727.49.
    ii) The Respondent has paid the Applicant Ksh. 1,200,000.00 denoting an overpayment of Ksh. 240,272.51.

iii) As such, the Applicant is directed to refund the Respondent the overpayment of Ksh. 240,272.51.

g) Each party to bear own costs of the reference.

Dated, signed and delivered on the 28th day of November, 2025

B. O. M. MANANI

JUDGE

In the presence of:

…… for the Applicant

……for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI