



MM Kimuli & Co Advocates v Brinks Security Services Ltd (Miscellaneous Application E128 of 2023) [2025] KEELRC 236 (KLR) (31 January 2025) (Ruling)

Neutral citation: [2025] KEELRC 236 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E128 OF 2023**

**SC RUTTO, J
JANUARY 31, 2025**

BETWEEN

MM KIMULI & CO ADVOCATES ADVOCATE

AND

BRINKS SECURITY SERVICES LTD CLIENT

RULING

1. This Reference was filed by the Advocate/Applicant vide a Chamber Summons dated 23rd July 2024 against the Ruling of the Taxing Officer delivered on 19th April 2024 with respect to the taxation of the Applicant's Advocate/Client bill of costs dated 9th June 2023.
2. The Application seeks the following orders:
 1. That this Honourable court be pleased to set aside the Taxing Master's findings and assessment of Item 1 and item 2 of the Advocates/Client Bill of Costs dated 9th June 2023 as contained in the Ruling delivered on 19th April 2024 and this Court be pleased to assess the instruction fees in accordance with the law.
 2. That this Honourable Court be pleased to correct the conclusive total award arrived by the Taxing Master in view of his findings that items 3 to 76 were drawn to scale.
 3. That the costs of this application be provided for.
3. The Application is supported by the grounds on its face and the Supporting Affidavit sworn on 23rd July 2024 by Morris Kimuli, Advocate. Grounds in support of the Application are that the Taxing Officer grossly misapprehended and misapplied the law and principles of taxation when assessing Items 1 and 2 by applying Schedule 7 of Advocates Remuneration Order, 2014. That the scale being used to



- assess the Bill ought to have been Schedule 6 which applies to the High Court as the Employment and Labour Relations Court, where the mother suit was filed, is a Court of equal status as the High Court.
4. That in this case, the party and party costs had already been assessed and the instruction fees determined yet the Taxing Officer went against the principles of taxation when he could easily have increased the instruction fees in the party and party costs by half as envisaged by the law.
 5. It is further averred that the Taxing Officer suo moto applied the wrong law when assessing the Bill when he applied the provisions of Paragraph 58 of the Advocates Remuneration Order. The Applicant contends that even if such a provision was applicable, then it ought to apply only to the party instituting the suit and not to a party who is only defending a suit and who would have no control over the forum being chosen by a Claimant.
 6. That further, the Taxing Officer fell into error when applying Paragraph 58 of the Advocates Remuneration Order because he did not give the parties, especially the Applicant, an opportunity to address him on the implication, import and consequences of the provisions of Paragraph 58.
 7. The Applicant further avers that the Taxing Officer fell into an arithmetical error and arrived at the wrong figures in his final total award. That the total award does not appear to resonate with the Taxing Officer's finding that Items 3 to 76 were drawn to scale.
 8. The Application is opposed by the Client/Respondent through the Replying Affidavit sworn on 26th November 2024 by Baroness Okweto, its Advocate on record. Ms. Okweto deposes that the Chamber Summons Application dated 23rd July 2024 is fatally defective and incompetent hence ought to be dismissed forthwith for having been brought under the Advocates (Remuneration) (Amendment) Order 2009 instead of the Advocates (Remuneration)(Amendment) Order, 2014.
 9. Ms. Okweto further avers that the Taxing Officer did not use any wrong principle in taxing the Bill of Costs dated 9th June 2023 since he relied on Paragraph 58 of the Advocates (Remuneration) (Amendment) Order, 2014 and that the Taxing Officer had the responsibility to use the correct provisions of the law in order to arrive at a just and fair decision.
 10. It is Ms. Okweto's further deposition that the Applicant has not given any cogent reason whatsoever to sustain the allegation that the Taxing Officer used the wrong principle to tax the Bill of Costs.
 11. She further states that the Taxing Officer was correct in law and principle in applying Schedule 7 of the Advocates (Remuneration) (Amendment) Order, 2014 to tax the Bill of Costs.
 12. In answer to the Applicant's assertion that the Respondent had no control over the forum chosen by the Claimant, Ms. Okweto avers that the Applicant had a chance to object to the court's jurisdiction.
 13. She further avers that if at all the conclusive total award arrived at is an arithmetical error, such an error does not warrant the filing of a reference and the Applicant had other options at their disposal.

Submissions

14. The Application was canvassed by way of written submissions which I have considered. On its part, the Applicant submitted that the scale used ought to have been Schedule 6 which applies to matters before the High Court. The Applicant further submitted that the Employment and Labour Relations Court, where the mother suit (vide Nairobi ELRC 276/2017) was filed in the year 2017, is a Court of equal status as the High Court. That the original suit was defended before the Employment and Labour Relations Court up to its conclusion.



15. The Applicant further submitted that there was no window for raising any objection to jurisdiction at the time since there was no other court that would have handled such a claim.
16. It was the Applicant's further submission that at the time of filing the original suit, the Magistrate's Courts did not have jurisdiction to hear employment matters. There was therefore no way the matter could have been lodged in the Magistrate's Court for determination.
17. In the Applicant's view, there is absolutely no justification for applying Rule 58 to this matter when the advocate has worked so hard and done his job so well so as to reduce the award or have it dismissed altogether.
18. In support of the Applicant's submissions, reliance was placed on the case of *Mwanza v Muslim Association (Mosque Committee Eldoret) (Cause 62 of 2017)* [2022] KEELRC 13077 (KLR) (1st November 2022) (Ruling).
19. On the Respondent's part, it was submitted that the Taxing Officer properly applied Paragraph 58 of the Advocates Remuneration (Amendment) Order, 2014 in the assessment of the Advocate-Client Bill of Costs dated 9th June, 2023. To this end, the Respondent referenced the case of Joseph Mumali Wanga vs Blessed TC World Class Spares Limited (2021) eKLR.
20. The Respondent further posited that there was no error of principle by the Taxing Officer and that he was guided by the law in reaching his findings and therefore cannot be faulted.

Analysis and Determination

21. Arising from the Chamber Summons, the Respondent's Replying Affidavit and the rival submissions, the singular issue falling for determination is whether the Court should interfere with the exercise of discretion by the Taxing Officer.
22. As was held in *First American Bank of Kenya Ltd v Gulab P. Shah, Panachand Jivraj Shah & Dipack Panachand Shah* [2002] KEHC 1277 (KLR) this court cannot interfere with the Taxing Officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle.
23. In the case herein, the Applicant has faulted the Taxing Officer for applying paragraph 58 of the Advocates Remuneration Order and subsequently Schedule 7 of the Advocates Remuneration Order as opposed to Schedule 6.
24. On the other hand, the Respondent has posited that the Taxing Officer properly applied Paragraph 58 of the Advocates Remuneration Order in the assessment of the Bill Costs in question.
25. Rule 58 of the Advocates Remuneration Order which forms the basis for the dispute herein provides as follows;
 - (58) In causes or matters which, having regard to the amount recovered or paid in settlement or the relief awarded, could have been brought in a Resident Magistrate's or other subordinate court. Costs on the Scale applicable to subordinate courts only shall be allowed unless the judge otherwise orders.
26. The main suit from which the instant Reference arises was filed in the Employment and Labour Relations Court (ELRC) vide ELRC Cause No. 276 of 2017 (*Festus Kiplangat Chepkwony vs Brinks Security Services Ltd*). The matter was subsequently heard and determined by the ELRC and



Judgment was delivered on 22nd July 2022. Therefore, for all intents and purposes, the proceedings were in the ELRC which is of equal status to the High Court.

27. Further, it is noteworthy that when the Cause was filed in 2017, the Magistrates Court did not have jurisdiction over employment disputes. The jurisdiction was only extended through the Gazette Notice No. 6024 of 2028 issued on 22nd June 2018. Before then, the suit could only have been filed in the ELRC and not in any other court.
28. Further, in as much as the Cause was heard and determined at a point in time when the Magistrates Court had delegated jurisdiction, the Court trying the matter did not transfer the matter to the Magistrates Court. It proceeded to hear the same to its logical conclusion.
29. In light of the foregoing, it goes without saying that the applicable scale in this case was Schedule 6 as opposed to Schedule 7.
30. In the circumstances, there was no justification for the Taxing Officer to apply Rule 58 of the Advocates Remuneration order and consequently Schedule 7 to assess the Bill of Costs.
31. It is this court's view that the formulation of Rule 58 was meant to deter litigants from filing matters in the High Court that would ordinarily be filed in the Subordinate Court so as to attract higher fees upon taxation. In this case, it is not apparent that that was the intention of the litigants when the suit was instituted and prosecuted in the ELRC as opposed to the Chief Magistrates Court.
32. For the foregoing reasons, the Court is satisfied that the Applicant/Advocate has made a justifiable case for the Court's interference with the exercise of discretion by the Taxing Officer, on the basis of error of principle.
33. Accordingly, the Chamber Summons dated 23rd July 2024 is allowed as follows:
 - a. The taxation of the Bill of Costs dated June 9, 2023 is set aside and remitted for taxation by a different Taxing Officer.
 - b. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY, 2025.

.....

STELLA RUTTO
JUDGE

In the presence of:

Mr. Kimuli for the Applicant/Advocate

Mrs. Omondi for the Respondent

Millicent Court Assistant

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, this court had 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 this 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.

STELLA RUTTO

JUDGE

