



Ogentoto v Mega Pack (K) Limited (Employment and Labour Relations Cause 101 of 2017) [2025] KEELRC 382 (KLR) (14 February 2025) (Ruling)

Neutral citation: [2025] KEELRC 382 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE 101 OF 2017
AN MWAURE, J
FEBRUARY 14, 2025**

BETWEEN

DOUGLAS OGENTOTO CLAIMANT

AND

MEGA PACK (K) LIMITED RESPONDENT

RULING

Introduction

1. The Respondent/Applicant filed a Reference vide Chamber Summons dated 30th August 2023 seeking the following orders that:
 1. The Ruling/Decision of Honourable M. Kyalo, Deputy Registrar of the Employment and Labour Relations Court of Kenya issued on 15th August 2023 on taxation of all the items of the Party & Party bill of costs dated 17th October, 2022 be set aside.
 2. The Honourable Court be pleased to set aside the Taxing Master's decision delivered on 15th August 2023 in respect to the Party & Party bill of costs dated 17th October 2022 and make a fair assessment thereupon taking cognizance of the Claimant's expectation and claim as captured in its submissions dated 13th April 2023.
 3. In the alternative, upon setting aside the subject taxation, the Honourable Court be pleased to direct the Deputy Registrar of the Employment and Labour Relations Court to re-tax/re-assess all the items in the Party & Party bill of costs dated 17th October 2022.
 4. The Honourable Court otherwise be pleased to give the requisite factors and/or guidance or directions for consideration by the Deputy Registrar of the Employment and Labour Relations Court of Kenya for purposes of the re-taxation/assessment of all the items in the Party & Party bill of costs dated 17th October 2022.



5. The costs of this Application be provided for.

Respondent/Applicant's case

2. The application is supported by the affidavit of Kisilah Daniel Gor, Advocate.
3. The Respondent/Applicant avers that he filed a party to part bill of costs on 17th October 2022 amounting to Kshs. 369,680/=.
4. The Respondent/Applicant avers that the bill of costs was placed before the Taxing Master and the same was canvassed by way of written submissions.
5. The Respondent/Applicant avers that the Claimant/Respondent's submissions urged the Taxing Master to reduce the amount asked in the bill of costs and tax it at Kshs.188,135/=.
6. The Respondent/Applicant avers that the Taxing Maser acted contrary to the principles under Schedule 6 of the Advocates Remuneration Order.
7. The Respondent/Applicant avers that the Deputy Registrar of Employment Labour Relations Court, Honourable M. Kyalo, being the Taxing Master delivered a ruling on 15th August 2023 taxing the bill of costs amounting to Kshs.335,730.
8. The Respondent/Applicant avers that the Taxing Master failed to appreciate that the costs awarded were not supported by any documents.
9. The Respondent/Applicant avers that the taxing master failed to take into account that the decree where the costs of Kshs. 28,500/= were 10 times the value of the decree rendering it incongruent, irrational and illogical.
10. The Respondent/Applicant avers that the bill of costs amounting to Kshs.335,730/= is legally flawed and unreasonable, as it violates the principle that litigation costs should not be excessively high to the point of discouraging citizens from seeking justice, making it unaffordable and exclusive to the rich.
11. The Claimant/Respondent did not file any response to the reference.
12. The court directed parties to canvass the reference by way of written submissions.

Respondent/Applicant's submissions

13. The Respondent/Applicant submitted that the taxing of the bill of costs dated 17th October 2022 by the taxing master was not founded on the legal principle of taxation. The Respondent/Applicant also submitted how the Taxing Master arrived to an award of sum of Kshs.335,730/= while the judgment awarded was Kshs.28,500/=.
14. The Respondent/Applicant submitted that the Claimant/Respondent's submissions dated 13th April 2023 indicated that the amount to be taxed should be Kshs. 188,135/= as the said amount was challenged.
15. The Respondent/Applicant submitted that taxation aims to prevent advocates from overcharging or undercharging clients, ensuring legal costs are uniform, profitable, affordable, and accessible. The Respondent/Applicant relied on the case of *Premchand Raichand Limited & Another v Quarry Services of East Africa Limited and Another* [1972] E.A 162 where the Court set out the taxation principles as follows:
 - a. That costs be not allowed to rise to such a level as to confine access to the courts to the wealthy;



- b. That a successful litigant ought to be fairly reimbursed for the costs he has had to incur;
 - c. That the general level of remuneration of advocates must be such as to attract recruits to the profession; and
 - d. That so far as practicable there should be consistency in the awards made;
 - e. The court will only interfere when the award of the taxing officer if is so high or so low as to amount to an injustice to one party;
 - f. In considering bills taxed in comparable cases an allowance may be made for the fall in value of money;
16. The Respondent/Applicant also relied on the case of *Philip Muchiri V Mbeu Kitbakwa* [2016] eKLR where the court cited the Canadian case of *Reesse V Alberta* {1993} 5 A.L.R. (3rd) 40 which laid down principles that are considered in awarding and determining costs and held that:
- “While the allocation of costs of a lawsuit is always in the discretion of the court, the exercise of that discretion must be consistent with established principles and practice.the costs recoverable are those fees fixed for the steps in the proceeding by a schedule of feesplus reasonable disbursements....
- When the case is of considerable magnitude and complexity, the practice...contemplates that the court may order the unsuccessful party to pay a multiple of the fees that are fixed by the Schedule.....”
17. The Respondent/Applicant submitted that items 9 and 11 were awarded Kshs. 1,100, but since the court was not sitting thus, these items should not have been awarded.
18. The Respondent/Applicant submitted that items 52 and 53 were arrived at erroneous figures of Kshs.204,770/= and 369,680/= respectively.
19. The Respondent/Applicant relied on Rule 11(2) of the *Advocates Remuneration Order 2009* which provides as follows:
- “The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.”
20. The Respondent/Applicant submitted that the Taxing Master failed to furnish her reasons for the items in the bill of costs when the objection was filed on 24th August 2023 which was within the timelines of the 14 days as stipulated by law. The Respondent/Applicant also submitted that the taxing master was to give reasons for the award.
21. The Respondent/Applicant urges this Honourable Court to return the bill of costs to the taxing master for re-taxation.

Claimant/Respondent’s submissions

22. The Claimant/Respondent also relied on Rule 11(2) of the *Remuneration Order* and submitted that the decision of the taxing master on the bill of costs was delivered on 15th August 2023 and the timeline of 14 days was to lapse on 30th August 2023. There is no sufficient explanation for the delay.



23. The Claimant/Respondent submitted that parties are required to stick to timelines unless time extension is done but in this instant application, there was no time extension therefore the reference was filed out of time.
24. The Claimant/Respondent relied on the case of *First American Bank of Kenya V Shab and Others* [2002] E.A.L.R.64 at 69 Ringera J (as then was) set out principles to interfere with the taxing master's decision as follows:
- “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.... it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors.... some of the relevant factors to take into account include the nature and importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial Judge... not all the above factors may exist in any given case and it is therefore open to the Taxing Officer to consider only such factors as may exist in the actual case before him...”
25. In *Nancy Wambui Gatheru V Peter Wanjere Ngugi* Nairobi HCCC No. 36 of 1993 Mwera J (as he was then) expressed himself as follows:
- “Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case.”
26. In *Ng'ang'a & another V Owiti & Another* [2008] 1KLR(EP) 749 the court held that the court may hear final submissions from counsel, which summarize the case, evidence, and law. These submissions are not part of the case itself and are not evidence. They help focus the court on key aspects affecting the case's outcome. Final submissions can be heard or dispensed with, but the main basis for a decision is the claim, evidence, and applicable law.
27. The Claimant/Respondent submitted that the Respondent/Applicant's argument for the taxing master failing to consider the submissions is not concrete.
28. The Claimant/Respondent submitted that there was no sufficient evidence that the taxing master did infringe principles of taxation while taxing the bill of costs therefore the ruling was well founded on both in law and in fact. The Claimant/Respondent relied on the case of *Kipkorir, Tito and Kiara Advocates v Deposits Protection Fund Board* [2005] eKLR where the court stated as follows:
- “On reference to a Judge from the taxation officer, the Judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs.
29. The Claimant/Respondent submitted that the taxing master has broad discretion in awarding costs and is not obligated to follow the parties' submissions. The Claimant/Respondent also submitted that



the proposals made regarding the taxation of the bill of costs did not lead to any errors in the Taxing Master's decision.

30. The Claimant/Respondent therefore urges this Honourable to uphold the Taxing Master's decision and dismiss the reference with costs.

Determination

31. This court has considered the reference together with the submissions by both parties, the issue of determination is whether the reference before this Honourable Court is merited.
32. In *Kipkorir, Tito and Kiara Advocates v Deposits Protection Fund Board*(*supra*) and *First American Bank of Kenya V Shah and Others* (*supra*) it was stated that the court will interfere with the Taxing Master's decision if there was an error in assessing costs and the error should be explained.
33. In this instant case, items 9, 11, and 12 are based on a sitting but where the court was not sitting and the case was adjourned. The taxing officer taxed all items at Kshs. 1,100/=. Those should be reviewed.
34. For item 16, this Honourable Court sat on the said date but both parties did not attend court therefore the Honourable court should set aside the taxed item.
35. For item 17, the Honourable Court has noted there was no existence of such a date in the court records therefore the court should set aside the taxed item.
36. For items 52 referred as Total and Gross, this Honourable Court has noted, that there are readjustments required since they are erroneous and therefore the same should be re-calculated.
37. Flowing from the foregoing, the Respondent/Applicant's reference dated 30th August 2023 is upheld as follows:
- a. The decision of the taxing officer in respect of items 1,2,4,5,6,8, 10, 13, 14, 15, 16, 20, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 34, 35, 38, 40, 41, 43, 44, 45, 47, 49 and 51 in the bill of costs dated 17th October 2022 is upheld.
 - b. The decision of the taxing officer in respect of items 9, 11, 12, 16 and 17 be referred to the Deputy Registrar of Employment and Labour Relations Court for revision.
 - c. Item 52 on the bill of costs claimed as Total Kshs.204,770/= and Gross Kshs.369,680/= to be recalculated by the Deputy Registrar Employment and Labour Relations Court as they are erroneous
 - d. The file to be placed before the Deputy Registrar by 3rd March 2025 for recalculation.

Order accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 14TH DAY OF FEBRUARY, 2025.

ANNA NGIBUINI MWAURE

JUDGE

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 has 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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

