



Tuimising v Lule (Cause 1688 of 2017) [2024] KEELRC 204 (KLR) (9 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 204 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1688 OF 2017
SC RUTTO, J
FEBRUARY 9, 2024

BETWEEN

KIPKOECH TUIMISING CLAIMANT

AND

PROF GODFREY NSEKERO LULE RESPONDENT

RULING

1. This Ruling arises from a taxation by Hon. Fredrick Nyamora. In his decision dated 9th August 2023, the Taxing Officer taxed the Party and Party Bill of Costs in the total sum of Kshs 160,740/=.
2. Aggrieved by the said decision, the Applicant lodged the instant Reference vide a Chamber Summons Application dated 15th August 2023 seeking the following orders:
 - a. That the Honorable Court be pleased to vacate and set aside in its entirety the Ruling and reasoning of the Honourable Fredrick M Nyamora, Deputy Registrar, dated and delivered on the 9th August 2023, taxing the Party and Party Bill of Costs dated 29th March 2023 at Kenya Shillings One Hundred and Sixty Thousand, Seven Hundred and Forty Shillings (Kshsn160,740/=) and refer the matter for fresh taxation before a Taxing Master.
 - b. The costs of this Application be provided for.
3. The Application is founded on the grounds set out on its face and the Supporting Affidavit sworn on 15th August 2023, by Godfrey Nsekero Lule, the Applicant herein. The Applicant avers that the Judgment was Kshs 88,688.24 and as such, the Instruction fees can only be Kshs 1,330.32. He contends that the instruction fees in this case was taxed at Kshs 75,000.00 which is way more than the amount due to scale. He further states that the getting up fees was exaggerated as a result.
4. According to the Applicant, the Taxing Officer erroneously exercised his discretion by taxing the matter at Kshs 160,740.00.



5. In response to the Chamber Summons Application, the Claimant filed a Replying Affidavit sworn on 6th November 2023.
6. The Claimant avers that he is advised by his Advocates on record whose advise he verily believe to be true that this court cannot interfere with the Taxing Officer's decision on taxation unless it is shown that the decision was based on an error of principle or the fee awarded was manifestly excessive or too low. That even though the Applicant did not oppose the Party and Party Bill of Costs, the Taxing Officer proceeded on the correct principles and properly exercised his discretion judiciously in taxing his Party and Party Bill of Costs at Kshs 160, 740.00.
7. He is further advised by his Advocates on record whose advise he verily believe to be true that the Applicant has not shown that the decision of the Taxing Officer was based on wrong principles or that the fees awarded was excessive or that the Taxing Officer took into account any irrelevant factors or omitted any relevant factors in arriving at his decision to warrant an interference by this Court.

Submissions

8. The Application was canvassed by way of written submissions. Both parties complied and I have considered their respective submissions.

Analysis and Determination

9. As I can discern from the Application before me, the Responses thereto as well as the rival submissions, the singular issue arising for determination by this Court is whether the Taxing Officer erred in law and principle while taxing the Party and Party Bill of Costs herein and thereby reached a wrong assessment.
10. In the case of *Kipkorir, Titoo & Kiara Advocate v Deposit Protection Fund Board* (2005) eKLR, it was stated as follows:

“On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing office unless the taxing officer, erred in principle in assessing the costs. In *Arthur v Nyeri Electricity Undertaking* [1961] EA 497, the predecessor of this court said at page 492 paragraph 1:

“Where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases”.

11. Essentially, a Judge will only interfere with the exercise of discretion by the Taxing Officer where there is an error in principle in assessing costs.
12. As to what would amount to an error of principle, the Court reckoned as follows:

“An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles – see *Arthur v Nyeri Electricity Undertaking* (supra) or where the taxing officer has over emphasized the difficulties, importance and complexity of the suit (see *Devshi Dhanji v Kanji Naran Patel (No. 2)*, [1978] KLR 243. We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA (1), that would be an error in principle.”



13. As stated herein, the Applicant’s main contention is that the Taxing Officer ought to have based the instruction fees on the pleadings, Judgment or settlement and it is only in the absence of the three that the Taxing Officer can exercise discretion. The Applicant has further argued that in this case, the Judgment was Kshs 88,699.24 hence the instruction fees can only be Kshs 1,330.32. He further contends that the instruction fees was taxed at Kshs 75,000.00 which is way more than the amount due to scale.
14. The argument by the Applicant brings up the question of the value of the subject matter. It is trite that instruction fees are charged from the value of the subject matter. In the case of *Joreth Ltd v Kigano & Associates* [2002] 1 EA 92, the Court addressed the issue as follows:

“We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a Bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case), but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.” Underlined for emphasis
15. In a nutshell, the subject matter may be ascertained from the pleadings, judgment or settlement.
 11. In the case herein, the Court entered Judgment in favour of the Claimant for the sum of Kshs 83,688.24 hence the said award constituted the value of the subject matter.
16. Turning to the 6th Schedule Part A of the *Advocates Remuneration Order*, the same is couched as follows:
 - (1). The fees for instructions in suits shall be as follows, unless the taxing officer in his discretion shall increase or (unless otherwise provided) reduce it—
 - a)
 - b) To sue in any proceedings described in paragraph (a) where a defense or other denial of liability is filed; or to have an issue determined arising out of inter-pleader or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties and—

That value exceeds But does not exceed

Kshs. Kshs Kshs

-- 500,000 75,000
17. Taking into account the foregoing provisions of the Advocate’s Remuneration Order and noting the award by the Court, it is evident that the instruction fees in the sum of Kshs 75,000.00 is within the scale. Fundamentally, that was the basic instruction fees in this case.
18. As was determined in *First American Bank of Kenya Ltd v Gulab P Shah & Others* [2002]1 E.A, the Taxing Officer is vested with discretion to increase or decrease the instruction fees. It is apparent in this case, that the Taxing Officer exercised discretion and determined the instruction fees as per scale hence neither increased nor reduced the same. The instruction fees was strictly taxed to scale.



19. As stated herein, and drawing from numerous authorities, the Court will only interfere with the decision of the Taxing Officer where there has been an error in principle but should not do so in questions solely of quantum as that is an area where the Taxing Officer is more experienced and therefore more apt to the job.
20. I am fortified by the decision of the Supreme Court in *Outa v Odoto & 3 others* (Petition 6 of 2014) [2023] KESC 75 (KLR) (22 September 2023) (Ruling) where it was held that:

“To these general principles, I may add that...The single Judge will normally not interfere with the decision of the taxing officer merely because the Judge believes he would have awarded a different figure had he been in the taxing officer’s shoes.”
21. And further, in *Non- Governmental Organizations Coordination Board v EG & 5 others* (Petition (Application) 16 of 2019) [2023] KESC 102 (KLR) (Civ) (8 December 2023) (Ruling), where the Apex Court held that:

“(28) Unless the taxing officer improperly exercises his discretion or applies the wrong principles or the quantum awarded is obviously wrong, the single Judge ought not to interfere with the decision of the taxing officer on the mere question of quantum, or merely because the single Judge would have awarded a different figure had he been the taxing officer.”
22. Drawing from the above authorities and bearing in mind the relevant provisions of the 6th Schedule Part A of the *Advocates Remuneration Order*, I find no error of principle by the Taxing Officer in assessing the instruction fees in the instant case as to warrant this Court to interfere with the same.
23. Turning to the question of the getting up fees, the *Advocates Remuneration Order* provides for the same where a denial of liability is filed or in which issues for trial are joined by the pleadings. In this case, as the matter was defended and went to full trial, a getting up fee was awarded in the sum of Kshs 25,000.00, which is a third of the instruction fees. Again, this amount was taxed to scale hence I see no basis for interfering with the same.
24. With regards to the other items being attendances, drawings and perusals, I find no reason to fault the Taxing Officer in the manner in which he exercised his discretion as the said items were also taxed to scale.
25. All things considered, it is my finding that the Taxing Officer substantially complied with Schedule IV of the *Advocates Remuneration Order* and the proviso thereto.
26. In light of the foregoing, I find no merit in the Reference hence I have no basis to interfere with the decision of the Taxing Officer.
27. Accordingly, the Reference is dismissed with no orders as to costs.

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.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024.

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STELLA RUTTO

JUDGE

Appearance:

Mr. Obuya for the Applicant/Respondent

Mr. Tonui for the Respondent/ Claimant

Abdimalik Hussein Court Assistant

