



Murila v Langat & another (Employment and Labour Relations Cause 1153 of 2014) [2024] KEELRC 683 (KLR) (15 March 2024) (Ruling)

Neutral citation: [2024] KEELRC 683 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1153 OF 2014
AN MWAURE, J
MARCH 15, 2024**

BETWEEN

SUSAN MURILA CLAIMANT

AND

RICHARD KIPKOECH LANGAT 1ST RESPONDENT

NATIONAL SECURITY SOCIAL SECURITY FUND 2ND RESPONDENT

RULING

1. The Respondents filed Chamber Summons dated 6th October 2023 seeking orders that:
 1. Pending the hearing and determination of this Application, the Honourable Court be pleased to grant leave to the firm of P.K. Mbabu & Co. Advocates to come on record for the Applicants.
 2. The Honourable Court be pleased to enlarge time which the Applicants can file an objection and a taxation reference against the ruling of the taxing officer delivered on 15.09.2023.
 3. Consequent to grant of order 2 above, the notice of objection filed herein and this Application be deemed to be duly filed and properly before the Court.
 4. The ruling of the taxing officer delivered on 15.09.2023 in so far as the same relates to the reasoning and determination pertaining to the Claimant's Party and Party Bill of Costs dated 16.08.2021 be set aside.
 5. The Honourable Court be pleased to re-tax the Claimant's Party to Party Bill of Costs dated 16.08.2021.
 6. In the alternative to prayer 5, the Honourable Court be pleased to refer the matter back for re-taxation of the Claimant's Party to Party Bill of Costs dated 16.08.2021 before another taxing officer with proper and appropriate directions thereon.



7. the costs of this application be borne by the Claimant.

Respondents/ Applicants' Case

2. The Respondents/ Applicants aver that *vide* a ruling delivered on 26.01.2022, the Bill of Costs was taxed at Kshs 236,954 which was later reviewed due to an arithmetic error apparent on the face of record and amount increased to Kshs 306,929 *vide* a ruling delivered on 17.02.2022.
3. The Respondents/ Applicants aver that being dissatisfied with the ruling, the Claimant filed Chamber Summons dated 12.05.2022 seeking to enlarge time to institute reference proceedings and to set aside the rulings of the taxing officer delivered on 26.01.2022 and 17.02.2022.
4. The Respondents/ Applicants aver that the court set aside the decision of the taxing officer and referred the Bill to a different taxing officer for re-taxing. Consequently, the Claimant's Bill of Costs was placed before Hon. Fredrick Nyamora who taxed it at Kshs 1,390,269.67 *vide* his ruling of 15.09.2023.
5. The Respondents/ Applicants aver that they received a copy of the ruling on 25.09.2023 when it forwarded to them by their previous advocates. Subsequently, the Respondents had to seek approval from the 2nd Respondent's Board of Trustees to file a reference to challenge the ruling. The approval was granted on 29.09.2023.
6. The Respondents/ Applicants aver that they instructed the firm of P.K Mbabu & Co Advocates to take over the conduct of the matter from their previous advocates and file a reference against the ruling.
7. The Respondents/Applicants aver that the delay in filing the reference has been caused by delay in getting approval of the Board compounded by the delay in transferring the matter from its former advocates to its new advocates. Hence the delay is justifiable and not inordinate.
8. The Respondents/Applicants aver that the taxing officer in his ruling of 15.09.2023 taxed the Claimant's Party and Party Bill of Costs at Kshs 1,000,000 which is ten times more than the basic instruction fees of Kshs 100,000 provided under the Advocates Remuneration Order.
9. The Respondents/Applicants aver that the amount is manifestly excessive to constitute an error of principle. The matter was seeking a declaratory order and permanent injunction and nothing more. There was nothing complex to warrant the increase of the basic instruction fees by ten times.
10. The Respondents/Applicants aver that the taxing master committed an error in principle in failing to appreciate that the Claimant's suit took years to conclude is not necessarily indicative of the time and resources expended in the suit.
11. The Respondents/Applicants aver that the taxing officer failed to consider the 2nd Respondent being a public institution, the amount awarded will be paid by public resources. As such awarding excessive costs, the taxing officer acted contrary to public policy and notably the Claimant is till an employee of the 2nd Respondent.

Claimant/ Respondent's Case

12. In opposition to the application, the Claimant/ Respondent filed a replying affidavit dated 14th November 2023.
13. The Claimant/ Respondent avers that this matter has already been taxed twice by two different taxing masters, taking the matter for taxation for a third time shall be abuse of the court process.



14. The Claimant/ Respondent avers that when taxing instruction fees, the taxing master is not limited to Kshs 100,000 limit. He may exercise his discretion while taking into account various relevant factors such as value of the subject matter, the complexity, industry put, time taken on the matter and work done.
15. The Claimant/ Respondent avers that the taxing master did not err when he taxed the Respondent's Party and Party Bill of Costs at Kshs 1,000,000, this was a proper exercise of his discretion. The taxing officer considered the time taken to prosecute the suit which was for a period of over 5 years, this cannot be ignored when assessing instruction fees.
16. The Claimant/ Respondent avers that the Respondents have not demonstrated why Kshs 1,000,000 is manifestly excessive to warrant intervention by this court.
17. The Claimant/ Respondent avers that the suit which is the subject matter of the Bill of Costs was not a simple matter, they had a direct impact on the Respondent's discharge of her statutory duties and rights and at the material time the Claimant filed the suit her job was indeed at stake.
18. The Claimant/ Respondent avers that the Applicants suggestion that the 2nd Applicant is a public institution and the amount awarded in cost would be paid using public resources is untenable and bad in law.
19. The Claimant/ Respondent avers that the Applicants failed to comply with Rule 11 of the Advocates Remuneration Order and proceeded to file their Chamber Summons on 06.10.2023 outside the 14-day time limit. They have failed to annex any evidence to demonstrate that the board approval was obtained on Sunday 29.09.2023.
20. The Claimant/ Respondent avers that the Applicant have not explained the inordinate delay which is fully attributable to them.

Respondents/Applicants Submissions

21. The Respondents/Applicants submitted that the impugned ruling was delivered on 15.09.2023 and they ought to have filed a notice of objection within 14 days that is not later than 29.09.2023. The notice of objection and reference herein were filed on 06.10.2023, a delay of only 7 days.
22. The Respondents/Applicants submitted that the delay is neither inordinate nor inexcusable as it has been satisfactorily explained. The Respondents/Applicants received a copy of the ruling on 25.09.2023 when the same was forwarded to them by their previous advocates, the firm of Ogetto, Otachi & Co Advocates. Upon receipt and review of the ruling, the 2nd Respondent had to seek approval from its Board of Trustees to file a reference challenging the ruling which was granted on 29.09.2023.
23. The Respondents/Applicants submitted that the delay in filing the reference was also caused by the delay in transferring the matter from their previous advocates to its new advocates the firm of P.K Mbabu & Co Advocates.
24. The Respondents/Applicants submitted that no prejudice will be suffered by the Claimant if the time for filing the reference is enlarged. The delay by only 7 days cannot be inordinate by any stretch of imagination.
25. The Respondents/ Applicants submitted that as per Clause 11(2) of the Advocates Remuneration Order, time for filing a reference against the decision of the taxing officer began to run from 25.09.2023 when they received the reasons for taxation. The reference was filed on 06.10.2023, 11 days from



- the date of receipt of the reasons for taxation. Therefore, the reference was filed within the timelines provided under Clause 11(2) of the *Advocates Remuneration Order*.
26. The Respondents/Applicants submitted that taxation of costs is an exercise of judicial discretion; the circumstances under which a judge interferes with the taxing officer's exercise of discretion are now well settled in *Ngatia & Associates Advocates v Interactive Gaming & Lotteries Limited* [2017] eKLR.
 27. The Respondents/Applicants submitted that vide his ruling of 15.09.2023, the taxing officer taxed item one of the Claimant's Party and Party Bill of Costs at Ksh 1,000,000 which is ten times more than the basic instruction fees. The amount is manifestly excessive to constitute an error of principle.
 28. The Respondents/Applicants submitted that the taxing officer erred in principle by failing to appreciate that the suit was a matter seeking a declaratory order and a permanent injunction nothing more. There was nothing complex to warrant the increase of the basic instruction fees by ten times; there was no justification to increase the minimum instruction fees from Kshs 100,000 to Kshs 1,000,000.
 29. The Respondents/Applicants submitted that the taxing officer erred in principle by applying loose textures criteria in increasing the basic instruction fees. The taxing officer simply stated to have considered the time taken, the nature and interest of the case, volume of documents and research on the law without giving any specification. He did not clarify how the matter was time consuming and the research undertaken by counsel.
 30. The Respondents/Applicants submitted that the taxing officer committed an error in principle by failing to appreciate the fact that the Claimant's suit took several years to conclude is not necessarily indicative of the time and reasons expended in the suit. It may be an indication on the Claimant's failure to prosecute her case expeditiously.
 31. The Respondents/Applicants submitted that the number of court attendances is not a matter for consideration when taxing instruction fees because the same is provided for under a different head of costs.
 32. The Respondent/Applicants submitted that the taxing officer committed an error in principle by stating the documents involved were voluminous which was not the case. The taxing master failed to appreciate the Claimant had separately charged for every document drawn and perused per folio.
 33. The Respondent/Applicants submitted that the taxing officer committed an error in principle by concluding that the Claimant knew her job was at stake, which was not the case. This was not supported by any evidence at all considering that the Claimant's case was that her job description had been varied without consultation.
 34. The Respondent/Applicants submitted that the taxing officer failed to consider that the 2nd Respondent being a public institution, the amount awarded as costs would be paid using public resources, hence, the award of excessive costs acted contrary to public policy.
 35. The Respondent/Applicants submitted that the court should not hesitate to interfere with the taxing officer's ruling as it is shown he committed an error of principle in arriving at the award.

Claimant/Respondent's Submissions

36. The Claimant/ Respondent submitted that this court should not allow the enlargement of time as the Applicants have failed to demonstrate that they were justified to file or excused from complying with the mandatory provisions of the law relating to timeframes.



37. The Claimant/Respondent submitted that the rules of procedure exist to provide a formal channel where justice can be attained fairly, expeditiously and without delay. Where procedural rules dictate timelines, they must be adhered to. She relied on *Mombasa County Government v Kenya Ferry Services & Another* [2019] eKLR.
38. The Claimant/Respondent submitted that the Respondent/Applicant has not demonstrated substantial loss to warrant issuance of the orders of stay of execution. It is not enough to merely put forward allegations or assertion of substantial loss, the Applicant has a duty to demonstrate to the Court through documentary evidence its claim.
39. The Claimant/Respondent submitted that the Applicants have not demonstrated to the court's satisfaction that there was reasonable cause for the 7-day period of delay. It is evident that the Applicants were aware that Hon. Nyamora had delivered a ruling on the taxation on 15.09.2023 and it was upon them to ensure the objection was filed within the required time frame.
40. The Claimant/Respondent submitted that the Applicants have failed to demonstrate how the taxing master erred in the calculation of the basic instruction fees. A court cannot interfere with a taxing master's decision unless it is shown that its either based on an error of principle or it was manifestly excessive.
41. The Claimant/Respondent submitted that the matter herein was already in issue between the same parties and retaxed by Hon. Nyamora. Therefore, the matter is res judicata and an affront to the principal of finality in litigation.

Analysis and Determination

42. The first issue for determination is whether this court should enlarge time to enable the Applicants file a Reference against the ruling of the Taxing Master out of time.
43. In *Odera Obar & Co. Advocates v Aquva Agencies Limited* [2021] eKLR, the High Court held:

“Paragraph 11 of the *Advocates Remuneration Order* provides as follows;

1. Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
2. 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.
3. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
4. The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”



In *Fabim Yasin Twaha v Timamy Issa Abdalla & 2 Others* [2015] eKLR the Supreme Court, laid out the general principles governing extension of time thus: -

“As regards extension of time, this Court has already laid down certain guiding principles. In the *Nick Salat case*, it was thus held:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;
2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;
4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the respondents, if extension is granted;
6. whether the application has been brought without undue delay; and
7. whether in certain cases, like election petitions, public interest should be a consideration for extending time”.

44. On the issue of delay, Mohammed J. (as he then was) held as follows in *George Kagima Kariuki & 2 Others v George M. Gichimu & 2 Others* [2014] eKLR: -

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favorably exercisable.”



The same position was taken in *Stanley Kaboro Mwangi & 2 Others v Kanyamwi Trading Company Limited* [2015] eKLR where the court was of the view that: -

“A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favorably exercised.”

45. The argument that delay was only for 7 days and was occasioned by the late service of the ruling by its former advocates is in courts opinion not inordinate delay and being only 7 days the court should find it is reasonable delay. In the case of *George Kagima Kariuki & 2 Others v George M. Gichimu & 2 Others* (supra); the law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained.
46. The Applicants explained the delay on grounds that Upon receipt and review of the ruling, the 2nd Respondent had to seek approval from its Board of Trustees to file a reference challenging the ruling which was granted on 29.09.2023.
47. The court finds it prudent to exercise its discretion and allow the respondents/applicants to enlarge the time to file their reference to the ruling of the taxing officer dated 15th September 2023 and to admit the application as duly filed.
48. The firm of P.K. Mbaabu are allowed to come on record on behalf of the respondent’s application as is a right of a client to be represented by an advocate of his choice. The court finds it also prudent to re-tax the claimant’s party to party bill of costs because it is quite excessive considering the provisions of schedule VI of the *advocates remuneration act* which states as follows:

“to present or oppose an application for a constitutional and prerogative orders such as fee as the taxing matter in the exercise of his discretion and taking into consideration the nature and importance of the petition or application the complexity of the matter and the difficulty or novelty of the question raised, the amount on value of the subject matter, the time expended by the advocate:-

- i. Where the matter is not complex or opposed such sum as may be reasonable but not less than kshs 45,000.
 - ii. Where the matter is opposed and found to satisfy the criteria set out above, such sum as may be reasonable but not less than kshs 100,000
 - iii. To present or oppose application for setting aside arbitral award 50,000.
49. The court has considered all the grounds raised by Hon. Nyamora that the suit was complex and had voluminous documents and it took several years. That notwithstanding the same is still quite excessive and the court will re-tax the same as follows:
 - (1) The instructions fees will be awarded at kshs 600,000/-
 - (2) Getting up fees will therefore be 200,000
 - (3) The rest of the items will not be retaxed as they are not in issue.
 - (4) Total bill of cost is therefore allowed at Kshs 1,390,269.67-533,333=856,936/67Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 15TH DAY OF MARCH, 2024.

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

