Public Service Commission & another v Kenya County Government Workers Union; Mbuvi t/a Katunga Mbuvi & Co Advocates (Applicant); Kenya County Government Workers Union (Formerly Kenya Local Government Workers Union) (Respondent) (Miscellaneous Application E248 of 2021) [2024] KEELRC 525 (KLR) (7 March 2024) (Ruling)

Neutral citation: [2024] KEELRC 525 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISCELLANEOUS APPLICATION E248 OF 2021

BOM MANANI, J

MARCH 7, 2024

BETWEEN

PUBLIC SERVICE COMMISSION ..... 1ST CLAIMANT

ASSOCIATION OF LOCAL GOVERNMENT WORKERS UNION .... 2ND CLAIMANT

AND

KENYA COUNTY GOVERNMENT WORKERS UNION ..... RESPONDENT

AND

LEONARD K MBUVI T/A KATUNGA MBUVI & CO ADVOCATES ..... APPLICANT

AND

KENYA COUNTY GOVERNMENT WORKERS UNION (FORMERLY KENYA LOCAL GOVERNMENT WORKERS UNION) ..... RESPONDENT

RULING

1. This is a reference from the ruling by the Taxing Master which was rendered on 9th June 2023 in respect of the Advocate-Client Bill of costs that is dated 16th December 2021. Kenya County Government Workers Union (hereafter referred to as the Client) avers that the Taxing Master made errors of principle in the decision, a matter which entitles it (the Client) to have the decision set aside and the Bill of Costs taxed afresh by this court.

2. The reference is opposed. Leonard K Mbuvi T/A Katunga Mbuvi & Co Advocates (hereafter called the Advocate) takes the position that there is no error that was committed by the Taxing Master to warrant the instant application. Further, the Advocate believes that the reference is res-judicata.

3. Besides the reference, the Advocate has filed the application dated 6th July 2023 in which he prays that judgment be entered in his favour in terms of the Certificate of Costs that was issued by the Taxing Master on 4th July 2023. This latter application is opposed by the Client who contends that the court cannot enter judgment in favour of the Advocate in respect of the Certificate as it is premised on an improperly taxed Bill.

4. The grounds in support of the reference are that:-

    a. The Taxing Master relied on the wrong provision of the Advocates Remuneration order to determine instruction fees;

    b. The Taxing Master grossly overstated instruction fees;

    c. The Taxing Master failed to give credit for payments made by the Client to the Advocate as fees in the cause.

5. The Client argues that these three matters constitute errors of principle which render the taxation order inappropriate. As such, the order should be set aside and fresh taxation done.

6. The Advocate has argued that the reference is res-judicata. According to the Advocate, the Client had filed a similar reference which was determined by this court in its ruling dated 13th December 2022. Therefore, the instant reference is res-judicata.

Analysis

7. The ruling by this court dated 13th December 2022 related to an earlier reference that arose from a taxation order that was issued on 31st May 2022. The ruling set aside the taxation order of 31st May 2022 and ordered that the Bill of Costs dated 16th December 2021 be taxed a fresh before another Taxing Master.

8. The instant reference stems from the taxation order of 9th June 2023. This latter taxation order is distinct from the one that issued on 31st May 2022. Therefore, the same is not res-judicata.

9. That said, the court holds the firm view that although the two references arise from taxation of the same Bill of Costs, they ought to have been filed separately. It was improper for the Client to file the latter reference in the cause that commenced the earlier reference as it had been dealt with and closed. The instant reference, arising from the fresh taxation, constitutes a distinct cause of action from the earlier one which required separate processing.

10. The Client has asserted that the Taxing Master relied on the wrong Schedule of the Advocates Remuneration Order to determine instructions fees. According to the Client, the Taxing Master erroneously relied on Schedule VI rule (1) (j) which fixes base instruction fees at Ksh. 28,000.00 instead of Schedule VI rule (1) (l) which provides for base instruction fees of Ksh. 6,300.00.

11. The Client's argument is premised on the fact that Schedule VI rule 1(j) deals with actions in which prerogative orders are sought. According to it (the Client), the instant action did not seek prerogative orders. Therefore, base fees on it cannot be determined by reference to this Schedule. The Client argues that because the value of the subject matter of the action cannot be determined by reference to the

pleadings or judgment in the cause, the applicable Schedule in determining base fees for the matter is Schedule VI rule (1) (l).

12. I have considered the submission by the Client in this respect. It is true that the suit informing the taxation did not seek any of the prerogative orders to wit certiorari, prohibition and mandamus. However and as the Client concedes in its submissions, the action sought among other orders a declaratory order that the Collective Bargaining Agreement registered in court on 7th February 2013 between the parties to the action was lawful.

13. Whilst a declaratory order is often not included in the family of prerogative remedies, it is nevertheless recognized as a public law remedy which often issues together with the traditional prerogative remedies. To the extent that this remedy has always been considered together with the other prerogative remedies mentioned above, it falls in the family of these remedies. Therefore, the Taxing Master did not fall into error in considering the action in the parent suit as having, in part, sought a prerogative order.

14. Besides the foregoing, the Client has taken issue with the way the Taxing Master exercised his discretion in increasing instructions fees. According to it (the Client), even if the base fees was to be considered as Ksh. 28,000.00 as provided for under Order VI rule (1) (j), it could not for whatever reason be increased to Ksh. 2,000,000.00. This increment, representing more than seventy two (72) times the base fees, was inordinately high thus constituting an error of principle.

15. In his ruling, the Taxing Master considered the interest in the cause as a determinant for increasing the instruction fees from Ksh. 28,000.00 to Ksh. 2,000,000.00. There is no suggestion in the ruling that the cause was complex to warrant such a sharp rise in the instruction fees.

16. The fact that the suit was intended to benefit many individuals who were members of the Client does not appear to me to have been a justifiable reason for raising instruction fees more than seventy two (72) fold. This is particularly in view of the fact that the main purpose of the action was to enforce an already negotiated and registered Collective Bargaining Agreement between the parties. In effect, it was an action for specific performance of a contract whose terms were already agreed between the parties.

17. Such action cannot be described as complex. In any event, the trial court did not certify the matter as complex to warrant the sharp rise in instruction fees.

18. It is true that the results of the action was to benefit several individuals who were members of the Client. Therefore, the matter was of considerable significance to the parties. However, this alone could not have justified the increase in instruction fees more than seventy two (72) fold.

19. I note that in its submissions, the Client is of the view that the matter ought to have attracted instruction fees that did not exceed Ksh. 200,000.00. However, having regard to the myriad people (approximately 25,000 as estimated by the Advocate in his affidavit dated 11th April 2023), the matter was of significant importance to the parties and therefore exerted considerable pressure on the Advocate. Thus, I consider that instruction fees of Ksh. 500,000.00 would have been fair in the circumstances. Consequently, I set aside the award of instruction fees of Ksh. 2,000,000.00 and substitute it with an award of Ksh. 500,000.00.

20. Having reduced instruction fees as above, item two (2) in the Bill of Costs has to inevitably be revised to one half (1/2) of the instruction fees now granted. This works out to Ksh. 250,000.00. It is so ordered.

21. Save for the above adjustments, the other items remain as taxed by the Taxing Master. The total of the other items after taxation as per the ruling of the Taxing Master dated 9th June 2023 works out to Ksh. 36,217.00.

22. Value Added Tax on the above amount is fixed at 16%. This works to Ksh. 125,795.00.

23. The Client has attacked the ruling of the Taxing Master for having failed to discount Ksh. 2,600,000.00 allegedly paid on account of the suit under inquiry. This attack is not well founded.

24. First, by its own admission, the Client contends that the nature of the action under inquiry could not have warranted instruction fees of more than Ksh. 200,000.00. If this is the position taken by the Client, how can it explain its decision to pay Ksh. 2,600,000.00 for a matter it contends was incapable of attracting instruction fees that is in excess of Ksh. 200,000.00?

25. Second and as correctly observed by the Taxing Master, apart from displaying evidence that it has remitted Ksh. 2,600,000.00 to the Advocate, the Client did not provide evidence to link this payment to cause number 1023 of 2013 that is the subject of taxation.

26. The record placed before the Taxing Master shows that apart from cause number 1023 of 2013, the parties had several other files. Therefore and in the absence of cogent evidence to link payment of Ksh. 2,600,000.00 to cause 1023 of 2013, there was no way the Taxing Officer was going to make an assumption that the payments were to the credit of that file and therefore grant credit to the Client. This is particularly in view of the fact that the Advocate has denied that the amount was paid to the credit of cause number 1023 of 2013.

27. It was up to the Client to provide proof that the Ksh. 2,600,000.00 was for the credit of cause number 1023 of 2013 by for instance providing letters forwarding the payment cheques to show they were for this file. This was not done. Therefore, the Taxing Officer was right to reject the Client's invitation to discount the amount so taxed by the alleged payment of Ksh. 2,600.000.00.

28. Until the Client provides cogent evidence linking the Ksh. 2,600,000.00 to cause number 1023 of 2013, it is not entitled to a credit for this amount in respect of this file. Therefore, I do not agree that by declining to grant the client credit for Ksh. 2,600,000.00, the Taxing Master made an error of principle.

Determination

29. The upshot is that the court makes the following findings and orders:-

    a. The instant reference is not res-judicata.

    b. The Taxing Master did not commit an error of principle in relying on Schedule VI (1) (j) of the Advocates Remuneration Order, 2006 as amended in 2009 to ascertain the base instruction fees in the matter.

    c. However, the reference partially succeeds as hereunder:-

        i. The taxing Master's orders on items 1 and 2 in the Advocate-Client Bill of Costs dated 16th December 2021 are set aside and the two items taxed afresh at Ksh. 500,000.00 and Ksh. 250,000.00 respectively.

        ii. The other items in the said Bill of Costs remain as taxed by the Taxing Master at Ksh. 36,217.00.

        iii. VAT on the taxed costs is revised to Ksh. 125,795.00.

    d. The request by the Client to be given credit of Ksh. 2,600,000.00 towards satisfaction of the outstanding costs in cause number 1023 of 2013 is rejected as no evidence was tendered to demonstrate that the said sum was paid to the credit of the cause.

e. Accordingly, judgment is entered for the Advocate for Ksh. 912,012.00 in terms of paragraphs 29 (c) (i), (ii) and (iii) above.

f. Each party to bear own costs for this reference.

DATED, SIGNED AND DELIVERED ON THE 7TH DAY OF MARCH, 2024

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Client

.....for the Advocate

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