



**Nairobi City County v Kenya Local Government Workers Union & another;  
Kenya County Government Workers Union (Client); Leonard K.Mbuvi t/  
a Katunga Mbuvi & Co. Advocates (Advocate) (Miscellaneous Application  
E208 of 2021) [2024] KEELRC 744 (KLR) (8 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 744 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
MISCELLANEOUS APPLICATION E208 OF 2021  
BOM MANANI, J  
APRIL 8, 2024  
IN THE MATTER OF ADVOCATE-CLIENT BILL OF COSTS  
ARISING OUT OF LEGAL SERVICES IN CIVIL CAUSE NO. 1410  
OF 2013, NAIROBI**

**BETWEEN**

**NAIROBI CITY COUNTY ..... CLAIMANT**

**AND**

**KENYA LOCAL GOVERNMENT WORKERS UNION ..... 1<sup>ST</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**KENYA COUNTY GOVERNMENT WORKERS UNION ..... CLIENT**

**AND**

**LEONARD K.MBUVI T/A KATUNGA MBUVI & CO.  
ADVOCATES ..... ADVOCATE**

**RULING**

**Background**

1. The instant reference stems from a taxation order that was rendered on 30<sup>th</sup> June 2023. The Applicant/ Client accuses the Taxing Master of having committed errors of principle which justify this court to set aside the impugned order.



2. In particular, the Applicant/Client has identified two areas where it considers that the errors occurred. First, it is argued that the raise in instruction fees from Ksh. 6,300.00 to Ksh. 1,200,000.00 constituted a grave error of principle that resulted in the award of an excessive sum towards instruction fees. Second, it is argued that the failure to grant the Applicant/Client credit for earlier payments amounting to Ksh. 3,100,000.00 was in error.
3. The reference is opposed. The Advocate denies that the Taxing Master committed the alleged errors of principle. In addition, the Advocate contends that the instant reference is res-judicata, the issues raised in it having been litigated in an earlier reference that arose from a taxation order in respect of the same Bill of Costs. Further, the Advocate denies that the Applicant/Client paid him Ksh. 3,100,000.00 towards fees in Cause No. 1410 of 2013 which gave rise to the instant taxation.
4. The Advocate has filed a separate application dated 20<sup>th</sup> July 2023 in which he prays for judgment to be entered in his favour in terms of the Certificate of Costs that was issued pursuant to the taxation order of 30<sup>th</sup> June 2023. The Applicant/Client has objected to the request on the ground that it cannot issue in the face of this reference which seeks to set aside the taxation order.

### Analysis

5. This is the second reference to arise from taxation of the Client-Advocate Bill of Costs between the parties in relation to Cause No. 1410 of 2013. The first reference stemmed from the Taxing Master's decision that was rendered on 31<sup>st</sup> May 2022. The taxation order was eventually set aside and the matter remitted to another Taxing Master for fresh taxation. It is this latter taxation that yielded the taxation order of 30<sup>th</sup> June 2023 which is the subject of this reference.
6. As counsel for the Applicant/Client intimates, the court expressed the view that since the reference in respect of the first taxation was closed when the court rendered its ruling on 13<sup>th</sup> December 2022, the instant reference ought to have been filed as a standalone reference instead of being filed in the closed reference file. Despite this observation by the court, I agree with counsel that the instant reference is not res-judicata since it arose from the taxation order of 30<sup>th</sup> June 2023 and not the one of 31<sup>st</sup> May 2022.
7. It is now settled that a Judge in a reference is not entitled to interfere with the decision of a Taxing Master in respect of a Bill of Costs unless it is apparent that the Taxing Master committed an error of principle in arriving at the impugned decision. Underscoring this position, the Court of Appeal in the case of *Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR expressed itself as follows:-

“On 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 Officer unless the Taxing Officer, erred in principle in assessing the costs.”
8. In *First American Bank of Kenya Ltd v Gulab P. Shah & 2 others* [2002] eKLR, the learned Judge commended on the matter 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.”
9. In determining the quantum of instructions fees, the Taxing Master is supposed to be guided by the value of the subject matter. This value ought to be discerned from the pleadings or the judgment of the court or the settlement between the parties.



10. Where the value of the subject matter cannot be ascertained in the manner that has been alluded to above, the Taxing Master is allowed to use his discretion to determine the amount of instructions fees. However, this discretion is guided by settled legal principles. It is not exercised whimsically.
11. Usually, the Taxing Officer will consider factors such as: the complexity of the case; the nature and importance of the case; the time expended on handling the matter; and the interest of the parties in the dispute. The foregoing was well articulated by the Court of Appeal in *Joreth Ltd v Kigano & Associates* [2002] 1 E.A. 92 when it stated 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.”
12. In the suit that gave rise to this taxation, the value of the subject matter could not be ascertained by reference to the pleadings or the decision of the court. Indeed, this issue was discussed at length in *Kenya County Government Workers Union v Mbuvi t/a Katunga Mbuvi & Co Advocates* (Miscellaneous Application E208 of 2021) [2022] KEELRC 13500 (KLR) (13 December 2022) (Ruling) in which the earlier taxation of the Bill of Costs that has given rise to this reference was considered.
13. The foregoing being the position, the Taxing Master in the ruling dated 30<sup>th</sup> June 2023 correctly appreciated that he had to invoke Schedule VI rule 1(i) of the Advocates Remuneration Order, 2009 to determine the base instruction fees. Thus, he correctly declared that the base instruction fee in the matter was Ksh. 6,300.00.
14. As mentioned earlier, the Advocates Remuneration Order permits the Taxing Master to increase the base instruction fees in recognition of, inter alia, the complexity of the brief, the nature and importance of the cause, the interest of the parties to the cause among other factors. In line with this edict, the Taxing Master for the Bill of Costs that gave rise to the instant reference took into account various elements in upscaling the base fees. For instance, he considered the fact that the Applicant was likely to lose Ksh. 10,419,936/= annually if the contested Collective Bargaining Agreement was implemented. He also considered that the dispute exposed the jobs of close to 25,000 employees depending on the court’s decision regarding the legality of the impugned strike action.
15. In the Taxing Master’s view, these factors pointed to the significance of the dispute before the court. As such, he arrived at the conclusion that the Advocate was entitled to higher instructions fees than that which is provided as the base fees in the Advocates Remuneration Order.
16. In my view, the Taxing Master correctly appreciated and applied the above principles to the taxation that was before him. To this extent, I find no error of principle in his decision.
17. The challenge though is whether, having correctly appreciated the applicable principles, the Taxing Master was right in increasing instruction fees from the base fees of Ksh. 6,300.00 to Ksh. 1,200,000.00. A couple of decisions suggest that an increase of instruction fees by a huge margin may constitute an error of principle.
18. For instance, in *Danson Mutuku Muema v. Julius Muthoka Muema & Others* Machakos High Court Civil Appeal No. 6 of 1991(unreported) which was cited in *Republic v Minister for Agriculture &*



- 2 others Ex-parte Samuel Muchiri W’Njuguna & 6 others [2006] eKLR, the court suggested that increasing the base instruction fees more than ten (10) times was improper. In effect, the court suggested that such an increase may constitute an error of principle which will justify inference with the award.
19. In Republic v Commissioner of Domestic Taxes Ex-Parte Ukwala Supermarket Limited & 2 others [2018] eKLR, the court observed as follows on a similar scenario:-
- “In this case the effect of the decision of the taxing officer was to increase the basic instructions fees 50 times.....In my view the fee awarded in respect of the instructions fees in this matter was clearly manifestly excessive as to justify an inference that it was based on an error of principle.”
20. Yet, in other decisions, it is suggested that so long as the Taxing Master has provided an explanation for increasing the base fees, the Judge handling the reference should exercise restraint in interfering with the decision (Republic v Cabinet Secretary, Internal Security & 2 others; Federation of Kenya Employers & another (Interested Parties) Ex parte Gragory Oriaro Nyauchi [2019] eKLR). This is notwithstanding the fact that had he been in the Taxing Master’s shoes, he would probably have arrived at a different conclusion.
21. In some decisions, it has been suggested that the mere fact that the Taxing Master has increased the base fees several fold may not be a good reason to interfere with the decision unless it is evident that the increment is manifestly excessive. For instance, in Republic v Attorney General Ex-Parte Kirinyaga Construction Co. Ltd [2015] eKLR the court observed as follows:-
- “Whereas this Court must express its dissatisfaction with the fact that the learned Taxing Officer did not indicate the factors which led her to award 17 times the basic instructions fees, considering the foregoing decisions, I am not satisfied that I ought to interfere with the award even if the Court itself would have awarded a different figure and I am not prepared to interfere therewith. I am not satisfied that the decision was based on an error of principle, or the fee awarded was manifestly excessive or low as to justify interference.”
22. In Republic v Medical Practitioners & Dentist Board & 2 others Ex-parte: Mary A. Omamo-Nyamogo [2017] eKLR, the learned Judge quoting another decision expressed himself on the matter as follows:-
- “This Court is aware that in Butt & Another v. Sifuna T/A Sifuna & Company Advocates Civil Appeal No. 45 of 2005 [2009] KLR 427, the Court of Appeal while appreciating that the basic instructions fees was Kshs 9,000.00 in a winding up petition nevertheless awarded Kshs 150,000.00 in respect of instructions fees which was 17 times the basic instructions fees.”
23. What becomes apparent from the foregoing is that no two cases can be treated alike. Every case must be decided based on its peculiar circumstances.
24. That said and more critically, if the increase in the base instruction fees is manifestly excessive and the Taxing Master has not provided justification for it, the court considering the reference may interfere with it. However, if the Taxing Master has justified the award, the court considering the reference should be hesitant to interfere with it.
25. In the instant taxation, the Taxing Master set out the reasons why he increased the base fee to Ksh. 1,200,000.00. He considered the high stakes in the dispute including that: the employer was exposed to the risk of incurring an added annual budget of approximately Ksh. 10,419,936/= if the impugned



Collective Bargaining Agreement was implemented; and the jobs of approximately 25,000 employees were at stake depending on the way the court pronounced itself on the impugned strike. Having regard to these factors, the Taxing Master considered the dispute to have been of great significance to the parties.

26. As such, I am satisfied that the Taxing Master provided a plausible basis for the increment in the base instruction fees. Having regard to the exposure that the parties to the dispute faced, I think that he (the Taxing Master) was entitled to increase the base instruction fees to Ksh. 1,200,000.00. In the premises, I do not think that I have legitimate grounds to interfere with the award.
27. Finally, the Applicant/Client has argued that the Taxing Master made an error of principle by failing to credit it (the Applicant/Client) with Ksh. 3,100,000.00 allegedly paid in settlement of the Advocate's fees in Cause No. 1410 of 2013. On the other hand, the Advocate contends that there was no evidence placed before court to demonstrate that the alleged Ksh. 3,100,000.00 was paid as fees in the cause under reference.
28. In his ruling, the Taxing Master indicated that the Applicant/Client did not provide evidence to demonstrate that the sum of Ksh. 3,100,000.00, was paid in settlement of the fees in Cause No. 1410 of 2013. The Taxing Master observed that there was evidence that the Applicant/Client had entrusted the Advocate with many matters to handle on its behalf. Thus, absent evidence to demonstrate that the aforesaid sum was paid in settlement of fees in Cause No. 1410 of 2013, there was no basis for him to apportion this sum to the file particularly in light of the objection mounted by the Advocate.
29. I have looked at the replying affidavit that was sworn by one Roba Duba on 4<sup>th</sup> March 2022 in response to the Bill of Costs under consideration. At paragraphs 8 and 9 of the affidavit, this officer stated on oath that the Applicant/Client had paid the Advocate Ksh. 1,000,000.00 in settlement of his fees in the cause. To support this averment, the officer annexed a receipt for this amount issued on 16<sup>th</sup> May 2014. However, the receipt does not demonstrate that the payment was in settlement of the fees in Cause No. 1410 of 2013.
30. Without discounting the position expressed in the aforesaid affidavit, the very same Roba Duba swore a second affidavit on 18<sup>th</sup> April 2023 now contending that the Advocate had been paid Ksh. 3,100,000.00 in settlement of his fees in the cause. It is this latter figure that the Applicant/Client now demands credit for.
31. I agree with the Taxing Master's view that there was no evidence presented before him to tie the purported payment of Ksh. 3,100,000.00 to the Advocate's fees in Cause No. 1410 of 2013. What is more, the varying averments by the Applicant/Client in its two affidavits as to what was exactly paid to the Advocate in purported settlement of legal fees in the aforesaid Cause put to question whether the fees was indeed paid.

### **Determination**

32. Having regard to the foregoing, I arrive at the conclusion that the instant reference is without merit.
33. As such, it is dismissed.
34. I allow the Advocate's application dated 20<sup>th</sup> July 2023 and enter judgment for him against the Client in the sum of Ksh. 2,205,638.00 in terms of the Certificate of Costs that was issued on 18<sup>th</sup> July 2023.
35. I order that the Client pays the Advocate interest on this amount at court rates from the date of this order.



36. Costs of the two applications are granted to the Advocate.

**DATED, SIGNED AND DELIVERED ON THE 8<sup>TH</sup> DAY OF APRIL, 2024**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

..... for the Applicant/Client

.....for the Advocate

**ORDER**

In light of the directions issued on 12<sup>th</sup> 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**

