



**Association of Local Government Workers Union v Kenya County Government Workers Union; Kenya County Government Workers Union (Formerly Kenya Local Government Workers Union) (Client); Mbuvi t/a Katunga Mbuvi & Co Advocates (Advocate) (Miscellaneous Application E244 of 2021) [2024] KEELRC 828 (KLR) (4 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 828 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**MISCELLANEOUS APPLICATION E244 OF 2021**

**L NDOLO, J**

**APRIL 4, 2024**

**IN THE MATTER OF THE ADVOCATES ACT, CAP 16 LAWS OF KENYA**

**AND**

**IN THE MATTER OF ADVOCATE CLIENT BILL OF COSTS ARISING OUT OF LEGAL SERVICES IN COLLECTIVE AGREEMENT C.A NO. 19 OF 2013-NAIROBI**

**BETWEEN**

**ASSOCIATION OF LOCAL GOVERNMENT WORKERS UNION .. CLAIMANT**

**AND**

**KENYA COUNTY GOVERNMENT WORKERS UNION ..... RESPONDENT**

**AND**

**KENYA COUNTY GOVERNMENT WORKERS UNION (FORMERLY KENYA LOCAL GOVERNMENT WORKERS UNION) ..... CLIENT**

**AND**

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

**RULING**

1. This ruling flows from two references; one filed by the Client and the other filed by the Advocate.
2. The Client’s reference is by way of a Chamber Summons dated 28<sup>th</sup> August 2023 seeking the following orders:



- a. That the decision of the Taxing Officer delivered on 18<sup>th</sup> August 2023, taxing the Advocate's Bill of Costs dated 16<sup>th</sup> December 2021 at Kshs 1,027,478 be set aside, vacated and/or reviewed;
  - b. That the Court proceeds to assess the costs payable to the Advocate;
  - c. That in the alternative, and without prejudice to the foregoing, the Court proceeds to remit the Advocate's Bill of Costs for reconsideration/re-taxation by a different Taxing Officer, with appropriate directions in respect of items 1 to 18 thereof.
3. The application is supported by an affidavit sworn by the Client's General Secretary, Roba Sharu Duba and is based on the following grounds:
- a. That considering the Advocate's Bill of Costs dated 16<sup>th</sup> December 2021 together with the parties' responses and submissions, Hon Fredrick M.Nyamora, sitting as a Taxing Officer, delivered his ruling on 30<sup>th</sup> June 2023, whereby he taxed the Advocate's Bill of Costs at Kshs. 1,027,478;
  - b. That aggrieved by the Taxing Officers' decision, the Client filed and served Notice of Objection in compliance with the requirements of Paragraph 11(1) of the Advocates Remuneration Order;
  - c. That the Taxing Officer committed an error of principle by enhancing the base instruction fees from Kshs. 3,500 to Kshs. 1,000,000, an increase which is 286 times the statutory base instruction fees;
  - d. That the Taxing Officer erred in principle by applying the wrong provisions of the law, being Schedule VI(1)(o)(viii) (where the application is opposed, in which case the base instruction fees is Kshs. 3,500), instead of Schedule VI(1)(o)(viii) (where the application is unopposed, in which case the base instruction fees is Kshs. 1,750), despite there being no evidence that the matter giving rise to the Bill was opposed;
  - e. That the Taxing Officer committed an error of principle by erroneously and wrongly applying and/or abusing discretion to enhance the base instruction fees from Kshs. 3,500 to Kshs. 1,000,000;
  - f. That therefore the Taxing Officer abused his discretion and misdirected himself on the instruction fees payable to the Advocate by awarding instruction fees of Kshs. 1,000,000 which is manifestly high and/or excessive as to justify an inference that it is based on an error of principle;
  - g. That the Taxing Officer erred in principle by failing to consider and/or take into account the advance payment of Kshs. 900,000 already made by the Client to the Advocate and to appropriate the same to this particular matter, despite the Advocate having admitted receipt of the said payment in his further affidavit sworn on 24<sup>th</sup> October 2022;
  - h. That the award on fees made in favour of the Advocate is so manifestly high and/or excessive as to amount to an injustice to the Client;
  - i. That it is in the interest of justice and fairness that the Court grants the orders sought;
  - j. That the Advocate will not suffer any prejudice if the orders sought in this application are granted.



4. The Advocate opposes the Client's application by his replying affidavit sworn on 27<sup>th</sup> September 2023. He depones that the application is full of false averments and material non-disclosure.
5. The Advocate states that the applicable provision is Schedule VI (1) (a) and not VI (1) (o) (viii). He maintains that the Taxing Officer was well guided in awarding Kshs. 1,000,000 as instruction fees.
6. The Advocate adds that the Taxing Officer, having taken all factors into consideration, gave sufficient reasons for the award of Kshs. 1,000,000 as instruction fees.
7. The Advocate states that he did not receive Kshs. 900,000 on account of this case, pointing out that every payment made by the Client was accompanied by a forwarding letter. He concludes that the ruling by the Taxing Officer is well reasoned and fair. He therefore asks the Court to confirm the ruling dated 18<sup>th</sup> August 2023 taxing the Bill of Costs at Kshs. 1,027,478.
8. By his Chamber Summons dated 20<sup>th</sup> November 2023, the Advocate pursues similar orders as those sought by the Client.
9. The Advocate bases his application on the following grounds:
  - a. That the Taxing Officer committed an error of principle by relying on Cheque No 941816037 for Kshs. 350,000 and Cheque No 941816029 for Kshs. 450,000 dated 3<sup>rd</sup> October 2013 and 8<sup>th</sup> November 2013, respectively, which did not constitute payment for this specific matter alone;
  - b. That the said cheques amounting to Kshs. 800,000 were denied by the Advocate but the Taxing Officer went ahead and used them to deduct the taxable amount in the Bill of Costs;
  - c. That the Taxing Officer erred both in law and fact by presumptuously finding and holding that the said cheques amounting to Kshs. 800,000 were for payment in this matter when they were not;
  - d. That the Taxing Officer failed to note that there are over 25 matters between the Advocate and the Client, with 7 of them having been initiated in 2013;
  - e. That the Taxing Officer erred in law and in fact by failing to take into account the complexities and the number of employees the Advocate was representing on behalf of the Client;
  - f. That the Taxing Officer abused his discretion and misdirected himself on the instruction fees payable to the Advocate by taxing off a whole Kshs. 4,000,000 from instruction fees and awarding only Kshs. 1,000,000 in this regard;
  - g. That the said Kshs. 4,000,000 negatively affected the costs awarded on half Advocate/Client fees and the costs awarded on Value Added Tax;
  - h. That the Taxing Officer committed an error of principle by taking into account irrelevant factors while exercising his discretion to tax instruction fees where the value of the subject matter cannot be gleaned from the pleadings, as was the case here. The instruction fees awarded is manifestly low to justify an inference that it is based on an error of principle;
  - i. That it is in the interest of justice and fairness that the Court grants the orders sought;
  - j. That the Client will not suffer any prejudice if the orders sought in this application are granted.
10. The Client challenges the decision of the Taxing Officer on multiple fronts; first, that the Taxing Officer relied on the wrong provisions in the *Advocates Remuneration Order*. In this regard, the Client submits



that Schedule VI (1)(o)(viii) provides for different base instruction fees depending on whether the matter giving rise to the Bill of Costs is opposed or unopposed.

11. According to the Client, the application forming the subject matter of the Bill of Costs presented by the Advocate was unopposed and the base instruction fees ought to have been Kshs. 1,750 and not Kshs. 3,500. The Client asserts that this was an error of principle as defined in *Odera Obar & Co Advocates v Charterhouse Bank Limited* [2018] eKLR.
12. Secondly, the Client complains that the Taxing Officer wrongly exercised his discretion by increasing the instruction fees to Kshs. 1,000,000 without assigning any reason for the increase. The Client takes the position that this increase is unjustified and grossly excessive. According to the Client, the matter giving rise to the Bill of Costs was not novel or complex.
13. The Client refers to a number of decisions where tax awards enhanced by a factor of more than ten were adjudged to have been excessive thus justifying interference (see *Ngatia & Associates Advocates v Interactive Gaming & Lotteries Limited* [2017] eKLR, *Republic v Commissioner of Domestic Taxes Ex Parte Ukwala Supermarket Limited & 2 others* [2018] eKLR and *Rose Wangui Mambo & 2 others v Limuru Country Club & 15 others; Federation of Women Lawyers (FIDA) & another (Interested Parties)* [2020] eKLR).
14. The Client further accuses the Taxing Officer of failure to take into account advance payments made to the Advocate aggregating to Kshs. 900,000. In this regard, the Client relies on the decision in *Alutala Mukhwana t/a Alutala Mukhwana & Co Advocates v Tom Ndeche & another* [2022] eKLR where it was held that failure to take into account advance payment of fees would result to unjust enrichment of an Advocate.
15. Looking at the Taxing Officer's decision and the rival positions presented by the parties, I find and hold that there are valid grounds to justify interference with the award made in favour of the Advocate.
16. Regarding the reference by the Advocate, the only thing I will say is that this was clearly an afterthought. I say so because in the replying affidavit in opposition to the Client's reference sworn on 27<sup>th</sup> September 2023, the Advocate agrees with the award by the Taxing Master, which he adjudges as 'reasonable, well-reasoned and very fair.'
17. For the Advocate to now turn around and ask the Court to set aside an award he previously supported is to engage in approbation and reprobation, which in my view, amounts to abuse of the court process.
18. In the circumstances, justice demands the following orders; the Client's reference is allowed, the Advocate's reference is disallowed and the Bill of Costs is remitted for re-taxation by another Taxing Officer other than Hon Fredick M. Nyamora.
19. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 4<sup>TH</sup> DAY OF APRIL 2024**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Oginga for the Client

Mr. Mbuvi for the Advocate

