



Eldoret Polytechnic v In the matter of Advocate Stanley N Kagunza together with Evaline Sabayi Aseneka Andambi & Cedric Andambi Alubala Suing as administrators & administratix of the Estate of the Late Abenayo Alubala Andambi t/a Andambi & Company Advocates (Miscellaneous Application 1 of 2024) [2024] KEELRC 1674 (KLR) (28 June 2024) (Ruling)

Neutral citation: [2024] KEELRC 1674 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
MISCELLANEOUS APPLICATION 1 OF 2024**

MA ONYANGO, J

JUNE 28, 2024

BETWEEN

ELDORET POLYTECHNIC APPLICANT

AND

**IN THE MATTER OF ADVOCATE STANLEY N KAGUNZA TOGETHER WITH
EVALINE SABAYI ASENEKA ANDAMBI & CEDRIC ANDAMBI ALUBALA
SUING AS ADMINISTRATORS & ADMINISTRATIX OF THE ESTATE OF
THE LATE ABENAYO ALUBALA ANDAMBI T/A ANDAMBI & COMPANY
ADVOCATES RESPONDENT**

RULING

1. By a Chamber Summons Application dated 22nd January 2024 brought under Rule 11 of the *Advocates Remuneration Order*, sections 3 and 12 of the *Employment and Labour Relations Court Act*, Rule 28 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 and Order 22 Rule 22 of the *Civil Procedure Rules*, the Applicant prays for orders that:
 - a. Spent.
 - b. That leave be granted to the Applicant to file this reference out of time.
 - c. That there be a stay of execution of the Certificate of Costs dated 30th November 2023 pending the hearing and determination of the Reference.
 - d. That this court be pleased to restrain the Respondents either by themselves and/or their agents or servants from selling or disposing of the applicant's properties proclaimed and attached on the 19th January 2024 pending the hearing and determination of this reference.



- e. That the taxing officer's decision *vide* the ruling delivered on 24th November 2023 be varied, set aside or reviewed.
 - f. That the advocate client bill of costs dated 9th November 2021 be taxed/assessed by this Honorable Court.
 - g. That costs of this application be provided for.
2. The Application is founded on the grounds set out on the face of the Application and the Supporting Affidavit sworn on 22nd January 2024 by Charles Kipkirui Koech, the Applicant's Principal. The Applicant contends that the taxing master delivered his ruling on 24th November 2023 taxing the Respondent's advocate bill of costs dated 9th November 2021 at Kshs 387,670 and thereafter granted the Applicant thirty days stay of execution which has since expired.
 3. The Applicant avers that being aggrieved by the said decision, it now seeks leave to file this reference out of time objecting to the bill of costs as taxed by the taxing master as he did not take into consideration the Replying Affidavit and submissions filed by the Applicant to the advocate client bill of costs.
 4. It is averred that the Deputy Registrar made an error by not deducting Kshs 300,000 paid as deposit by the Applicant, a fact which was not opposed by the Respondent during taxation. The Applicant contends that it paid the said deposit after it received a letter dated 12th August 2015 from the Respondent requesting to be paid a total of Kshs 965,000 where 300,000 was towards deposit for fees for Nakuru Industrial case No.211 of 2015, *KUDHEIHA v Eldoret Polytechnic* now Eldoret ELRC Cause No. 254B of 2017 *vide* cheque No. 12998 which was delivered to the office of M/S Andambi & Co. Advocate who was previously representing the Applicant, *vide* delivery note dated 11th April 2016. According to the Applicant, it paid a total of Kshs 965,000 as requested by the Advocate.
 5. It is the Applicant's contention that the taxing master in exercising his discretion, wrongly failed to appreciate that failure to deduct the deposits already paid made the bill excessive hence violating the constitutional right of access to justice at a reasonable fee. It maintains that it has since offered the Respondent the balance of Kshs. 87,670 which money the Respondent has declined to receive.
 6. Further, the Applicant states that the Respondent has given 7 days proclamation notice to the Applicant, and that attachment is due anytime from now and that the application to file the reference has been preferred in a timely manner in the interest of justice.
 7. The Application is opposed through a Replying Affidavit sworn by Stanley N. Kagunza on 7th February 2024 and filed in court on 13th February 2024. The Respondent contends that the ruling of the taxing master having been made on 24th November 2023, following the procedure set out in paragraph 11 of the *Advocates Remuneration Order*, the Applicant ought to have filed reference before the expiry of the 14 days; that the applicant has not demonstrated that it has any good and sufficient cause for not filing the reference within time, that the whole period of delay has not been declared and explained satisfactorily to the court; that the Applicant has not made any attempt to explain the reason for the delay in meeting the requirements set out in paragraph 11(1) and (2) of the *Remuneration Order*: that the Applicant's application is an approbation and reprobation only intended to frustrate realization of the taxed amount in Eldoret ELRC No. 254B of 2017 to the detriment of the Respondent and that a further delay in the proceedings as a result of the unwarranted orders sought would occasion insurmountable prejudice to the Respondent.
 8. In response, the Applicant filed a further affidavit sworn by the Applicant's Principal on 26th February 2024 where he deposes that the Applicant received a letter dated 6th December 2023 from its advocate forwarding the ruling by the Deputy Registrar; that its advocate further sought for the Applicant's



instructions on filing a reference since the Deputy Registrar had failed to deduct Kshs 300,000 paid as deposit to the Respondent. He further averred that they visited their advocate's offices on 18th December 2023 to give further instructions and found the advocate's offices closed up to 15th January 2024; that the Applicant's counsel has been in constant communication with the Respondent over the deposits received but the Respondent declined to receive the cheque dated 19th December 2023 for Kshs 87,670.

9. The Respondent filed a supplementary affidavit dated 4th March 2024. In that affidavit, the deponent, counsel Kagunza avers that there was no retainer agreement that existed between the Respondent and the firm of the late Andambi & Co. Advocates for consideration by the Deputy Registrar. According to counsel Kagunza, the retainer agreement marked CCK2 annexed to the instant application is not specific that the late Andambi was retained to specifically handle Nakuru ELRC No. 211 of 2015 thus the Deputy Registrar could not be left to make an inference to that effect. It is also contended that the said retainer agreement is unsigned and that there is no nexus between the retainer agreement and Nakuru ELRC No. 211 of 2015 as the suit was filed on 1st December 2015 while the retainer agreement is dated 2nd July 2015. Lastly, counsel contends that there is no evidence that annexure CCK3, the delivery note, was ever duly served and acknowledged.
10. The Application was canvassed by way of written submissions. The Applicant filed its written submissions dated 26th February 2024 in which it submits that the Deputy Registrar's ruling delivered on 24th November 2023 should be reviewed and deduction made for the deposit in the sum of Kshs 300,000 from the taxed amount being Kshs. 387,670. According to the Applicant, the failure by the taxing master to deduct Kshs 300,000 already paid to the Respondent led to him being awarded excessive costs in violation of the constitutional right of access to justice at a reasonable fee. The Applicant therefore submits that there was an error by the deputy registrar not deducting the said deposits hence making the fee awarded excessive to warrant this court to interfere with the ruling.
11. The court was urged to grant the orders sought and find that the Respondent is entitled to Kshs 87,670 only.
12. In his submissions dated 4th March 2024, the Respondent submits that the explanation given by the Applicant regarding the delay is not satisfactory and there are no reasons for the court to interfere with the decision of the taxing master delivered on 24th November 2023. The Respondent urged the court to dismiss the application dated 22nd January 2024 with costs.

Determination

13. The court has considered the pleadings, the court records, the rival submissions filed by the parties, the cited authorities and the relevant provisions of law and finds the following are the issues for determination:
 - i. Whether leave should be granted to the Applicant to file this reference out of time?
 - ii. Whether the ruling delivered on 24th November 2023, by the Taxing Master and the subsequent Certificate of Costs should be set aside?
 - iii. Who should bear the costs?



14. On the first issue, Rule 11 of the *Advocates Remuneration Order* makes provision for the procedure that an aggrieved party must adopt when seeking to file a reference against the decision of a taxing master. It provides:

(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.

15. From the contents of the Applicant's further affidavit filed in court on 27th February 2024 it has been explained that the Applicant was made aware of the ruling of the taxing master vide a letter from its counsel dated 6th December 2023. The letter was annexed to the further affidavit and marked CKK1. It has been explained in the Applicant's Further Affidavit what transpired thereafter. I am satisfied that the delay in filing the instant application has been explained satisfactorily to this court.

16. With regard to the second issue whether the ruling delivered on 24th November 2023 by the taxing master should be set aside, the principles for setting aside the decisions of a taxing master are now well established. They are;

- i. That there was an error of principle.
- ii. The fee awarded was manifestly excessive or is so high as to confine access to the court to the wealthy
- iii. That the successful litigant ought to be fairly reimbursed for the costs he has incurred
- iv. That so far as practicable there should be consistency in the award.

17. In the case of *First American Bank of Kenya vs Shah and Others* [2002] E.A.L.R 64 AT 69, the court observed as follows:

“First, I find that on the authorities, 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”.



18. In the instant case, the Applicant has submitted that the award by the taxing master of Kshs 387,670 amounted to an error in principle as the Applicant had already paid Kshs. 300,000 as deposit to Andambi & Company Advocates towards his legal fees vide a cheque number 12998 delivered to Andambi's office on 11th April 2016. From a perusal of the documents on record and particularly the retainer agreement marked CCK1 and annexed to the replying affidavit in opposition of the advocates/client bill of costs dated 9th November 2021, it is evident that Andambi & Company Advocates and the Respondent herein entered into a retainer agreement where at paragraph 2 it was agreed as follows:
1. That Andambi and Company Advocates have been formally retained and empaneled to continue offering legal services to the polytechnic as one of the law firms, pursuant to notification letter of offer dated 1st July 2015.
 2. That the period of the legal service has been once more renewed to include the year 2015 to 2017.
 3. That Andambi and company advocates shall continue to be paid a retainer fee of Kshs 50,000 per month as previously done, this will include services which on a random basis, reply to demand letters and any other services which are not bulky in nature pursuant to notification letter of offer dated 1st July 2015.
19. The Respondent cannot therefore say that the retainer agreement did not cover Nakuru ELRC No. 211 of 2015 when paragraph 2 of that agreement specifically mentioned that the offer of the legal services was to include the year 2015 to 2017.
20. It is clear and evident from the Applicant's attachment CCK2, that the Applicant had already paid deposit for the costs of the suit in the sum of Kshs 300,000 which the taxing master ought to have taken into account when taxing the bill of costs.
21. Based on the foregoing, it is the finding of this court that the taxing master erred in principle in failing to consider that the Applicant had already paid the Respondent Kshs 300,000 as deposit for legal fees in Nakuru ELRC No. 211 of 2015 which was transferred to this court and is the file in respect of which the taxation in issue herein relates.
22. Consequently, I make the following orders:
- a. The Ruling of the Taxing Master dated 24th November 2023 is hereby reviewed by deducting the sum of Kshs. 300,000 already paid by the Applicant as deposit for the suit.
 - b. The Advocate Client bill of costs dated 9th November 2021 is accordingly taxed at Kshs 87,680.
 - c. Each party shall bear its costs of this application.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 28TH DAY OF JUNE, 2024

MAUREEN ONYANGO

JUDGE

ELD ELRC MIS.APPL NO. E001 OF 2024 RULING

