



REPUBLIC OF KENYA



**KENYA LAW**  
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**Universities Academic Staff Union v Kirinyaga University (Cause  
2 of 2022) [2024] KEELRC 2448 (KLR) (9 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2448 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI**  
**CAUSE 2 OF 2022**  
**ON MAKAU, J**  
**OCTOBER 9, 2024**

**BETWEEN**  
**UNIVERSITIES ACADEMIC STAFF UNION ..... APPLICANT**  
**AND**  
**KIRINYAGA UNIVERSITY ..... RESPONDENT**

**RULING**

1. The Claimant and Respondent have each filed a Summons dated 14<sup>th</sup> November 2023 and 9<sup>th</sup> February 2024 respectively challenging the ruling of the Taxing officer this Court delivered on 17<sup>th</sup> May 2023.
2. The Claimant's Chamber Summons seeks the following orders:
  - a. That the decision of the Taxing Master delivered on May 17, 2023 be set aside and /or quashed and vacated by way of reference and all the consequential orders be set aside.
  - b. That in the alternative to prayer 1 above, the Honourable Court do exercise its inherent jurisdiction and be pleased to re-tax the Respondent's party-party bill of costs dated 6<sup>th</sup> March 2023.
  - c. That in the alternative to prayer 1 above, the Honourable Court do exercise its inherent jurisdiction and be pleased to refer the bill of costs dated 6<sup>th</sup> March 2023 to another taxing officer for re-taxation or make directions to a fresh taxation.
  - d. That the Honourable Court do issue an order of stay of execution of the taxation ruling by the taxing master for payment of Kshs. 3,796,159/= pending the hearing and determination of this Application.
  - e. The costs of the application be provided for.



3. The same is premised on the grounds set out on the body of the Summons and the supporting affidavit sworn by Dr. Constantine Wasonga on 14<sup>th</sup> November 2023. The gist of the reference is that the taxing master misdirected herself by taxing item 1 at Kshs. 3,686,169/= which figure is above scale; that the award was without legal basis and no justifiable reasons was provided; that the taxing master failed to ascertain the correct value of the subject matter for purposes of taxation and thus relied on wrong principles; that she disregarded Schedule 6A of the Advocates Remuneration Order and established precedents; and that there being no value ascertainable, the correct mount for Item 1 ought to have been Kshs. 120,000/=.
4. It is further applicant's case that items 26, 40 and 47 on drawing of pleadings ought to have been taxed off due to ambiguity and lack of particulars; that the items on attendance ought to have been at Kshs. 1,100/= instead of Kshs. 3,000/= which was an imprudent figure; that the amounts awarded was punitive as opposed to compensatory and therefore allowing the application will serve the interest of justice and fairness.
5. The respondent opposed the interference with the award of Kshs 3,796,159 because the same was based on the value of the subject matter as discerned from the pleadings; that the claimant had sought compensation for unfair termination at the rate of 12 months salary plus general damages of Kshs.5,000,000 for each of the 18 grievants equalling to Kshs. 101,890,536; that item 2,40, and 53 were taxed off and the rest were not contested and were allowed; and that the claimant has failed to demonstrate that the items in its bill of costs were erroneous, illegal, incorrect and not based on any discretionary power vested in the Taxing master.
6. On the other hand, the Respondent's Chamber Summons sought the following orders:
  - a. That this Honourable Court be pleased to enlarge time within which to file a Reference against the ruling of the Honourable Taxing Master dated 17.5.2023 in respect of Item 2 only of the Respondent's Party & Party Bill of Costs dated 6<sup>th</sup> March 2023.
  - b. That this Honourable Court be pleased to review, vary and or set aside the Ruling delivered on 17<sup>th</sup> May 2023 in respect of Item 2 only of the Respondent's Party & Party Bill of Costs dated 6<sup>th</sup> March 2023.
  - c. That Item 2 of the Respondent's Party & Party Bill of Costs dated 6<sup>th</sup> March 2023 be taxed afresh by this Honourable Court or be remitted back for taxation before the Taxing Officer.
  - d. That the costs of the Application be provided for.
7. The Application is premised on the grounds set out on the body of the Summons and the Supporting Affidavit of Richard Kamotho sworn on 9<sup>th</sup> February 2024. The gist of the Application is that the typed copy of the taxation ruling delivered on 17/5/2023 was only made available after the Court's ruling of 3<sup>rd</sup> November 2023 directing that the same be supplied within 14 days thereof; that subsequently, the Claimant filed its Reference on 14<sup>th</sup> November 2023 and given a hearing date of 6<sup>th</sup> March 2024; that the Respondent's counsel only got to learn that the taxing master declined item 2 in February 2024 when preparing the replying affidavit; that the Respondent was denied its right to claim full compensation for defending the claim as there was no way it could have known what items to object to without a typed ruling; that time for objection ought to be extended with respect to item 2 to avoid injustice being meted against the Respondent as a successful party; that the Court has the jurisdiction to enlarge the said time; and that the Claimant will not suffer any prejudice since time was also extended for it.



8. The Claimant opposed the application vide the Replying Affidavit sworn by Dr. Constantine Wasonga, the Secretary General contending that the application was fatally defective and incurably incompetent; that Rule 11 of the Advocates Remuneration Order which requires that reference be filed within 14 days of the decision, whereas the application was more than 3 months late; that the delay is inordinate and without a justifiable reason; that the respondent was in the same boat with the Claimant because the Claimant filed its reference on 14<sup>th</sup> November 2023, 7 days after the receiving the typed Ruling; and that the Application should be dismissed with costs because it is just a delaying tactic.

### **Claimant's submissions**

9. The Claimant raised the following issues for determination:
- a. Whether the Claimant is entitled to the order's sought in the Chamber summons Application dated 14<sup>th</sup> November 2023.
  - b. Whether the Respondent is entitled to the orders sought in its Chamber Summons Application dated 9<sup>th</sup> February 2024.
10. On the first issue, it was submitted that as a general rule, the court does not interfere with the decision of the Taxing Master unless there exists an error in law or in principle. Reliance was placed on *Kipkorir Titoo & Kiara Advocates v Deposit Protection Fund Board Civil Appeal No. 220 of 2004 [2005] eKLR* to urge that the taxing master did not exercise her discretion judicially and that she disregarded factors she ought to have considered. It was submitted that the ward of Kshs. 3,686,169/= for Item 1 was above the scale and not justifiable. As such it was submitted that the Taxing master disregarded Schedule 6A of the said Order and established precedents.
11. It was further submitted that the Taxing master ought to have taxed off items 26, 40 and 47 on drawings as the items were ambiguous and lacking in particularity. Therefore, court was urged to allow the Summons as prayed.
12. On the second issue, it was submitted that the Respondent had a copy of the ruling from 17<sup>th</sup> November 2023 but failed to file a reference to challenge the same but waited for 83 days from the said date before filing its Reference. The said delay was deemed inordinate and not deserving extension of time. Reliance was place on the case of *Salat v Independent Electoral & Boundaries Commission & 7 others [2014] eKLR* where the Court laid out te principles to be considered while exercising discretion to extend time. Reference was also made to the case of *County Government of Tana River v Miller and Company Advocates [2021] eKLR*
13. Besides, it was submitted that getting up fees is only applicable where the matter went for trial and therefore since this case was disposed of by written submissions, the respondent is not entitled to that relief.

### **Respondent's submissions**

14. It was submitted for the respondent that the Taxing Master erred in principle in declining to grant item 2 of the Bill of Costs thus warranting this Court's intervention. Reliance was placed on the case of *Tom Rading Kuyoh v Joshua Nyiera (sued as Chairman of Fera Association); Nairobi City County Government (Interested Party) [2021] eKLR* and the case of *Mwakio Kirwa & Company Advocates v County Public Service Board Bome & Joshua Terer (Miscellaneous Cause 1 of 2020) [2022] KEELRC 834 (KLR) (10 February 2022) (Ruling)*.



15. It was further submitted that the Claimant did not indicate how it would suffer prejudice if the application was allowed. Reliance was also placed on the case of Peter Waweru Kamami v James Mburu civil application E088 of 2024 (UR) to argue that the delay from 17<sup>th</sup> November 2023 to 13<sup>th</sup> February 2024 was not inordinate.
16. On the Claimant's Application, it was submitted that Schedule 6 (1b) of the said Advocates Remuneration Order provides for guide on establishing the value of the subject matter including the pleadings, judgment or settlement between the parties. Reliance was placed on the case of Joreth Limited v Kigano & Another [2002] eKLR to argue that since the suit was dismissed, the value could be derived from what the Claimant was seeking being Kshs. 101,890,536. Accordingly, using the said value, the minimum fee would be Kshs. 1,728,358.00 but the taxing master had the discretion to increase the amount based on the peculiar circumstances of the case. Hence the increase to Kshs. 3,686,169 which was not manifestly excessive to warrant the Court's interference.
17. As regards the other issues, the respondent adopted the averments in paragraphs 10,11,12 and 13 of its Replying Affidavit sworn on 4<sup>th</sup> March 2024. Finally, the Court was urged to allow the Respondent's Application and dismiss the Claimant's reference.

### **Analysis**

18. The issues that arises for determination are
  - a. Whether the claimant's application has merits.
  - b. Whether the respondent deserves leave to object to the impugned ruling out of time.
  - c. Whether the respondent should be awarded Item 2 in its Bill of Costs.

### **Claimant's Chamber Summons**

19. The claimant faulted the taxing officer first, for assessing the instruction fees at Kshs. 3,686,169 without ascertaining the correct value of the subject matter and thereby committed an error of principle. Consequently, it urged that the award was excessive and ought to be interfered with and reduced to Kshs 120, 000. The respondent maintains that the value of the subject matter as per the Amended Statement of Claim was Kshs. 101,890,536 and therefore the assessed instruction fees was proper.
20. I have considered the impugned ruling and confirmed that in awarding instruction fees of Kshs. 3,686,169, the taxing officer assessed the value of the subject matter of the suit as Kshs. 101,890,536. The basis of the said valuation was the Amended Statement of Claim. She stated thus:

“On item 1 the value of the matter can be determined from the Amended Claim. The total amount claimed is Kshs. 101,890,536. The Charge is thus Kshs. 3,686,169 as taxed.”
21. The Amended Claim had the primary prayers and an alternative one. The primary prayer was an order that the claimant's members be appointed on five years contracts effective from expiry date of the previous contracts, and that they be paid salary for March 2018. The alternative prayer was that of compensation of 12 months' salary for unfair loss of employment plus general damages of Kshs.5,000,000 for discrimination and unfair practices for each of the 18 grievants. In my judgment, I declined the primary prayers and also the alternative ones and dismissed the suit with costs.
22. The question that arises is whether the value of the suit was based on the primary prayer or the alternative one. My considered view is that we should use the primary one if both are dismissed. The alternative relief becomes relevant if the primary one is dismissed and the alternative one granted.



Consequently, I find that the taxing officer fell into error of principle when she used the alternative prayer in the Amended Claim to determine the value of the subject matter of suit as opposed to the primary prayers. Had she considered the primary prayers she would have arrived at a differed award.

23. In view of the foregoing finding, I must hold that the award of kshs.3,686,169 was made in consideration of wrong factors and without considering the relevant factors. Consequently, it is set aside. I gather support from *First American bank of Africa v Shah & others* [2002] 1 E.A 64 where Rigeri J held that:

“This court cannot interfere with the taxing officer’s decision unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle.”

24. Turning to the other items in the Bill of costs, I have noted from the written submission filed before the taxing officer that the claimant did not contest item number 3, 4, 5, 6, 7, 8, 9, 10, 12, 14, 15, 17, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 33, 34, 37, 38, 41, 42, 43, 48, 49, 54, 55, 56, 57, and 58. The rest of the items were contested and taxed. The claimant has asked me to exercise my powers and tax the Bill of costs afresh or refer it for re-taxation by a different taxing officer.
25. Since the respondent is also challenging the same ruling, I need not belabor the point but rather refer the Bill of costs dated 6<sup>th</sup> March 2023 for taxation on all the items except the uncontested ones aforesaid. The taxation will be before a different taxing officer other than Hon M. Lubia and will take into account my directions on the item 1 of the Bill of Costs.
26. In view of the foregoing finding and directions, I see no need of considering the respondent’s Chamber Summons dated 9<sup>th</sup> March 2024 since it has become moot.

### **Conclusion**

27. I have found merits in the Claimant’s Chamber Summons dated November 14, 2023 and allowed it to extent highlighted above. Consequently, the Respondent’s Bill of Costs dated March 6, 2023 is referred for fresh taxation subject to the directions given above. The side finding and directions have rendered the respondent’s application moot. Each party shall bear its own costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 9<sup>TH</sup> DAY OF OCTOBER, 2024.**

**ONESMUS N MAKAU**

**JUDGE**

**Order**

This ruling has been delivered to the parties via Teams video conferencing with their consent, 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.

**ONESMUS N MAKAU**

**JUDGE**

