



**National Union of Water & Sewerage Employees & 3 others v Nairobi Water & Sewerage Co Ltd & 3 others; Mbuvi t/a Katunga Mbuvi & Co Advocate (Applicant); Kenya County Government Workers Union (Respondent) (Miscellaneous Application E214 of 2021) [2023] KEELRC 710 (KLR) (20 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 710 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
MISCELLANEOUS APPLICATION E214 OF 2021**

**JK GAKERI, J**

**MARCH 20, 2023**

**BETWEEN**

**NATIONAL UNION OF WATER & SEWERAGE EMPLOYEES & 3 OTHERS ..... APPELLANT**

**AND**

**NAIROBI WATER & SEWERAGE CO LTD ..... 1<sup>ST</sup> RESPONDENT**

**KENYA COUNTY GOVERNMENT WORKERS UNION & 2**

**OTHERS ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**LEONARD K MBUVI T/A KATUNGA MBUVI & CO**

**ADVOCATES ..... APPLICANT**

**AND**

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

**RULING**

1. Before the court for determination is a Chamber Summons Application dated 23<sup>rd</sup> June, 2022 brought pursuant to Rule 11(2) of the Advocates Remuneration Order by the Respondent/Applicant seeking orders that:-
  - i. There be a stay of execution of the Taxing Officer’s ruling delivered on 14<sup>th</sup> June, 2022 taxing the Respondent’s Bill of Costs dated 11<sup>th</sup> November, 2021 at Kshs.14,082,365.28 pending the hearing and determination of the application.



- ii. The ruling/decision of the Taxing Officer be overturned and or vacated and the bill of costs dated 11<sup>th</sup> November, 2021 since the Taxing Master had no jurisdiction to entertain the Bill.
  - iii. The decision/Ruling of the Taxing Officer delivered on 14<sup>th</sup> June, 2022 on the Respondent's-Advocate-Client Bill of Costs dated 11<sup>th</sup> November, 2021 taxing the Bill of costs at Kshs.14,082,365.28 be set aside and/or reviewed by the court in its entirety.
  - iv. The Further Affidavit sworn by Mr. Leonard Katunga Mbuvi on 1<sup>st</sup> April, 2022 and relied upon by the Taxing Master be struck out for having been fraudulently and unprocedurally sneaked into the court's record without having been duly filed, paid for or served upon the client to enable them to respond.
  - v. The court be pleased to re-assess the costs due to the Advocate/Respondent in the taxation cause.
  - vi. In the alternative and without prejudice to the foregoing, the court be pleased to remit the Bill of Cost dated 16<sup>th</sup> November, 2021 for reconsideration/re-taxation by a different Deputy Registrar with appropriate directions in respect of items 1 to 16 thereof.
  - vii. The court be pleased to grant any other order and/or directions as it deems fit, just and fair.
  - viii. The costs of this application be provided for.
2. The grounds in support of the application are detailed on the face of the application and in an Affidavit sworn by Roba Duba on 23<sup>rd</sup> June, 2022.
  3. The applicant's case is that Respondent advocate had sought Kshs.14,123,754/= as costs for representing and defending the client in a matter the claimant was seeking stay of execution and an order restraining the client from proceeding with the making or implementation of a CBA. The Taxing Officer considered the Bill of Costs and the client's preliminary objection which she dismissed and taxed the Bill at Kshs.14,082,365.28 in a ruling delivered on 14<sup>th</sup> June, 2022.
  4. This is the impugned ruling, the subject matter of the instant chamber summons application.
  5. It is urged that the Taxing Officer erred, misdirected herself on legal and factual issues and made serious errors of principle to justify this court's interference with the decision.
  6. The Taxing Officer is faulted for having held that the matter was still active yet the advocates task ended on 26<sup>th</sup> July, 2013 and no fresh instructions had been established by evidence.
  7. That the Taxing Officer abused her discretion by failing to consider relevant factors such as payments made by the Applicant to the Respondent.
  8. That having regard to the nature and importance of the matter, skill and labour applied by counsel lack of complexity and novelty, the Taxing Officer's award is grossly excessive, exaggerated, unreasonable, capricious and exorbitant and justifies the court's interference.
  9. That the Taxing Officer erred by holding that the Bill of Costs was not time barred yet the matter came to a close on 26<sup>th</sup> July, 2013 when judgement was entered.



10. The applicant avers that after the ruling date had been set, the Respondent/Advocate unlawfully and fraudulently sneaked into the court record a Further Affidavit and there was no record that it was filed or paid for or served upon the Applicant's counsel for a response.
11. That the copy of the cheque annexed related to another matter, HCCC No. 412 of 2011 and should not have been used as the basis for the finding that the Bill of Costs was not time barred and the same cheque No. 061025 was used to find that other matters were not statute barred and the Taxing Officer's error was procedurally incurable.
12. The Taxing Officer abused her discretion and misdirected herself on the instruction fees payable to the Advocate by awarding Kshs.8,000,000/= as instruction fee. That the decision in Republic V University of Nairobi & Another (2018) eKLR relied to enhancement of instruction fees and in Republic V University of Nairobi Ex parte Nabiswa Wakenya, the court had reduced the instruction fees to Kshs.4,000,000/=.
13. That it is in the interest of justice that the orders sought be granted.

### **Respondent's case**

14. In his Replying Affidavit dated 24<sup>th</sup> June, 2022, the Respondent/Advocate avers that the application was full of false averments and material non-disclosures. That the Taxing Officer awarded Kshs.314,082,365.28 after parties had filed responses and submissions.
15. The advocate further states that the parties had an engagement on how the applicant would settle the legal fees for all the matters he had waived for it and payments were made once in a while after push and pull and then stopped altogether and the last cheque for Kshs.300,000/= was dated 24<sup>th</sup> November, 2020 and was not for HCCC No. 412 of 2011 as alleged by the applicant.
16. The Respondent/Advocate avers that the last communication was on 7<sup>th</sup> June, 2022.
17. That the applicant cut off communication and refused to respond to calls or letters which prompted the filing of the bill of costs.
18. That there was no letter terminating the engagement or appointment of another advocate and counsel had handled the matter at hand to the satisfaction of the client/applicant.
19. That the Taxing Officer had jurisdiction to hear and determine the bill of costs as she held.
20. The Respondent states that the Further Affidavit challenged by the applicant was filed before the close of pleadings and was physically delivered to the Registry due to technical challenges and its contents were not denied.
21. That the correct Advocates Remuneration Order was the one of 2014 as the matter was still handled after it came into effect and there was no error in principle or law.
22. The Respondent further avers that the Taxing Officer had the discretion to award Kshs.8,000,000/= as instruction fees and the court is urged to award the same as counsel worked extremely hard and tirelessly and was thus entitled to the award.
23. That the applicant's intention was to delay the case and the applicant had not denied that services were rendered or were wanting.
24. The court is urged to uphold the ruling of the Taxing Officer.



25. The Applicant filed a Supplementary Affidavit sworn on 7<sup>th</sup> October, 2022 stating that the parties had not been communicating in the recent past and that liability was not admitted for the amount awarded by the Taxing Officer.
26. The applicant explains how it raises and uses its finances to demonstrate its financial position and that it had pending debts totalling more than Kshs.130,000,000/= and could not afford to deposit half of the decretal sum and would be rendered insolvent if the orders sought were not granted.
27. Finally, it is averred that failure to allow the reference would deny the workers representation Article 41(2)(c) of *the Constitution* to participate and join trade unions as the union will have been crippled.

### **Applicant's submissions**

28. The Applicant urged that the Advocate's Bill of Costs was time barred as time started running from 2013 when judgement was delivered and the duration of 6 years lapsed. The decision in *Akide & Co. Advocates V Kenindia Assurance Co. Ltd (2021)* eKLR was relied upon on when time begins to run as was the decision in *Maina Njuguna & Associates V Chege Gichuru t/a Exodus Transporters (2017)* eKLR.
29. It was urged that the Taxing Officer erroneously placed reliance on the Further Affidavit and cheque "sneaked in" by the Advocate a few days to 5<sup>th</sup> April, 2022. That the Taxing Officer knew or ought to have known that the Further Affidavit was not properly on record as it had no receipt and thus discern the mischief and the alleged technical mishaps were suspicious and the affidavit had no effect as it was incurably defective and rendered the proceedings deficient and invalidated the record. The decision in *SM V HGE (2019)* eKLR was cited in support of the submission that the suit was incompetent. It was urged that since the affidavit was irregularly sneaked in to the court's records, the Bill of Costs should be dismissed.
30. It was submitted that the Further Affidavit was not served upon the applicant and thus denied it the right to fair trial as it could not respond to the issues raised substantively and thus the process was deficient.
31. That the cheque attached related to another matter HCCC No. 412 of 2011, a fact the applicant would have brought to the court's attention and the cheque was used to extend time in more than 10 Bills of Costs by the Respondent/Advocate.
32. On errors of principle, it was submitted that reliance on the Further Affidavit was as an error and a misdirection as it raised integrity issues to vitiate the taxation process.
33. As regards the award of Kshs.8,000,000/= as instruction fees, the decision in *Nyangito & Co. Advocates V Doinyo Lessos Creameries Ltd (2014)* eKLR was relied upon on the discretion to increase instruction fees. That the huge enhancement was abuse of discretion and thus an error of principle. The decision in *Nolly K. Musango V Peter Odanga & another (2021)* eKLR was also cited. It was submitted that the Taxing Officer failed to particularize the justification for the enhancement.
34. Thirdly, it was urged that the Taxing Officer overemphasized the nature and importance of the matter that gave rise to the Advocates Bill of Costs to justify the award of Kshs.8,000,000/= as held in *Kipkorir Titoo & Kihara Advocates V Deposit Protection Fund (2005)*. That had other matters been considered, the outcome would have been different.
35. It was submitted that the Taxing Officer's failure to take into account the sum of Kshs.300,000/= paid by the advocate was an error of principle as held in *B. Mbai & Associates Advocates V Clerk, Kiambu*



County Assembly & another. The decision in *Spire Properties (K) Ltd t/a Diani Reef Beach Resort & SPA V Nyachoti & Co. Advocates* (2018) eKLR was also relied upon to buttress the submission.

36. It was further submitted that unions were public bodies and costs should not cripple them as it would impair the right of employees to representation.
37. Finally, it was speculatively argued that the respondent advocate had attempted to file other unidentified documents without leave before this court.
38. Nothing turns on this allegation. The court was urged to find the reference meritorious.

### **Respondent's submissions**

39. The Respondent raised two issues for determination, namely; whether the Taxing Officer committed an error of principle and whether the Respondent/Advocate is entitled to the costs of the application.
40. As regards error of principle, the decision in *Wycliffe Chitayi Muhalya V Dorothy Awiti Omboto t/ a Dao Associates & another* (2017) eKLR was cited to demonstrate the circumstances in which the court may interfere with the decision of the Taxing Officer as was the decision in *Metro Petroleum Ltd V Onyango Oloo & Co. Advocates* (2016) eKLR.
41. It was urged that the Taxing Officer acted in a just and fair manner and committed no error of principle. That the applicant had not denied the interaction on 20<sup>th</sup> November, 2020 and payment of Kshs.300,000/=. That the applicant's silence led to the filing of the Bill of Costs and parties had their day in court. The Respondent denied having sneaked in the Further Affidavit and argued that he had rendered services as required by the applicant who did not deny that it had not paid the entire amount due. The decision in *Tom Ojienda V County Government of Meru* (2021) eKLR was relied upon to emphasize the role of the Taxing Officer or Master, as was the Court of Appeal decision in *Joreth Ltd V Kigano & Associates Advocates* (2002) eKLR to underscore the discretion of the Taxing Officer in the award of instruction fees.
42. The sentiments of Ojwang J. (as he then was) in *Republic V Ministry of Agriculture & 20 others, Ex Parte Muchiri W. Njuguna* (2006) eKLR were also cited to urge that the legal services rendered were important and reasonable compensation was warranted.
43. The court was urged not to interfere with the award of instruction fees.
44. As regards the costs of the application, reliance was made on Section 27 of the [Civil Procedure Act](#) to urge that the court should exercise its jurisdiction in favour of the Respondent/Advocate as he had been deprived of his income by the applicant.
45. The decision in *Cecilia Karuru Ngayu V Barclays Bank of Kenya & another* (2016) eKLR was relied upon.
46. The court was urged to dismiss the application.

### **Determination**

47. Having considered the application, responses and rival submissions by parties, the issues for determination are;
  - i. Whether the Bills of Costs was statute barred and
  - ii. Whether the Taxing Officer committed errors of principle.



48. On the first issue, the applicant argued that the Taxing Officer had no jurisdiction to entertain the Bills of Costs as it was statute barred by virtue of Section 4(1) of the *Limitation of Actions Act*, Cap 22, Laws of Kenya as the prescribed duration of 6 years had lapsed.
49. As regards jurisdiction of the Taxing Officer, the sentiments of Ringera J. in *Macharia & Co. Advocates V Magugu* (2002) EA 428 are instructive that;
- “Taxation of costs, whether those costs be between party and party or between Advocate/ Client is a special jurisdiction reserved to the Taxing Officer by the Advocates Remuneration Order . . .”
50. The Court of Appeal expressed similar sentiments in *Wilfred N. Konosi t/a Konosi & Co. Advocates V Fiamco Ltd* (2017) eKLR.
51. The issue of jurisdiction was raised before the Taxing Officer who found that she had jurisdiction to determine whether the bill of costs was statute barred. The Taxing Officer relied on Section 23(1) of the *Limitation of Actions Act* on accrual of fresh right of action by acknowledgement or part payment which the Applicant faulted on the ground that the Further Affidavit relied upon by the Taxing Officer had been sneaked into the court record, an allegation the Respondent vehemently denied but admitted that it was filed physically due to technical challenges in the office, a common occurrence in the era of e-filing and virtual hearing. According to the applicant, the affidavit was neither filed nor paid for or served upon the applicant and thus could not respond to its contents. The Respondent countered the argument by stating that the applicant did not deny its contents or the evidence of payment attached. The letters dated 4<sup>th</sup> December, 2017 and 22<sup>nd</sup> March, 2017 enclosing cheque number 117391 and 116828 respectively did not indicate the matter in respect of which payment was made. Both letters are explicit that it was “part payment of legal fees.” A copy of cheque number 061025 dated 24<sup>th</sup> November, 2020 had no accompanying letter.
52. The fact that the applicant did not deny that it owed the Respondent monies in respect of the services rendered and which it had not faulted in any way nor had their relationship been formally terminated even after the judgement is a tacit admission of the amount outstanding.
53. Although it is unclear as to how the applicant was to liquidate counsel’s fees for the many matters involved, it is evident that the duration of payment or interval was not fixed and the applicant does not appear to have been consistent in meeting its obligations. Otherwise, that matter ought to have been concluded several years ago.
54. The learned Taxing Officer was of the view that Section 23(3) of the *Limitation of Actions Act* gave a party accrual right of action if the debt was acknowledged or the last payment. The Taxing Officer also relied on Section 39(1)(b) of the Act that the applicant could not plead Limitation as it was estopped by reason of its promise to pay the Respondent/ Advocate his fees when it sought his services, a promise the Respondent relied upon to his detriment and the applicant was therefore estopped from alleging otherwise.
55. Under Section 39(1)(b) of the Act, estoppel includes the equitable doctrine or promissory estoppel, a concept eloquently explained by Denning L.J. in *Combe V Combe* (1951) 2 KB. 15 as follows;
- “Where one party has, by his/her words or conduct made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations



as if no such promise, or assurance had been made by him, but he/she must accept his/her legal relation subject to the qualifications which he/her himself/herself has so introduced, even though it is not supported by any consideration but only by his/her word.”

56. The doctrine or principle of equitable or promissory estoppel is a modification of the common law rule of consideration in contractual relationships.
57. This, in the court’s view is the more persuasive argument in this case since the doctrine of promissory estoppel is based on principle of fairness in enforcement of contracts where a party has made a representation to another intended to affect their relationship and the representee has relied on it to its detriment and without furnishing consideration. It would be unfair for the representor to act as though there was no promise.
58. The Applicant did not deny that it made a promise or representation to the Respondent/Advocate that it would pay him for the services rendered and the Respondent acted accordingly and had to await periodic or occasional payments by the applicant. The applicant did not furnish evidence or proof that under the engagement, it would pay and actually paid the Respondent’s legal fees either before, during or on the date of Judgement. At any rate, the services the Respondent rendered were not gratuitous. The Applicant must have promised to pay the Respondent. The applicant is estopped from pleading limitation of time under the provisions of Section 39(1)(b) and (2) of the *Limitation of Actions Act*.
59. The court is in agreement with the finding of the Taxing Officer that the Bill of Costs was not statute barred and therefore had jurisdiction to determine it. It is true that time generally starts running from the date of judgement as submitted by the applicant. However, the applicant did not explain the details of the engagement and in particular the time when legal fees were payable to the Respondent/Advocate and tendered no evidence of payment. The court is unpersuaded that the parties were not communicating on and off regarding the amount due to the Respondent/Advocate.
60. However, the foregoing notwithstanding, counsel for the applicant raised a serious issue that the Taxing Officer relied on the Further Affidavit dated 7<sup>th</sup> October, 2022 which was neither filed, paid for nor served upon the applicant. Relatedly, the Respondent/Advocate had attached a copy of a cheque dated 24<sup>th</sup> November, 2020, which the Taxing Officer relied upon to find that the Bill of Cost was not statute barred. Similarly, that the Respondent/Advocate tactfully used the same cheque to extend time for all the Bills of Cost before the court.
61. The applicant’s counsel faulted the Further Affidavit on the premise that it was not properly on record as it had neither been filed nor paid for by the Respondent, an argument the Respondent did not controvert by cogent evidence as the Affidavit was placed on record the day before the scheduled ruling date on 5<sup>th</sup> April, 2022.
62. Counsel wondered how the Respondent had the Further Affidavit placed on the court record yet he had filed all the other documents through the e-filing.
63. Although the Respondent argued that the document was filed manually owing to technical challenges, he did not avail evidence of payment and service to the applicant since he was introducing new evidence that required rebuttal by the applicant. Service is mandatory and its absence denied the applicant the right to a fair hearing as submitted by counsel for the applicant. Similarly, the Respondent/Advocate had no leave to file the Further Affidavit.
64. The High Court decision in SM V HGE (2019) eKLR is highly persuasive as regards documents that are not properly on record in proceedings.



65. On 2<sup>nd</sup> February, 2022, the Deputy Registrar directed that the direction on the filing of submissions in 214/2021 would apply to 215, 216, 217, 218 and 219/2021.
66. Court records reveal that on 7<sup>th</sup> March, 2022, the matter came up before the Deputy Registrar for confirmation of filing of submissions and a ruling date.
67. The Applicant's counsel informed the court that the applicant had filed submissions and served in some of the matters and prayed for 3 days to file and serve submissions. The Respondent's counsel had no objection.
68. The Deputy Registrar directed counsel for the Applicant to file the remaining submissions by 10<sup>th</sup> March, 2022 and the order was to apply to all the matters 248/2021, 247/2021, 246/2021, 242/2021, 245/2021, 241/2021, 244/2021, 243/2021, 214/2021, 216/2021, 217/2021, 218/2021 and 219/2021
69. An entry on record dated 14<sup>th</sup> April, 2022 states as follows "Parent file not traced. Applicant to avail documents." It is unclear to the court what documents the Applicant was to avail and when.
70. The ruling was delivered on 14<sup>th</sup> June, 2022.
71. The learned Deputy Registrar found that the Bill of Costs not statute barred because of the payment by cheque dated 24<sup>th</sup> November, 2020 as part payment which gave fresh accrual to the right of action under Section 23(3) of the [Limitation of Actions Act](#).
72. It is common ground that the Further Affidavit and the annexure were presented to court after filing of the submissions and probably on 4<sup>th</sup> April, 2022 on the date it was sworn.
73. The applicant is challenging the Taxing Officer's reliance on the Further Affidavit and the copy of cheque attached thereto for want of court's leave, filing through the Registry and service. The copy of the Further Affidavit on record has no acknowledgement or Registry stamp. In other words, it lacks authentication by the Registry.
74. Needless to emphasize, documents presented to court physically must be presented at the Registry for authentication and placement in the relevant file. The Registry is the custodian of court files and placement of documents therein. Without cogent evidence that the Further Affidavit was delivered to the Registry with leave of the court and acknowledged and subsequently served upon the applicant's counsel, the court is left with no option but agree with the applicant's counsel's submission that the Further Affidavit was presented to the court out of time, was neither filed nor paid for and was not served and reliance on it by the Taxing Officer unfairly prejudiced the applicant's right to fair trial guaranteed by Article 50 of [the Constitution](#) of Kenya, 2010. Similarly, the Respondent did not seek the Deputy Registrar's leave to regularise the Further Affidavit as emphasized by Mativo J. in *Mombasa Cement Ltd V Speaker National Assembly & another* (2018) eKLR cited by the Applicant's Counsel.
75. Puzzlingly, the parties could not agree on the matter in respect of which cheque No. 061025 was issued by the applicant.
76. In the end, having found that the Further Affidavit dated 7<sup>th</sup> October, 2022 was not properly on record and was not served upon the applicant, the same should have been struck out by the Deputy Registrar and ought not to have been relied upon in the determination of the Bill of Costs.
77. Regrettably, the absence of the original files made it exceedingly difficult for the court to appreciate the nature of the matter involved. The history of the relationship between the parties was either by design or mistakenly not found necessary by the parties, yet the court required it for the essential background of the chamber summons.



78. For the foregoing reasons, the court is satisfied that Section 23(3) of the Limitation of Action Act could not ameliorate the Respondent's case.
79. As regards errors of principle, the starting point are the sentiments of Mutungi J. in *Metro Petroleum Ltd V Onyango Oloo & Co. Advocates (Supra)*, where the judge exemplified the concept of error of principle as follows;
- “The term error of principle was defined in the case of *Kagwimi Kangethe & Co. Advocates V O-lerai Nurseries Ltd* as follows:
- “An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an interference that the Taxing Officer acted on erroneous principles. See *Arthur V Nyeri Electricity Undertaking (Supra)* or where the Taxing Officer has over-emphasized the difficulties, importance and complexity of the suit (See *Devshi Dhanji V Kanji Naran Patel (No. 2) [1978] KLR 243*).”
80. In *Wycliffe Chitayi Mohalya V Dorothy Awiti Omboto t/a Dao Associates & another (Supra)* cited by the Respondent/Advocate, the court stated as follows;
- “In the case of *First American Bank of Kenya V Shah & others*, the court set two tests for reviewing the decision of a Taxing Officer being that the court should not interfere with the Taxing Master's decision on taxation unless first, it is shown that the decision was based on an error of principle, or secondly that the fee awarded was so manifestly excessive as to justify an interference that it was based on an error of principle.”
81. Similarly, in *Alice Yano t/a Yano & Co. Advocates V Rebecca Nadupoi Supeyo & another (2021) eKLR*, Mwita J. stated as follows;
- “It is a principle of law that a Judge will not readily interfere with the decision of the Taxing Officer, and should only do so in very exceptional cases. The judge should only interfere where it is sufficiently demonstrated, that the Taxing Officer erred in principle. An example is where the sum awarded is either inordinately high or low . . .”
82. According to Spry JA in *Premchand Raichand Ltd & another V Quarry Services East Africa Ltd & another (1972) E.A 162*, the court will only interfere if it is of the view that amount awarded is high or low as to amount to an injustice to one party or the other.
83. The court is guided by these sentiments.
84. The applicant identified various errors of principle such as reliance on the Further Affidavit by the Taxing Officer, increase of instruction fee from Kshs.6,300/= to Kshs.8,000,000/= under the Advocates Remuneration Order, 2009, overemphasizing the nature and importance of the matter that gave rise to the Bill of Costs. Strangely, the applicant faulted the Taxing Officer for failure to take into account the sum of Kshs.300,000/= paid in November 2021, yet it contested the Further Affidavit which introduced the cheque.
85. As regards the Further Affidavit and as adverted to elsewhere in this ruling, the court is satisfied that the Taxing Officer committed an error of principle. Although the Affidavit was in the court file, it was not properly on record for purposes of preparation of the ruling as it had neither been filed or paid for nor served on the applicant's counsel for a response and ought not to have been relied upon.



86. As regards the alleged unjustified enhancement of instruction fees, the first issue to dispose of is the Remuneration Order applicable. The applicant argued that the Advocates Remuneration Order, 2009 was the applicable framework and the court is of a similar view on account that the suit in question was filed and concluded during the currency of the Advocate's Remuneration Order, 2009.
87. The alleged actions taken by the Respondent/Advocate after 2013 were not particularized.
88. The ruling dated 14<sup>th</sup> June, 2022 is explicit that the Advocates Remuneration Order, 2009 applied.
89. From the foregoing, it is the finding of the court that the Advocates Remuneration Order, 2009 was the operative legal framework.
90. As regards the instruction fee, the applicant urged that it was excessive and inordinately high and cited decisions where the awards were held to be excessive. In *Nolly K. Musango V Peter Odanga & another (Supra)*, for instance, the enhancement of fees from Kshs.6,300/= to Kshs.200,000/= was held to be excessive as was a 10 fold increase in *Nyagito & Co. Advocates V Doinyo Lessos (Supra)*.
91. The Taxing Officer was also faulted for not particularizing the pertinent details of complexity or novelty, in other words justify the award.
92. Part II of Schedule V of the Advocates Remuneration Order, 2009 itemised the factors to be considered in assessing the instruction fees. These included:
  - a. the care and labour required.
  - b. number and length of the papers to be perused.
  - c. nature or importance of the matter.
  - d. amount or value of the subject matter involved.
  - e. interest of the parties.
  - f. complexity of the matter.
  - g. All other circumstances of the case.
93. These factors were also emphasized in *Joreth Ltd V Kigano & another (Supra)* among other decisions.
94. The Taxing Officer relied on time, skill and research, importance of the matter, negotiations with the unions and the decision in *Republic V University of Nairobi & another* where *Nyamweya J.* had affirmed the Taxing Officers award of Kshs.4,000,000/=, but as submitted by the applicant, the amount was reduced to Kshs.2,000,000/= by the Court of Appeal in its judgement delivered on 4<sup>th</sup> February, 2022 as the learned judges considered the award to be "on the higher side."
95. In the instant case, the Taxing Officer awarded the amount prayed for by the Respondent/Advocate of Kshs.8,000,000/=.
96. Similarly, since the award relied upon was subsequently reduced by a Superior Court, the award is unsustainable and justifies the court's intervention as excessive and thus an error of principle as enunciated in many decisions.
97. It is the view of this court that the Taxing Officer ought to have been more detailed in upholding this prayer in the context of the factors enumerated in Part II of Schedule V to the Advocates Remuneration Orders, 2009 so as to justify the award.



98. This reasoning is consistent with the applicant’s submission and case law that costs are intended to ensure reasonable compensation and access to justice by all.
99. Closely related to the foregoing is the applicant’s submission that the Taxing Officer overemphasized the nature and importance of the suit that gave rise to the Bill of Costs. However, whereas the Taxing Officer made reference to the importance of the case to the parties, she also addressed the issue of attraction of recruits to the profession as emphasized in the Premchand Raichand Ltd case (Supra). She also made reference to time, research and skill deployed by counsel as emphasized in Republic V Ministry of Agriculture & 2 others Ex parte Muchiri Njuguna & others (Supra). Finally, since the parent file could not be traced, the Taxing Officer’s leeway was arguably circumscribed.
100. The court is unpersuaded that the Taxing Officer paid undue attention to the importance of the matter at the expense of other factors.
101. For the above stated reasons, it is the finding of the court that the Taxing Officer committed no error of principle with regard to the alleged overemphasis so as to implicate the Court of Appeal holding in Titoo & Kihara Advocates V Deposit Protection Fund (Supra).
102. Finally, on Bill of costs, it is essential to emphasize that as explained in the Premchand V Raichand Ltd Case,  
“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience.”
103. It is common ground that the sum of Kshs.300,000/= was paid via cheque dated 24<sup>th</sup> November, 2021 and although the applicant submitted that the Affidavit to which it was attached was unprocedurally on record, a submission the court is in agreement with, it could not deny the fact and relied on it to urge the court to find and hold an error of principle had been committed.
104. Guided by the contents of Part II of Schedule V to the Advocate Remuneration Order, 2009 and the holdings in B. Mbai & Associates Advocates V Clerk, Kiambu County Assembly & another (Supra) and Spire Properties Ltd V Nyachoti & Co. Advocates (Supra), the court is satisfied that applicant has not demonstrated that the Taxing Officer committed an error of principle by not taking into consideration the sum of Kshs.300,000/= as part of circumstances of the case.
105. Flowing from the foregoing, it is the finding of the court that the applicant has established a sustainable case for the court’s interference with the taxation of the Bill of Costs.
106. Consequently, the decision of the Taxing Officer in the ruling delivered on 14<sup>th</sup> June, 2022 as regards the assessment of instruction fees is hereby set aside and it is ordered that;
1. The Bill of Costs be referred to another Taxing Officer for fresh taxation of the instruction fees.
  2. Each party shall bear its own costs of the Applicant’s Chamber Summons dated 22<sup>nd</sup> June, 2022.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20<sup>TH</sup> DAY OF MARCH 2023**

**DR. JACOB GAKERI**



**JUDGE**

