



**Munyao & another v Otiende; Kenya County Government Workers Union (Applicant);
Leonard K. Mbuvi t/a Katunga Mbuvi & Co. Advocates (Respondent) (Miscellaneous
Application E218 of 2021) [2023] KEELRC 608 (KLR) (13 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 608 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E218 OF 2021**

**JK GAKERI, J
MARCH 13, 2023**

BETWEEN

BONIFACE MUNYAO 1ST APPELLANT

KENYA COUNTY GOVERNMENT WORKERS UNION 2ND APPELLANT

AND

ALOIS A. OTIENDE RESPONDENT

AND

KENYA COUNTY GOVERNMENT WORKERS UNION APPLICANT

AND

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

ADVOCATES RESPONDENT

RULING

1. Before the court for determination is a Chamber Summons Application dated 10th June, 2022 brought pursuant to Rule 11(2) of the Advocates Remuneration Order by the Respondent/Applicant seeking ORDERS THAT:-

1. There be a stay of execution of the Taxing Officer's ruling delivered on 31st May, 2022 taxing the Respondent's Bill of Costs dated 23rd November, 2021 at Kshs.5,468,226.30 pending the hearing and determination of the application.
2. The ruling/decision of the Taxing Officer be overturned and or vacated and the bill of costs dated 23rd November, 2021 be struck out for being time barred by virtue of the statute of limitation.



3. The decision delivered on 31st May, 2022 on the Respondent-Advocate-Client Bill of Costs at Kshs.5,468,226.30 be set aside and/or reviewed by the court.
 4. The Further Affidavit sworn by Mr. Leonard Katunga Mbuvi on 1st 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.
 5. In the alternative and without prejudice to the foregoing, the Honourable Court be pleased to remit the Advocate-Client Bill of Costs dated 23rd November, 2021 for reconsideration/re-taxation by a different Deputy Registrar.
 6. The court be pleased to re-assess the costs due to the Advocate/Respondent in the taxation cause.
 7. The court be pleased to reassess the costs due to the Advocate/Respondent in the taxation cause.
 8. Any other order and/or directions as it deems fit.
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 10th June, 2022.
 3. The applicant's case is that Respondent advocate had sought Kshs.9,103,384.20 as fees in a judicial review matter and after the Taxing Officer had considered the Bill of Costs, the Advocate was awarded Kshs.5,468,226.30 in a ruling delivered on 31st May, 2022 and dismissed the Preliminary Objection that she had no jurisdiction.
 4. This is the impugned ruling, the subject matter of the instant chamber summons application.
 5. That the case lacked complexity, novelty or large documentation for the amount awarded which is exaggerated and exorbitant.
 6. That the Taxing Officer erred by holding that the bill of costs was not time barred.
 7. The applicant avers that after the ruling date had been set for 5th April, 2022, the Advocate/Respondent fraudulently sneaked into the court record a Further Affidavit and there was no record that it was filed or paid for.
 8. 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 was used to find that other matters were not statute barred and the Taxing Officer's error was procedurally incurable.
 9. That in such instances, the court has jurisdiction to hear and determine the application.
 10. The applicant urges that the Taxing Officer misdirected herself on the amount of Kshs.5,468,226.30 as manifestly high or excessive to justify interference.

Respondent's case



11. In his Replying Affidavit, the Respondent/Advocate avers that the application was full of false averments and material non-disclosures. That the applicant had raised a Preliminary Objection before the Taxing Officer.
12. The Respondent/Advocate further states that the parties had an engagement on how the applicants would settle the legal fees for all the matters he had acted for it and payments were made on and off after push and pull and then stopped altogether and the last cheque for Kshs.300,000/= was dated 24th November, 2020 and was not for HCCC No. 412 of 2011 as alleged by the applicant.
13. That the applicant cut off communication and refused to respond to calls or letters which prompted the filing of the bill of costs.
14. 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.
15. The Respondent avers that the Taxing Officer had jurisdiction to hear and determine the bill of costs as she held.
16. 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.
17. 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 of principle or law.
18. It is further averred that the Taxing Officer had the discretion to award Kshs.5,468,226.30 as counsel worked extremely hard and tirelessly and was thus entitled to the award.
19. That the applicant's intention was to delay the case and the applicant had not denied that services were rendered or were wanting.
20. The court is urged to uphold the ruling of the Taxing Officer.
21. The Applicant filed a Supplementary Affidavit sworn on 10th 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.
22. The applicant explained how it raised and used 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.
23. Finally, it is averred that failure to allow the reference would deny the workers represented their rights under Article 41(2)(c) of *the Constitution* to participate and join trade unions.

Applicant's submissions

24. The Applicant urged that the Advocate's Bill of Costs was time barred as time started running from 30th April, 2014 when the Respondent/Advocate attended court for a mention to confirm withdrawal of the appeal and lapsed in April 2020.
25. 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 5th 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.
26. The decision in *SM V HGE (2019) eKLR* was cited in support to urge that the Further Affidavit was improperly on record and vitiated the proceedings.
 27. 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.
 28. 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.
 29. The decision in *Mombasa Cement Ltd V Speaker, National Assembly & another (2018) eKLR* to urge that non-payment of court fees rendered a suit incompetent as was the case in this case and the Further Affidavit should not have been part of the record.
 30. It was further submitted that failure to serve the Further Affidavit tendered the same defective nullius effectus.
 31. The decision in *Kumbatha Naomi Adi V The County Returning Officer, Kilifi & 3 others (2013) eKLR* was relied upon to urge that a document filed but not served had no force of law, as it cannot be relied upon and no lawful order can be drawn from it as it denies the opposite party the opportunity to be heard.
 32. It was further submitted that the trial denied the appellant the right to fair trial. The court was urged to declare a mistrial. The decision in *Chandaria V Njeri (1982) eKLR* and *MMO V FAH (2017) eKLR* were relied upon to reinforce the submission.
 33. The decision in *Murugi Karanu V Gabriel Gikonyo Ndirangu (2008)* and *Duncan Kamau Kiriro V Japheth P. Kimotho (2013) eKLR* were cited to exemplify the right to be heard in proceedings.
 34. As regards errors of principle, the decision in *KANU National Election Board & 2 others V Salah Yakub Farah (2018)* was cited to underscore the instances in which the discretion of the Taxing Master may be interfered with.
 35. Counsel identified the Taxing Officer's reliance on the Further Affidavit as the first error of principle since it denied the applicant the opportunity to be heard. The Second was the use of the Advocates Remuneration Order, 2014 in lieu of the Advocates Remuneration Order, 2009. The decision in *Alutalala Mukhwana t/a Alutalala Mukhwana & Co. Advocates V Tom Ndede & another* was relied upon as was the decision in *Odera Obar & Co. Advocates V Jet Properties & Apartment Ltd (2019) eKLR*. The third error was the basic instruction fees, that the Taxing Officer proceeded without setting out the basic instruction fee contrary to the holding in *First American Bank of Kenya V Shah and others (2002) 1EA 64* affirmed in *B. Mbai & Associates V Clerk, Kiambu County Assembly & another (2017) eKLR*.
 36. Counsel submitted that the sum of Kshs.3,000,000/= as instruction fees was excessive and thus an error of principle.
 37. The decisions in *Nolly K. Musango V Peter Odanga & another (2021) eKLR* and *Kipkorir Titoo & Kihara Advocates V Deposit Protection Fund (2005) eKLR* were cited to reinforce the submission.



38. Counsel further urged that the Taxing Officer failed to strike a balance between the need to remunerate counsel and the need to ensure that legal services were accessible to the society generally.
39. The decision in Republic V Ministry of Agriculture and 20 others Ex Parte Muchiri W. Njuguna (2006) eKLR was relied upon to urge that the Taxing Officer did not consider the totality of the circumstances of the case in awarding Kshs.3,000,000/= as instructions fees.
40. Reliance was also made on the decision in Mwakio Kirwa Advocates V County Public Service Board of Bomet as well as Paul Ssemogerere & Olum V Attorney General Civil Application 5 of 2001 (unreported).

Respondent's submissions

41. 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 costs of the application.
42. 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.
43. 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 20th 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 underscore 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.
44. 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.
45. The court was urged not to interfere with the award of instruction fees.
46. 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.
47. The decision in Cecilia Karuru Ngayu V Barclays Bank of Kenya & another (2016) eKLR was relied upon.
48. The court was urged to dismiss the application.
49. The Applicant's Supplementary submissions dated 31st January, 2023 addressed the Further Affidavit exclusively. Counsel urged that the Respondent could not file additional documents as he had no leave to do so and the action was highly prejudicial to the Applicant.



****Issues and determination****

50. Having considered the application, responses and rival submissions, the issues for determination are;
- i. Whether the Bill of Costs was statute barred and
 - ii. Whether the Taxing Officer committed errors of principle.
51. On the first issue, the applicant argued that the Taxing Officer had no jurisdiction to entertain the Bill 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.
52. According to Ringera J. in *Macharia & Co. Advocates V Magugu* (2002) EA 428;
- “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 . . .”
53. The Court of Appeal expressed similar sentiments in *Wilfred N. Konosi t/a Konosi & Co. Advocates V Fiamco Ltd* (2017) eKLR.
54. 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.
55. According to the applicant, the affidavit was neither filed, paid for nor served upon the applicant and thus it 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 only contest was the matter in respect of which the sum of Kshs.300,000/= was paid. The letter dated 30th November, 2020 stated that it was for HCCC No. 412 of 2011 and there is no documentary evidence to the contrary. This would appear to have been the last payment the applicant made before the Bill of Costs was filed.
56. 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 appeal was withdrawn. This is a tacit admission of the amount outstanding.
57. 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.
58. 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 acting otherwise.



59. Under Section 39(1)(b) of the Act, estoppel includes the equitable doctrine of promissory estoppel, a concept eloquently explained by Denning L.J. in *Combe V Combe* (1951) 2 KB. 15 where the judge stated 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.

60. The doctrine or principle of equitable or promissory estoppel is a modification of the common law rule of consideration.

61. This, in the court’s view is the more persuasive argument in this case since the doctrine of promissory estoppel is based on the 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 the promise to its detriment. It would be unfair for the representor to act as if there was no promise.

62. The Applicant cannot 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 withdrawal of the appeal. 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*](#).

63. 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 begin 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 unconvinced that the parties were not communicating on and off on the amount due to the Respondent/Advocate.

64. However, the foregoing notwithstanding, counsel for the applicant raised a serious issue that the Taxing Officer relied on the Further Affidavit dated 4th April, 2022 which was neither paid for nor served upon the applicant. Relatedly, the Respondent/Advocate had attached a copy of a cheque dated 24th November, 2020, which the Taxing Officer relied upon so as 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.

65. The applicant’s counsel faulted the Further Affidavit on the premise that it was 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.

66. The earlier Ruling date was 5th May, 2022 and the Further Affidavit on record is dated 1st April, 2022.

67. 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.



68. 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 denies the other party 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.
69. The High Court decision in SM V HGE (2019) eKLR is highly persuasive as regards documents that are not properly on record in proceedings.
70. Court records reveal that on 3rd February, 2022, the matter came up before the Deputy Registrar for confirmation of filing of response by the Applicant.
71. Counsel holding brief for the Respondent/Advocate informed the court that the Respondent/Advocate had not received a response and prayed for the Bill of Costs to be taxed as drawn. Counsel holding brief for the applicant's counsel prayed for 30 days to file submissions. Mention to confirm filing of submissions was scheduled for 7th March, 2022 and the directions were to apply to 215, 2016, 217, 218 and 219 of 2021 notwithstanding the fact that they had different parent files. Taxation would proceed separately.
72. On 7th March, 2022, although the Respondent/Advocate had filed submissions, counsel for the applicant reported that he was yet to file submissions in some matters and prayed for 3 days. The Applicant was accorded three days to do so. The Deputy Registrar directed that the submissions would apply to 247/2021, 248/2021, 246/2021, 242/2021, 245/2021, 241/2021, 244/2021, 243/2021, 214/2021 and 217/2021, 218/2021 and 219/2021. Ruling was scheduled for 5th April, 2022 and was delivered on 31st May, 2022.
73. An entry on record on 14th April, 2022 states as follows "Parent file not traced. Parties to avail documents by 19th April, 2022." It is unclear to the court what documents the applicant was to avail and when.
74. In her ruling, the learned Deputy Registrar found that the Bill of Costs not statute barred because of the payment by cheque dated 24th November, 2020 as part payment which gave fresh accrual of the right of action under Section 23(3) of the *Limitation of Actions Act*.
75. Granted that the ruling was already slated for 5th April, 2022, it would appear to follow that Further Affidavit was presented to court after filing of the submissions and probably on 4th April, 2022 on the date it was sworn.
76. The applicant is challenging the Taxing Officer's reliance on the Further Affidavit and copy of the cheque attached thereto for want of leave and filing through the Registry and service. The original copy of the Further Affidavit dated 4th April, 2022 has no acknowledgement or Registry stamp. In other words, it lacks authentication by the Registry.
77. 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.
78. Puzzlingly, the parties could not agree on the matter in respect of which cheque No. 061025 issued by the applicant.
79. In the end, having found that the Further Affidavit dated 4th April, 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.
80. 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.
81. 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.
82. 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).
83. 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.”
84. 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 . . .”
85. 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.
86. The court is guided by these sentiments.



87. The applicant identified various errors of principle such as reliance on the Further Affidavit by the Taxing Officer, increase of instruction fee from Kshs.28,000/= to Kshs.5,000,000/= under the Advocates Remuneration Order, 2009, which was 179 times, 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.
88. As regards the Further Affidavit as explained 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.
89. As regards the alleged excessive instruction fees, the first issue to dispose of is the Advocates Remuneration Order applicable. While the Respondent argued that the Advocates Remuneration Order, 2014 was applicable, the applicant on the other hand maintained that the Advocates Remuneration Order, 2009 was the applicable framework since the instructions were given during the currency of the Advocates Remuneration Order, 2009 and the bulk of the responsibility was discharged during the currency of the former Remuneration Order, the court is of the view that the Advocate's Remuneration Order, 2009 was applicable.
90. The alleged actions taken by the Respondent/advocate after 2013 and 2014 when the subsequent remuneration order was promulgated were not particularized.
91. The ruling dated 14th June, 2022 made no direct mention of the Advocates Remuneration Order, 2009 or 2014. It is unclear which of the remuneration orders was relied upon in the computation of figures cited by the applicant.
92. The Respondent appears to suggest that the Taxing Officer relied on the Advocates Remuneration Order, 2014.
93. From the foregoing, it is the finding of the court that the Advocates Remuneration Order, 2009 was the operative legal framework.
94. 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 as the Taxing Officer had not established the basic of instruction fees which was necessary.
95. The Taxing Officer was also faulted for not particularizing the pertinent details of complexity or novelty, in other words justify the award.
96. 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.

97. These factors were also emphasized in *Joreth Ltd V Kigano & another* (Supra) among other decisions.
98. 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 4th February, 2022 as the learned judges considered the award to be “on the higher side.”
99. In the instant case, the Taxing Officer awarded the amount prayed for by the Respondent/Advocate of Kshs.5,000,000/=.
100. 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.
101. 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.
102. 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.
103. 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.
104. The court is unpersuaded that the Taxing Officer paid undue attention to the importance of the matter at the expense of other factors.
105. 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).
106. Finally, on Bills 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.”
107. It is common ground that the sum of Kshs.300,000/= was paid via cheque dated 24th 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.
108. 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.

109. 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.
110. Consequently, the decision of the Taxing Officer in the ruling delivered on 14th 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 22nd June, 2022.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 13TH DAY OF MARCH 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE



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