



Nyambane & another v Kenya County Government Workers Union; Kenya County Government Workers Union (Applicant); Leonard K. Mbuvi t/a Katunga Mbuvi & Co. Advocates (Respondent) (Miscellaneous Case E247 of 2021) [2023] KEELRC 607 (KLR) (13 March 2023) (Ruling)

Neutral citation: [2023] KEELRC 607 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CASE E247 OF 2021
JK GAKERI, J
MARCH 13, 2023**

BETWEEN

ZEPHANIA O. NYAMBANE 1ST CLAIMANT

FRANCIS N. MAKOKHA 2ND CLAIMANT

AND

KENYA COUNTY GOVERNMENT WORKERS UNION RESPONDENT

AND

KENYA COUNTY GOVERNMENT WORKERS UNION APPLICANT

AND

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

RULING

1. This is the determination of the Applicant's Chamber Summons dated 14th June, 2022 seeking orders that:-
 1. Spent.
 2. The decision of the Taxing Master be overturned/vacated and the bill of cost dated 16th December, 2021 be struck-out for being time barred by virtue of the statute of time limitations.
 3. The decision/Ruling of the Taxing Officer delivered on 31st May, 2022 on the Respondent's Advocate-Client Bill of Costs dated 16th December, 2021 taxing the Bill of Costs at Kshs.3,624,829/= be set aside and/or reviewed by the Honourable Court in its entirety.



4. The Further Affidavit sworn by Leonard Katunga Mbuvi on 4th April, 2022 and relied on by the Taxing Officer 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/Applicant to enable them respond.
5. In the alternative and without prejudice to the foregoing, this Honourable Court be pleased to remit the Advocate-Client Bill of Costs dated 16th December, 2021 for reconsideration/re-taxation by a different Deputy Registrar with appropriate directions in respect of items 1 – 57 thereof.
6. The Honourable Court be pleased to re-assess the costs due to the Advocate/Respondent in the taxation cause.
7. The costs of this application be provided for.
2. The Chamber Summons is expressed under paragraph 11(2) of the *Advocates Remuneration Order* and based on the grounds set out on its face and the Supporting Affidavit of Roba Duba sworn on 14th June, 2022.
3. The affiant deposes that the Respondent/Advocate was claiming Kshs.3,672,642/= from its client as legal costs for a matter filed at the Industrial Court on unfair termination of employment.
4. That the Taxing Officer considered the Bill of costs, preliminary objection dated 2nd March, 2022 and delivered the impugned ruling dated 31st May, 2022 taxing the Bill at Kshs.3,624,829.48 and the applicant filed a Notice of Objection.
5. The affiant further deposes that the Taxing Master made errors of principle, misdirected herself on legal and factual matters and the court had jurisdiction to interfere.
6. That the sum of Kshs.3,624,829.48 awarded is grossly excessive and justifies interference.
7. The affiant states that the Deputy Registrar applied wrong principles, took into consideration irrelevant factors not pleaded and ignored relevant factors in awarding Kshs.2,000,000/= as instruction fees as the sum was arbitrary and unreasonable high in light of the instructions given.
8. That on 4th April, 2022, the Respondent/Advocate sneaked into the court record a Further Affidavit not paid for, filed or served during the pendency of the ruling.
9. That there was no evidence that the Affidavit was ever filed, fees paid or served thus denying the applicant the opportunity to respond, an incurable procedural error.
10. That the Taxing Officer based her ruling on the impugned Further Affidavit.
11. That the annexed cheque dated 24th November, 2020 related to another case Edward Nyerere & 1 other V Registrar of Trade Union, HCCC No. 412 of 2011 as opposed to the matter under consideration.
12. That the Taxing Officer relied on the cheque in her ruling.
13. The affiant further states that the Taxing Officer abused her discretion and misdirected herself on the instruction fees payable to the Advocate and awarded a manifestly excessive figure and thus an error of principle.
14. That the Taxing officer increased the instruction fee from Kshs.6,300/= to 2,000,000/= and paid undue attention to the importance of the matter to the parties and did not detail the novelty, uniqueness or complexity. That the increase was arbitrary, capricious excessive, unreasonable and unjustified and amounted to unjust enrichment.



15. That the Taxing Officer assumed that the Bill arose from a Judicial Review.

Response

16. In her Response, the Respondent/Advocate stated that the Applicant had raised a Preliminary Objection before the Deputy Registrar which was unsuccessful and had not disclosed all relevant facts.
17. It is the Respondent's case that the Further Affidavit the applicant was challenging was delivered to the Registry before close of pleadings owing to technical hitches and the applicant did not deny its contents.
18. The Respondent states that the Taxing Officer had discretion to award the sum of Kshs.2,000,000/= as she did as the advocate expended time and other resources.
19. It is the Respondent's case that the Advocates Remuneration Order, 2014 was applicable.
20. The Respondent further avers that although the parties had previously been in constant engagement on payment of legal fees and payments were made on and off, the last cheque was the one dated 24th November, 2020 and was for a matter other than HCC No. 412 of 2011 as alleged.
21. Thereafter, the applicant cut off communication and has not responded to the Respondent's inquiries.
22. The Respondent avers that the parties herein had not disengaged and there was no letter to that effect.
23. Finally, the Respondent avers that the Taxing Officer had jurisdiction to hear and determine the bill of costs and the applicant's chamber summons was intended to delay the case as it had not denied that services were indeed rendered.
24. The court was persuaded to uphold the decision of the Taxing Officer.

Applicant's submissions

25. The applicant's counsel identified four issues for determination, namely;
- i. Whether the Bill of Costs was statute barred.
 - ii. Whether the award of Kshs.2,000,000/= and Kshs.3,624,829.48 was excessive to amount to an injustice to the Client/Applicant.
 - iii. Whether the Taxing Officer's decision was based on errors of principle and
 - iv. Whether the applicant is entitled to costs of the reference.
26. On the first issue, counsel submitted that the parties had no retainer and the limitation period began running on 4th November, 2013 when judgement was delivered and lapsed before the Bill of Costs was filed in 2021.
27. The decision in *Akide & Co. Advocates V Kenindia Assurance Co. Ltd* (2021) eKLR as well as Maina Njuguna & Associates were relied upon to reinforce the submission that instructions to counsel to institute proceedings came to an end when judgement was delivered.
28. The Taxing Master is faulted for having relied on part payment made via cheque dated 24th November, 2020 as a trigger of Section 23(3) of the *Limitation of Actions Act* on extension of time.
29. Counsel urged that the Taxing Master misdirected herself and erred in law.



30. It was further urged that the Further Affidavit to which the copy of the cheque was attached was not properly filed.
31. Counsel submitted that the Respondent/Advocate's Further Affidavit was sworn on 4th April, 2022 but had no filing date.
32. During a mention before the Deputy Registrar on 7th March, 2020 when parties were to confirm filing of submissions, Mr. Oginga for the Applicant confirmed compliance in some files but sought 3 more days to ensure full compliance. The Respondent sought 2 days after service to submit on any issue arising and ruling was scheduled for 5th April, 2022.
33. It is unclear as to what transpired between 7th March, 2022 and 14th April, 2022 as on these date, the Deputy Registrar reported that the parent file could not be found and the applicant was to avail documents by 19th April, 2022. It is unclear as to what documents the applicant was to avail and whether the respondent had corresponding leave. The ruling was rescheduled to 31st May, 2022.
34. The Applicant's counsel urged that the Respondent's contention that he had technical difficulties was suspicious.
35. Reliance was made on the decision in SM V HGE (2019) eKLR on the effect of improperly filed documents.
36. Counsel contended that since the Further Affidavit was sneaked in irregularly, the Bill of Costs should be dismissed.
37. Counsel argued that reliance on the Further Affidavit by the Taxing Officer vitiated the process and rendered the Bill of Costs incompetent.
38. It was counsel's case that the cheque dated 24th November, 2020 was used by the Respondent to extend time in more than 10 bills of costs.
39. As regards errors of principle, counsel urged that the first error of principle was reliance on the Further Affidavit dated 4th April, 2022 (some of the copies are dated 1st April, 2022) as it was sneaked into the record and thus the Taxing Officer considered extraneous factors and the applicant was not heard on the issue which constituted an error of principle.
40. That the Taxing appeared biased against the Applicant.
41. Reliance was made on the decision in *Katunga Mbuvi & Co. Advocates V Kenya County Government Workers Union* to buttress the submission.
42. Counsel submitted that the Further Affidavit was used in 15 files and the Taxing Officer should have discovered the same. Moreover, warrants of attachment were issued yet there was no decree.
43. On the Advocates Remuneration Order applied by the Taxing Officer, counsel submitted that there was an error of principle as the Taxing Officer did not identify the order she applied in the determination of the matter and thus misapplied the law as law does not apply retroactively as the instructions were given in 2011.
44. On instruction fees, it was submitted that under the Advocates Remuneration Order, 2009, the minimum amount was Kshs.6,300/= as per Schedule VI (1)(b) which the Taxing Officer ought to have used and exercised discretion to increase it on the basis of the relevant factors as was held in *First American Bank of Kenya V Shah & others* (2002) 1EA 64. That failure to set the basic fee was an error of principle.



45. The decision in *Nolly K. Musango V Peter Odanga & another* (2021) eKLR was cited to urge that the enhancement of instruction fees from Kshs.6,300/= to Kshs.2,000,000/= was excessive as the court held.
46. Reliance was also made on the sentiments of the Court of Appeal in *Kipkorir Titoo & Kihara Advocates V Deposit Protection Fund* (2005) eKLR to exemplify how overemphasis of certain aspects of a case such as difficulties, importance and complexity may constitute an error of principle.
47. It was contended that the Taxing Master laid undue emphasis on the importance of the suit to the Respondent as opposed to considering all the relevant factors.
48. Similarly, the decision in *Republic V Ministry of Agriculture & 20 others, Ex Parte Muchiri W. Njuguna* was relied upon to highlight the guidelines to Taxing officers such as reasonable instruction fees, comparability, objectivity, elements of complexity of the case, nature of responsibility borne by counsel, details on novelty and details on the time spent, research and skill deployed.
49. That the matter in the case was neither complex nor novel and the Taxing Officer did not set out the detailed elements of the factors she considered.
50. Counsel urged that the suit was presented from 2011 to 2013, a fairly short time to warrant Kshs.2,000,000/= as instruction fees and counsel had not indicated that he undertook extensive research in preparation of the case and the Taxing Officer did not detail the particulars.
51. Counsel further submitted that the fact that the Taxing Officer did not consider the payment of Kshs.300,000/= by the applicant was also an error of principle as held in *Spire Properties (K) Ltd t/a Diani Reef Beach Resort & SPA V Nyachoti & Co. Advocates* (2018) eKLR.
52. Similarly, counsel invited the court to be guided by the principles highlighted in *B. Mbai & Associates V Clerk, Kiambu County Assembly & another* such as excessiveness of an award taking into account irrelevant factors or omission of relevant factors, discretion of the Taxing Officer to increase or decrease instruction fees, setting out the basic fee.
53. The decision of Makau J. in *Mwakio Kirwa Advocates V County Public Service of Bomet* (2021) eKLR was cited to demonstrate that an instruction fee of Kshs.3,000,000/= was held to be excessive and the case had 36 claimants to urge that the Kshs.2,000,000/= in the instant case was inordinately high.
54. Counsel further submitted that the Respondent had not cited authorities to justify the award and the decision relied upon by the Taxing Officer was a judicial review matter for which the fee of 4,000,000/= was awarded based on the *Advocates Remuneration Order, 2014* and thus distinguishable and relatedly, the award was reduced to Kshs.2,000,000/= by the Court of Appeal.
55. Counsel urged that the Taxing Officer should have considered that the applicant being a union relied on monies collected from members and was a public entity with limited funds. That the award of Kshs.3,624,829.48 for a single file was excessive.
56. Counsel submitted that allowing excessive awards to advocates would sound the death knell of unions and concomitantly deny workers the right to be represented, hence the need to balance motivation of advocates and reasonability of awards.
57. Finally, counsel submitted that the applicant was operating at a deficit.



Respondent's submissions

58. The Respondent submitted that there was no letter terminating his services with the applicant or notice of change of advocates and had successfully prosecuted the matter in respect of which the Bill of Costs arose.
59. That after a change of officials at the applicant's union, the new officials started changing administrative structures of the previous regime and the parties had been in constant communication the last being 22nd June, 2022 and the matter was still active in 2019 and the Respondent was still on record for the applicant.
60. Counsel urged that the *Advocates Remuneration Order*, 2014 was the operational framework as the matter was handled after it came into effect.
61. Counsel argued that the applicant's intention was to delay the case, justice, waste the courts time and did not want to pay legal fees.
62. On error of principle, counsel relied on the decision in *Wycliffe Chitayi Muhalya V Dorothy Awiti Omboto t/a Dao Associates & another* (2017) eKLR to demonstrate the instances in which the court may interfere with the decision of a Taxing Master i.e error of principle or the fee awarded was manifestly excessive.
63. Similarly, the sentiments of Mutungi J. in *Metro Petroleum Ltd V Onyango Oloo & Co. Advocates* (2016) eKLR were also relied upon to exemplify errors of principle.
64. As regards the Further Affidavit, counsel stated that it was delivered physically due to technical challenges and was not sneaked into the court file as alleged and the applicant had not denied the payment of Kshs.300,000/= to the Respondent.
65. Counsel submitted that the Taxing Officer did not commit an error of principle and the award given was reasonable.
66. Counsel prayed for dismissal of the reference with costs.
67. The applicant filed supplementary submissions dated 31st January, 2023 arguing that a reference was in the nature of an appeal and a party could not adduce additional evidence without leave.
68. That the Respondent/Advocate had improperly filed documents without leave of the court.
69. Reliance was made on the sentiments of Manani J. In *Katunga Mbuvi & Co. Advocates V Kenya County Government Workers Union* on the placement of a further affidavit in the court's record without leave of the court.
70. The court was urged to strike out the Further Affidavit as the applicant stood to suffer by its reliance upon by the Taxing Officer.
71. The decision in *Kiru Tea Factory Co. Ltd V Stephen Maina Gitbiga & 3 others* (2019) eKLR was relied upon to demonstrate the fate of affidavits filed without leave of the court.
72. Counsel argued that the Respondent had not explained why he did not adduce the evidence he was filing through the Further Affidavit irregularly and no exceptional circumstances had been demonstrated.
73. The court was urged to strike out and/or ignore the documents filed by the Respondent.



74. The court was urged to set aside the taxation of bill of costs.

Determination

75. The issues for determination are;

- i. Whether the Bill of Costs was statute barred.
- ii. Whether the taxing officer committed errors of principle.

76. 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.

77. 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 . . .”

78. The Court of Appeal expressed similar sentiments in *Wilfred N. Konosi t/a Konosi & Co. Advocates V Fiamco Ltd* (2017) eKLR.

79. Needless to emphasize, this issue was raised before the Taxing Officer who found that she had jurisdiction by relying 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 or paid for nor 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 only contest is 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 appear to have been the last payment the applicant made before the Bill of Costs was filed.

80. Noteworthy, the applicant did not deny that it owed the Respondent monies in respect of the services rendered which it had not faulted in any way nor had their relationship been formally terminated even after the judgement. This may be construed as a tacit admission of the amount outstanding.

81. 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.

82. 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.



83. 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 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.”
84. The doctrine or principle of equitable or promissory estoppel is a modification of the common law rule of consideration in contractual engagements.
85. 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 to be acted upon and the representee has relied on it to its detriment. It would be unfair for the representor to act as if there was no promise.
86. 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 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.
87. 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 not persuaded that the parties were not communicating on and off on the amount due to the Respondent/Advocate.
88. 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.
89. The applicant’s counsel faulted the Further Affidavit on the premise that it was properly on record as it had neither been filed, paid for nor served, an argument the Respondent did not controvert by cogent evidence as the Affidavit was placed on record a day before the earlier ruling date on 5th April, 2022.
90. 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.
91. 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 as its absence denied the applicant the



- right to a fair hearing as submitted by counsel of the applicant. Similarly, the Respondent/Advocate had no leave to file the Further Affidavit.
92. The High Court decision in *SM V HGE* (2019) eKLR is highly persuasive as regards documents that are not properly on record in proceedings.
 93. Court records reveal that on 8th March, 2022, the matter came up before the Deputy Registrar for confirmation of filing of submissions.
 94. The Respondent/Advocate informed the court that the applicant had filed submissions and served and prayed for a ruling date which the Deputy Registrar gave as 12th April, 2022. The Respondent also prayed that the directions apply to 176, 211, 207, 2008, 210 of 2022. Applicant's counsel was absent.
 95. An entry on record under the heading "In Chambers" dated 6th April, 2022 states as follows "Parent file not traced. Parties to avail documents." It is unclear to the court what documents the parties were to avail and when.
 96. On 12th April, 2022, both parties were represented by counsel and the Deputy Registrar directed the parties to avail copies of documents by 19th April, 2022 and the Ruling date was pushed to 31st May, 2022 on which date it was not ready and was rescheduled to 7th June, 2022 and was eventually delivered on 14th June, 2022.
 97. As adverted to elsewhere in this ruling, the learned Deputy Registrar found the Bill of Costs not statute barred because of the payment by cheque dated 24th November, 2020 as part payment which gave fresh accrual to the right of action under Section 23(3) of the *Limitation of Actions Act*.
 98. Granted that the ruling was already slated for 12th 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.
 99. The applicant is challenging the substratum of the finding, the Further Affidavit and the copy of 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.
 100. It cannot be gainsaid that 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.
 101. Puzzlingly, the parties could not agree on the matter in respect of which cheque No. 061025 issued by the applicant.
 102. 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.



103. 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.
104. 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.
105. 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*).
106. 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.”
107. 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 . . .”
108. 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.
109. The court is in agreement with these sentiments.
110. 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/= which under the Advocates Remuneration Order, 2009 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.



111. 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.
112. 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.
113. The alleged actions taken by the Respondent/advocate after 2013 and 2014 when the subsequent remuneration order was promulgated were not particularized.
114. Intriguingly, 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.
115. The Respondent appears to suggest that the Taxing Officer relied on the *Advocates Remuneration Order, 2014*.
116. From the foregoing, it is the finding of the court that the *Advocates Remuneration Order, 2009* was the operative legal framework.
117. 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 such as *Nolly K. Musango V Peter Odanga & another (supra)*, where 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)*.
118. The Taxing Officer was also faulted for not particularizing the pertinent details of complexity or novelty, in other words justify the award made.
119. Part II of Schedule V of the *Advocates Remuneration Order, 2009* itemised the factors to be considered in assessing the instruction fees.
120. 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.
121. These factors were also emphasized in *Joreth Ltd V Kigano & another (supra)* among other decisions.
122. 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. 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.”

123. In the instant case, the Taxing Officer awarded the amount prayed for by the Respondent/Advocate of Kshs.5,000,000/=.
124. Similarly, since the award relied upon as authority was subsequently reduced by a Superior Court, the award is unsustainable and justifies the court’s interference as excessive and thus an error of principle as enunciated in many decisions.
125. 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.
126. 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.
127. 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)*. Equally, 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.
128. The court is unpersuaded that the Taxing Officer paid undue attention to the importance of the matter at the expense of other factors.
129. 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)*.
130. 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.”
131. 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, the applicant could not deny the fact and relied on the cheque to urge the court to find and hold that an error of principle had been committed.
132. 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.
133. Flowing from the foregoing, it is the finding of the court that the applicant has demonstrated a sustainable case for the court’s interference with the taxation of the Bill of Costs.
134. 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

