



**Gachoka v Kisiwa Guest House Lodge Limited (Cause 806 of 2016)
[2023] KEELRC 2521 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2521 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 806 OF 2016
M MBARÚ, J
OCTOBER 19, 2023**

BETWEEN

JOSEPH GACHOKA CLAIMANT

AND

KISIWA GUEST HOUSE LODGE LIMITED RESPONDENT

RULING

1. The respondent, Kisiwa Guest House Lodge Limited filed application dated 11 August 2023 seeking for orders that;
 1. There be a stay of execution of the taxing master's ruling delivered on 28th July 2023 pending the hearing and determination of this application.
 2. The ruling delivered on 28th July 2023 of the taxing master Hon. D. O. Mbeja, Deputy Registrar Employment and Labour Relations Court be set aside entirely or in the alternative the assessment done in respect of items 1(a) and (b), 2, 3, 5(v), (w) and (x), 7(b), (d), (f), (g), (h), (i), (j) and 10 of the claimant's Party and Party Bill of Costs dated 15 February 2023 be set aside.
 3. The court be pleased to remit the claimant's Party and party Bill of Costs dated 15th February 2023 to another Taxing Officer for re-taxation of 1(a) and (b), 2, 3, 5(v), (w) and (x), 7(b), (d), (f), (g), (h), (i), (j) and 10.
 4. The costs of this application be provided for.
2. The application is supported by the affidavit of Gikandi Ngibuini advocate for the respondent and on the grounds that in the ruling delivered on 18 February 2023 with regard to taxation of the Bill of Costs, aggrieved, the respondent filed objections and the reference herein and is apprehensive if an order of stay of execution is not issued the claimant shall proceed with execution.



3. The taxing officer committed an error in principle and law in the manner he assessed item 1(a) on instruction fees, item 1(b) on getting up fees and items 2, 3, 5(v), (w) and (x), 7(b), (d), (f), (g), (h), (i), (j) and 10 which assign manifestly excessive costs and not per scale. The bill of costs should be re-taxed by another taxing officer.

The claimant did not file any Replying Affidavit.

4. Parties agreed to file written submissions. Only the respondent complied. On 20 September 2023 the claimant requested to be allowed to file a Replying Affidavit but there is no compliance. On 9 October 2023 the claimant requested to file written submissions, but there is no compliance.

5. The respondent submitted that in the judgment herein, the claimant as awarded Kshs. 247,212 with costs. A bill of costs was filed for Kshs. 428,365 higher than the judgment sums contrary to the principles outlined in the case of *Republic v Minister for Agriculture & 2 others ex parte Samuel Muchiri W Njuguna & 6 others* [2000] eKLR that the quantum of costs allowed by the taxing master as the costs payable and not properly managed, litigation costs would be so high leading to bankruptcy. By allowing costs of Kshs. 414,765 in costs taxed off Kshs. 13,600, the taxing officer analysed the bill of costs wrongly.

1. Item (ii) of the bill of costs has no evidence that there were 42 folios and the award of Kshs. 6,800 is not justified similarly to items b, to g in the same items.
2. Item (ii) the claimant was awarded Kshs. 10,000 instead of Kshs. 39,690 claimed. The taxation only addressed one item.
3. Item 3 was heavily contested by the respondent proposing Kshs. 3,000 instead of Kshs. 8,950.
4. Item 5, v, w, and x for Kshs. 55,100 were contested and these were awarded as claimed.
5. Items 7 b, d, e, f, g, h, I, j for Kshs. 18,550 represented Kshs. 166,950 which is excessively high.

6. Paragraph 7 of the respondent's submissions were not considered in this regard to justify the high award of service fees. No reasons were given as held in *Blue Sea Services Ltd & another v Public Procurement Administrative Review Board & another* [2016] eKLR.

when a Bill of Costs is not properly determined, the same should be re-taxed by another taxing officer.

7. The claimant did not file any Replying Affidavit or written submissions as noted above.

Determination

8. On 28 July 2023 the taxing officer delivered ruling with regard to the party and party bill of costs dated 14 February 2023 where the claimant was seeking a total sum of Kshs. 428,365 as costs.
9. The core principle in a taxing officer assessing a party and party bill of costs is to consider the instruction fee which should cover the advocates work including taking instructions and preparing the case for trial, the value of the subject matter and that the taxing master's discretion must be exercised judicially and not whimsically or capriciously.
10. From the record, it is a given fact that the judgment herein delivered on 5 November 2021 was for Kshs. 247,212. This does not mean that the instruction fee was to be based on this amount. This was one of the reliefs that had been granted as the court found the claimant was unfairly terminated in his employment.



11. The respondent's case is that the taxing officer erred in taxing item 1(a) on instructions fee and item 1(b) on getting up fees and that items 2, 3, 5(v), (w) and (x), 7(b), (d), (f), (g), (h), (i), (j) and 10 are excessively high.
12. In the party and party bill of costs, item 1(a) on instructions fees the claimant claimed Kshs. 75,000 which is per scale on the award of Kshs. 247,212.
 1. Item 1(b) on getting up fee is calculated at 1/3 of the instructions fees at Kshs. 25,000 which is per scale. Under this heading, a total of Kshs. 100,000 is claimed.
 2. On items 2, 3, 5(v), (w) and (x), 7(b), (d), (f), (g), (h), (i), (j) and 10 said to be excessive.
 3. Item 2 is the Memorandum of Claim assessed at 42 folios, which is not correct. This document has a total of 13 pages. Subsequent pages filed by the claimant have less pages contrary to the tabulations given. Objections in this regard are justified.
 4. Item 3 copies of Memorandum of claim follow the sequence of an erroneous assessment from item 2.
 5. Item 5(v) on court registry attendances, a quick analysis reveals the following;
The alleged attendance on 6 November 2021 to collect the judgment, under items 5(o) to (u) are not part of the court record;
13. Attendance on 21 June 2021 is not on the record;
This item shall be re-assessed based on the actual record of the court.
14. However, item 5 (v), (w) and (x) are reasonable and per scale.
 1. Items 7(b), (d), (f), (g), (h) and (j) on mention notices service at Nairobi, the claimant shall submit evidence of such service, otherwise, the item shall be assessed at local rates of service.
 2. Item 10 is without evidence of any schedule of calls, transport costs to court, swearing fees is paid directly and should form basis of any fees and receipts issued.
15. The objection in this regard is justified.
16. Accordingly, as outlined above, the party and party bill of costs dated 14 February 2023 shall be re-assessed and the above analysis put into account. For this application, each party to be own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 19TH DAY OF OCTOBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

