



**Kimonye v Kenya Meat Commission; Co-operative Bank Ltd (Athi River) (Garnishee)
(Cause 465 of 2017) [2023] KEELRC 3024 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3024 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 465 OF 2017
JK GAKERI, J
NOVEMBER 23, 2023**

BETWEEN

JAMES KIMONYE CLAIMANT

AND

KENYA MEAT COMMISSION RESPONDENT

AND

CO-OPERATIVE BANK LTD (ATHI RIVER) GARNISHEE

RULING

1. This is the Respondent's Chamber Summons dated 14th September, 2023 seeking orders that:-
 1. The decision of the Honourable Taxing Master delivered on 8th September, 2013 be set aside and/or quashed and vacated by way of reference and all consequential orders be and are hereby set aside.
 2. In the alternative to Prayer 1, the Honourable Court do exercise inherent jurisdiction and be pleased to re-tax the Bill of Costs dated 19th April, 2022.
 3. In the alternative to Prayer 1 and 2 above, the Honourable Court exercise its inherent jurisdiction and refer the Bill of Costs dated 19th April, 2022 to another Taxing Officer for re-taxation or make directions to a fresh taxation.
 4. Spent.
 5. Costs of this Application be provided for.
2. The Chamber Summons is expressed under Rule 7 and 11 of the Advocates Remuneration Order, 2014 and Section 3A of the *Civil Procedure Act* and is based on the grounds set out on its face and the Supporting Affidavit of Anthony Ademba, the Applicant's Chief Legal Officer who deposes that the



- Taxing Master misdirected himself in taxing items 1 to 9 of the Bill of Costs in relation to instruction fees at Kshs.496,610/= above the scale without justification contrary to precedent.
3. That the Taxing Master disregarded the Respondent's submissions and binding authorities from a superior court.
 4. The affiant states that the Taxing Master misapplied the law by failing to tax of items No. 4, 14, 16, 23, 30, 33, 39, 53, 61, 67, 71 and 79 on drawing of pleadings as they lacked particulars and should have been disregarded.
 5. That the Taxing Master overlooked the provisions of Schedule 6A(S) of the Advocates Remuneration Order 2014 on copies of pleadings at Kshs.25/= per folio in lieu of Kshs.1,000/= and the same ought to be reviewed.
 6. The affiant deposes that the award of Kshs.802,208.31 is excessive in the circumstances and is a clog on the right to access justice.
 7. The affiant deposes that there is no legal basis of the award which unjustly enriches a party as opposed to reimbursement of the costs incurred as by law required.
 8. That the Taxing Master's decision to tax the Bill of Costs higher than the ordinary scale without justification or explanation is unlawful and illegal and the award is punitive.
 9. That the failure to tax off items 6 and 7 which were fictitious in nature was erroneous.

Response

10. In his Replying Affidavit sworn on 23rd October, 2023, the Decree-holder/Respondent, in opposition to the Application deposes that both parties filed written submissions and a ruling delivered on 8th April, 2022 based on the sum of Kshs.8,818,900/= awarded and the counter-claim of Kshs.6,011,556.00 was dismissed.
11. That the Taxing Master appraised himself with the provisions of Section 6A of the Remuneration Order, 2014 and considered the nature of the suit, weight and magnitude of the matters and prayers sought.
12. The affiant deposes that the Applicant had not demonstrated that the Taxing Officer committed an error of principle to warrant the courts interference as all relevant factors were taken into consideration.
13. The affiant prays for dismissal of the application with costs.

Respondent/Judgement-Debtor's submissions

14. Counsel isolated one issues for determination namely; whether the Application dated 14th September, 2023 is merited.
15. Counsel relied on the decisions in Premchand Raichand Ltd & another V Quarry Services of East Africa Ltd & another (1972) CA 162 and First American Bank of Kenya V Shah & another (2002) EA 64 as well Joreth Ltd V Kigano and Associates (2002) 1 EA 92 to underline the principle of setting aside of the decisions of the Taxing Master namely; an error of principle award is manifestly excessive or too high, fair reimbursement for costs and consistency in awards.
16. Counsel urged that the court ought to interfere with an award where it was shown that the award was manifestly excessive or was based on an error of principle.



17. Counsel reinforced the submission further by citing the sentiments of the court in Ocean Commodities Inc & others V Standard Bank of SA Ltd & others (1984) (3) SA 15(A) at 18 FCG.
18. Counsel submitted that the Bill of Costs was taxed astronomically high and puts the provision of legal services out of reach as the Taxing Master disregarded Section 6 of the Remuneration Order and misinterpreted and misapplied the law and thus erred to award the sum of Kshs.802,208.31 and the reference herein was merited.

Claimant's submissions

19. Counsel submitted that the sum of 496,261.00 awarded as instruction fees was based on the amount awarded by the court and the Respondent's Counter-claim as the law provides.
20. Counsel urged that the Taxing Master did not make any error of principle.
21. Reliance was made on the sentiments of the court in Peter Muthoka & another V Ochieng & 3 others (2019) eKLR on the applicable principles.
22. It was submitted that the Respondent's counsel had not shown that the Taxing Officer had committed an error of principle or did not exercise his discretion judiciously.
23. That counsel for the Respondent provided no basis to argue that the amount awarded was excessive and urged the court to dismiss the reference with costs.

Determination

24. The singular issue for determination is whether the reference application dated 14th September, 2023 is merited.
25. Counsels have adopted opposing positions with the Applicant maintaining that the Taxing Master committed errors of principle.
26. As correctly submitted by the Applicant's counsel, the principles governing the court's interference with the exercise of discretion by a Taxing Master are well settled as captured in many decisions.
27. In Republic V Ministry of Agriculture & 2 others, Ex Parte Muchiri W. Njuguna & others (2006) eKLR, Ojwang J. (as he then was) held as follows;

“The court cannot interfere with the Taxing Officer's decision on taxation unless it is shown that either the decision was based on an error of principle or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle. Of course it would be an error of principle to take into account irrelevant factors or omit to consider relevant facts . . .

And according to the Advocates (Remuneration) Order itself, some of the relevant factors to take into account include the nature and importance of the case or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge . . . if the court considers that the decision of the Taxing Officer discloses errors of principle the normal practice is to remit it back to the Taxing Officer for reassessment unless the judge is satisfied that the error cannot materially have affected the assessment . . . A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved . . .



The taxation of the costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore interfere with the award of a Taxing Officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or low as to amount to an injustice to one party or the other.”

28. Similar sentiments were expressed in *First American Bank of Kenya V Shah & others* (2002), *Kipkorir Tito & Kiara Advocates V Deposit Protection Fund Board* (2005) eKLR as well as *Joreth Ltd V Kigano & Associate* (2002) eKLR among others.
29. The Decree-holder’s party and party costs against the Respondent dated 19th April, 2022 was taxed by the Deputy Registrar and a ruling delivered on 8th September, 2023.
30. On instruction fees, the Taxing Officer relied on the amount awarded to the Claimant, Kshs.8,818,900.00 and the Respondent’s Counter-claim of Kshs.6,011,556/= which the court dismissed and arrived at a figure of Kshs.496,610/=.
31. From the Ruling, it is evident that the court considered all the items and taxed of Kshs.428,351.14 from the amount charged, Kshs.1,230,559.45 leaving a balance of Kshs.802,208.31 which the applicant considers excessive.
32. The applicant faults the Taxing Officer on various grounds as follows;
33. On the Taxing Officer’s disregarded established precedents on instruction fees, which counsel considered above the scale.
34. Although the Taxing Officer considered the subject matter, the ruling provides no explanation as to what other principles or precedents were relied upon to justify the award as ordained by the Advocates Remuneration Orders.
35. Second, the Taxing Officer is faulted for disregarding the submissions and authorities cited by the Judgement debtor.
36. Although the Respondent did not exemplify what the Taxing Officer did not consider, the ruling is silent on what any of the parties submitted or the authorities they relied upon. A mention of what the Taxing Officer found persuasive or unpersuasive would have demonstrated regard for the submissions or authorities relied upon by the parties.
37. Third, as regards misapplication of law by failing to tax off items No. 4, 14, 16, 23, 30, 33, 39, 44, 53, 61, 67, 71 and 79 on the ground that they were ambiguous, it is clear that the items, though identified by name as drawing of notices, affidavits, list of documents issues, list of witnesses, there is no indication of the number of folios as submitted by the Respondent’s counsel.
38. Fourth, on making of copies, the applicant argues that the sum of Kshs.1,000/= was ambiguous and above the scale of Kshs.25 per folio.
39. Although counsel did not identify the specific item, items 5, 13, 15, 19, 22, 24, 31, 34, 40, 42, 45, 48, 54, 80, 83, 87 and 89 among others are drawn to scale.
40. However, under item 11, 15 folios are charged Kshs.1,000/= which appears inconsistent with rest as the correct amount ought to have been Kshs.375/=.
41. Arguably, the amount is ambiguous as alleged.



42. From the foregoing, it is evident that the Taxing Officer did not consider the full complement of factors which should inform the assessment of instruction fees as set out in *Ochieng, Onyango, Kibet and Ottaga Advocates V Adopt Light Ltd HC Misc. 729 of 2006* as follows;

“ . . . The Taxing Master must consider the case and the labour required in the matter, the nature or importance of the matter, moreso the amount or value of the subject matter involved, the interest of the client in sustaining or loosing a brief and the complexity of the dispute. In assessing an amount commensurate to the work undertaken, it is of fundamental importance to consider the value of subject matter . . .”

43. It requires no belabouring that the formula in Schedule 6 Part B of the Advocates Remuneration Order must be adhered to as a basis for determining the basic instruction fee and other items.

44. From the ruling by the Taxing Officer, it is clear that the learned Deputy Registrar addressed his mind to the value of subject matter exclusively in the following words;

“ These amounts (award and counter claim) will be the respective ascertained value of the subject matter for purposes of determining the instruction fees. Instruction fees is therefore calculated as follows . . .”

45. Judicial authority is consistent that failure to consider relevant factors or taking into account irrelevant circumstances amounts to an error of principle.

46. In this case, the learned Deputy Registrar did not consider other relevant factors such as nature and importance of the matter, interests of the parties and degree of complexity among others.

47. For the foregoing reasons, it is the finding of the court that the Taxing Master erred in principle in failing to consider the formula in Schedule 6 Part B of the Advocates Remuneration Order and not taxing ambiguous items identified herein above.

48. Consequently, the orders that commend themselves are that:-

- a. The Ruling of the Taxing Master dated 8th September, 2023 is hereby set aside.
- b. The party and party Bill of Costs dated 19th April, 2022 is hereby remanded for re-assessment by a different Taxing Master.
- c. That parties shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23RD DAY OF NOVEMBER 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

