



Local Authorities Provident Fund v Nairobi City County Government (Cause 746 of 2019) [2023] KEELRC 3391 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEELRC 3391 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 746 OF 2019
SC RUTTO, J
DECEMBER 20, 2023

BETWEEN

THE LOCAL AUTHORITIES PROVIDENT FUND CLAIMANT

AND

NAIROBI CITY COUNTY GOVERNMENT RESPONDENT

RULING

1. This Ruling arises from a taxation by Hon. Daisy Mutai. In her decision dated 24th August 2023, the Taxing Master taxed the Party and Party costs in the total sum of Kshs 3,083,000/=.
2. Aggrieved by the said decision, the Applicant lodged the instant reference vide a Chamber Summons Application dated 5th September 2023 seeking the following orders:
 - a. Spent
 - b. Spent
 - c. The taxation of the Instruction fees in the sum of Ksh3,000,000/- in the Ruling delivered by Hon. Daisy C. Mutai (Learned Deputy Registrar) on 24th August 2023 under item no. 1 of the Applicant's party and party Bill of Costs dated 4th May 2023 be set aside and the matter be remitted to a different Deputy Registrar of this Honourable Court other than Hon. Daisy C. Mutai (Learned Deputy Registrar) for fresh taxation.
 - d. Further to and upon the grant of prayer no. 4 above, this Honourable court be pleased to stay the execution and/ or enforcement of the Ruling delivered by Hon. Daisy C. Mutai (Learned Deputy Registrar) on 24th August 2023 on the Applicant's party and Bill of Costs dated 4th May 2023 pending the fresh taxation by a different Deputy Registrar of this Honourable Court other than Hon. Daisy C. Mutai (Learned Deputy Registrar)



- e. In the alternative but without prejudice to prayers no. 3 and 4 above, this Honourable Court be pleased to set aside the instructions fees under items no. 1 of the Applicant's party and party Bill of Costs dated 4th May 2023 as taxed in the Ruling delivered by Hon. Daisy C. Mutai (Learned Deputy Registrar) on 24th August 2023 and instead proceed to tax the said item.
 - f. This Honourable Court be pleased to issue any other order to meet the ends of justice.
 - g. The cost of this Chamber Summons application be provided for.
3. The Application is founded on the grounds set out on its face and the Supporting Affidavit sworn on 5th September 2023, by Wasonga Sijeyo Ogola, the Applicant's Acting County Solicitor who avers that in the Applicant's assessment and computation of the Instruction Fees item no. 1 of the Bill of Costs, it derived the value of the subject matter in this cause from the special damages amount of Kshs 27,081,599,466/= which was expressly pleaded as relief (a) in the Claimant's Statement of Claim dated 5th November 2019. In doing so, the Applicant assessed its instructions fees in the sum of Kshs 304,821,743.99/=.
 4. Mr. Wasonga contends that in arriving at her assessment, taxation and award of the instruction fees, the Learned Deputy Registrar improperly exercised judicial discretion in taxing and awarding the Applicant a sum of Ksh3,000,000/=.
 5. That the Learned Deputy Registrar in her assessment expressly found that in adopting the formula provided under the Advocates (Remuneration) (Amendment) Order 2014, the Applicant was entitled to instruction fees of Kshs 304,817,994/=. He deposes that notwithstanding this finding, the Learned Deputy Registrar unjustifiably, unreasonable and without sufficient explanation proceeded to exercise judicial discretion to reduce the amount to Kshs 3,000,000/= on the basis that the instruction fees that the Applicant was entitled to be "quite a huge amount".
 6. He is advised by the Applicant's advocates, which he believes to be accurate, that the Learned Deputy Registrar was correct in being limited to assessing, taxing and awarding the instruction Fees under item no. 1 of the Bill of costs on the basis of the pleaded sum of Kshs 27,081,599,466 only. However, the Learned Deputy Registrar's failure to award the costs arising therefrom in the sum of Kshs 304,821,743.99/= is in breach of the principles of taxation based on the parties' pleadings as held by the Court of Appeal in the decisions delivered in the locus classicus cases of *Joreth Limited v Kigano & Associates* (2002) eKLR, *Peter Muthoka & Another v Ochieng & 3 others* (2019) eKLR and *Otieno, Ragot & Company Advocates v Kenya Airports Authority* (2021) eKLR.
 7. According to Mr. Wasonga, the Learned Deputy Registrar erred in failing to correctly apply the principles as set by the Court of Appeal in the locus classicus case of *Premchand Rainchand Ltd Another v Quarry services of East Africa Ltd and another* (1972) EA 162 when taxing the Bill of costs.
 8. He further states that the decision by the Learned Deputy Registrar was made on the basis of matters which were improperly considered therefore leading to an incorrect assessment of the party and party costs. As such, the interference by this Honourable Court with the decision of the Learned Deputy Registrar is justified and warranted.
 9. In response to the Chamber Summons Application, the Claimant filed a Replying Affidavit sworn on 28th September 2023, by Kellen Njue, its Legal Manager.
 10. According to Ms. Njue, it is trite law that judges will not interfere with the quantum allowed as an instruction fee upon taxation unless it is manifestly so high or so low that it calls for interference by reason of misdirection having occurred or some wrong principle having been adopted.



11. She further avers that courts have upheld the general principle that it is within the discretion of the Taxing Officer to increase or reduce the instruction fee and the amount of the increase or decrease is discretionary.
12. She further deposes that the Claimant's suit was not heard on its merit at a full hearing.
13. Ms. Njue further avers that the Claimant's claim was of a public nature and was against the Applicant for failing to remit monies deducted from employees of the county government. There were no complex issues that were raised by the parties and the court's main observation was that the Claimant did not draw a distinction between the claim in ELRC 486 and ELRC 746.
14. That further, there were no novel issues raised in the proceedings before the court.
15. She contends that the instruction fee and the getting up fee are predatory and aim to unjustly benefit the Applicant.
16. Upon being served with the Claimant's Replying Affidavit, the Applicant filed a Supplementary Affidavit sworn on 18th September 2023, by Wasonga Sijeyo Ogola who deposes that the dispute in this cause was not of a public nature as alleged. He contends that the suit was commercial by which the Claimant sought the payment of arrears of the Applicant's employees' retirement benefits which were alleged by the Claimant to not have been remitted by the Applicant.
17. Mr. Wasonga further states that any recovery by the Claimant of alleged unremitted dues from the Applicant is a commercial engagement and therefore of a commercial nature through the instant cause.
18. In Mr. Wasonga's view, the instant cause concerned complex and novel matters for determination.
19. He further avers that the Replying Affidavit does not disclose any basis or ground to support the award of the instruction fees in the Ruling on Taxation.

Submissions

20. The Application was canvassed by way of written submissions. On its part, the Applicant has submitted that the reduction of the instruction fees was unjustifiable as it was premised on factors that the Learned Deputy Registrar ought not to have considered. The Applicant further submits that the decision to decline to award Kshs 304,817,994/= was premised entirely on the "reasonableness" of the award vis a vis the decision delivered in the case of *Republic v Minister for Agriculture & 2 others Ex parte Samuel Muchiri W'Njuguna & 6 others* (2006) eKLR to the effect that the taxation of advocates instruction fees is to seek no more and no less than the reasonable compensation for professional work done and that the same should avoid any prospect of unjust enrichment for any particular party or parties.
21. The Applicant further submits that the learned Deputy Registrar in the taxation of the bill of costs took into account factors which were not to be taken into account thereby compounding the erroneous exercise of juridical discretion.
22. The Applicant further argues that the threshold has been satisfied to justify this Court's intervention to interfere with the learned Deputy Registrar's taxation of the instruction fees under item No. 1 of the Bill of Costs.
23. It has further been submitted by the Applicant that the learned Deputy Registrar violated the principles set by the court in *Premchand Raichand Ltd v Quarry Services of East Africa Ltd* (No. 3) [1972] EA 162.



24. On its part, the Claimant has submitted that the general principle applied by the Courts is that the Taxing Officer has discretion to increase or reduce the instruction fees and that the amount of the increase or reduction is discretionary. On this score, reliance was placed on the case of *First American Bank of Kenya Ltd v Gulab P. Shah & 2 others* (2002) eKLR and *Kabari & Kiai Advocates v Safari Lodges & Hotels Ltd* (2007) eKLR.
25. It was the Claimant's further submission that the suit was not confirmed for hearing and heard on merits and further, there was no novel issue and no novelty had been identified or clarified in the Ruling.

Analysis and Determination

26. As I can discern from the Application, the Responses thereto as well as the rival submissions, the singular issue arising for determination by this Court is whether the Taxing Officer erred in law and principle while taxing the Party and Party bill of costs herein and thereby reached a wrong assessment.
27. The Principles of taxation were aptly stated in *Premchand Raichand Ltd and another v Quarry Services of East Africa Ltd and Others No.3* (1972 EA 162) thus:
- “(a) successful litigant ought to be fairly reimbursed for costs he has had to incur
- (b) That costs be, not allowed to rise to such level as to confine access to justice to the wealthy.
- (c) that the general level of remuneration of advocates must be such as to attract recruits to the profession and
- (d) that as far as practicable there should be consistency in the awards made.
- (e) that there are no mathematical formulae to be used by the taxing master to arrive at the precise figure. Each case has to be decided on its merits and circumstances
- (f) the taxing officer has discretion in the matter of taxation but he must exercise the discretion judiciously and not whimsically (g) the court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party.”
28. In the case of *Joreth Limited v Kigano & Another* [2002] E.A. 92 the Court set out various factors to be considered in determining the instruction fee thus; the importance of the matter, general conduct of the case, the nature of the case, time taken for its dispatch and the impact of the case on the parties.
29. As was determined in *First American Bank of Kenya Ltd v Gulab P Shah & Others* [2002]1 E.A, the Taxing Master is vested with discretion to increase or decrease instruction fees and in exercising such discretion, the Taxing Master must act judicially by taking into account relevant factors stipulated in the Advocates Remuneration Order including importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings and all other relevant circumstances. Further, the court will only interfere with the discretion of the Taxing Master in certain circumstances, such as where the amount is either too low or too high as to occasion an injustice or where the Taxing Master errs in principle



30. The gist of the Applicant's case is that the Taxing Master erred in proceeding to tax the bill of costs on mistaken principles and consequently, erroneously exercised judicial discretion where it did not arise at all.
31. In the Ruling, the Taxing Master applied the formula in Paragraph 1(b) Schedule 6A of the Advocates Remuneration Order and noted that the instruction fees due to the Applicant would be Kshs 304,817,994/=. The Taxing Master however noted that the said amount is huge hence it would not be reasonable to grant the same in the circumstances. Additionally, she opined that to grant the sum of Kshs 304,817,994/= as instruction fees, would be prejudicial and occasion great injustice to the party condemned to pay the costs. As such, she exercised her discretion and reduced the instruction fees to Kshs 3,000,000/=.
32. The Taxing Master also stated that she had considered the nature of the matter and that the same is of an economic nature as opposed to commercial. She further noted that the matter was not complex presenting a novel issue for determination. She further observed that the matter was determined in a summary manner.
33. In my considered view, the Taxing Master took into account relevant factors in reducing the instruction fees from Kshs 304,817,994/= to Kshs 3,000,000/=. These included the reasonableness of the award, the nature of the matter as well as its complexity.
34. In as much as the Applicant has argued that the Claim was complex in nature, it should also be appreciated that the matter did not proceed to full hearing. Indeed, the action was terminated by an order striking it out before it was heard on merit.
35. What's more, the Claimant is a Provident Fund to which the employees of the Applicant and other employees of the County Governments, contribute their retirement savings. Therefore, the money held by the Claimant constitute retirement benefits of the Applicant's employees as well as employees of other County Governments. In this regard, an award of costs which would ultimately be settled from the Fund, ought to bear in mind public interest. As such, any costs awarded ought to be reasonable.
36. Therefore, in as much as the Applicant's instruction fees as per the Advocates Remuneration Order was the sum of Kshs 304,817,994/=: it is not in doubt that the said sum is colossal and by all means, cannot be termed as reasonable.
37. In light of the foregoing, I do not detect an error of principle of awarding costs on the part of the Taxing Master and find no basis to interfere with the said decision.
38. Accordingly, the reference is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2023.

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STELLA RUTTO

JUDGE

Appearance:

Ms. Matunda for the Applicant

Mr. Adano for the Respondent/ Claimant

Abdimalik Hussein Court Assistant

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 had 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.

STELLA RUTTO

JUDGE

