Mwakio, Kirwa & Company Advocates v County Public Service Board Bome & Joshua Terer (Miscellaneous Cause 1 of 2020) [2022] KEELRC 834 (KLR) (10 February 2022) (Ruling)

Mwakio, Kirwa & Company Advocates v County Public Service Board Bome & another [2022] eKLR

Neutral citation: [2022] KEELRC 834 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO

MISCELLANEOUS CAUSE 1 OF 2020

ON MAKAU, J

FEBRUARY 10, 2022

BETWEEN

MWAKIO, KIRWA & COMPANY ADVOCATES ..... APPLICANT

AND

COUNTY PUBLIC SERVICE BOARD BOMET ..... 1ST RESPONDENT

JOSHUA TERER ..... 2ND RESPONDENT

RULING

1. This ruling concerns two applications. The first one is the notice of motion dated December 7, 2020 brought by applicant (hereinafter called the Advocate),under section 51(2) of the *Advocates Act*, rule 7 of the *Advocates Remuneration Order*, section 12 of the *Employment and Labour Relations Court Act*, rule 17 & 38 of the *Employment an Labour and Relation Court (Procedure) Rules* and section 3 & 3A of the *Civil Procedure Act* and it seeks the following Orders;

    a) That judgment be entered in favour of the applicant against the respondents jointly and severally for the sum of Kenya Shillings Seven Million Three hundred and Thirty-EightThousand Nine Hundred and Seventy-Eightand Ninety-Six Cents (Kshs 7, 338,978.96) being the certified costs due to the applicant as against the respondents.

    b) That the respondents do pay to the applicant interest on the certified costs dated October 14, 2020 at 14% per annum from July 26, 2020 (being the 30th day from the date on which the bill of costs was served upon the respondent as provided at paragraph 7 of the *Advocates Remuneration Order and Rules* until payment in full.

    c) That the respondents do pay to the applicant the costs of this application.

    d) That any other relief that this honorable court would deem fit to grant.

2. The application is based on the grounds on the body of the motion and the supporting affidavit sworn by Mr Jonah Kirwa Advocate on December 7, 2020. In brief the advocate's case is that the taxing master of this court rendered a ruling on the advocate client bill of costs dated March 12, 2020, on October 14, 2020; that since then the said ruling has not been challenged or settled; and that judgment should be entered as prayed plus interest at 14% per annum on the costs certified by the taxing master.

3. In response to the application, the respondents through the 1st respondent's Secretary Mr Peter Bii, filed a replying affidavit sworn on January 19, 2021. According to the respondent the Ruling of the taxing master which was delivered on October 14, 2020 was done without consideration of their submissions which were filed and received in the registry on July 30, 2020 on the basis that the said submissions were not on record at the time of writing the ruling.

4. The affiant further deposed that the respondents were dissatisfied with the ruling and applied for leave to file reference out of time. In their submissions, they contended, and it is a fact, that the said leave has since been granted and the Reference is on record.

5. The second application is the chamber summons (Reference) dated November 19, 2021 and filed in court on November 22, 2021. The said application was brought by the respondents (herein after called the Clients), pursuant to paragraph 11 of the *Advocates Remuneration Order*, the inherent jurisdiction of the court, article 159 of the *Constitution of Kenya* and pursuant to leave of court granted on the November 18, 2021. The Reference seeks the following orders That; -

    a) This honorable courtbe pleased to set aside the ruling and taxation of the honourable SK Ngetich delivered on October 14, 2020 and the certificate of costs consequential thereupon.

    b) The honourable court be please to re-assess items 1,2,3,4,5,6,10,15,25,28,33,35 and 41 of the advocates bill of costs dated March 12, 2020.

    c) Further to (b) above the original case file being Kericho ELRC Cause No 46 f 2017 be recalled for purposes of re-assessment of items 1,2,3,4,5,6,10,15,25,28,33,35 and 41 of the advocates-client bill of cost dated March 12, 2020 if need be.

    d) Cost of this reference be borne by the advocate in any event.

6. The application is supported by affidavit of Peter Bii, the secretary of the 1strespondent, sworn on November 19, 2021 and it is based on the following general grounds on the face of the application, thus: -

    a) That the taxing master delivered its ruling without putting into consideration the submissions by the respondents which were on record.

    b) That the judgment delivered by the court on December 15, 2017 should have been the guiding factor in determining the bill of costs.

    c) That the suit was filed on September 21, 2021 and determined on December 15, 2021 therefore the taxing master should have considered the duration and time in which the advocate used in defending the suit.

    d) It was also stated that the suit was dismissed on a technicality therefore does not warrant the payment of the exorbitant fees allowed by the taxing master.

    e) That the taxing master did not consider similar award given for similar work.

    f) The affiant also challenged the disbursement allowed without prove by way of receipts.

7. In response to the reference the advocate filed grounds of opposition dated December 3, 2021 and verifying affidavit sworn by him on even date, thus: -

a) That the client's chamber summons dated November 26, 2021 offends the orders and the ruling of the honourable court in this matter of November 19, 2021 because client failed to comply with the terms set out in the order.

b) That the application offends the provisions of rule 11 (1) of the *Advocates Remuneration Order* since the client failed to file the necessary objection as required by the law, giving credible and substantiated reasons of their objection to the items as taxed by the taxing master.

c) That the notice of objection under rules 1l (1) & (2) of the *Advocates Remuneration Order* is mandatory and failure to file any, it means That the prayers sought in the chamber summons application is misconceived and untenable in law.

d) The client has failed to demonstrate That the taxing master erred in principle and law when he taxed the party & party bill of costs dated 12 March, 2020 at Kshs 7,338,978.96.

e) That the taxing master gave his reasons for every items of the awards made. That the taxing master considered all the issues That had been raised by the applicant herein before arriving at the impugned decision on October 14, 2020. That the reasons for the awards included and was not limited to the value of the subject matter in issue, complexity of the matter, the number of claimants involved being more than 350, the volumes of the pleadings, the time spent and resources put in the same, the interest of the parties and the general impact of the case on all the parties.

f) That it is trite law That the decision of taxing master is not to be interfered by court unless it has been shown That the taxing master arrived at wrong assessment of costs payable. It is insufficient to merely allege That the amount awarded is too high. The client has completely failed in this regard and in the circumstance the application herein be struck out.

g) That failure to file submissions on time cannot in the circumstance be considered as an error apparent on record. The client has failed to demonstrate That even if the submissions were on record as at the time of ruling on 14 October, 2020, it will substantially change the decision and reasoning of court and That the court would arrive at a different figure of award in respect to the advocates client bill of costs on record and dated March 12, 2020.

h) That there exist nothing on the face of the record evidencing filing of the alleged submissions as directed by court on June 16, 2020 and 8 July, 2020.

i) That the honourable court directed on June 16, 2020 as follows: -

i. That the bill of costs dated March 12, 2020 be served within 14 days and affidavit of service be filed.

ii. That upon service parties to file written submissions within 7 days.

iii. That further directions as regards ruling date be given on July 8, 2020.

j) That the client was served with the above orders of court on June 26, 2020 together with the bill of costs. The client received and stamped on the face of the order and the bill of costs and an affidavit of service evidencing service was filed in court on July 8, 2020.

k) That the advocate complied with directions of court of June 16, 2020 and filed their submissions on July 8, 2020.

l) That further directions were given on July 8, 2020 wherein the client in this application was granted a further 14 days to comply in vain.

m) That on September 3, 2020 the honourable court informed parties That the ruling on the bill of costs dated March 12, 2020 will be delivered on October 14, 2020 however the applicant herein exercised massive indolence by firstly failing to comply with orders of court and secondly failing to verify whether the same were on court record or not.

n) That the client's instant application is frivolous and an afterthought aimed at frustrating due processes and subverting Justice. It is a delaying tactic by the client.

o) That the client has failed to demonstrate how it will suffer irreparable harm, loss and damage. The orders for stay sought cannot issue. The advocates ought to be allowed to enjoy the fruits their successful litigation.

p) That the application is frivolous & vexatious and thus a perfect material for dismissal.

q) That the entire application is opposed for reasons That it is fatally defective, bad in law and an abuse of the court process.

r) That the application is brought under the wrong provisions of the law.

s) That the orders sought by the client herein only aims at perpetuating an ancient and untenable injustice perpetrated by the client by resorting to seemingly endless streams of legal maneuvers.

t) That the application does not meet the threshold for review and/or setting aside the orders of the court as set out under rules 33 of the *Employment and Labour Relations court (Procedure) rules*, 2016 and upheld by the court in the case of *James Wangalwa & another v Agnes Naliaka Cheseto* High Court Misc App No 42 of 2012. KLR and *Machira t/a Machira & Co Advocates v East African Standard (No 2)* (2002) KLR 63.

u) The advocate prayed for the reference be dismissed with costs.

8. The applications were canvassed by way of written submission..

Advocate's Submissions.

9. The advocate submitted from the onset that the retainer in their bill of costs was never challenged by the client therefore the decision of the taxing master should not be disturbed as provided for under section 51(2) of the *Advocates Act*. Reliance was on the case of *Lubellah & Associates Advocates V N K Brothers Limited* [2014]eKLR where the court held that;-

> " The law is very clear that once a taxing master has taxed the costs, issued a certificate of costs and there is no reference against his ruling or there has been a ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter judgment. An applicant is not required to file suit for the recovery of costs. The certificate of costs is final as to the amounts of the costs and the court would be quite in order to enter judgment in favour of the applicant against the respondent herein for the taxed sum indicated in the certificate of taxation.

10. The advocate also cited the case of *Owino Okeyo and Co Advocates V Mike Maina and Mureithi Investments Co Limited* to urge that rule 7 of the *Advocates Remuneration Order* allows advocates to charge interest on disbursement and costs.

11. Accordingly, it was submitted that the clients were served with the bill of costs dated March 12, 2020, and they did not challenge the same informing the decision of the taxing master which according to the advocate is sound and should not be interfered with. They then urged this Court to dismiss the reference filed and allow their application as prayed.

12. With regard to the Reference filed by the respondents, the applicant submitted that this court extended time within which the respondent could file a reference on the November 19, 2021 on condition that the entire taxed amount of Kshs 7,338,978.96 was to be deposited in a joint interest earning account or in court. It was argued that the clients have failed to obey this court and to allow the client to disobey this court orders would set a dangerous precedence. In support of this argument the applicant cited the case of *Plaza Limited v National bank of Kenya Limited* [2015] eKLR and the case of *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR.

13. The advocate submitted that the taxing master was duly guided by schedule 6 A (1) of the *Advocate Remuneration Order* in allowing the bill of cost. It was argued that the taxing master considered the time taken to prepare for the said suit, complexing, importance among other. To buttress their argument, the applicant cited the case of *Joreth Limited v Kigano and associates* (2000) EA 92.

14. The advocate argued that the issue in dispute in the trial suit was between the clients and 350 parties which required that the advocate prepares huge documents such as payslips, employment letters, copies of national Identity cards, newspapers Photostats, press statements, county assembly legislation, internal memos, demand letter among other therefore that the pleading were voluminous.

15. It was further submitted that the advocate in defending their client have averted an instance in which the client could have been forced to pay a sum of Kshs 2.8 Billion, had the claimants won in the said claim and be retained for the 25 years sought in the claim. The advocate then submitted that if that was the case then the respondent could have paid legal fees of about Kshs 60 million as per sub-paragraph (1) (b) of schedule vi.

16. It is the advocate's contention that the suit was determined on merit and not on a point of technicality as stated by the clients.

17. On whether the advocate should be awarded getting up fees, it was submitted that schedule vi paragraph 2 allows for the payment of getting up fees on condition that a denial of liability has been filed. Consequently, it was argued that clients denied liability and the matter proceeded for trial. It was then argued that it does not matter whether the case proceeded viva voce or by way of written submission. In this they cited the case of *Arthur v Nyeri Electrical Undertaking* [1962] EA 497.

18. The advocate further argued that this Court can only interfere with the taxing master decision when the taxing master erred in principal and if the erring is on quantum then the court should only interfere with the calculation on exceptional circumstances. To support their argument, the advocate cited the case of *Premchand Raichand Ltd & another v Quarry services of East Africa Limited and another* (1972) EA 162.Additionally, it was submitted that there are no exceptional circumstances which were brought forth by the client and therefore the quantum should not be interfered with.

19. With regard to VAT, the advocate cited the case of *AM Kimani & Co advocates v Kenindia Assurance Co, Limited* [2010] eKLR and submitted that advocates are entitled to charge VAT on instruction fees.

20. The advocate maintained that all the other disputed items have all been justified and prayed that the same remain as taxed.

Client' Submissions.

21. The clients submitted that this court is empowered under the law to exercise its jurisdiction and interfere with the decision of a taxing master based on principles given in various case laws such as the case of *Republic v Commissioner of Domestic Taxes Ex parte Ukwala Supermarket Limited & 2 others* [2018] eKLR.

22. The guideline which this court ought to consider when directing fresh taxation be undertaken were as enunciated in the case of *Republic v Minister for Agriculture & 2 others ex parte Samuel MuchiriW'Njuguna* as follows;

    (i) the proceedings in question were purely public-law proceedings and are to be considered entirely free of any private - business arrangements or earnings of the tea production sector;

    (ii) the taxation of advocates' instruction fees is to seek no more and no less than reasonable compensation for professional work done;

    (iii) the taxation of advocates' instruction fees should avoid any prospect of unjust enrichment, for any particular party or parties;

    (iv) so far as apposite, comparability should be applied in the assessment of advocate's instruction fees;

    (v) objectivity is to be sought, when applying loose-textures criteria in the taxation of costs;

    (vi) where complexity of proceedings is a relevant factor, firstly, the specific elements of the same are to be identified and stated; and secondly, complexity is to be judged on the basis of the express or implied recognition and mode of treatment by the trial Judge;

    (vii) where responsibility borne by advocates is taken into account, its nature is to be specified;

    (viii) where novelty is taken into account, its nature is to be clarified;

    (ix) where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarized form.

23. Accordingly, it was submitted that the issue for determination in the trial court case was an ordinary termination of employees. It was further argued that as much as there were 350 employees in the said cause the same did not raise an issue of novelty, complexity that would warrant the instruction fees awarded by the taxing master. The clients argued that the taxing master never gave reason for said hiked instruction fees. He only indicated in his ruling that he has taken all issue to consideration but failed to particularize the said issue he considered in allowing instruction fees of 3 Million. It is the clients' submission that the relevant remuneration orders which the taxing master should have used is Schedule VIB of the Advocates (Remuneration)(Amendments) Orders of 2014 where the minimum awardable fees ought to be Kshs 100,000.

24. On whether the advocate should be granted getting up fees, it was submitted that the case was disposed of by way of written submission therefore the claim of getting up fees is not warranted as the matter was not heard *viva voce*.

25. The client also submitted that VAT is only applicable to professional fees and not disbursements. The client then urged this court to vacate payment of instruction fees awarded under item 4 for filling

an application. Further, the perusal fees allowed under item 5 and 6 should be disallowed for lack of evidence of perusal receipt. The client then submitted that there is no evidence tabled before the taxing master to inform the payment of services under item 10, 15, 25, and 28. Finally that item 33 and 35 on attendances at hearing of an application should be taxed off at Kshs 1,900.

Analysis and determinations

26. After considering the applications, the responses thereto and the submissions, the main issues for determination are:

    a) Whether there are sufficient grounds for interfering with the taxing officer's ruling dated October 14, 2020.

    b) Whether judgement should be entered on the taxed costs as prayed by the advocate.

Whether the taxed costs should be interfered with.

27. It is now trite law that the court will only interfere with the decision of a taxing officer in cases where there is demonstration of an error of principle. In *Republic v Ministry Of Agriculture & 20 others Ex-parte Muchiri W' Njuguna* [2006] eKLR, Ojwang J (Retired) stated as follows:-

> " The taxation of 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 is so high or so low as to amount to an injustice to one party or the other...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 inference that it was based on an error of principle."

28. The clients are challenging the taxation of item No 1 on instruction fees which was taxed at Kshs 3,000,000/=. They submit that the suitable amount ought to be Kshs 100,000/= and argue that the taxation of Kshs 3,000, 000/= is excessive and unreasonable.

29. The Court of Appeal in the case of *Joreth Ltd v Kigano & Associates* NRB CA Civil Appeal No 66 of 1999 [2002] eKLR in determining the issue of instruction fees stated as follows:

> " We would at this stage point out that the value of the subject matter of a suit for the purpose of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, among other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances."

30. The taxing officer in his ruling delivered on October 14, 2020 indicated that the value of the subject matter could not be ascertained and he therefore exercised his discretion and awarded Kshs 3,000,000/=. From the judgement of the court delivered on December 15, 2017 in ELRC No 46 of 2017 out of which the advocate/client bill of costs was filed, it is clear that the value of the subject matter could not be ascertained from the pleadings or the judgment.

31. The Court of Appeal in the case of *Kipkorir, Titoo& Kiara Advocates v Deposit Protection Fund Board* NRB CA Civil Appeal No 220 of 2004 [2005] eKLR stated that:

> " On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs."

32. This is also the holding in the case of *First American Bank of Kenya v Shah and others* [2002] 1 EA 64 at 69 by Ringera J (as he then was) where it was stated as follows;

> " First, I find that on the authorities, this 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 so manifestly excessive as to justify an inference that it was based on an error of principle".

33. In the impugned ruling by the taxing officer delivered on October 14, 2020, he assessed the instruction fees at Kshs 3,000,000 instead of the provided minimum sum of Kshs 75,000 and gave the reason as volume of work since the claimants in the suit were 350 meaning perusal of volumes of documents in the preparation of an equally voluminous defence and evidence in support. The taxing master also considered the amount of time which the advocate had to use in the perusal and preparation of the defence and the evidence. The taxing master ruled out any novelty or complexity in the matter and in fact described it as an ordinary employment dispute.

34. In view of the foregoing, am in agreement with the advocate that the taxing master did not proceed on any error of principle. The only issue I need to address is whether the increase of fees from Kshs 75,000/= to Kshs 3 000,000/= was manifestly excessive. Does the volume of documents and time used alone warrant the payment of Kshs 3,000,000 as instruction fees?

35. I think this is an enormous increase of fees, and although reason for the increase has been given, in my view, the increase is manifestly excessive and unjust. Even if one takes into consideration all the other factors that the taxing officer properly took into account in his ruling, still, Kshs 3,000,000/= would appear to be way off the mark.

36. There is doubt, that much work was done and a lot of time spend but I am persuaded to find that the client has shown sufficient ground warranting interference with the assessment of instruction fees at Kshs 3,000,000, being that the amount is manifestly excessive.

37. I have the option of remitting the matter back to the taxing officer or dealing with it myself. To save the parties time and trouble of going back and forth, I opt to deal with the matter myself. Taking into consideration the volume of work done and the amount of time spent in taking instruction on the 350 claimants, perusing the documents and preparing a commensurate defence, I am of the view that an assessment of the instruction fees at Kshs 1,000,000 is reasonable.

38. The primary suit was contested by the clients in the defence filed through the advocate herein. Direction for hearing was taken that the suit would be disposed of by written submissions on the basis of the pleadings and the evidence filed. In my view the suit went full hearing and it matters not that it did not proceed by oral testimonies. Therefore I agree with the taxing master that an award of Getting-up fees is warranted. However, the above reassessment of the instruction fees affects assessment of the getting up fees and the VAT by the taxing master, and therefore the two items are to be adjusted accordingly.

39. With regard to item 3 being fees awarded for instruction to defend an application, the taxing master awarded Kshs 50,000 under paragraph C(Viii) of Schedule 6 of the Remuneration Orders. The said paragraph C (viii) provides for a minimum fee of Kshs 5000 for presenting or opposing any interlocutory application not otherwise provided in the Order. In my view the award of Kshs 50,000 was manifestly excessive and not supported by any cogent reason. Therefore I will reduce the amount to Kshs 10,000 considering the volume of the work and time taken to peruse the relevant documents and in preparing the Replying Affidavit in opposition to the application for Interlocutory Injunction.

40. I will not interfere with item number 5 & 6 on perusal of the documents since it has been well explained that the documents had 1750 folios which fact was not disputed by the respondent. Perusal of one folio is Kshs 50 multiply by 1750 amounts to Kshs 87,500.

41. I will not also interfere with the taxation of service and disbursements together with the amount allowed for court attendance since the taxing master has aptly explained how the figures were arrived at.

42. In the circumstances of this case, and for the reasons I have given above, I make the following orders;-

    a) The respondents chamber summons dated November 19, 2021 is hereby allowed in the following terms;

    i. That the instruction fees has been reduced from Kshs 3,000,000 to Kshs 1,000,000 which fees will inform the getting up fees and the VAT payable.

    ii. Getting up fees will be one third of the Kshs 1,000,000 equaling to Kshs 333,333.30

    iii. The award given as fee for defending an application is reduced from Kshs 50,000 to Kshs10,000.

    iv. The other items will remain as taxed, that is, disbursements of Kshs 1445 and other costs for professional services taxed at Kshs 251,689.66.

    v. The total costs under part A of the Order is Kshs 1,585,022.96. This is to be increased by 50%.

    vi. The total costs assessed is Kshs2,382,534.44 plus disbursements of Kshs 1445 = Kshs 2,383,979.44

    vii. The clients will have costs of the reference plus VAT on the professional fees.

43. Having interfered with the ruling of the taxing master it follows that the applicant's application of 7th December, 2020 cannot be allowed as prayed. In order to save on time and since the bill has not been referred back for fresh taxation, I will allow the advocate's application by entering judgment in terms of the sum assessed above being Kshs2,383,979.44. The sum will attract interest at 14% from the date of this Ruling. The advocate is awarded costs of the application dated 7.12.2020.

Dated, signed and delivered at Nakuru this 10th day of February, 2022.

ONESMUS N MAKAU

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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance

with Rule28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE