



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

MISC. APPLICATION NO. 5 OF 2019

KENYA NATIONAL UNION OF NURSES.....CLAIMANT

VERSUS

THE COUNCIL OF GOVERNORS.....1ST RESPONDENT

SIAYA COUNTY PUBLIC

SERVICE BOARD.....2ND RESPONDENT

BARINGO COUNTY PUBLIC

SERVICE BOARD3RD RESPONDENT

TRANS-NZOIA COUNTY PUBLIC

SERVICE BOARD.....4TH RESPONDENT

NAROK COUNTY PUBLIC

SERVICE BOARD.....5TH RESPONDENT

THE ATTORNEY GENERAL FOR

MINISTRY OF HEALTH.....6TH RESPONDENT

PUBLIC SERVICE COMMISSION.....7TH RESPONDENT

(BEFORE HON. JUSTICE DAVID NDERITU)

RULING

1. INTRODUCTION

1. By way of a Notice of motion dated 2nd April, 2019 the Applicant herein, the law firm of Sifuna & Sifuna Advocates, applied that their Advocate/client bill of costs dated 1st April, 2019 in regard to legal services rendered in **Nakuru ELRC Cause No.169 of 2015** be taxed as drawn.
2. Together with the said Notice of motion were filed several annexures including, of course, the subject Advocate/client bill of costs.
3. On 22nd May, 2019 Counsel for both parties, Prof. Sifuna for Applicant and Mr. Karani for the Respondent, appeared before the taxing officers (Hon.Makau, DR) and agreed that the matter proceeds by way of written submissions.
4. The record shows that the taxing officer delivered her ruling on 20th August, 2019 in which the bill was taxed at Kshs.447,500/=. Both parties and their respective Counsel were absent during the delivery of the ruling.

5. On 13th September, 2019 the Applicant authored two letters to the Deputy Registrar (taxing officer), one seeking for reasons for the taxation as rendered and the other asking for typed certified copies of the proceedings and the ruling on the taxation for purposes of filing a Reference to a judge.
6. On 20th September, 2019 the taxing officer responded and informed the Applicant's Counsel that the reasons for the taxation were contained in the ruling.
7. On 7th October, 2019 the Applicant filed a Reference to this court by way of a Chamber Summons application dated 4th October, 2019. The said application is expressed to be brought under **paragraph 11(1) of the Advocates Remuneration Order, 2014 (ARO)**, the **Advocates Act**, and all the other enabling provisions of the law.
8. The Applicant is seeking that the ruling of the taxing officer be set aside in its entirety and that upon the setting aside that this court proceeds to tax the Advocate/client Bill of Costs afresh. The Applicant also prays for costs of the proceedings before the taxing officer and for this Reference.
9. The Chamber summons is supported by the affidavit of Prof. Nixon Sifuna, Counsel for Applicant sworn on 4th October, 2019 with several annexures thereto including copies of the proceedings and the ruling by a taxing officer.
10. The Respondent filed a response by way of a replying affidavit sworn by **KARANI O. AGGREY**, Advocate for the Respondent on 14th November, 2019.
11. On 7th November, 2019 Counsel for both parties appeared before court (Mbaru J) and agreed that this Reference be heard and disposed of by way of written submissions.
12. However, it appears that the matter went into a lengthy period of dormancy until Counsel for both parties appeared before this court on 25th January, 2022 when it was agreed that this Reference be heard and disposed of by way of written submissions. Counsel for the Applicant filed his written submissions on 4th February, 2022 and Counsel for Respondent filed on 11th February, 2022.

II. ISSUES FOR DETERMINATION

13. This court has dutifully and carefully gone through all the materials placed before it by the parties and their respective Counsel as alluded to in Part I above.
14. The Applicant's case is that the learned taxing officer misdirected herself and hence erred in law by failing to apply the law and principles applicable in taxation of costs between an Advocate and a client and hence arrived at the wrong assessment.
15. The Applicant further argues that the taxing officer abused her discretion by failing to give reasons for the taxation arrived at and failed to consider Applicant's Counsel two sets of written submissions and hence arrived at the wrong decision.
16. The Applicant further urges that the taxing officer erred in failing to apply Value Added Tax (VAT) on all the items taxed as the same should apply to the global taxed amount.
17. On the other hand, the Respondent has urged this court not to disturb the findings of the taxing officer and hence dismiss the Reference with costs. The Respondent argues that the taxing officer proceeded on established legal principles and arrived at the right decision on all the items.
18. In view of the foregoing, this court considers the following to be the issues for determination in this Reference:-
 - (i) Should this court set aside the ruling of the taxing officer delivered on 20th August, 2019?
 - (ii) If (i) above is in the affirmative, what orders should this court issue?
 - (iii) Costs.

III. TAXATION AND ORDERS

19. The Applicant has raised seven (7) specific items that they feel were not properly handled by the taxing officer. Those items are in pages 2 and 5 paragraphs 5 and 20 of the Applicant's Counsel written submissions. It is those items, the issue of VAT, together with the additional one-half based on **Schedule VIB of the ARO** that this Reference is all about.
20. Although Counsel for Applicant complained that the ruling was delivered *ex-parte* and or without notice, I see no prejudice occasioned as the Applicant was able to take action within reasonable time, and in any event within the 14 days provided for under **rule 11(1)** of the **ARO** vide a letter dated 13th September, 2019.
21. However, in the above mentioned letter the Applicant's Counsel did not inform the taxing officer which items they were objecting to. Nonetheless, the taxing officer responded and informed Counsel to obtain the reasons from the ruling.

22. Taxing officers are court officers appointed to carry out taxation of costs on matters that are not necessarily being heard before them (**See Rule 10** of the **ARO**). For example Nakuru ELRC 169 of 2015 was heard and determined by Radido J but the taxation of costs must have been done by taxing officer and not the judge.
23. The reason why this court has stated what it has in the above paragraph is to illustrate that when a Reference is made to a judge it is not an appeal in the traditional sense. It is more or less in the nature of a review or revision of the ruling of the taxing officer in regard of some of the items taxed or all of them.
24. However, **under Rule 11 (3)** of the **ARO** a party who is dissatisfied with the decision of a judge in a Reference such as this one has to proceed to the **Court of Appeal** by way of an **appeal** and the law and rules on appeals in that court shall apply thereto accordingly.
25. In the circumstances, the Applicant is asking this court to revisit and if pleased review revise the decision of the taxing officer in respect of the items specified above. That is the jurisdiction and territory of this court in this Reference.
26. This court shall now proceed to examine each of the items complained of. However, before doing so, and for avoidance of repetition, it may be necessary for this court to determine the second issue at this stage so that where this court disagrees with the findings of the taxing officer this court is able to remedy the same there and then.
27. This court is in agreement with the sentiments of Munyao Sila J in **Masore Nyang'au & Co Advocate Vs. Kensalt Limited (2019) eKLR** wherein the learned judge stated that in case a judge finds that the taxing officer erred in taxation the judge has three options. The judge can remit the bill back for taxation by the same or another taxing officer or the judge may tax the bill.
28. There is emphasis also that a judge should not interfere with the decision of the taxing officer unless it is clear that the officer erred in law or departed from established principles and hence arrived at the wrong decision.
29. None of the parties or their respective Counsel has informed the court whether the party and party costs were taxed or agreed in Nakuru ELRC 169 of 2015. Such information or material if placed before this court would have been important and helpful as party and party costs have a bearing in determining the Advocate/client costs - See the holding of Waweru J in **Kenya Tea Development Authority Vs. J.M. Njenga & Co. Advocates (2011) eKLR** and Murgor JA in **Otieno Ragot & Co. Advocates Vs. Kenya Airports Authority (2021) eKLR**.
30. This court has carefully gone through the two page ruling by the learned taxing officer delivered on 20th August, 2019 and with respect makes the following observations.
31. In her ruling the learned taxing officer clearly indicated that she had read and considered the written submissions by Counsel for both parties. She also indicated that she looked into and considered the contents of the mother file being **Nakuru ELRC 169 of 2015**. However, the ruling is short on the import and the impact of the written submissions and the contents of the mother file on her ruling.
32. For example the following questions find no answer in the ruling of the taxing officer. What were the prayers/remedies sought for in ELRC 169 of 2015 and how did that impact the award in taxation? Given that the monetary value of the subject matter could not be assessed in the main cause, what factors or considerations informed the decision of the taxing officer in making the awards that she made? How complex or novel were the issues in that cause? How much effort and research was necessary in dealing with the issues in that cause? Were the party and party costs taxed and what was the import thereof on the awards made in the taxation subject of this Reference?
33. It is the view of this court that had the taxing officer considered all the above parameters, which were in any event relevant and paramount in the taxation, she most likely should have arrived at a different decision on the items complained of by the Applicant.
34. The Applicant has also raised the two issues of VAT not applied to the entire sum of taxed costs and also the failure by the taxing officer not to increase the taxed amount by one-half as required under **Schedule VIB** of the **ARO**. Again, and with respect to the learned taxing office, these are two very important issues that cannot be wished away or ignored all together.
35. It is for the reasons stated above that this court holds that there are good and sound legal grounds for disturbing the findings of the taxing officer as contained in the ruling delivered on 20th August, 2019. However, this court shall only interfere with the specific items complained of by the Applicant as both the parties have no issues with the other items in the bill as taxed, unless this court finds good legal grounds of doing so.
36. Further, to save on time and avoid further unnecessary delay in having this matter concluded, this court shall proceed to tax the bill based on the materials placed before the court and specifically the written submissions by Counsel for both parties.

III. FEES ON INSTRUCTIONS

37. The Applicant prayed for a sum of Kshs.3,580,000/= as instructions fees in the bill. The taxing officer awarded Kshs.300,000/= taxing off the balance. The Applicant takes the view that Kshs.300,000/= is too little under that head and insists on the sum of Kshs.3,580,000/=. The states that they forwarded their feenote/invoice dated 22nd August, 2015 to the Respondent and that a local purchas Order (LPO) was raised. However, this court notes that the said LPO was not executed by the Respondent, as per the copy exhibited in co by the Applicant. No agreement has been produced by either party, or moreso the Applicant, to indicate that the said fees was agreed upon. Therefore, this court has to evaluate and tax that item to arrive at a fair and reasonable amount.

38. This court has looked at the pleadings filed in **Nakuru ELRC 169 of 2015** and the court notes that the prayers sought were mainly declaratory in nature. For avoidance of doubt the said prayers were to the effect that:-

- (i) **1st Respondent to implement resolution of inter- governmental forum relating to E.S.P health/ workers.**
- (ii) **2nd, 3rd, 4th and 5th Respondents to confirm all health workers employed by County governments on contract under (E.S.P).**
- (iii) **2nd, 3rd, 4th and 5th Respondents to pay arrears due to the nurses and other health workers.**
- (iv) **2nd, 3rd, 4th and 5th Respondents promote all E.S.P Health staff who completed three years.**
- (v) **6th and 7th Respondent put in place viable measures to protect health staff on secondment to Counties.**
- (vi) **Any other relief.**
- (vi) **Costs.**

39. Equally, the judgment by **Radido J** in that cause to a large extent gave declaratory and directional orders. This is not to say that matter was not complex in its own right. Matters concerning county governments are novel for the fact that devolution is a fairly new phenomenon in Kenya. The law in this area is evolving and jurisprudence is bound to be created in almost every new cause filed.

40. Unless in a moribund lawfirm a good lawyer must always research in every matter he/she handles to give the best legal services to a client. However, although the value of the subject matter in the main cause may not be ascertained from the pleadings, and it is not in dispute that indeed the Applicant took instructions and filed defence, attended court and filed other necessary papers, including written submissions, the cause was not the most complex as Counsel for Applicant seems to suggest. The orders granted in the judgment speak for themselves.

41. However, it is the view of this court that the sum of Kshs.300,000/= awarded by the taxing officer was inordinately low for instructions fees in a matter of this nature. Nonetheless, the defence filed by the Applicants for and on behalf of the 4th Respondent (the Respondent herein) in **Nakuru ELRC 169 of 2015** does not point towards a very complex matter.

42. In the circumstances, this court shall set aside the sum of Kshs.300,000/= awarded by the learned taxing officer and substitute therefor a sum of Kshs.500,000/= as instructions fees.

IV. GETTING UP FEES

43. Getting up fees is chargeable under **Schedule VIA part 2** of the **ARO**. It should not be less than one-third of the instructions fees. This court shall award the same at one- third of the instructions fees, hence **Kshs.500,000 X 1/3 = 166,667/=**. This court finds no reason to award the same beyond the minimum one-third of the instructions fees.

44. The above two items, instructions fees and getting up fees, are the two major items complained of and the court shall now consider the other items as hereunder.

45. The court notes that item 3 in the bill was either overlooked or not considered in the total sum of Kshs.1,075/=. The same is hereby allowed.

46. On item 4, drawing defence and making three copies thereof, the taxing officer awarded Kshs.1,100/=. The Applicant has not advanced any reason as to why this court should interfere with the same and it is hence left undisturbed. The same applies to item 5 as no justification is given for the Kshs.5,000/= prayed for. The sum of Kshs.3,500/= awarded is in my view adequate.

47. Item 6 is allowed as drawn at Kshs.5,000/= in view of the bulky pages involved in that document. Item 7 is not indicated as to what amount is claimed in the bill and hence no award is made. Items 8, 9, and 10 are allowed at Kshs.1075/=: Kshs.1,100/=: and Kshs.75/= respectively.

48. Items 11, 12, 13, 14, and 16 are on court attendance wherein the taxing officer awarded a sum of Kshs.2,300/= per attendance making a total of Kshs.13,800/= for six appearances.

49. With respect, the learned taxing officer misdirected herself on this issue. **Nakuru ELRC 169 of 2015** was heard and determined at **Nakuru ELRC** yet the Applicant has an office located at **Kitale in Transnzoia County**. The taxing officer failed to appreciate that besides the actual court appearance the Applicants incurred travelling and possibly accommodation costs due to the long distance to and from the court station.

50. It is clear that the taxing officer approached the bill as if it was a party and party bill of costs wherein only actual court attendance fees should be charged. A party to a cause who hires a lawyer out of town who has to cover a long distance to attend court assumes the responsibility of compensating the lawyer for the time spent on the road and incidental costs including meals and accommodation if the lawyer spends the night outside his usual abode. It is wrong in principle to assume that such a lawyer is not entitled to recover such costs.

51. Although the Applicant failed to clearly indicate that the sum prayed for of Kshs.20,000/= per attendance was to cater for travelling and other incidental expenses, the taxing officer ought to have put into consideration that aspect. The road distance between **Nakuru** and **Kitale** is about **225 Kilometres**.

52. It is the considered view of this court that the sum of Kshs.20,000/= claimed per attendance is on the higher side as there are no particulars given by the Applicant. However, the sum of Kshs.2,300/= awarded based strictly on the actual court appearance is inordinately low.

53. Doing the best that this court can do and exercising my discretion I find that an award of Kshs.10,000/= per attendance is fair and reasonable in the circumstances. It is important to note that the main cause was heard and determined close to five years ago when the cost of living was a bit lower than it is today due to inflation.

54. This court has hence taxed the bill and awarded as per the schedule attached which forms part of this ruling.

55. It is the considered view of this court that while VAT is applicable to the gross amount awarded, the one-half addition awarded under **Schedule VIB** of the **ARO** only applies to fees awarded to the lawyer. It would not make any logical sense to add one-half on actual disbursements such as court fees paid as that would amount to unlawful and unjust enrichment on the part of the lawyer. This explains the approach taken by this court schedule attached.

V. COSTS

56. This Reference has partially succeeded and in the interest of justice each party shall bear own costs both for the proceedings before the taxing officer and before this court.

VI. DISPOSAL

57. In final disposal of this Reference the Applicant's Advocate/client bill of costs dated 1st April, 2019 is taxed at Kshs.1,287,789/=. This amount shall attract interest at court rates from the date of this ruling till payment in full.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 26TH DAY OF APRIL, 2022.

.....

DAVID NDERITU

JUDGE

SCHEDULE ON TAXATION

ITEM	AMOUNT (KSHS)	AMOUNT AWARDED (KSHS)	AMOUNT TAXED OFF
1.	3,580,000	500,000	3,808,000
2.	1,000,000	166,667	833,333
3.	1,075	1,075	-
4.	5,000	1,100	3,900
5.	5,000	3,500	1,500
6.	5,000	5,000	-
7.	-	-	-

