



County Assembly of Kericho & another v Bett & another (Miscellaneous Cause E001 of 2020) [2022] KEELRC 83 (KLR) (12 May 2022) (Ruling)

Neutral citation: [2022] KEELRC 83 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
MISCELLANEOUS CAUSE E001 OF 2020**

ON MAKAU, J

MAY 12, 2022

BETWEEN

COUNTY ASSEMBLY OF KERICHO 1ST APPLICANT

SPEAKER, COUNTY ASSEMBLY OF KERICHO 2ND APPLICANT

AND

ERIC BETT 1ST RESPONDENT

ANN TUM 2ND RESPONDENT

RULING

1. The application for consideration is the Chamber Summons (Reference) dated 5th January, 2022 brought by the respondents in the primary suit (herein after called the Applicants). The application is brought under Section 89 of the [Civil Procedure Act](#) and Schedule 6 of the [Advocates Remuneration Order](#) (ARO) 2014, and pursuant to leave of Court granted on the 16th December, 2021 and it seeks the following orders; -
 - a. That the entire decision of the Learned Deputy Registrar of this Honorable Court made on 7th July, 2021 with respect to the respondent's Party and Party Bill of Costs dated 22nd March 2021 in ELRC Petition No. 3B of 2019 be pleased to set aside and taxed afresh by this Honourable Court or be remitted for re-taxation by a different Taxing Officer.
 - b. Cost of this Reference be provided for.
2. The application is supported by affidavit of Mr. Dominic Rono the secretary of the 1st respondent, sworn on the 19th November, 2021 and it is based on the general grounds that the award of Kshs.713,610 is excessive in the circumstances; that there is no legal basis for the award; and that the award is punitive in nature and not compensatory.



3. The applicants contend that the taxing officer failed to take into account the scale of instruction fees prescribed under the Schedule VI (j) of the ARO 2014 in an application for prerogative orders being a minimum of Kshs.100,000. Further, the taxing officer failed to give any justification for awarding more than the minimum amount prescribed under the said schedule.
4. The applicants also contend that the taxing officer failed to consider that the suit in issue involved a simple and ordinary question of law, and that no complex or novel issues of law were determined as the parties were not even required to submit on the merits of the matter. The parties did not file any written arguments to justify any research expended in the matter and therefore the costs should be commensurate to the work done.
5. As regards the other costs, the applicants contend that the taxing officer failed to take into account the scale of fees prescribed under the Schedule VI 7(d) of the ARO.
6. The applicants also contend that the taxing officer totally disregarded the comparative authorities that demonstrate what would amount to fair and reasonable compensation in the circumstances of this case. Therefore, in their view, the applicants contend that the taxing officer made serious errors in principle in taxing the said Bill of Costs and thereby arrived at a wrong decision, especially the item of instructions fees which they deemed to be exaggerated in comparison with the work done.
7. In response to the reference the respondents filed Replying Affidavit sworn on 28th January 2022 by their Advocate Mr. Julius Mutai in which he states that the taxing officer was right in awarding the impugned costs. He contends that the sum Kshs. 100,000 prescribed under Schedule VI (j) of the ARO is the minimum awardable and not binding and therefore the taxing officer has discretion to give more.
8. He defends the award of Kshs. 500,000 as instruction fees contending that the taxing officer considered that the primary suit involved a multiplicity of issues that involved legal research and spending of time in doing apt submissions on each issue. In his view the taxing officer exercised his discretion well because he assigned reasons for his decision.
9. Further, the affiant denies that the taxing officer made serious errors in principle and failed to consider comparable authorities. He contends that the taxing officer gave cogent reasons for the exercise of his discretion and even cited the case of Geoffrey Makana Asanyo v Nakuru Water and Sanitation Limited & 8 others, and the case of Premchand Raichand Limited v Quarry Services of East Africa Limited [1973] EA 162.
10. Besides, the counsel denies that the taxing officer failed to take into account the scale of fees prescribed under Schedule VI (7) (d) of the ARO. In conclusion, the counsel deposes that the amount of costs assessed is not arbitrary, or exaggerated and urges the court not to interfere with the same.
11. The applications were canvassed by way of written submission.

Submissions.

12. The applicants pointed out that the respondents filed a Party and Party Bill of costs dated 22nd March for Kshs 844,690 and the same was taxed at Kshs. 713,610 by the taxing officer of this court. In applicants' view, the amounts claimed are excessive and contrary to the law on taxation of costs.
13. To begin with, he submitted that the claim for Kshs. 500,000 as instructions fee is five times more than the Kshs. 100,000 prescribed by Schedule VI (1) (j) of the ARO for an application for prerogative orders. They submitted that Kshs. 100,000 is sufficient instruction fees in the primary suit by dint of Schedule VI 1 (j) (iii) of the ARO because it involved a simple and ordinary question of law, no complex



or novel issues of law were determined as the parties were not required to submit on the merits of the matter.

14. They maintain that the taxing officer did not give justification for increasing the instructions fees five times the prescribed minimum of Kshs. 100,000. For emphasis, he placed reliance on the case of *Joreth Limited v Kigano & Associates* [2002] EA 92, *Kyalo Mbobu T/A Kyalo & Associates Advocates v Jacob Juma* [2015] eKLR, *Paul Imison & another v Jodad Investment* [2014] eKLR and *Opa Pharmacy Ltd v Howse & McGeorge Ltd Kampala* [1972] EA 233 where the courts discussed the principles that should be considered when taxing costs and the need to give reasons to justify the awards. In this case the applicants maintain that the Kshs. 500,000 awarded as instruction fees was based on wrong principle, it is excessive in the circumstances and warrants interference.
15. As regards the getting up fees, the applicants submitted that the same should be reduced from Kshs.166,000 to Kshs.33,333,33 which is the 1/3 of the correct amount of instruction fees of Kshs. 100,000.
16. Further, he faulted the award of Kshs 6000 for drawing of letters charged under item number 13, 27, 32, 39, 47, and 50 of the Bill of costs contending that the award is unreasonable and not backed by the ARO.
17. They further faulted the award of Kshs. 23,400 for court attendance charged under item 14, 16, 22, 29, 37, 42, 46, 49 and 51 of the Bill of costs contending that the correct award should be calculated using Kshs. 1100. Therefore he calculated the cost down to Kshs. 9900.
18. Likewise, he faulted the costs awarded for attending court registry and submits that schedule VI 7(b) of the *ARO* provides for Kshs.500 per attendance at the offices of the court. Therefore they calculated the costs down from Kshs.5600 to kshs. 2000 for four attendances.
19. With respect to drawing of Hearing Notices, items 30,44 and 48, the applicants submitted that the taxing officer failed to take into account Schedule VI 4 (a) (i) of the *ARO* which provides for Kshs 1,100 for any pleadings with four folios or less. Therefore he calculated the costs for the said items down from Kshs.4200 to Kshs. 3300.
20. Regarding drawing of the Bill of Costs and making copies, the applicants contend that the claim for Kshs.3075 is on the higher side and submit that Schedule VI 4(e) of the *ARO* prescribes Kshs. 180 as the cost of drawing per folio and 25 for making copies per folio. Their calculation reduces the award to Kshs. 1275.
21. The respondents on the other hand submit that the application is founded on a misapprehension of the law and especially Schedule VI (j) of the *ARO*. They further submit that their petition did not involve a simple question of law but a multiplicity of issues that involved legal research and spending of time to do apt submissions as the taxing officer correctly observed in his ruling. They contended that they filed lengthy submissions to canvass the petition and a preliminary objection.
22. They further submit that schedule VI (j) of the *ARO* merely prescribes the minimum fee and leaves the taxing officer with discretion to award more. They argued that the taxing officer in this case gave reason for awarding Kshs. 500,000 as instruction fees and therefore the award was not arbitrary and excessive to warrant interference.
23. The respondents submit that it is a well principles of the law the court does not interfere with the taxing officer's exercise of discretion unless there are compelling reasons demonstrated by the applicant. For emphasis, they relied on the case of *PZ Cussons East Africa Limited v Kenya Revenue Authority* [2014]



eKLR, where the court gave instances when the court can interfere with a discretionary award by the taxing officer of the court.

24. The respondents maintain that the taxing officer's award was based on the nature of the suit and was well guided by comparable authorities including *Geoffrey Makana Asanyo v Nakuru Water and Sanitation limited and others and Primchand Raichand Limited v Quarry Services of East Africa limited, supra*.
25. As regards the getting up fees, the respondent submit that once a matter is confirmed for hearing, and the preparation is made for the hearing, the fees becomes payable. Therefore, the respondents contend that the applicant is misconceived to think that getting up fees is only payable when a hearing proceeds by calling witnesses.
26. For the above reasons, the respondents are of the view that the application is utterly unmerited and it should therefore be dismissed with costs.

Analysis and Determinations

27. After considering the application, the response thereto and the rival submissions, the main issues for determination are:
 - a. Whether there are sufficient grounds for interfering with the taxing officer's ruling dated 14th October, 2020.
 - b. Which orders are merited?

Whether the taxed costs should be interfered with.

28. It is now settled that the Court will not interfere with the decision of a taxing officer except in cases where the applicant demonstrates that there was an error in principle or the quantum is manifestly excessive or too low that it amounts to an injustice.
29. In the case of *PZ Cussons East Africa Limited v Kenya Revenue Authority, supra*, the Judge cited the decision of the Court of Appeal in *Thomas James Artur v Nyeri Electricity Undertaking* [1969] EA 64 at page 69 that: -

“Where there has been an error in principle, the court will therefore interfere, but questions solely of quantum are regarded as matters with which the Taxing Officers are particularly fitted to deal and the court will interfere only in exceptional circumstances.”
30. 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.”
31. This is also the holding in the case of *First American Bank of Kenya vs Shah and Others* [2002] 1 E.A. 64 at 69 by Ringera J where he 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...there is thus a general caveat on judicial review of quantum of taxation unless there is clear error of principle or the sums awarded are either manifestly high or low as to lead to an injustice.”

32. The applicants are challenging the award of Kshs. 500,000 charged under as instruction fees under item No. 1 in the Bill of Costs. They submit that the suitable amount ought to be Kshs. 100,000/= and argue that the award of Kshs. 500, 000/= is excessive and unreasonable. However, the respondents are in denial and submit that the costs awarded are not excessive.
33. The Court of Appeal, in the case of *Joreth Ltd v Kigano & Associates* [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.”
34. In the impugned ruling by the taxing officer delivered on 7th July 2021, the instruction fees was assessed at Kshs 500,000 instead of the provided minimum sum of Kshs. 100,000 and the reason given to justify the same was not complexity of the case but the multiplicity of the issues involved. In page 3 of the Ruling, the taxing officer, observed that: -

“Although I find nothing to suggest that the matter was complex from the pleadings and judgment, from the multiplicity of issues raised and the reliefs sought, there is no doubt that a considerable amount of time and labour was put into the preparation and prosecution of the case. The case was important and it is in the public interest that government bodies act within the law. From the foregoing, I find that a fee of Kshs.500,000 as charged by the two petitioners is reasonable.”
35. Having considered the submissions by both sides and the above ruling by the taxing officer that the matter was not complex, I am of the view that the primary suit was a simple matter that was challenging removal of the respondents as members of County Assembly Service Board. The trial court never certified the same to be complex. There was therefore no multiplicity of issues in strict sense since the petitioners were only challenging their removal. There were also no big volumes of documents to peruse and compile.
36. Whereas I appreciate that the taxing officer had discretion to increase the fee from the minimum of Kshs.100,000 prescribed by Schedule 6 (j) (ii) of the *ARO*, in this case there was no valid reason to justify an increase five times the minimum prescribed fee. Without any complexity of the legal and factual issues, the parties’ counsel cannot be said to have done so much work that the prescribed minimum fee ought to be increased five times.
37. In view of the foregoing, I find that the taxing officer made an error of principle and thereby made an award of instruction fees that was manifestly high that it amounts to injustice to the applicants. Consequently, I reduce the award to Kshs. 200,000, appreciating that considerable amount of time was spent and labour put in taking instructions and preparing the pleadings. I also consider that there was public interest in proceedings because involved a public organ whose leadership was under threat.



38. The foregoing reduction in the instructions fee, means that the getting up fees goes down to one third of the Kshs. 200,000 equaling to Kshs. 66,666.66.
39. As regards the other items, I will not interfere with award for drawings, court attendance, attending court registry, drawing hearing notices and making copies because the same were properly determined according to the scale prescribed by Schedule 6 paragraph 4, 5, 6 and 7 of the ARO. Therefore, the award by the taxing officer of Kshs.46, 943.43 remains.
40. In the circumstances of this case, and for the reasons I have given above, the applicants' Chamber Summons dated 5thJanuary, 2022 is hereby allowed in the following terms;
- a. That the instruction fees has been reduced from Kshs 500,000 to Kshs 200,000.
 - b. Getting up fees will be one third of the Kshs. 200,000 equaling to Kshs. 66,666.66.
 - c. The other items will remain as taxed, being Kshs.46,943.43.
 - d. The total award is Kshs.313,610.90
 - e. The applicants are awarded costs of the application.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 12TH DAY OF MAY, 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 Rule 28 (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

