



Katunga Mbuvi & Co Advocates v Kenya County Government Workers Union (Miscellaneous Application E246 of 2021) [2022] KEELRC 3798 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEELRC 3798 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E246 OF 2021
NZIOKI WA MAKAU, J
JULY 28, 2022**

BETWEEN

KATUNGA MBUVI & CO ADVOCATES APPLICANT

AND

KENYA COUNTY GOVERNMENT WORKERS UNION RESPONDENT

RULING

1. The ruling herein has presented a quandary that is of unimaginable proportions as various legal elements have been tested with very little material before the court. It is a matter of unpaid legal fees. This ruling will only apply to this miscellaneous cause as the court is aware there are a series of matters pending before the courts in relation to fees between the parties. A jurist posits that there is some latitude where argument can be raised about the fee note arising out of a judgment which he posits may fall within the exception under section 4 of the *Limitation of Actions Act* where 12 years is the outer limit. This was however discounted by the legal scholar who argues that one cannot render services in the year 2010 and raise a fee note in 2022. In this case, the dispute revolves around matters that were litigated between 2012 and 2020 or thereabout. More on this later in the ruling.
2. The application before me is the one dated June 10, 2022 being a reference from the decision of the taxing master Hon Noelle Kyany'a Deputy Registrar of this court issued on May 31, 2022. The taxing master had taxed the Advocate's bill of costs at Kshs 3,539,769/-. The respondent (client) applicant asserts that the taxation was time barred as the advocate was seeking dues for services allegedly given in 2019 while the taxation was made in 2022. It is asserted that the issues for determination are whether the taxing officer erred by finding and holding that the advocates bill of costs was not statutorily time-barred. It was also asserted that the other issue for determination was whether the award of Kshs 2,000,000/- as instruction fees and a total of Kshs 3,539,769/- as the amount payable to the advocate is so high and/or excessive as to amount to an injustice to the client/applicant and to justify an interference by the Honourable Judge. The final issue raised is whether the taxing officer's decision on taxation of the advocate's bill of costs was based on errors of principle and whether the applicant is



entitled to the costs of its reference application. The parties before the court have dealt with each other in a cloak and dagger fashion with scant information being shared. No instruction note was attached, no indication of fees demanded was shown, no basis was laid for the failure to pay i.e. the how the dispute arose. I have sought to understand precisely when an advocate's fees fall due in a matter where there is a falling out with the client. One very erudite position expressed by a legal scholar is that the fee becomes payable once there is refusal to pay and once the attorney raises the matter it behoves him or her to render the bill of costs as time runs from the time there is a disagreement on fees and the client's refusal to pay. As such, once a client is recalcitrant then the dispute crystalizes into a cause of action upon which limitation runs for 6 years.

3. The client/applicant submits that the learned taxing officer misdirected herself and made an error of law by relying and basing her ruling regarding whether or not the bill was time barred on the alleged payment of legal fees giving rise to the bill vide cheque number 061025 annexed to the advocate's further affidavit to extend the period of limitation of the bill. The client/applicant submits that firstly, the further affidavit annexing the cheque was not properly on record as it was neither filed nor paid for by the advocate but instead was fraudulently sneaked into the court's record just a day to April 5, 2022 when the matter was due for delivery of ruling. The client/applicant submits that it is not clear how the advocate was allowed to sneak in the affidavit as the matter was pending a ruling. It is further submitted that to the client/applicant it is even more puzzling that the taxing master did not realise this irregularity and proceeded to premise her ruling on whether the bill of costs was time barred on this defective affidavit. The client/applicant submits that the taxing master knew or ought to have known that the further affidavit had not been properly placed on record since it had no receipt in stark contrast to all the other documents that were on the file and the fact that the further affidavit was sworn on April 4, 2022 should have alarmed her since by March 7, 2022 all the parties had filed and served their respective documents.
4. The client/applicant submits that the advocate in his response submits that he experienced technical difficulties with the e-filing portal and delivered the affidavit physically. The client/applicant submits that it finds this highly suspicious and unlikely that the advocate was able to successfully file all his other documents including the replying affidavit and submissions in respect of the reference through the e-filing system portal but was unable to file the impugned further affidavit. The client/applicant submits that it finds this a desperate attempt to sanitize and mask a blatant fraudulent activity. The client/applicant submits there is no evidence in the form of filing receipts or court stamp showing that the said affidavit was paid for by then and properly received by the court registry. The client/applicant cited the case of *SM v HE* [2019] eKLR where the court had this to say about documents not properly placed on record by being paid for and stamped:-

“...his handwritten defence statement does not appear to have been properly placed on record. There is no evidence that it was paid for. Secondly, there is nothing to suggest that it was properly received at the registry for it bears no court stamp. Thirdly, there is no affidavit of service to suggest that it was ever served on the appellant.

From the above it is quite clear that the entire proceedings were deficient. Firstly, because the court papers were not properly received at the court registry and properly processed. It is critical that court papers be embossed with the official stamp of the court. This serves several purposes. The stamp would indicate that the document was properly on record, and was received procedurally. Secondly, it gives an indication as to the time and date when it was received. This is important as court filings are subject to certain timelines. Thirdly, and more importantly, it authenticates the process. It gives the stamp of validity and genuineness to the document thus filed. A document in a court file, especially a critical one, such as a



pleading, which is not stamped is clearly not authentic and should not be treated as genuine, or properly on record. It should, therefore, not be something to be overlooked. These are control and accounting issues. It is about the integrity of the whole process. Court staff have a duty to ensure that the documents they receive at the registry at the time of filing by the parties are properly paid for, and are properly stamped or embossed with the official stamp of the court. It is equally the duty of the judicial officer hearing the matter to ensure that the documents that form the base of the cause are proper, in terms of being properly stamped, signed by the parties, paid for, dated, among other requirements.” (emphasis added)

5. The client/applicant submits that the presentation of the further affidavit was not proper and that the process was flawed such that the reliance on the replying affidavit sufficient to vitiate the entire process. The client/applicant submits that there was no fairness and that the taxing/master's decision is for setting aside. The client/applicant relied on the case of *Mombasa Cement Limited v Speaker, National Assembly & Another* [2018] eKLR where Mativo J (as he then was) held that:-

The filing of a civil case requires the payment of filing fees. It follows that failure to pay court fees renders the suit incompetent because there is no competent suit filed before the court. Whereas the court has inherent powers to allow a party who has not paid fees time to remedy the situation, where a party as in this case is afforded the opportunity to remedy the situation or demonstrate that he paid, and fails to remedy the situation or offers out rightly conflicting explanations as happened in this case which culminated in the above affidavit. In such circumstances as has happened in this case, the court is left with no option but to declare the suit incompetent and strike it off as I am compelled to in this case.

6. The client/applicant submits that the bill of cost was time barred and should face the fate of dismissal. It asserts that the advocate slept on his rights from 2012 and cannot now seek the aid of this court as he is barred by the doctrine of laches. The client/applicant submits that the further affidavit annexing payment of the payment which triggered the fresh cause of action was never served on the client/applicant which is stated to be a serious procedural flaw as the client/applicant was never accorded the opportunity to controvert the claims made therein. It is argued that the failure was a fundamental breach of the client/applicant's rights to fair hearing.

7. The advocate on his part objects to the reference and asserts that in response to the application raised he filed a replying affidavit on June 23, 2022 stating that the taxing officer rendered her ruling after the parties had put in their responses and comprehensively argued on the particulars and the items on the bill of costs. The advocate/respondent asserts that he rendered good service to the client/applicant's satisfaction and that therefore the bill is just. He submits that in response to the preliminary objection raised by the client/applicant on limitation of action, he filed a further affidavit on April 1, 2022 before the pleadings closed. The advocate/respondent submits that he was undergoing technical difficulties with the e-filing platform and that he hand-delivered a copy of the affidavit as is the norm when the e-filing platform fails. He submits that the same was not sneaked in to the court file as alleged by the client/applicant. The advocate/respondent asserts that he has represented the client/applicant to date and no notice of change of advocates was filed and that as such the fees due are legitimate. He cited the case of *Wycliffe Chitayi Muhalya v Dorothy Awiti Omboto t/a Dao Associates & Another* [2017] eKLR where Onyango J held that

In the case of *First American Bank of Kenya v Shah & Others* the court set two tests for reviewing the decision of a taxing master, being that the court should not interfere with the taxing master's decision on taxation unless first, it is shown that the decision was based on an error of principle, or secondly, that the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle.



It was further submitted that in the case of *Republic v Minister for Agriculture & 2 Others Ex-parte Samuel Muchiri W'Njuguna & 6 Others* [2006] eKLR Ojwang' J (as he then was) held:-

“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, and 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 so low as to amount to an injustice to one party or the other.”

8. The advocate/respondent submits that he has been denied income by dint of the client/applicant's failure to pay for efficient legal services rendered which are not settled in full to date. He thus urges the dismissal of the application with costs to him.
9. It is not in dispute that the advocate rendered services for which the client/applicant has been either reluctant or unwilling to pay. It was a bone of contention as to whether the award of Kshs 2,000,000/- as instruction fees and a total of Kshs 3,539,769/- as the amount payable to the advocate is so high and/or excessive as to amount to an injustice to the client/applicant and to justify an interference by the court. Legal fees are structured under the *Advocates Remuneration Order* and the current one was actually applied. The fee charged was on account of complexity of issues and the court did not discern any error in principle in the manner the *Advocates Remuneration Order* was applied in this matter. The fee was neither too high nor too low as to call for interference by the court.
10. The most compelling issue raised by the client/applicant is the one on limitation. There was also a challenge raised on whether the taxing master had the jurisdiction to deal with the issue of limitation. It is settled law that a taxing master has jurisdiction to determine at the very least the issue of whether or not there is limitation as that is a jurisdictional challenge. It is not for the superior court to determine for the taxing master whether there is limitation on the claim for fees. Given there was payment of part of what constituted fees in November 2020, and given the scant material presented to court, the court finds that the claim for fees was revived by this gesture and limitation is now in 2026. What is clear in this case is that the advocate failed in one critical respect – he presented an affidavit whose legal standing is cast under a shadow. There is no record of its filing either on the e-filing portal currently in use being the CTS system deployed in answer to the Covid pandemic. Nor is there a stamped and receipted copy on the court file. There is no proof that this affidavit was ever served upon the client/applicant upon filing on April 1, 2022 (notwithstanding that matter was pending a ruling by the taxing master). The ruling by the taxing master in this particular case which heavily relied on this affidavit is erroneous as the affidavit was not properly on record. I agree with Mativo J (as he then was) who held in the case of *Mombasa Cement Limited v Speaker, National Assembly & Another* [2018] eKLR that:-

The filing of a civil case requires the payment of filing fees. It follows that failure to pay court fees renders the suit incompetent because there is no competent suit filed before the court.

Granted the foregoing, the manifest failure to pay the court fees due for the filing of the impugned further affidavit renders it of no effect as it was not admitted into the court record regularly. There is no prayer discerned on the court record made to the learned taxing master for the admission of the document in the form it was presented after the alleged inability to file it online. As such the court comes to the inevitable conclusion that the decision by the taxing master was wrong on principle on this score alone and thus amenable to setting aside, as I hereby do. Each party will however bear their own costs as the client/applicant ought to have settled the fees which precipitated this action and has even gone to admit it by paying partial fees on the disputed sums.

It is so ordered.



DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY 2022

NZIOKI WA MAKAU

JUDGE

