



**Ireri v David Tours & Car Hire Limited (Cause 485 of 2017)
[2022] KEELRC 12901 (KLR) (14 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12901 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 485 OF 2017
B ONGAYA, J
OCTOBER 14, 2022**

BETWEEN

ENOS IRERI CLAIMANT

AND

DAVID TOURS & CAR HIRE LIMITED RESPONDENT

RULING

1. The application by the respondent in the suit was filed on June 14, 2022 through Masore Nyangau & Company Advocates. It is by the chamber summons under rule 11(1) (2) of the [Advocates \(Remuneration\) Order, 2009](#), Rule 29 of [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#). The applicant prayed for Orders:
 1. (spent).
 2. The taxing master's (Hon DO Mbeja) ruling of June 8, 2022 taxing the claimant's party and party bill of costs dated November 9, 2021 in the sum of Kshs 357, 000.00 be vacated in entirety.
 3. The matter be remitted to another taxing master for re-taxation with appropriate directions or guidance.
 4. In alternative to (3) above the Court exercising its inherent jurisdiction, be pleased to re-tax the claimant's party and party bill of costs dated November 9, 2021.
2. The application was based upon the annexed affidavit by the applicant's managing director David Ngunjiri and upon the following grounds:
 - a. The claimant's bill of costs was dated November 9, 2021 and was taxed per the ruling delivered on June 8, 2022 at Kshs 357, 000.00. The applicant is aggrieved as follows.



- b. The master failed to be guided by Rule 58 of the *Advocates (Remuneration) Order, 2009* as applied by the Court in its decision in *Joseph Mumali Wanga v Blessed TC World Class Spares Limited* (2021)eKLR regarding the applicable schedule.
 - c. The taxing master made a sweeping conclusion that the bill of costs was drawn to scale absent reasons for accepting the sums charged for each item in the bill.
 - d. The respondent’s specific objections were not considered in respect of the items in the bill of costs or treated the objections superficially and allowing the bill at Kshs 357, 000.00.
 - e. It is in the interest of justice that the Court intervenes.
3. Parties filed their respective submissions on the application. The claimant filed through Isaac Onyango & Company Advocates. The Court has considered the submissions and makes pertinent findings as follows.
 4. First, as submitted for the claimant, in *Kipkorir, Titoo & Kiara Advocate v Deposit Protection Fund Board* [2005] eKLR the Court of Appeal held, “On 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 costs.” The Court considers that to be the binding approach to the present dispute.
 5. Second, it is not in dispute that in the instant case the Court entered Judgment against the respondent in the sum of Kshs 289, 845.00. The respondent was also ordered to pay costs. The costs have been taxed at Kshs357, 000.00 per Schedule VI of the *Advocates (Remuneration) Order* applicable to the High Court – being way above the principal sum awarded in the judgment. Paragraph 58 of the *Advocates (Remuneration) Order, 2009* provides, “In causes or matters which, having regard to the amount recovered or paid in settlement or relief awarded, could have been brought in a resident magistrate’s or other subordinate court, costs on the scale applicable to subordinate courts only shall be allowed unless the judge otherwise orders.” The Court considers that the amount of Kshs 289, 845.00 would otherwise be awarded by a subordinate court. The Court therefore finds that the correct applicable provisions for taxing the itemized party and party bill of costs was Schedule VII of the *Advocates (Remuneration) (Amendment) Order, 2014* applicable to subordinate courts – especially, taking into account the said Paragraph 58, the amount awarded in the judgment, and, the Judge having not ordered otherwise. The respondent’s submissions in that regard are upheld. The taxing master erred in principle by failing to apply Paragraph 58 of the *Order* so that the Court returns that the discretion as was exercised is amenable to interference.
 6. The Court follows Rika J’s holding in *Joseph Mumali Wanga v Blessed TC World Class Spares Limited* [2021] eKLR thus, “17. Judgment value was Kshs 48, 333.30. Rule 58 of the *Advocates Remuneration Order* should have applied. Where the amount given at the High Court in the Judgment, could have been given within the jurisdiction of the Subordinate Court, the applicable scale is that which regulates party and party costs, in the Subordinate Court.” And further holding, “19. The correct Schedule should have been Schedule 7, which regulates taxation of party and party costs, in the Subordinate Courts. The Judge did not allow application of Schedule 6.” The Court further considers that there is no reason to deviate from Rika J’s assertion in that case thus,
 - “ 15. There is an obvious disconnect, between what was granted to the Claimant in the Judgment, and what he received as costs on taxation.
 16. The principal sum and taxed costs are distinct as submitted by the Claimant, but there is an inescapable correlation under the Advocates Remuneration



Order. The amount granted in the Judgment, ordinarily determines amount allowable, as the instructions fees.”

7. Third, the Court has considered the submission made for the claimant that the jurisdiction of the Court flows from Article 162 of the [Constitution, 2010](#) and further that it is by Gazette Notice No 6024 of 10.06.2018 that the Subordinate Court acquired jurisdiction to entertain the suit like the present one but which had been filed on June 17, 2017, being prior to publication of the Gazette Notice. It is submitted that unlike the High Court which could only handle cases of the pecuniary jurisdiction of Kshs20, 000,000.00 and above, this Court had no limited pecuniary jurisdiction (for a ceiling or a floor) and as a superior court with status equal to the High Court, Schedule VI of the [Advocates \(Remuneration\) Order](#) applied and Paragraph 58 of the [Order](#) was inapplicable. However, the Court has followed the holding by Rika J in the above cited case and considers that there must indeed be some rational and acceptable correlation of the amount awarded by the Judge in the judgment and the assessed costs flowing from such an award. The consequence is that in the instant case, Paragraph 58 of the [Order](#) is found to apply and Schedule VII and not VI of the [Order](#) will be the just schedule to apply. The Court has considered the claimant’s otherwise justifiable reliance on the mix-up in the applicable law and returns that each party will bear own costs of the application.
8. While following Rika J’s holding and exposition in the cited case, the Court has also reckoned that it is established pursuant to Article 162 of the [Constitution, 2010](#); as correctly urged and submitted for the claimant. It is apparent that the Advocates (Remuneration) Order appears not to have been subsequently promulgated or aligned to take into account the taxation of bills of costs for matters before this Court. In such circumstances, it is that section 7 (on existing laws) of the Sixth Schedule (on Transitional and Consequential Provisions) of the [Constitution of Kenya, 2010](#) applies. Under the section, all law in force immediately before the effective date continues in force and shall be construed with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the [Constitution](#). In that regard, the Court considers that Paragraph 58 of the [Advocates \(Remuneration\) Order](#) must be construed and applied by this Court as would have been applied by the High Court. There is nothing before the Court to suggest that this Court as a Court of equal status to the High Court should disregard the said Paragraph 58 towards curbing the mischief for which the Paragraph 58 was promulgated – being, as per Rika J’s holding, there be a correlation and not a disconnect between the principal amount awarded by the Court in the Judgment and the taxed party and party costs ensuing in the concerned suit.
9. The Court considers that there is a gap to be filled about specific provisions of the [Advocates \(Remuneration\) Order](#) on taxation of bills of costs for matters determined by the Court. In that regard, the applicant to serve this ruling upon the Registrar of the Court with a view of the Court’s Rules Committee initiating appropriate remedial action.
10. In conclusion the application is hereby determined with orders:
 1. The taxing master’s (Hon DO Mbeja) ruling of June 8, 2022 taxing the claimant’s party and party bill of costs dated November 9, 2021 in the sum of Kshs 357, 000.00 is hereby reviewed by being set aside and all processes flowing therefrom vacated.
 2. The party and party bill of costs herein is remitted to the taxing master for priority re-taxation, item by item, in presence of both parties, and, under the correct Schedule VII of the [Advocates \(Remuneration\) \(Amendment\) Order, 2014](#).
 3. The applicant to serve this ruling upon the registrar of the court within 7 days from the date of the ruling.



4. Each party to bear own costs of the application.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS
FRIDAY 14TH OCTOBER, 2022.**

BYRAM ONGAYA

JUDGE

