Kenya County Government Workers Union v County Government of Nakuru on behalf of Naivasha Municipal Council (Miscellaneous Application E175 of 2021) [2022] KEELRC 13502 (KLR) (13 December 2022) (Ruling)

Neutral citation: [2022] KEELRC 13502 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISCELLANEOUS APPLICATION E175 OF 2021

BOM MANANI, J

DECEMBER 13, 2022

BETWEEN

KENYA COUNTY GOVERNMENT WORKERS UNION .... APPLICANT

AND

COUNTY GOVERNMENT OF NAKURU ON BEHALF OF NAIVASHA MUNICIPAL COUNCIL .... RESPONDENT

RULING

Introduction

1. The respondent (hereafter called ''the advocate'') is a lawyer practicing in Kenya with his offices in Nairobi. He commenced legal action to recover legal fees for services rendered to the applicant (hereafter called ''the client'').

2. The client is a trade union registered in the Republic of Kenya. Its membership covers workers of the defunct Local Government and now the County Governments.

Facts of the Dispute

3. It is common ground that the parties to this action had a client-advocate relationship, the client having instructed the advocate to render legal services relating to enforcement of the award decreed in Industrial Cause No 132 of 2006 alongside other matters. It does appear that the relationship ran into headwinds following what the advocate has described as the client's reluctance to pay legal fees. Consequently, the advocate filed the present case seeking that the court's taxing master ascertains the fees that is due to him.

4. From the record, the advocate-client bill of costs was eventually taxed and a ruling delivered on May 31, 2022. It is this ruling that triggered the application dated June 10, 2022 by the client which is in the

nature of a reference. In the application, the client seeks for several orders some of which are alternative prayers. These are:-

a. Spent.

b. Spent.

c. The decision of the taxing master be overturned and or vacated and the bill of costs dated September 29, 2021 be struck out as the taxing master lacked jurisdiction to entertain the proceedings.

d. The decision of the taxing master dated May 31, 2022 be set aside and or reviewed.

e. In the alternative the court be pleased to remit the bill of costs to another taxing master for re-taxation.

f. The court does assess the costs due to the advocate.

g. The court be pleased to grant any other order it deems fit.

h. The court gives orders on costs of the application.

5. The court considering a reference from the decision of a taxing master is not to interfere with the award of costs by the taxing master unless it is demonstrated that there was an error of principle committed by the taxing master in the process of taxation. This principle has been re-stated in a number of decisions including *First American Bank of Kenya v Shah and others* [2002] eKLR where the court observed as follows:

> ''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."

6. I will have this principle in mind in determining the current reference. The issues that I need to consider are:-

a. Whether the bill was time barred.

b. Whether the bill was filed prematurely.

c. Whether the taxing master had jurisdiction to tax the bill.

d. Whether the taxing master committed an error of principle in the taxation process.

7. The manner in which the client has addressed the issues is such that they are largely considered as jurisdictional. Hence, the main plank of the case is founded on the question of jurisdiction.

8. In respect of the question of jurisdiction, the client starts by pointing out that the taxing master did not pronounce herself on the preliminary objection that had been filed. That this failure to address the preliminary objection constitutes an error of law which should nullify the proceedings before the taxing master.

9. I have looked at the notice of preliminary objection (notice of PO) dated November 28, 2021. It raises the following objections to the bill of costs as filed:-

a. That the bill was prematurely filed contrary to section 48 of the *Advocates Act* and rule 7 of the *Advocates Remuneration Order*.

b. That the bill is time barred.

c. That the bill lay outside the purview of the taxing master.

10. I have looked at the court record before the taxing master. When the matter was mentioned on October 14, 2021, Mr Aguti (for the advocate) is recorded as asking that the bill be canvassed through written submissions. In response, Mr Oginga (for the client) is recorded as stating that because of the amounts involved, he required at least 30 days to file his response. The court is then shown as issuing an order removing the matter from the cause-list for the day and relisting it for mention on December 14, 2021 to confirm the filing of responses and submissions by the parties.

11. After the adjournment of October 14, 2021, the client filed the notice of PO aforesaid. On December 14, 2021, the court listed the matter for ruling on January 18, 2022 in the absence of the client.

12. On December 17, 2021, the client applied to set aside the orders of December 14, 2021. On February 1, 2022, the request to re-open the taxation was granted and the matter referred to taxation on March 8, 2022.

13. On March 8, 2022, the client's advocates were not in attendance. The taxing master fixed the matter for ruling on the bill on April 12, 2022. This was eventually delivered on May 31, 2022.

14. It appears from the record that the client filed its submissions on the bill on March 4, 2022. This fact was confirmed by the court on March 8, 2022.

15. Although the client's advocates indicate that they filed submissions on the preliminary objection on March 1, 2022, these submissions were not on the court's record perhaps because the registry omitted to print a copy from the court's online portal. As such, the submissions did not, as a matter of fact, form part of the record as at the date of the taxing master's ruling. As a matter of fact, it is this court which drew the attention of the client's advocates to the fact that the submissions on the preliminary objection were not on the taxing master's record.

16. From the proceedings on record, it is true that the taxing master did not pronounce herself on the preliminary objection. However, I think that this is because she was not moved on the matter. As mentioned above and as the court record demonstrates, the client's submissions on the preliminary objection were not on record at the time the taxing master wrote her ruling.

17. Through the reference filed on June 10, 2022, the client has raised the matter of limitation afresh. Despite the contestations on the validity of the affidavits filed by the advocate, i note that the client does not provide a basis for contending that the bill is time barred. Neither the advocate nor the client filed documents from Industrial Cause No 132 of 2006 to support their contention that the bill is either time barred or it is not.

18. In the interest of justice and in order to resolve the matter, the court called for and perused the court file in which the proceedings in Industrial Cause No 132 of 2006 were recorded. From the record, the last order in the cause was issued by Justice Nduma Nderi on January 27, 2017. This order is reported as *Kenya Local Government Workers Union v Nakuru County Council on behalf of Naivasha Municipal Council* [2017] eKLR.

19. From this last order, it does appear that the parties proceeded to the Court of Appeal. The Notice of Appeal filed in the cause is dated February 7, 2017 and filed on February 8, 2017. It shows that it was intended to be served on M/S Katunga Mbuvi & Co, Advocates, appearing for Kenya Local Government Workers Union. These two are the disputants in the current reference.

20. There is no suggestion that there has been a notice of change of advocates to discontinue M/S Katunga Mbuvi & Co Advocates from the record in the said industrial cause. Therefore, in terms of the Court of Appeal decision in *Omulele & Tollo Advocates v Mount Holdings Limited* [2016] eKLR, the advocates still enjoy a retainer in the industrial case.

21. Quoting *Halsbury's Laws of England*, 4th Edition, Vol 28 at paragraph 879, the learned judge in *Akide & Company Advocates v Kenindia Assurance Company Limited* [2021] eKLR states as follows:-

> "In relation to continuous work by a solicitor, such as the bringing and prosecuting or defending an action; if a solicitor sues for his costs in an action, the statute of limitation only begins to run from the date of termination of the action or of the lawful ending of the retainer of the solicitor;
>
> > …if there is an appeal from the judgment in the action, time does not begin to run against the solicitor, if he continues to act as such, until the appeal is decided."

22. From the record in Industrial Cause No 132 of 2006, it was intended that M/S Katunga Mbuvi & Co, Advocates continue acting for the client. That is why the notice of appeal was proposed to be served on them. There is no evidence that the appeal is concluded. And neither is there evidence that the said lawyers were debriefed. Accordingly, the advocate's retainer in the cause, *prima facie*, continues.

23. That notwithstanding, the record in Industrial Cause No. 132 of 2006 shows that M/S Katunga Mbuvi & Co, Advocates were last involved in the cause in the month of June 2017 when they filed an application to have the County Commissioner, Nakuru County execute warrants of arrest against one Kinuthia Mbugua, the then Governor of Nakuru County Government, the supposed successor in title to Naivasha Municipal Council. This was hardly five (5) years before they filed their bill in September 2021.

24. The limitation of actions period based on actions founded on contract is six (6) years. This action having commenced within the six (6) year period from the date the Advocates last acted in the Industrial Cause is not time barred.

25. The other objection relates to whether the matter ought to have been placed before the taxing master in the High Court division. The dispute emanates from a dispute adjudicated by the Industrial Court. The record shows that the enforcement proceedings were handled by Justices Nduma Nderi and DK Marete, judges of the Employment and Labour Relations Court (ELRC). This being the case, the issue of ascertainment of the lawyer's fees could only have been referred to the taxing master of the ELRC, a court of equal status to the High Court.

26. Section 48 of the *Advocates Act* provides as follows:-

> " ''Subject to this Act, no suit shall be brought for the recovery of any costs due to an advocate or his firm until the expiry of one month after a bill for such costs, which may be in summarized form, signed by the advocate or a partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause to be verified by affidavit filed with the plaint, for believing that the party chargeable therewith is about to quit Kenya or abscond from the local limits of the court's jurisdiction, in which event action may be commenced before expiry of the period of one month. Subject to subsection (1), a suit may be brought for the recovery of costs due to an advocate in any court of competent jurisdiction. Notwithstanding any other provisions of this Act, a bill of costs between an

advocate and a client may be taxed notwithstanding that no suit for recovery of costs has been filed."

27. Relying on this provision, the client contends that the advocate-client bill has been filed prematurely. I do not agree with this contention. This section only bars the filing of substantive suit to enforce recovery of fees before an itemized bill has been delivered to the client at least one month before filing of the case.

28. However, the advocate is free to file the bill for taxation before filing the substantive suit for recovery contemplated under the section. Where the advocate does this, the obligation to serve the client with the itemized bill one month before filing it does not apply. This is clear from the proviso to section 48 of the *Advocates Act* which states thus:

 "notwithstanding any other provisions of this Act, a bill of costs between an advocate and a client may be taxed notwithstanding that no suit for recovery of costs has been filed."

29. Put differently, there is a difference between the bare bill filed for purposes of taxation in order to determine the quantum of fees and the substantive suit filed to enforce recovery of the fees ascertained through the process of taxation. Therefore, the objection founded on section 48 of the *Advocates Act* is without foundation.

30. Proceeding on the foregoing, I find that the client's preliminary objection was not well founded. The taxing master did not pronounce herself on the notice of PO because, at least as the record demonstrates, she was not moved to do so.

31. Nevertheless, being matters that go to jurisdiction, the issues in the notice of PO can still be properly raised, as they have, at the reference stage which, though not an appeal, is in the nature of appeal proceedings. And when raised, the court at this stage is bound to pronounce itself on the matter.

32. The other question relates to whether the taxing master misdirected herself on the item relating to instruction fees. The client contends that the proceedings in Industrial Cause No 132 of 2006 were in the nature of execution proceedings. Therefore, the taxing master was wrong to treat them as if they were a substantive suit in terms of schedule VI 1 of the *Advocates Remuneration Order*, 2006 (ARO, 2006). In counsel's view, there were no instructions to the advocate to sue in an ordinary suit as provided for under the schedule. The instructions given to the advocates were to enforce and or cause to be executed the industrial award. As such, the applicable schedule for purposes of ascertaining advocate fees was schedule VI 13 (c) of the *ARO*, 2006.

33. So far as the record in Industrial Cause No 132 of 2006 demonstrates, the proceedings to enforce the court's award commenced by way of an application for leave to commence contempt proceedings against the judgment debtors in the cause. The application was filed on December 15, 2009.

34. As suggested in *Charles M Oroba & 23 others v Kenya Tea Development Agency Ltd* [2019] eKLR awards by the Industrial Court as it then was could only be enforced upon their adoption as decrees of the ordinary court, usually the High Court. Perhaps, the aforesaid application by the advocate filed on December 15, 2006 intended that the Industrial Court award dated August 31, 2007 be simultaneously considered as adopted by implication.

35. The contested issue is whether an application to enforce an award constitutes a suit within the meaning of schedule VI 1 of the *ARO*, 2006. In my view, this part of the schedule contemplates an ordinary suit commenced by way of a plaint, originating summons, or other motion in which the determination of an issue is made by reverence to evidence taken in the ordinary course of things. It does not cover

situations where parties are invoking the court's jurisdiction to enforce an award that has already been rendered.

36. In a situation where a matter has been considered on its merits before another forum and it is only presented to the court for adoption and enforcement of the award, this does not constitute a suit in the true meaning of the word. Therefore, to the extent that the advocate in Industrial Cause No 132 of 2006 was only moving the High Court and thereafter the ELRC to enforce the order of the Industrial Court, he was not thereby instituting a ''suit''.

37. The above view is reinforced by the provisions of the Trade Disputes Act, now repealed. Section 17 of the Act rendered an award of the Industrial Court final. My understanding of this provision is that it acknowledged that all issues regarding the merits of an industrial claim were conclusively determined by the Industrial Court. When the parties moved to the High Court, it was only for adoption of the Industrial Court's final order.

38. In recognition of the rather straight forward nature of enforcement of awards from the Industrial Court, section 15(2) of the Trade Disputes Act (repealed) provided for summary procedure at the enforcement stage (*Kenya Plantation and Agricultural Institute v Kenya Agricultural Research Institute (KARI) & another* [2007] eKLR). Summary procedure is often invoked in instances where it is generally recognized that the proceedings are not of a complex nature. Underscoring this reality Warsame J in *Safaricom Limited v Itnets East African Limited* [2007] eKLR said as follows:-

> " ''In my view the summary procedure of the court is invoked to avoid delay and unfair withholding a party's right without any justification. In fact there is no justification for trial, when the case of the plaintiff is as clear as between day and night. It means the awaiting of the hearing would not change the circumstances due to the clear and uncontroverted nature of the plaintiff's case.''

39. In view of the foregoing, I consider that enforcement proceedings to breathe life into an award by the Industrial Court as it then was are by reason of section 15 (2) of the repealed *Trade Disputes Act* to be considered as uncomplicated. I therefore decline the invitation by the Advocate to hold that the enforcement proceedings in Industrial Cause No 132 of 2006 were complex and requiring much input from him. In fact, the court record in the cause speaks otherwise.

40. As was observed in *First American Bank of Kenya v Shah and others* [2002] eKLR, the mere fact that counsel committed time to research on the matter does not necessarily denote that it was complex. The court expressed itself as follows on the issue:-

> " ''I am of the view that, if a defendant does research before filing a defence and then puts a defence informed by such research, he has done no more than expected. It is nothing extra ordinary. The research is not necessarily indicative of the complexity of the matter. It may well be indicative of the advocate's unfamiliarity with basic principles of law. Such unfamiliarity should not be turned into an advantage against the adversary.''

41. The value of the subject matter of the enforcement proceedings was easily ascertainable using the parameters set in the award. Indeed, that is why in the affidavit in support of the client's application to set aside the award dated February 3, 2010, the client's town clerk, one Shadrack Mutua Mulanga was able to state that the effect of the award was to require the judgment debtor to pay Kshs 26,325,421/. The taxing master was therefore right in relying on this figure as the value of the decree as issued by the Industrial Court.

42. Further, the taxing master was correct to invoke schedule VI 1 (b) of *ARO*, 2006, to arrive at the conclusion that base instruction fees in the matter was Kshs 441,067.76 or thereabouts. The provision contemplates situations where billing is permitted for proceedings filed after finalization of a suit. In my view, such proceedings include enforcement proceedings.

43. However, after determining the base instruction fees, the taxing master increased it by close to tenfold on account of the time spent, research and skill deployed by counsel. As I have observed earlier, enforcement of decrees from the Industrial Court is by law to be by way of summary process denoting the incomplexity of the process. Whilst the advocate avers that he participated in the proceedings leading to the award by the Industrial Court, he did not furnish the taxing master with this record. The only record that the court has obtained after going out of its way to ask for the record of the Industrial Court case file relates to enforcement proceedings. As such, it was inappropriate for the taxing master to raise the base instruction fees on the basis of factors that the advocate had not established such as the skill deployed to handle the case. In this respect, the taxing master fell into error of principle.

44. I have considered that the enforcement case took a long time since December 14, 2009 when the advocate filed the application for contempt. The parties thereafter engaged in several applications of near similar nature all of which sought to either review, set aside or enforce the award by the Industrial Court. These proceedings terminated by the filing of the notice of appeal on February 8, 2017 when the parties perhaps moved to the Court of Appeal. This means that the advocate dedicated at least seven (7) years of his time to attending to the enforcement cause. As I mentioned earlier, the record shows that the advocate still remains on record to date.

45. Having regard to the totality of the time spent handling the case, it appears appropriate that the base instruction fees to the advocate be raised by a reasonable margin that can compensate him for the man-hours he has dedicated to the matter.

Determination

46. I therefore set aside the taxation on item one (1) on instruction and getting up fees. These two sub items of item one (1) shall be remitted to a taxing master other than the one who undertook the initial taxation for fresh taxation having regard to the observations I have made in the ruling.

47. Upon ascertainment of instructions and getting up fees, the taxing master shall increase it by one half in terms of part b of schedule VI of the ARO, 2006.

48. The advocate is also entitled to collect VAT on the fees ordered if he is a registered collector of VAT.

49. The taxing master's orders in respect of items 2 to 110 in the bill of costs and the disbursements incurred by the advocate as appearing on pages 13 to 14 of the said bill are upheld.

50. As both parties have partially succeeded, each of them shall bear their own costs.

DATED, SIGNED AND DELIVERED ON THE 13TH DAY OF DECEMBER, 2022.

B O M MANANI

JUDGE

In the presence of:

.... for the applicant

.... for the respondent

ORDER

In light of the directions issued on July 12, 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision 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.

B O M MANANI