



**Kenya County Government Workers Union v Leonard K Mbuvi t/
a Katunga Mbuvi & Co Advocates (Miscellaneous Application
E210 of 2021) [2022] KEELRC 13494 (KLR) (13 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13494 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E210 OF 2021**

BOM MANANI, J

DECEMBER 13, 2022

IN THE MATTER OF THE ADVOCATES ACT CAP 16 LAWS OF KENYA

AND

**IN THE MATTER OF ADVOCATE-CLIENT BILL OF COSTS ARISING OUT OF
LEGAL SERVICE IN JUDICIAL REVIEW MISC APP NO 309 OF 2009 NAIROBI**

BETWEEN

KENYA COUNTY GOVERNMENT WORKERS UNION CLIENT

AND

**LEONARD K MBUVI T/A KATUNGA MBUVI & CO
ADVOCATES ADVOCATE**

RULING

Introduction

1. The respondent in the reference (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 in the reference (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.

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 in Judicial Review Cause No. 309 of 2009 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 (hereafter called "the bill") 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. The decision of the taxing master on the bill dated November 11, 2021 be overturned and or vacated as the taxing master lacked jurisdiction to entertain the bill.
 - c. The decision of the taxing master dated May 31, 2022 be set aside and or reviewed.
 - d. The further affidavit by Leonard Katungi Mbuvi sworn on April 1, 2022 and relied on by the taxing master be struck out for having been fraudulently and unprocedurally sneaked into the court record without having been duly filed, paid for or served upon the client to enable a response.
 - e. In the alternative the court be pleased to remit the bill 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.

Analysis

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 taxing master had jurisdiction to tax the bill.
 - b. Whether the further affidavit by Leonard Katungi Mbuvi sworn on April 4, 2022 (not April 1, 2022 as suggested by the client) is improperly on the court's record.
 - c. Whether the taxing master committed an error of principle in the taxation process.



- d. Whether the bill should be remitted to a different taxing master for re-taxation.
7. On the first issue, it is the contention of the client that the bill emanated from judicial review proceedings that were handled by the High Court. Therefore, the bill ought to have been filed before the taxing master of the High Court as opposed to the taxing master of the Employment and Labour Relations Court.
 8. I have looked at copies of documents placed on the court file after the taxing master issued an order on April 12, 2022 directing the advocate to furnish the court with additional copies of documents in line with the powers conferred upon a taxing master under rule 13A of the *Advocates (Remuneration) Order 1962*. The Judicial Review (JR) proceedings were filed to challenge the award by the Industrial Court in Cause No 115 of 2006. By these proceedings, the applicant sought the order of the High Court to quash the decision of the Industrial Court to reinstate some of the applicant's employees on grounds that the orders were issued in excess of the mandate of the court in view of the sub-judice rule.
 9. The High Court delivered its judgment on April 26, 2013 (see *Republic v Industrial Court of Kenya & another Ex parte Municipal Council of Thika* [2013] eKLR). On May 8, 2013, the record shows that a notice of appeal was lodged against the High Court decision.
 10. From this record, it is clear to me that the issue before the High Court in the JR cause was the competence of the Industrial Court to order reinstatement of some of the applicant's employees. That was an employment issue.
 11. It is noteworthy that the JR cause was filed in 2009 just before the 2010 *Constitution* establishing the Employment and Labour Relations Court (ELRC) came into force. The ELRC has the same status as the High Court. If the JR motion had been filed under the current constitutional dispensation, it certainly would have been handled by the ELRC, the subject matter in contention being an employment and labour relations issue.
 12. At the time the Bill was filed in 2021, the ELRC had already been established with its own Taxing Master. Given the history aforesaid, the Bill was properly directed to the ELRC. Therefore, the Taxing Master of the ELRC was seized of jurisdiction to tax the Bill.
 13. The next jurisdictional issue relates to whether the cause was time barred. The contention by the client is that the relationship between an advocate and a client by which the client instructs the advocate to represent him is contractual in nature. As such, any action to enforce a right based on the contract must be brought within six years of conclusion of such contract in terms of section 4 (1) (a) of the *Limitation of Actions Act*.
 14. The Client contends that the advocate's action to recover fees was filed more than six (6) years after the contract for provision of legal services in JR No 309 of 2009 had come to a close. It is the client's contention that the last activity in the aforesaid JR was on April 26, 2013 when judgment was delivered. To support its position, the client avers that the advocate has admitted this truism by showing in the bill that the last item billed related to court attendance on April 26, 2013 to pick the court's judgment.
 15. Apart from the averments in the written submissions dated March 9, 2022, the client did not provide proof of its contention that indeed the court attendance of April 26, 2013 was the last activity in the cause. Indeed, the client did not allude to the fact of the bill being time barred in the affidavit sworn by Roba Duba on March 8, 2022 in opposition to the bill.
 16. The client may perhaps have relied on the item by the advocate raising a fee demand for court attendance on April 26, 2013 to infer that this was the last activity on the court file. However, this is not



necessarily so. The obligation remained on the client to establish its assertion that the claim was time barred on account of the advocate's retainer having allegedly terminated on April 26, 2013. Indeed, this is the requirement imposed by sections 107 and 109 of the *Evidence Act*.

17. As mentioned above, the record of the taxing master shows that she asked the advocate to supply her with copies of some documents by 19th April 2022. Meanwhile, she listed the matter for ruling on the Bill on May 31, 2022. The call by the taxing master for further documents was in line with powers granted to a taxing master under regulation 13 of the *Advocates (Remuneration) Order*, 1962.
18. From the record, copies of the pleadings in JR 309 of 2009 were placed before the taxing master following her request on April 12, 2022. One of the documents placed before the taxing master is a notice of appeal dated May 8, 2013. It is shown to have been served on the advocate on May 9, 2013.
19. The notice of appeal implies that the advocate was to remain on record in the appeal for the client. It is unclear whether the proposed appeal was pursued beyond filing the notice of appeal. However, existence of the notice of appeal signifies the presence of an appeal unless the party challenging the fact of continued existence of the appeal demonstrates that the appeal was heard and concluded or that the proposed appeal was not filed and the notice of appeal either withdrawn or struck out under rule 83 of the *Court of Appeal Rules*.
20. The client has not provided evidence to show that the notice of appeal was either withdrawn, struck out or that the appeal was heard and concluded more than six (6) years before presenting the bill. Similarly, there was no evidence that the advocate was debriefed in the JR after the proposed appeal was filed.

In *Akide & Company Advocates v Kenindia Assurance Company Limited* [2021] eKLR, the court said this of the time for filing a Bill of costs by an Advocate who has been involved in a matter that has progressed to appeal:-

“...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.”

21. In the JR, the notice of appeal shows that the advocate was to continue acting in the proposed appeal. There is no evidence that the Advocate's retainer was withdrawn by the client. There is no evidence that the proposed appeal suffered a stillbirth or that the appeal was in fact filed but finalized more than six years before the advocate presented his bill for taxation. Therefore, in the absence of evidence supporting the client's contention that the bill is time barred, it is prima facie, not statute barred. As pointed out, the obligation lay with the client to provide evidence that the bill is time barred: not the advocate.
22. The client has criticized the taxing master's decision to rely on the further affidavit by the advocate dated April 4, 2022 to find that the bill was not time barred. According to the client, this affidavit was filed without leave of the court and was never served on the client. Consequently, it denied the client the opportunity to be heard in respect of the issues it alluded to.
23. The court record shows that as early as November 30, 2021, the advocate had filed his submissions on the bill. The advocate then filed submissions on the preliminary objection around March 18, 2022. The record also shows that the client filed its submissions on the twin issues of the Bill and preliminary objection around March 9, 2022.
24. It appears that after the parties had filed their submissions, the advocate filed a further affidavit dated April 4, 2022. The affidavit introduced a receipt of legal fees paid by the client to the advocate on November 24, 2020. From her ruling, it is clear that the taxing master relied on this document to arrive at her conclusion that the claim was not time barred.



25. A scrutiny of the court record does not show that the further affidavit dated April 4, 2022 was filed with leave of the court. It was therefore irregularly placed on the court record.
26. A further affidavit can only find its way onto the court's record with leave of the court. That this is the generally accepted legal position is not even contested by the advocate. In *Treadsetters Tyres Ltd v Hussein Dairy Ltd* (2002) eKLR, the court observed that a further affidavit filed without leave of the court remains inadmissible however long it takes to point out the violation of the rules.
27. To the extent that the taxing master proceeded to assume jurisdiction to tax the bill on the basis of an invalid affidavit of April 4, 2022, she made an error of principle. Consequently, the taxation proceedings premised on this finding were rendered invalid *ab initio*.
28. However, as has been demonstrated above, the bill was not time barred if the physical record of the parent file has to be considered. In the premises, whilst setting aside the invalid taxation order, I am unable to strike out the bill as there is no evidence that it is in fact and law time barred.

Determination

29. In conclusion, I order as follows:-
 - a. That the taxation order by the taxing master issued on May 31, 2022 is set aside as it was premised on an invalid further affidavit.
 - b. That however, as the bill is in fact and law not time barred, I order that it be placed before another taxing master for taxation.
 - c. Costs of the reference are granted to the client.

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

B. O. M. MANANI

