



**Kenya County Government Workers Union v Leonard K Mbuvi t/
a Katunga Mbuvi & Co Advocates (Miscellaneous Application
E248 of 2021) [2022] KEELRC 13495 (KLR) (13 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13495 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E248 OF 2021**

BOM MANANI, J

DECEMBER 13, 2022

**IN THE MATTER OF ADVOCATE-CLIENT BILL OF COSTS ARISING OUT OF
LEGAL SERVICE IN INDUSTRIAL CAUSE NO 1023 OF 2013 NAIROBI AND
IN THE MATTER OF KENYA COUNTY GOVERNMENT WORKERS UNION**

BETWEEN

KENYA COUNTY GOVERNMENT WORKERS UNION CLIENT

AND

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

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.

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 Industrial Cause No 1023 of 2013 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 be overturned and or vacated and the bill dated December 16, 2021 be struck out for being time barred.
 - 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 4, 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 Shab 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 further affidavit by Leonard Katungi Mbuvi sworn on April 1, 2022 (not April 4, 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 has been caught up by the law on limitation of actions. The contention 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*.



8. The client contends that the advocate's action to recover fees was filed close to eight (8) years after the contract for provision of legal services in Industrial Cause No 1023 of 2013 had come to a close. It is the client's contention that the last activity in the aforesaid industrial suit was on January 24, 2014. However, apart from the averments in the written submissions dated March 7, 2022 and August 29, 2022, the client did not provide proof of its contention that indeed the court attendance of January 24, 2014 was the last action in the cause. Indeed, the client did not allude to this fact in the affidavit sworn by Roba Duba on March 7, 2022 in opposition to the bill.
9. The client may perhaps have relied on the entry in the bill by the advocate raising a fee demand for court attendance on January 24, 2014 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 January 24, 2014. Indeed, this is the requirement imposed by sections 107 and 109 of the *Evidence Act*.
10. The record of the taxing master shows that she sought for the parent file to enable taxation. However, as at April 14, 2022, she made comments to the effect that the said file had not been traced. She therefore asked the advocate to supply some documents by April 19, 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.
11. In view of the fundamental nature of the objection on limitation of time and having regard to the fact that the client did not lay a cogent factual basis for it, this court called for the parent file in order to resolve the issue. From the record, the last time the cause was in court was April 4, 2017 when the suit was dismissed for non attendance. The trial judge then made an order closing the file.
12. In effect, the matter was concluded on April 4, 2017. As the bill was filed in court for taxation on December 21, 2021, it was presented within the six (6) year timeframe contemplated under section 4 (1) (a) of the *Limitation of Actions Act*.
13. The client has criticized the taxing master's decision to rely on the further affidavit by the advocate dated April 1, 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 them. Consequently, it denied the client the opportunity to be heard in respect of the issues it alluded to.
14. The court record shows that as early as March 7, 2022, the advocate had filed his submissions on the bill. The submissions are dated February 23, 2022. The advocate then filed submissions on the preliminary objection. They are dated 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 7, 2022.
15. It appears that after the parties had filed their submissions, the advocate filed a further affidavit dated April 1, 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.
16. A scrutiny of the court record does not show that the further affidavit dated April 1, 2022 was filed with leave of the court. It was therefore irregularly placed on the court record.
17. 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 remains inadmissible however long it takes to point out the violation of the rules.



18. To the extent that the taxing master proceeded to assume jurisdiction to tax the bill on the basis of an invalid affidavit of April 1, 2022, she made an error of principle. Consequently, the taxation proceedings premised on this finding were rendered invalid *ab initio*.
19. 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 it is in fact and law not time barred.

Determination

20. 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

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent

ORDER

In light of the directions issued on 12th July 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

