



**Kenya County Government Workers Union v Mbuvi t/a Katunga  
Mbuvi & Co Advocates (Miscellaneous Application E208 of 2021)  
[2022] KEELRC 13500 (KLR) (13 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13500 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**MISCELLANEOUS APPLICATION E208 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 CIVIL CAUSE NO 1410  
OF 2013 NAIROBI**

**AND IN THE MATTER OF  
NAIROBI CITY COUNTY.....**

**.....CLAIMANT**

**VS**

**KENYA LOCAL GOVERNMENT WORKERS UNION.....**

**.....1ST RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....2ND  
RESPONDENT**

**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 Civil Cause No 1410 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 November 11, 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 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 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 4, 2022 (not April 1, 2022 as indicated 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 over eight (8) years after the contract for provision of legal services in Civil Cause No 1410 of 2013 had come to a close. It is the client's contention that the last activity in the aforesaid civil suit was on 11<sup>th</sup> or September 22, 2013 when the parties entered into a return to work agreement. However, apart from the averments in the written submissions dated March 4, 2022 and August 29, 2022, the client did not provide proof of its contention that indeed a consent was recorded on 11<sup>th</sup> or September 22, 2013 settling the cause on either of those dates and that this 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 4, 2022 in opposition to the bill.
9. A look at the bill shows that the advocate raised a claim for fees for attending court in the parent suit on April 20, 2018. This falls within the six (6) year period provided for under the *Limitation of Actions Act* given that the bill was lodged in court on November 18, 2021 or thereabouts.
10. It is the client who raised the objection to the bill on account of limitation of time. Consequently, the duty lay with the client to demonstrate that the last action in the matter was on 11<sup>th</sup> or September 22, 2013 as he alleged and not April 20, 2018 as asserted by the advocate in the bill. This requirement is anchored on the provisions of sections 107 and 109 of the *Evidence Act*.
11. Despite asserting that the action was time barred, the client did not provide the court with the factual foundation for its assertion. Consequently and in view of the fact that the advocate had indicated in the bill that he was taxing for services that covered court attendance on April 20, 2018, the action for recovery of fees was, *prima facie*, not time barred.
12. That said, I have discerned from the record that on April 12, 2022, the Taxing Master exercising powers granted to her under rule 13A of the *Advocates (Remuneration) Order, 1962* directed the advocate to supply copies of additional documents. It is also clear from her record that on March 8, 2022 and in exercise of these powers, the Taxing Master sought to have the parent file placed before her but it is indicated as "not traced" on that date.



13. In her ruling on the taxation, the Taxing Master referred to a certificate of urgency by Nairobi City Council dated September 2, 2013 from where she apparently came up with the value of the subject matter in the dispute. In view of the fact that the Taxing Master had considered the above document from the parent file, this court called for the said file. Upon perusal of the file, it is apparent that the parties appeared before Justice Maureen Onyango on April 20, 2018 confirming the advocate's position that the file was still active at least as at this date. It is therefore clear to me that the bill filed in November 2021 slightly three (3) years after the April 20, 2018 was not time barred.
14. The second issue relates to whether the further affidavit by Leonard Katungi Mbuvi sworn on April 4, 2022 is improperly on the court's record and whether it ought to be struck out. The court record shows that on February 1, 2022, Justice Nzioki directed that the bill be placed before the Taxing Master for taxation on March 8, 2022. On March 8, 2022, Mr Katunga Mbuvi appeared before the Taxing Master and asked for a ruling date on the bill. The Taxing Master reserved the matter for ruling on April 12, 2022. It is also noteworthy that by this time, the parties had filed their respective submissions on the bill and preliminary objection; the advocates on November 30, 2021 and March 18, 2022 or thereabouts and the client on March 4, 2022.
15. On April 4, 2022 or thereabouts the advocate filed a further affidavit in the cause introducing a receipt showing payment of legal fees by the client to the advocate on November 24, 2020. The record does not show that the said affidavit was filed with leave of the court especially now that the cause was pending for ruling on the preliminary objection and the bill, the parties having filed their written submissions.
16. The client submits that the decision by the advocate to place the further affidavit on the court file was, in the circumstances, irregular. I agree with this observation. 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.
17. The client has asked me to strike out the offending affidavit. However, I reckon that the affidavit is not in proceedings before me. It was filed in the proceedings before the Taxing Master. Therefore, I will only observe that it was improperly filed and it is, in my view, invalid.
18. The Taxing Master relied on the receipt introduced on record through the invalid affidavit to arrive at her conclusion that the Bill was not time barred. However, this was perhaps unnecessary as the court record of the parent file was sufficient to demonstrate that the Bill was, as a matter of law and fact, not time barred. Nevertheless, the decision by the Taxing Master to assume jurisdiction over the cause was on the premise of the invalid affidavit. This rendered the subsequent taxation invalid.
19. The third issue is whether the Taxing Master committed an error of principle in the taxation process. The Taxing Master relied on the figure of Kshs 10,439,936,631/= mentioned by the client in both the statement of claim and application dated September 2, 2013 in the parent file as reflective of the value of the subject matter. A perusal of the parent file discloses that indeed this figure is mentioned as the possible annual cost of implementing the collective bargaining agreement (CBA) that the respondent's members were pushing for implementation through strike action. However, the question for determination in the action was the legitimacy of the strike given that the client was contesting the applicability of the CBA to it.
20. In my view, whilst the above figure is referred to in the statement of claim, this was not in the context of determining the value of the subject matter. Indeed, if the value of the subject matter was to be determined in this way, it will keep varying depending on the duration of time that one elects to apply



to compute the true value of the subject under consideration. For instance, if one were to elect to apply a period of one month to work out the cost of implementing the CBA, it will certainly yield a much lower figure than that of one year suggested in the pleadings. Similarly, the cost of implementing the same CBA over a period of two years will be much higher than what is pleaded in the statement of claim.

21. Having regard to the foregoing, it is reasonable to conclude that the respondent referred to the figure in the statement of claim to emphasize the risk it faced in having its services crippled if it was forced, through the strike action, to implement the CBA in question. Put differently, the respondent used the figure to emphasize the significance and or importance it attached to the matter as opposed to the value of the subject matter.
22. In this respect I agree with the minority view expressed by Gatembu J in *Otieno, Ragot & Company Advocates v Kenya Airports Authority* [2021] eKLR, as follows:-

"The mere mention, without more, of a figure in a pleading cannot, per se, determine the value of the subject matter for purposes of taxation. The mere mention of a figure in the pleadings should not prevent a taxing officer from exercising judicial discretion and inquiring whether such figure is indeed representative of the value of the subject matter for purposes of taxation."
23. I hasten to add that even as I adopt the view aforesaid, it is clear to me that the matter before the Court of Appeal in the *Otieno Ragot* case was markedly different from the matter before me. In the *Otieno Ragot* case, there was an express prayer that the defendant compensates the plaintiff in the sum of Kshs 13,932,000,000. Consequently, it was justifiable for the court to take this amount as the value of the subject matter. The position is not exactly the same in the matter before me where the issue in contention was the legitimacy of the strike action by the client's members in view of the contested enforceability of the CBA. It is in this context that I should emphasize that by adopting the minority position in the case, I do not thereby pretend to overlook the majority position which is binding on me.
24. In view of the observations I have made, it is my view that the Taxing Master ought to have proceeded on the premise that the subject matter of the dispute was not ascertainable by reference to the pleadings or judgment in the cause. She ought to have assessed instruction fees based on the other indicators under the applicable schedule such as: the complexity of the matter; and the nature and importance of the case to the disputants.
25. Consequently, I have to reach the conclusion that the Taxing Master, by proceeding to pronounce herself on instructions fees on the basis of the figure extracted from the client's application aforesaid as representative of the value of the subject matter committed an error of principle that led to an award of instructions fees that was manifestly high. Importantly, the Taxing Master's reliance on the invalid further affidavit to assume jurisdiction in the cause was another error of principle that invalidated the subsequent taxation proceedings founded on this decision.

### **Determination**

26. As a result, I set aside the impugned taxation order.
27. I order that the matter be remitted to another Taxing Master to re-tax the bill of costs.
28. The client shall have costs of this reference.

**DATED, SIGNED AND DELIVERED ON THE 13<sup>TH</sup> 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 12<sup>th</sup> 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**

