



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION NO.171 OF 2017

BETWEEN

PROF. TOM OJIENDA & ASSOCIATES.....ADVOCATE /APPLICANT

VERSUS

NAIROBI CITY COUNTY.....CLIENT/ RESPONDENT

[Arising from Industrial Court of Kenya at Nairobi, Cause No. 1410 of 2013]

BETWEEN

NAIROBI CITY COUNCIL.....CLAIMANT

AND

1. KENYA LOCAL GOVERNMENT WORKERS UNION

2. THE HON. ATTORNEY-GENERAL

3. KENYA COUNTY GOVERNMENT WORKERS UNION.....RESPONDENTS

RULING

1. On 30th August 2013, the Advocate/ Applicant herein, received written instructions from the Respondent/ Client, to make an application before the Court, to stop intended industrial action by the Kenya Local Government Workers Union [KLGWU].
2. According to the Respondents, no other instructions issued.
3. The Advocate/ Applicant filed Cause No. 171 of 2017 and an application dated 2nd September 2018. *Ex parte* orders issued. The matter did not proceed to hearing of the application *inter partes*. No Response to the Claim was filed. There were no Witness Statements filed, and no hearing took place. Once the intended strike action fizzled, the Parties seem to have let the Claim lie.
4. Dispute concerning legal fees arose, between the Claimant and its Advocate, the Parties to this reference.
5. The Applicant drew an Advocate-Client Bill of Costs dated 27th November 2017, at an amount of Kshs. 156,729,206. On 10th November 2020, the Taxing Master, Hon. N.M. Kyanya, whittled down the Advocate's costs to Kshs. 448,328. There was a wide difference of over Kshs. 150 million between what was claimed by the Advocate, and what was allowed by the Court.
6. This culminated in this reference. The Advocate submits that he received instructions from the Respondent and acted upon those instructions, in a matter whose value was stated to be over Kshs. 5 billion.
7. The Advocate raised his instructions fees based on CBA concluded between the Respondent and KLGWU. The value of the CBA was Kshs. 10.4 billion. This was about twice the amount of revenue collected by the Respondent. The Advocate therefore adduced evidence on the value of the subject matter, which the Taxing Master ignored. The instructions fees, was modest, and pegged on the amount of Kshs. 5 billion. The sum was required to be paid in the year 2013 /2014, and was a liability meant to be paid by the National Government under the

transitional clause in the 6th Schedule, Constitution of Kenya 2010. This amount is captured in the Amended Statement of Claim.

8. The Advocate, relying on the High Court decision in **Republic v. Ministry of Agriculture & 2 others ex parte Muchiri [2006] e-KLR**, submits that this Court is empowered to interfere with the decision of the Taxing Master, on the basis that there was misdirection, amounting to error of law.

9. Under Schedule V1 [a] of the Advocates Remuneration Order, the factors to be taken into account in assessing instructions fees are given. The Court is urged to uphold the principle in **Joroth Limited v. Kigano Advocates, 2002 IEA 92**, that the instructions fee is an independent and static item, charged once, and is not affected or determined by the stage the suit has reached.

10. The Advocate submits that the Taxing Master deviated from the principles of taxation, established in a multiplicity of judicial precedents. The principles as discussed in **Premchand Raichand Limited and Anor. v. Quarry Services East Africa Limited and others No. 3 [1972] E.A. 162**, include: -

- A successful litigant ought to be fairly reimbursed for costs he has had to incur.
- That costs be not allowed to rise to such level as to confine access to justice to the wealthy.
- That the general level of remuneration of Advocates must be such as to attract recruits to the profession.
- As far as practicable, there should be consistency in the awards made.
- That there are no mathematical formulae to be used by the Taxing Master to arrive at the precise figure.
- Each case must be decided on its own merit and circumstances.
- The Taxing Master has discretion, but this must be exercised judiciously, not whimsically.

- The Court will only interfere when the award of the Taxing Master is so high or so low to amount to an injustice on one party.

11. The Taxing Master did not observe these principles, and gave no reasons for her decision. The Advocate therefore prays the Court to interrogate his Bill of Costs in light of actual services rendered; vary or set aside the orders of the Taxing Master in relation to item 1; and order that the Bill of Costs is taxed afresh before another Officer, or the Court proceeds to make a finding.

12. The Respondent submits that it issued instructions upon the Advocate to stop a strike, not for recovery of money. The dispute was not about money. The letter of 30th August 2013, instructed the Advocate to make an application to stop an intended strike. The Advocate filed the application, obtained *ex parte* orders, and nothing more. There were no other actual services rendered by the Advocate, to warrant exorbitant fees.

13. The Pleadings filed by the Respondent did not refer to money. The Affidavit filed by Lilian W. Ndegwa on 2nd September 2016 states, ‘*the revenue collection by the Applicant for the month of July 2013 amounted to Kshs. 453,721,817 which in a year translates to Kshs. 5,444,697,804. Implementing the CBA would require an annual personnel costs of Kshs. 10,439,936,631 an amount that is nearly double the total revenue collection by the Applicant.*’

14. It is illogical for the Advocate to posit that the sum of Kshs. 5.4 billion was the subject matter. The alleged amount the Respondent would have lost due to the strike, was not the value of the subject matter. It is not what parties were litigating about. This was a case where the value of the subject matter could not be determined. The application filed by the Advocate barring the strike, did not quote any money. The subject matter was not money, and the Taxing Master was right in treating the Claim as one where the subject matter could not be determined.

15. Where Pleadings and Judgment do not quote money, the Taxing Master cannot assign a monetary value to the Claim, and tax a Bill of Costs, based on such monetary value. The Respondent relies on Court of Appeal decision, **Moronge & Company Advocates v Kenya Airports Authority [2014] e-KLR**, where the Court said: -

‘In our view, there is no way the value of the subject matter of the suit could be determined from the Pleadings at paragraph 12. The figure given there was in our view plucked from the air. Like the learned Judge, we find and hold that the figure had absolutely no basis... as the value of the subject matter could not be determined from the Pleadings, Judgment or Settlement, the Taxing Officer should have used discretion to determine such instructions fees as he considered just’

16. In **Joroth Limited v. Kigano & Associates [2002] 1 EA 92**, the same principles above were upheld. The Court emphasized that if the value is not ascertainable, the Taxing Officer is entitled to exercise discretion, taking into account the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings and the direction by the trial Judge. In **Lubuleliah & Associates Advocates v. N.K. Brothers Limited [2014] e-KLR**, the Court held that a mere figure, that a party claims in its Pleadings can only be determined after the hearing.

17. It is further argued for the Respondent that an Affidavit is not a Pleading as held by the Court of Appeal in **Eastland Hotel Limited v. Wafula Simiyu & Company Advocates [2014] e-KLR**. Figures contained in an Affidavit are therefore not to be taken as figures from the Pleadings.

18. The applicable Schedule is the 2006 Advocates Remuneration Order, as amended in 2009. Schedule V1 provides “to sue in any case not provided for above; such sum as may be reasonable, but not less than Kshs. 8,400.” The Taxing Master had discretion in improving on this minimum, depending on the complexity of the matter. The subject matter was not money, but stoppage of a strike. There was no serious responsibility exercised by the Advocate. The Respondent urges the Court to find persuasion in **Republic v. Ministry of Agriculture & 2 others ex parte Muchiri Njuguna & 6 others**, where the Court found that the services rendered by the Advocate, did not rise at all above the workday chores of legal practitioners, and that responsibility entrusted the Advocate was quite ordinary, calling for nothing but normal diligence.

19. The Taxing Master was therefore within her discretion, to assess the instructions fees at Kshs. 150,000. If the strike was illegal, the Court would have prohibited it. There was no complexity in the brief. The Taxing Officer gave reason for every item taxed. Additional reasons are neither here nor there.

20. The Respondent prays the Court to find that the decision of the Taxing Officer was proper and guided by the law.

21. The issues as understood by the Court are: -

- **Whether the value of subject matter was knowable.**
- **Whether the Taxing Master assessed instructions fees properly and in accordance with the law.**
- **Whether the Court should refer the Bill of Costs to a different Taxing Master, or make its own award on instructions fees.**

The Court Finds: -

[i] Value of the subject matter.

22. Schedule V1 of the Advocates Remuneration Order prescribes 3 ways the value of the subject matter in a Claim, can be manifested: from the Pleadings; from the Judgment; or from a Settlement between the Parties.

23. It is not true from this law, that the value of the subject matter can only become known, after the hearing, as submitted by the Respondent on authority from **Lubulelah & Associates Advocates v. N.K. Brothers Limited**. The value can be read from the Pleadings, without going into hearing. If there is a hearing, then the value would probably be manifest through the Judgment. The value can also become known, if Parties settle without hearing.

24. There was no Judgment or Settlement in Industrial **Court Cause Number 1410 of 2013** for the time the Advocate / Applicant herein, was retained by the Respondent herein. To know if any value could be assigned to the subject matter, the Court would have to examine the Pleadings.

25. According to the Respondent, the value could not be known from the Pleadings, and the Affidavit of Interim County Secretary Lilian W. Ndegwa sworn on 2nd September 2013, which states that the Respondent’s annual revenue amounted to Kshs. 5,444,697,804, and that implementing the CBA which was subject of the strike action called by the KLGWU, would require annual personnel cost of Kshs. 10, 439, 936,631, could not be relied upon as it does not amount to a Pleading. The Respondent anchors this argument on the case of **Eastland Hotel Limited v. Wafula Simiyu & Company Advocates**.

26. This submission is flawed for various reasons. Rule 14[4] of the E&LRC [Procedure] Rules, 2016, states that Pleadings may contain evidence, provided that the Court may require the evidence to be verified by an Affidavit.

27. The statement on annual revenue of Kshs. 5.4 billion, and the cost of implementing the disputed CBA at Kshs. 10.4 billion, is repeated by the Respondent herein, at paragraph 6 of the Certificate of Urgency dated 2nd September 2013.

28. The same monetary figures are replicated in the Amended Statement of Claim dated and amended on 2nd September 2013, at paragraph 16.

29. The Statement of Claim was verified through an Affidavit sworn on 2nd September 2013 by Lilian W. Ndegwa.

30. It is completely misconceived to submit that the dispute was about a strike, with no quantifiable monetary value of the subjectmatter.

31. The strike action is normally taken by Trade Unions, as a means of advancing their collective rights and interest, in an underlying dispute. The strike is hardly the totality of the dispute. It is a tool in the hands of the Trade Unions, in exercise of their collective bargaining power.

32. It is equally misconceived to submit that the Advocate / Applicant herein, was merely instructed to make an application to stop the intended strike.

33. The prayers in the Amended Statement of Claim, show that the instructions given to the Advocate, went beyond stoppage of the strike. The Application was not made in isolation. It was meant to obtain interim measures stopping the strike, before the substantive dispute could be heard.

34. The substantive prayers went to the core of the CBA. They are listed as follows: -

a. A declaration that it is the responsibility of the National Government to implement the CBA between the Association of the Local Government Employers and the Kenya Local Government Workers Union [KLGWU];

b. A declaration that it is the responsibility of the National Government to pay salaries, remuneration, allowances and other benefits due to the staff seconded to the Claimant during the transition period including staff seconded to the Claimant under section 138 [1] of the County Governments Act No. 17 of 2012.

c. Mandatory order of injunction, compelling the National Government to promptly pay salaries, remuneration, allowances and other benefits due to the staff seconded to the Claimant during the transition period including staff seconded to the Claimant under the provisions of Section 138 [1] of the County Governments Act. No. 17 of 2012;

d. Mandatory order of injunction restraining the 1st Respondent and 3rd Respondent [KLGWU and its successor Kenya County Government Workers Union. 2nd Respondent was the Attorney- General in the Amended Claim] by themselves or by their members, agents, assigns, or any person claiming through them, from seeking that the Claimant implements the CBA between the Association of Local Government Employers and the KLGWU dated 1st September 2012 and registered in the Industrial Court on 7th February 2013;

e. Mandatory injunction restraining the 1st Respondent and the 3rd Respondent, either by themselves or by their members, agents, assigns of any person claiming through them, from commencing, proceeding with or participating in strike or pay parade against the Claimant, parading at any premises of the Claimant or in any manner whatsoever withdrawing their labour from the Claimant with a view to seeking that the Claimant implements the CBA between the Association of Local Government Employers and the KLGWU dated 1st September 2013 and registered in the Industrial Court on 7th February 2013;

f. The strike notice dated 26th August 2013 issued by the 3rd Respondent to the Interim County Secretary of the Claimant be and is hereby revoked;

g. Costs; and,

h. Such other and further orders that this Court deems honourable deems just and expedient to grant.

35. These prayers clearly show that the dispute was not merely about stoppage of the strike. Stoppage of the strike was one out of six substantive prayers. The main dispute was about the implementation of a CBA negotiated between the Parties and registered with the Industrial Court, with known value given to that CBA.

36. This was an economic dispute. The value of the subject matter, in an economic dispute is known or knowable. It cannot be said that the value cannot be determined. CBAs are negotiated and concluded based on hard figures, with hard-nosed Economists, at the centre of collective bargaining processes. The Interim County Secretary Lilian W. Ndegwa gave specific monetary value to the disputed CBA. She stated that its implementation would cost Kshs. 10.4 billion annually. She did not pluck the figures from the air. The figures originated from Economists involved in collective bargaining. The strike called by the KLGWU was to compel implementation of the CBA, while the Respondent herein instructed the Advocate to seek Court Orders stopping the strike, and shifting the burden of implementing the CBA, to the National Government. The value of the CBA was disclosed in the Statement of Claim, the Affidavit sworn by Lilian W, Ndegwa, and the Certificate of Urgency.

37. The Court must therefore agree with the Advocate that the value of the subject matter was disclosed by the Pleadings. It was knowable through a scrutiny of Pleadings and Affidavit filed by the Respondent.

ii. whether taxation was proper and in accordance with the law.

38. In light of the above finding on value of subject matter, the answer from the outset must be that taxation was not proper and in accordance with the law.

39. Even if the value of the subject matter was unknown, it does not appear that due regard was made to the nature, importance and complexity of the brief. The Advocate was tasked with stoppage of the strike in the interim and in the long term. Beyond this, he was instructed to seek orders, which would see the National Government assume the liability of meeting the staff remuneration, in place of the Respondent, under a very complex constitutional transitional phase. The Advocate was instructed about, and rendered his professionalism, with regard to the CBA which had been concluded between KLGWU and Association of Local Government Employers; KLGWU was itself in transition; he was required to advise the Respondent on the 6th Schedule to the Constitution; and advise on the Labour Relations Act. The matter was not as characterized by the Respondent, a simple strike dispute, under the Labour Relations Act. It was a complex dispute involving the Constitution, and in particular devolution and transition. It related to the complex relationship between the National Government and the Nairobi City County Government, a relationship which years later, is still unravelling in various cases pending before our Courts. There was lack of appreciation of the complexity of the brief.

40. The Taxing Master, beyond failure to apply the value of the subject matter in her assessment, does not seem to have given adequate weight to the complexity of the brief.

41. The lack of a Statement of Response and Witness Statements from the Respondents in the Claim, and the fact that the Claim was not heard in full, are aspects of taxation contemplated and regulated in the Advocates Remuneration Order. If there was no Statement of Response, the Taxing Officer would have proceeded with taxation adopting the clause on undefended causes. None of these aspects argued by the Respondent herein, would warrant lack of proper remuneration to the Advocate. As stated in *Jorerth Limited v Kigano & Advocates*, the instructions fees, is an independent and static item charged once only, and it is not affected or determined by the stage the suit reached.

Whether the Court should remit the Bill for fresh taxation, or tax the Bill.

42. The role of taxation legally is exercised by the Taxing Master. The Judge on reference ideally, should not be turned into a Taxing Master. Once there is a finding that taxation was flawed, the best course is to remit the Bill of Costs to the Taxing Master with the expectation that the Ruling by the Judge on reference, offers a degree of guidance, on re-taxation. The process must be allowed to revert to where it started.

IT IS ORDERED: -

a. The Ruling of Hon. N.M. Kyanya, with respect to the Advocate-Client Bill of Costs, awarding the Advocate the sum of Kshs. 448,328 is hereby set aside in relation to item No.1.

b. The Bill of Costs dated 27th September 2017 be taxed afresh before another Taxing Master.

c. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, AT NAIROBI, THIS 22ND JULY 2021,

JAMES RIKA

JUDGE