



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT UASIN GISHU

COURT NAME: ELDORET LAW COURT

CASE NUMBER: ELRC.C/233/2018

CITATION: ROBERT MUTAI AND 135 OTHERS VS PUBLIC SERVICE BOARD

ELGEYO MARAKWET AND ELGEYO MARAKWET COUNTY

EXECUTIVE COMMITTEE FINANCE AND 2 OTHERS

RULING

ON 2021-06-25 BEFORE HON. JUSTICE J. N. ABUODHA

1. The respondent /Applicant herein filed a Chamber Summons dated 7th April, 2021 seeking orders among others that: -

(a) There be a stay of execution pending hearing of the reference.

(b) Setting aside of the instructions fees and getting up fees and the Claimant bill of costs dated 29th October, 2020 be remitted to another taxing officer for reassessment.

2. The application was brought on the grounds among others that the question of the award on the instructions fee was excessive and that the taxing officer did not consider relevant factors in her ruling of 26th March, 2021.

3. In support of the application, Mr. Tororei for the applicant submitted in the main that the taxing officer in awarding Kshs. 3,900,000/= as instruction fees made an error in principle by failing to consider relevant factors including failure to appreciate that instruction fee is independent and static and is not determined by what stage the proceedings had reached and that in awarding the said amount, the taxing officer exercised her discretion wrongly. Counsel further submitted that in awarding the said sum, the respondent will be greatly prejudiced as the same was excessive thus denying them their constitutional right of access to justice at a reasonable fee.

4. Mr. Tororei further submitted that the claim was for a sum of 43 million and the Court correctly stated the instructions fee to be Kshs. 879,460/=. The taxing officer however proceeded to award a sum that was five times the instructions fee set out in law.

5. On the question of jurisdiction and competency of the application before the Court, Counsel submitted that article 159 of the Constitution enjoins the Court to administer justice to all parties without undue regard to technicalities. This approach was adopted to nip in the bud the guillotine approach where matters were dispensed with summarily for minor breaches of the rules.

6. Concerning rule 11 of the Advocates Remunerations Order, Counsel submitted that it stipulates that a party objecting to the decision of the taxing officer to give 14 days' notice in writing to the taxing officer of the items of taxation to which he objects upon which the officer will give reasons for the decision and Objector may within 14 days of receiving the said reasons apply to the Judge setting out grounds of the objections.

7. In the case before me Mr. Tororei submitted that the taxing officer gave the reasons on every item of the award hence it was not necessary again to give the requisite notice under Rule 11. In support of this submission Counsel relied on the case of Murei Mwaniki and Wamuti Advocates African Banking Corporation (2020) eKLR and Evans Thiga Gaturu vs Kenya Commercial Bank Ltd (2012) eKLR.

8. Regarding whether the Court should intervene in the matter, Mr. Tororei submitted that the guiding principle as to when the Court can intervene over a reference were set out in the case of First American Bank of Kenya vs Shah and Others (2002) EA 64 and appreciated in R v

Commissioner of Domestic Taxes ex-parte Ukwala Supermarket and 2 Others (2018) eKLR. Where it was stated among others that the Court could not interfere with the taxing officer's decisions on taxation unless it was 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.

9. According to Counsel, the taxing Officer erred in principle by awarding Kshs. 3,900,000/= as instructions fees by failing to consider relevant factors and in the process exercised her discretion wrongly and unjustifiably. The taxing Officer erred in principle in considering that the issues raised by the Claimants were complex in nature in absence of certificate to that effect by the trial Court. Further that a perusal of the ruling demonstrates that the taxing Officer failed to cogently identify what made the issues in the matter complex to justify an exorbitant increase of instruction fees. There was nothing in the proceedings that did not require normal diligence expected of Claimant's counsel in the conduct of the same. Secondly the taxing officer made an error in principle in considering that from the voluminous pleadings, the time and resources put in by the Claimants in prosecuting this matter was considerable to justify the increase of instruction fees. Counsel asked the Court to note that what the taxing officer considered as voluminous was a mere tabulation of 281 Claimants' claim all of which were a repetition of each other. They did not raise any novel issue of law or fact. In any event the matter was determined by way of written submission and no hearing took place.

10. Mr. Tororei further faulted the taxing master for making an error of principle by failing to consider that instruction fee is static as was held in the case of Jorith Limited V. Kigano and Associates (2002) IEA92. Where the court stated that in principle the instruction fee is an independent and static item, is charged once only and is not affected or determined by the stage the

suit has reached.

11. Counsel lamented that whereas the Court relied on the aspect of pleadings being voluminous hence the time and resources put in preparing the same was considerable, a perusal of the Court record shows that when the claim was initially filed on 2nd July, 2018, the pleadings were not voluminous. It was sometime in 2019 when the pleadings were amended by adding more claimants that made the same voluminous. Relying on the Joreth's case, Mr. Tororei submitted that instructions is given in a suit to defend and prosecute it to the end and therefore could not be affected by the stage the suit had reached. This meant, the instruction fees were charged the moment the claim was preferred on 2nd July, 2018 and therefore subsequent amendment to the claim to make it voluminous had no effect on the instruction fees since it was static, independent and only charged once.

12. Mr. Kirwa for the Claimant on his part submitted that the application offended rule 11 of the Advocates Remuneration Order, the same having been filed outside the 14 days period as stipulated by law and without leave of the Court. The application was thus incompetent and ought in the circumstances to be struck out with costs.

13. According to Counsel, the respondent ought to have brought the application latest on 7th April, 2021. The applicant was aware of the taxing Officer's ruling and its contents on 26th March, 2021 when the same was delivered. The application thus offended provisions of rule 11(9) of the Advocates Remuneration Order which was mandatory.

14. Mr. Kirwa further submitted the applicants failed to demonstrate that the taxing Officer erred in principle and Law when she taxed the party and party bill of costs dated 29th October, 2020 making an award on instruction fees at Kshs. 3,900,000/= and getting up fees of Kshs. 1,300,000/=. The taxing Officer gave her reasons on every item of the award made. She considered all the issues that had been raised by the applicant before arriving at the decision on 26th March, 2021. The reasons for the award included and were not limited to the value of the subject matter in issue, complexity of the matter, the number of Claimants involved being 282, the volume of the pleadings, the time spent and resources put in the same, the interest of the parties and the general impact of the case on all the parties.

15. Counsel further submitted that it was trite Law that the decision of the taxing Officer should not be interfered with by the Court unless it has been shown that the Officer arrived at a wrong assessment of costs payable. It was insufficient to merely allege that the amount awarded was too high.

16. Regarding the complaint that the taxing Officer erred in principle in her award on instruction and getting up fee, Mr. Kirwa submitted that the taxing officer in her ruling on the Claimant's party and party bill of costs dated 29th October, 2020, was with an award of costs to all the 282 Claimants at Kshs. 5,963,060 upon taxing off Kshs. 11,213,310 from the bill. The reasons for the award were contained in the ruling. According to Counsel, the main complaint by the applicant seemed to be essentially on quantum not the application of the principles of law. The applicant's complaint was that the quantum was excessive in the circumstances and no more.

17. The applicant defended the suit and so the instruction fee as provided in schedule VI(A) (1) (d) and calculated under sub-paragraph (1) (b) of schedule VI subject to the discretion of the taxing Officer to increase or reduce the instructions fee.

18. Relying on Joreth's case (supra) counsel stated that the factors to be considered by the taxing officer included importance of the matter, general conduct of the case, the nature of the case, time taken for its dispatch and the impact on the parties. Counsel further relied on the case of Ochieng, Onyango, Kibet and Ohaga Advocates v Adopt a Light Limited Milimani HC Misc Cause No 729 of 2006 where the Court stated in material part that the taxing master must consider the case and Labour required in the matter, the nature or importance of the matter. More so the amount on value of the subject matter involved, the interest of the client in sustaining or losing the benefit and the complexity of the dispute.

19. According to Mr. Kirwa, the final orders pursuant to the judgement of the Honourable Judge was recorded on 21st October, 2020 with an award of Kshs. 43,964,000/= to all the 282 Claimants.

20. Based on the above, the basic instruction fee under paragraph 9(1) (b) of the Advocates Remuneration Order was made at Kshs 879,460/= being the instruction fees and Kshs. 293,154 being getting up fees. This however, was not in contention. What was in contention was the quantum made well above basic instruction fees in consideration of other factors by the Honourable Deputy Registrar.

21. According to Counsel, the Hon. Deputy Registrar in her ruling exercised her discretion and increased the quantum payable on instruction fees and getting up fees. She made it clear in her ruling that she had an opportunity to peruse through the entire court record and in her assessment the issue raised were complex in nature the pleadings were voluminous and involved more than 280 Claimants who made distinct claims in the pleadings, the time and resources spent were highly considerable including the value of the subject matter and its importance to the 282 Claimants and respondents. Each of the Claimants supplied the advocates on record with independent instructions and awards duly paid to each Claimant as pleaded in the statement of claim, a fact admitted by the respondents when the parties appeared before the Court to record final consent orders on 21st October, 2020.

22. The tabulations were made separately for each of the Claimants and not lumped together as one and the reason behind this was that instructions were received by the advocates on record separately and for purposes of saving court's time one claim with separate prayers in terms of compensation was lodged and the Court made judgment pursuant to the same with the direction that the parties tabulate pursuant to the parameters of the return-to-work formula of 2nd November, 2017.

23. Regarding separate and distinct instructions, counsel relied on the case of Ochieng, Onyango, Kibet and Ohaga advocates v Adopt a Light (supra) and further on Mayers and Another v. Hamilton & Others (1975) E.A 16.

24. The application before me presents a diametrically opposed view of Counsel on the single issue of whether the Hon Deputy Registrar erred in enhancing the instruction fee from the initial amount stated in the Bill as Kshs. 879,460 to Kshs. 2,900,000/= and further whether she misdirected herself by allowing Kshs. 293,154/= as getting up fees.

25. From the summary of the submissions undertaken by the Court above, there seem to be confluence or implicit consensus by counsel on the principles applicable by a taxing Officer before making an award on instruction fees and further on the principles applicable by the Court on a reference to upset an award of a Deputy Registrar in exercise of her discretion as a taxing Officer, why I say so is because both Counsel in buttressing the arguments for or against the award of the Hon Deputy Registrar, have relied on more or less the same authorities on these principles but urged different interpretations.

26. It was common ground that the principles upon which this court may interfere with the discretion of taxing Officer when making an award are more or less settled and include that it must be shown that either decision was based on an error of principles or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle. Further, it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors.

27. The applicant contended that it was an error on the part of the taxing Officer to consider the issues between the parties as complex in nature in absence of a certificate to that effect from the trial Court. Secondly the taxing Officer erred in considering that from the voluminous pleadings the time and resources put by the Claimant in prosecuting the matter was considerable to justify the increase in instruction fees and that what the Court considered voluminous was a mere tabulation of 282 Claimants claim all of which was a repetition of the other.

28. This claim was initially filed on 2nd July, 2018 and according to Counsel for the applicants, the pleadings were not voluminous. The volume however increased when an amendment was made out sometime in 2019 to add more Claimants bringing their total number to 282.

29. An amendment of pleadings to add parties in the controversy before the court serves the same purpose as an order for consolidation of suits. It is a case management tool aimed economising on judicial time and consolidating similar evidence in one suit instead of having several suits involving same parties and based on same facts, spread across the Court registry concerned.

30. In the application before me Mr. Kirwa has submitted that each of the Claimant's instructed him separately however for purposes of saving the Court's time one claim with separate prayers in terms of compensation was lodged.

31. In the case of Ochieng, Onyango Kibet and Ohaga v Adopt a Light cited by Counsel for the Claimant it was held that there was nothing wrong in receiving two sets of instructions from different clients in the same matter and executing those instructions through single pleadings. This did not make the instructions one and does not disentitle the advocate concerned from demanding payment for separate instructions received.

32. In my view this is the most reasonable interpretation of the law or instruction fee any other interpretation would encourage joyriders in litigation commenced by others which they join in without paying the advocate instruction fees.

33. The Court agrees with the submission that instruction fees is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached as was stated in the case of Joreth Limited v Kigano Associates referred to earlier in the ruling. This independence and static nature of instruction fee does mean where an amendment has been done to include more Claimants on the same facts an advocate should be disentitled to instruction fees from the additional parties. The scenario emerges better when one considers these additional parties as filing their own separate suits. They would thus be entitled to pay instructions fee. This I think adequately disposes of the issue regarding the static and independent nature of instruction fees.

34. The second and final issue the Court should consider is whether the Hon Deputy Registrar erred in regarding the suit complex and voluminous. Mr. Tororei does not seem to seriously contest that the suit was voluminous. He however contends the volume was added when an amendment was carried out in 2019 adding more Claimants bringing a total of 282. According to Counsel in spite of the number there was nothing complex in respect of the Claimant's case and in any case the trial Court never certified the matter complex. Counsel however never cited any authority that enjoins a trial court to certify a matter complex upon conclusion for consideration by the taxing Officer when taxing a bill of costs. The case of Rv Minister of Agriculture and 2 Others ex Parte Samuel Muchir and 6 Others (2006) eKLR. relied on by Mr.

Tororei merely stated that the complex elements in the proceedings which guide the exercise must be specified cogently and with conviction.

35. Counsel has himself in his submissions quoted portions of the taxing Officers ruling where she stated that she had the opportunity to peruse the entire record and the issues that were raised by the petitioners (sic) were complex. The pleadings were voluminous given the number of Claimants involved hence the time and resources put in the same must have been considerable. The suit took quite some time before it was concluded.

36. It is the Court's view that the observations by the learned DR above were cogent enough and presented a complex and time-consuming scenario that justified the award on the instruction's fees.

37. The sum total of the above is that the reference is found without merit and is hereby dismissed with costs.

38. It is so ordered.

DATED AT ELDORET THIS 1ST DAY OF OCTOBER, 2021

DELIVERED AT ELDORET THIS 1ST DAY OF OCTOBER, 2021

GIVEN under my hand and Seal of this Court on 2021-10-03 12:22:01

SIGNED BY: HON. JUSTICE J. N. ABUODHA (ADMINISTER JUSTICE)