



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

MISCELLANEOUS APPLICATION NO. 21 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF THE ADVOCATES ACT, CAP 16

AND

IN THE MATTER OF TAXATION OF COSTS

JOB NYASIMI MOMANYI T/A

NCHOGU, OMWANZA AND NYASIMI ADVOCATES.....APPLICANT

VERSUS

KENYATTA NATIONAL HOSPITAL RESPONDENT

ARISING FROM

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 31 OF 2015

BETWEEN

KENYA UNION OF DOMESTIC, HOTEL, EDUCATIONAL INSTITUTIONAL,

HOSPITALS AND ALLIED WORKERS (KUDHEIHA)..... APPLICANT

VERSUS

KENYATTA NATIONAL HOSPITAL.....RESPONDENT

RULING

The application before me for determination is dated 2nd July 2019 and seeks the following orders –

1. Spent.

2. That pending the hearing and determination of the reference herein, this Court be pleased to issue and order of stay of execution of the Ruling delivered on 15th May, 2019 and the extracted Certificate of Costs dated 24th May 2019 issued by the Taxing Officer in NAIROBI ELRC MISC. APPLICATION NO. 21 OF 2019.

3. That this Court be pleased to review, vary and/or set aside the Taxing Officer's decision and ruling delivered on 15th May, 2019 and the extracted Certificate of Costs dated 24th May 2019 issued by the Taxing Officer in NAIROBI ELRC MISC. APPLICATION NO. 21 OF 2019
4. That this Court be pleased to issue an Order directing that the subject Bill of costs be remitted back to a different Taxing Officer for fresh taxation.
5. That this Court be pleased to make such Orders as it deems mete and just
6. That the costs of and incidental to this Application be provided for.

The application which was filed by way of chamber summons under certificate of urgency is made under Part 1 Section 11(2) and 4 of the Advocates (Remuneration) Order 2009, Order 51, Rule 1 and Order 22 of the Civil Procedure Rules 2010, Section 1A, 1B and 3A of the Civil Procedure Act, Article 50 of the Constitution and all other enabling provisions of the law.

The grounds in support of the application are that –

- a) That on 24th October 2018, the Wasilwa J. delivered judgement in **Nairobi ELRC Cause No. 31 of 2015 - KUDHEIHA v Kenyatta National Hospital** wherein the Court declined to interfere with the parties' free will to negotiate enshrined under Article 41 of the Constitution and referred the parties therein back to the negotiating table and thus declined to grant the orders sought therein.
- b) That the Firm of Nchogu, Omwanza and Nyasimi Advocates (hereinafter referred to as "the Advocate/Respondent") thereafter filed an Advocate-Client Bill of Costs dated 29th January, 2019 praying for the sum of Kenya Shillings Three Hundred and Fifty Eight Million, Four Hundred and Ninety One Thousand, Six Hundred and Seventy Three and Thirty Two Cents (Kshs.358,491,673.32/=).
- c) That on 15th May 2019, the Deputy Registrar delivered a Ruling in **Nairobi ELRC Misc. Application No. 21 of 2019 — Job Nyasimi Momanyi t/a Nchogu Omwanza and Nyasimi Advocates v Kenyatta National Hospital** wherein the Deputy Registrar proceeded to tax the Bill of Costs as follows:
 - i. That the instant Bill of Costs is taxed at Kshs.23,306,357.45/= and
 - ii. That since the Advocate/Applicant therein did admit that an amount of Kshs.870,000.00/= had been paid by the Respondent as deposit, the total amount due is Kshs.22,436,357.45/=.
- d) That on 24th May 2019, the Deputy Registrar issued a Certificate of Costs to the Advocate/Respondent awarding the said sum of Kenya Shillings Twenty Two Million, Four Hundred and Thirty Six Thousand, Three Hundred and Fifty Seven and Forty Five Cents (Kshs.22,436,357.45/=).
- e) That the said sum of Kshs.22,436,357.45 awarded to the Advocate/Respondent is well beyond the reasonable limits so as to be manifestly excessive.
- f) That being aggrieved by the said decision, on 16th May, 2019 and 7th June, 2019, the Client/Applicant requested for reasons for the said Taxation from the Taxing Officer.
- g) That vide a Letter dated 11th June 2019 and received by Counsel for the Client/Applicant on 17th June 2019, the Taxing Officer furnished her reasons for the said taxation as the same ones set out in her Ruling.
- h) That the Client/Applicant objects to Items No. 1 (Instruction Fees taxed at Kshs.10,000,000.00/=) and Items No. 2 (Getting-Up Fees taxed at Kshs.3,333,333.33/=) awarded by the Taxing Officer vide the subject Ruling on grounds that the said award is erroneous, inordinately high, manifestly excessive and grossly inflated especially for a claim where the subject value of the suit could not be ascertained from the pleadings.
- i) That there are items on the Certificate of Costs that are manifestly excessive which necessitate this Court to grant an Order of Stay of execution to enable the Reference filed herein be determined on its merits.
- j) That the taxing master misdirected herself and acted contrary to the established and well settled principles of law on taxation set out in **Truth Justice and Reconciliation Commission v Chief Justice of the Republic of Kenya Another (2014) eKLR**.
 - i. That a taxing officer should consider the value of the subject matter; and
 - ii. That a taxing officer should not award costs that is manifestly excessive.
- k) That the Taxing Master having committed errors in principle, the Court has jurisdiction to interfere with its Ruling on assessment of the Advocate/Client Costs.

l) That the Advocate/Respondent has begun the process of executing the Certificate of Costs and have pursuant thereto threatened to file a Notice of Motion Application to have the same adopted and confirmed as a Decree of the Court and have the same executed as against the Client/Applicant herein.

m) That the Client/Applicant is reasonably apprehensive that unless an order for stay pending the hearing and determination of the Reference is granted, the Advocate/Respondent shall proceed with execution which shall occasion significant and Immense prejudice to the Client/Applicant by crippling its operations which are solely to the benefit of the entire public.

n) That the Client/Applicant is a Corporation established by an Act of Parliament and if the Reference filed herein is not certified urgent and the Orders sought herein granted, the Respondent/Applicant and indeed the general public stand to suffer substantial loss and unnecessary loss since the assets of the Respondent/Applicant are held in trust for the public.

o) That this Reference has been brought timeously pursuant to Rule 11 of the Advocate Remuneration Order.

p) That no prejudice will be suffered by the Advocate/Respondent if the Orders sought herein granted.

q) That unless the application is certified as urgent and the orders sought

herein granted, the Respondent/Applicant will be condemned unheard contrary to the provisions of Article 50 of the Constitution of Kenya, 2010 and the rules of natural justice.

r) That if the orders sought herein are not granted, the entire object of this Reference shall be defeated and be rendered nugatory.

s) That it is only mete and just that the circumstances leading to the decision by the Taxing Officer be interrogated and as such, justice demands that the Orders sought herein be granted.

The application is further supported by the affidavit of CALVIN NYACHOTI, the corporation Secretary of the applicant in which he reiterates the grounds in support of the application on the face thereof.

When the application first came up for hearing ex parte on 3rd July 2019, the court granted orders of temporary stay of execution of the ruling of the Deputy Registrar dated 14th May 2019 and the certificate of costs issued pursuant to the ruling.

On 15th July 2019, the respondent filed a replying affidavit of Job Nyasimi Momanyi sworn on 12th July 2019. In the very lengthy affidavit of 59 paragraphs Mr. Momanyi on behalf of Nchogu, Omwanza and Nyasimi Advocates opposes the application/reference. He avers that this court has no jurisdiction to determine the application, that the ruling gave succinct explanation for the decision and that the application was filed out of time, 48 days after the ruling instead of 14 days. In the other averments in the affidavit, the affiant makes justification of the ruling on the advocate/client bill of costs.

When the application came up for interpartes hearing on 16th July 2019, directions were given for parties to dispose of the application by way of written submissions. Although the applicant sought and was granted leave to file a supplementary affidavit, none is on record. The parties highlighted their submissions on 5th December 2019.

At the hearing of the application Mr. Macharia instructed by Robson Harris and Company Advocates appeared for the applicant while Mr. Odhiambo instructed by Nchogu, Omwanza and Nyasimu Advocates appeared for the respondent.

The genesis of this dispute is that the applicant engaged the respondent as its Counsel to defend it in Cause No. 31 of 2015. Judgment in the suit was delivered on 24th October 2018.

The respondent thereafter raised its Advocate/Client Bill of Costs in the sum of Kshs.359,361,673.32. After giving credit of Kshs.870,000 which was been paid by the applicant, the bill payable was Kshs.358,491,673.32.

The parties disagreed on the bill following which the respondent filed its Bill of Costs. It is the ruling on the Bill of Costs that is the subject matter of the application herein. The applicant is contesting only two items in the Bill, the instructions fees and the getting up fees.

Determination

The issues for determination are whether this court has jurisdiction to determine the application and whether there is justification in this court interfering with the decision of the Taxing Officer in the ruling on the Bill of Costs.

Jurisdiction

The respondent has objected to the jurisdiction of this court to handle this reference on grounds that it was filed out of time. It submits that paragraph 11 of the Advocates (Remuneration) Order provides for objections to be made within 14 days. Further, that in this particular case there was no need for an objection as the Taxing Officer had delivered a ruling in which the grounds for the ruling were well set out. The respondent relies on the decision of the court in **Ahmednassir Abdikadir and Company Advocates v National Bank of Kenya Limited (2006) eKLR**, when the court stated –

“Although Rule 11(1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the taxing officer, should do so within 14 days after the said decision and thereafter file his reference within 14 days from the date of the receipt of the reasons, where the reasons for the taxation on the disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reason simply because of the unfortunate wording of Sub-rule (2) of Rule 11 of the Advocates Remuneration Order demands so. The said rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling.”

The respondent further relies on the decision in **Evans Thiga Gaturu Advocate v Kenya Commercial Bank Limited (2012) eKLR** where the court held –

“However, where there are reasons on the face of the decision, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessary a bar to the filing of the reference since that insufficiency may be the very reason for preferring a reference.”

It is submitted that where a reference is filed out of time the court will not entertain the same as was decided in **N. W. Amolo t/a Amolo Kibanya and Company Advocates v Samson Keengu Nyamweya (2016) eKLR** where the court stated –

“Consequently, I have no choice to make but to find that the Reference herein dated 6th October 2015 challenging the taxation of the taxing officer Honourable F. Wangila – Deputy Registrar made on 2nd July 2015 was filed out of time and therefore incurably and fatally incompetent and I proceed to strike it out with costs to the Advocate/Respondent/main applicant.”

The respondent submits that no leave of court was sought to file the reference out of time and it is thus incompetent as was held in **Ballon Safaris Limited v Skyslip Company Limited and Another (2015) eKLR**, where the court held that delay of 48 days rendered the reference fatally incompetent.

As has been set out on the face of the application and the affidavit in support thereof, the ruling of the Taxing Officer was delivered on 15th May 2019. The very next day on 16th May 2019, the applicant requested for reasons for the decision from the Taxing Master by letter of even date with a reminder on 7th June 2019. The reasons were furnished by letter dated 11th June 2019 and received by Counsel for the applicant on 17th June 2019. The reference herein was filed on 3rd July 2019.

Rule 11 of the Advocates (Remuneration) Order provides that –

11. Objection to decision on taxation and appeal to Court of Appeal

(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

The applicant having sought the reason for the decision only one day after receiving the decision and having filed the reference on 3rd July 2019, the same was filed within the timelines provided for under paragraphs 11 of the Advocates (Remuneration) Order.

The argument that the decision required no reason by the Taxing Officer is also being brought too late, as that should have been raised immediately the applicant sought the same. In any event, the Taxing Officer did give reasons. It can therefore not be that decision required no reason if the Taxing Officer found it necessary to give reasons as was done.

I thus find no merit in the objection on jurisdiction by the respondent.

Turning to the reference, as already stated above, the applicant is only objecting to items 1 and 2 of the Bill of Costs being instructions fees and getting up fees respectively on grounds that the same are excessive. The applicant's Counsel submitted that being a State Corporation under the State Corporations Act, the applicant is funded by exchequer and approved by the National Assembly.

Further, that the Taxing Officer contradicted herself as at page 3 of the ruling she stated that the subject matter could not be ascertained and at page 4 that the subject matter cannot be traced. That she further concurred with the applicant that this is a public interest matter as the fees comes from public funds.

Relying on the case of **Joreth Limited v Kigamo and Associates**, Counsel submitted that where the value of the subject matter cannot be

ascertained the Taxing Master is entitled to use discretion. He submitted that Cause No. 31 of 2015 was not matter of novelty on account of the subject matter involved. Counsel relied on the case of **National Oil v Real Emergency Limited and Another (2016) eKLR** where Odunga J. opined that the complexity of a case is not determined by the subject matter.

For the respondent it was submitted that it relied on the Advocates Remuneration Order, 2014. That there was no error of principle with regard to assessment of costs by the Taxing Officer. That the Taxing Officer used the factors at page 4 of the ruling to assess the instructions fees. It is further submitted by the respondent that the Taxing Officer relied on the pleadings. That this court cannot interfere with the discretion of the Taxing Officer particularly where the Taxing Officer is experienced. Counsel on the decision in **B. Mbai and Associates Advocates v Clerk, Kiambu County Assembly and Another (2017) eKLR**, where the court held that –

“... it is trite that a court will not, therefore interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low.”

It was submitted that the Taxing Officer, Hon. Ngumi is of great experience of more than 10 years having previously served as a Magistrate and that her decision was informed by established principles.

The respondent further relied on the decision in **Kipkorir, Titoo and Kiara Advocates v Deposit Protection Fund Board (2006) eKLR**, where Kasango J. opined that as long as the Taxing Officer exercised his discretion within the law, the High Court cannot interfere with the discretion.

It is further submitted that the court cannot interfere with the decision of the Taxing Officer merely because the applicant is unhappy with the amount awarded.

Having considered submissions by both parties, it is evident that the determination of this application turns on the value of the subject matter in **ELRC Cause No. 31 of 2015, KUDHEIHA v Kenyatta National Hospital**. According to the report of the dispute to the Ministry of Labour and the Memorandum of Claim, the issue in dispute in the suit was –

“Failure by the parties to agree on the following clauses of the CBA for 2013 to 2015:

- 1. Preamble (d) on definition of Health Worker*
- 2. Salary increase*
- 3. 7.3 - Medical Risk Allowance*
- 4. 7.4- Commuter Allowance*
- 5. House Allowance*
- 6. 7.10 - Extraneous Allowance*
- 7. 10.1 (f) – Leave Allowance*
- 8. 12. Transport and Traveling*
- 9. 12.7 - Death and funeral announcement in the print and electronic media*
- 10. Effective date and duration of the CBA*

The Judge after hearing the parties determined the suit as follows in the judgment dated and delivered on 24th October 2018 –

“The main issue this Court should consider is whether it can impose condition on Parties in their Collective Bargaining Agreement negotiations. Article 41 of the Constitution of Kenya states as follows:-

- 1) Every person has the right to fair labour practices.*
- 2) Every worker has the right:-*
 - a) to fair remuneration;*
 - b) to reasonable working conditions;*
 - c) to form, join or participate in the activities and programmes of a trade union; and*
 - d) to go on strike.*

3) *Every employer has the right:-*

a) *to form and join an employers organisation; and*

b) *to participate in the activities and programmes of an employers organisation.*

4) *Every trade union and every employers' organisation has the right:-*

a) *to determine its own administration, programmes and activities;*

b) *to organise; and*

c) *to form and join a federation.*

5) *Every trade union, employers' organisation and employer has the right to engage in collective bargaining.*

Other than this provision, it is my position that this Court should not interfere with the Parties free will to negotiate because this is unconstitutional and against provisions of Article 41 of the Constitution. I will therefore decline to grant the orders sought in this claim and refer the parties back to the negotiating table.

In the ruling of the Taxing Officer, she aptly captured the issue on the value of the subject matter of the suit as follows –

“The question that lingers here is: if the trial court did not find it worth to address the other issues raised in the pleading and only limited itself to the statement of dispute, would it be in order for the taxing master to look into the issue? I find that this would be improper. I shall hence look at the judgment of the court in determining the subject matter and not the pleadings.”

*From the judgment, the value of the subject matter cannot be ascertained. In the case of **Premchand Raichand Limited and Another v Quarry Services E. Africa Limited (1972) E. A.** The Court of Appeal held that the value of the subject matter for purposes of taxation of a Bill of Cost ought if not so ascertainable ... to use his discretion to assess the same. Instruction fees as he considers just, taking into account amongst other matters, the nature and the importance of the case or the matter, the interest of the parties, the general conduct of the proceedings any direction by the trial judge and all other relevant circumstances.”*

The Taxing Officer then decided that this was a public interest matter and determined the subject matter on the basis thereof. At page 4, paragraph 2 of the ruling she stated as follows –

*This was a case of public interest. It had great interest from both the claimant and the respondents. Had all the prayers sought by the claimants been allowed, the general public as the Respondent is a parastatal, would have incurred a lot of expenses as the salary increment would have been way above a billion shillings. The Respondents were eager to have the prayers declined and the Advocate did a superb job to defend the Respondents interest. I find that a sum of KShs.10,000,000/= would be reasonable as instruction fees I have arrived at this amount guided by the decision in **Premchand Reinchand Limited and another v Quarry Services (Supra)** when it was held;*

“Taxation of costs is not a mathematical exercise. It would not be in the interest of justice to just consider the amount sought, subject it to a formulae and obtained the instruction fees.”

Further a successful litigant ought to be fairly reimbursed and costs should not be allowed to go so high such as people and litigants could fear going to court.

I find the sum of KShs.10,000,000/= fair enough to both the Advocate and the general public to whom I cannot shut my eyes to the reality that they are the ones to bear the cost through taxes. Item No. 1 is hence taxed at this amount.”

Public interest is defined in **Black's Law Dictionary Tenth Edition** as follows –

1. The general welfare of a populace considered as warranting recognition and protection,

2. something in which the public as a whole has a stake; in interest that justifies governmental regulation.

In **Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another [2016] eKLR**, Odunga J. defined public interest as –

“... the general welfare of the public that warrants recognition and protection and it is something in which the public as a whole has a stake; especially an interest that justifies governmental regulation.”

Cause 31 of 2015 was not a public interest suit. The fact that public funds would be spent to pay salaries to public officers does not mean that a suit involving determination of section of wages of persons paid out of public funds is a public interest litigation. Cause 31 of 2015 was a suit filed by a trade union in respect of disagreement over certain terms and conditions of service of the union's members in their

private capacity as employees of the applicant herein.

It is my finding that the Taxing Officer misapprehended the nature of the suit which was the subject of the taxation and thereby misdirected herself in determining the intrinsic value of the subject matter and thus erred in assessing the fees payable to Counsel as instructions fees. She further misdirected herself when she stated that had the prayers sought by the claimants been allowed the general public would have incurred a lot of expenses. This was a departure from her earlier finding that the value of the subject matter was indeterminable. This was also erroneous as salaries or wages are paid for value of work done and does not constitute a loss of public funds.

For these reasons I find that there is valid reason to interfere with the decision of the Taxing Officer. I thus make the following orders –

- 1. The decision of the Taxing Officer on instructions fees and getting up fees as well as the extracted Certificate of Costs dated 24th May 2019 issued by the Taxing Officer in NAIROBI ELRC MISC. APPLICATION NO. 21 OF 2019 is set aside.**
- 2. The Bill of Costs is remitted to the Deputy Registrar to be taxed afresh by a different Taxing Officer.**
- 3. Each party shall bear its costs of this reference.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF MAY 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE