



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**MISCELLANEOUS APPLICATION NO. 48 OF 2017**

Before Hon. Lady Justice Hellen S. Wasilwa on 20<sup>th</sup> February 2018

IN THE MATTER OF: THE ADVOCATES ACT 16 LAWS OF KENYA

AND

IN THE MATTER OF: E & LRC NO. 2046 OF 2013

BETWEEN

BENJAMIN LANGWEN.....CLAIMANT

AND NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....RESPONDENT

AND

IN THE MATTER OF: APPLICATION FOR TAXATION

OF ADVOCATE/ CLIENT BILL OF COSTS

BETWEEN

PAUL OTIENO MUNGLA T/A PAUL

MUNGLA & CO. ADVOVATES.....APPLICANT

AND

BENJAMIN MALWA LANGWEN.....RESPONDENT

**RULING**

1. Before this Court is a Chamber Summons application dated 8<sup>th</sup> September 2017 brought under Paragraph 11(2) of the Advocates Remuneration Order.

2. The Applicant seeks the following orders:

1. ***THAT*** this Honourable Court be pleased to set aside and/or review the determination of the Hon Deputy Registrar/Taxing Master dated 22<sup>nd</sup> August 2017 on item numbers 1 (a) & (b) and 125 of the bill of cost herein dated 15<sup>th</sup> March 2017 and either tax or refer the said items of the bill of costs herein for taxation with appropriate directions on the Hon. Deputy Registrar to consider correctly established legal principles in taxing the aforesaid items.

2. ***THAT*** costs of this application be provided for.

3. The application is brought on the following grounds that:-

**1. The Hon. Deputy registrar erred both in law and in fact in setting the basic instruction fee for a decretal sum of 15,858.312 at Kshs. 299,874=68 contrary to the express provisions of schedule VI (A) paragraph 1 and schedule VI(B) of the Advocates Remuneration Order 2009 thereby arriving at an expressly wrong determination of instruction fees.**

**2. The Hon. Deputy Registrar erred both in law and in fact by failing to justify and/or sufficiently consider pertinent factors such as the complexity of the case, the public and personal interest on the case, the professional time and labour expended on the matter and industry when exercising her discretion to determine instruction fees and arrived at an inordinately and demonstrably low and unjust assessment of instruction fees.**

**3. The Hon. Deputy registrar erred in law and fact by failing to provide for value Added Tax on instruction/ professional fees i.e. item 1(b) of the Bill contrary to law.**

**4. The determination of instruction fees aforesaid has a direct bearing on item No. 125 of the bill of costs.**

**5. That it is demonstrably in the interest of justice that this Honourable Court be pleased to grant this application.**

4. It is further supported by the annexed affidavit of Paul Otieno Mungla.

5. The deponent avers that the Deputy Registrar correctly referred to the applicable Advocates Remuneration Order under which the bill of costs is to be taxed as being the 2009 and 2014 Order. He avers that the Deputy Registrar hereunder by not getting the correct instructions fees and schedule VI (A) paragraph 1 and schedule VI (B) of the Advocates Remuneration Order 2009.

6. He depones that the Deputy Registrar erred in law and fact by failing to judiciary and sufficiently consider all the germane issues in exercising her discretion in taxing item I(a) of the bill of cost.

7. He has also averred that the Deputy Registrar failed to provide for item 1B as expected. That the Deputy Registrar therefor arrived at a wrong figure on instruction fee, which adversely affected item 125 of the bill of costs.

8. The applicant's through their submissions dated 7<sup>th</sup> May 2014 disputed items in the Applicant's bill of costs dated 15<sup>th</sup> March 2017 and agreed that schedule VI of the advocates Remuneration order 2014 is the applicable charging schedule.

9. They cited Nairobi civil Appeal No. 66 of 1999, Joreth Limited -vs- Kigano, & Associates the Court of Appeal stated as follows with respect to determination of instruction fees:-

***"We would at this stage point out that the value of the subject matter of a suit for purposes of taxation of a bill of costs ought to be determined from the pleadings, judgement or settlement (if such be the case) but if the same is not ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fees as he considers just, taking into account, amongst other matter, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any directions of the trial judge and all other relevant circumstances...."***

10. They also cited Misc Application Number 843 of 2013 Nyangito & Co. Advocates versus Doinyo Lessos Creameries Limited, Odunga J quoted with approval the same principles as was laid down by Ojwang J. (as he then was) in Republic -VS- Ministry of Agriculture & 2 others Ex- Parte Muchiri Wajuguna & 6 others where the Hon. Judge stated inter-alia that:-

***"The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. 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 will only interfere if it thinks the award is too high or too low as to amount to an injustice to one party or the other.... 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. Of course, it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates(remuneration) order itself, some of the relevant factors to take into account include the nature and importance of the case or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge. Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him.... A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved... The complex elements in the proceedings which guide the exercise of the Taxing officer's discretion must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity, if novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode, if the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such initiative by counsel must be specifically indicated...."***

11. By his statement of claim herein, the Claimant was the Director in charge of Compliance and Enforcement at NEMA and number two in the hierarchy of command just after the Director General. He sought for three principal orders from the Court namely:

**(a) A declaration that his summary dismissal dated 16<sup>th</sup> December 2013 was illegal, null and void.**

*(b) Reinstatement to his position before dismissal without loss of benefits nor seniority.*

*(c) In the alternative and without prejudice to prayers (ii) above, general damages for unlawful dismissal.*

12. In determining what instructions should be, the law is clear as laid down in schedule VI of the Advocates Remuneration Order and the authorities cited.

13. This will be discerned to the subject matter. In the case under reference, the subject matter is the dismissal of the claimant where he sought to be paid damages for the wrongful dismissal.

14. Judgement was entered for the Claimant herein where he was reinstated back to work without loss of benefits. In the alternative the Hon Judge ordered that he be paid salary for 3 years and compensation equivalent to 12 months' salary. If the alternative award is reduced to monetary terms then that would be in the amount of 15,835.312.

15. I note that the Deputy Registrar in addressing the taxation was properly guided by the provision of the law and proper principles in the taxation.

16. The Deputy Registrar properly examined her discretion which this Court cannot interfere with. Despite the Applicant's assertion, I find that the Deputy Registrar did not error in any way and I decline to interfere with the Claimant's discretion so exercised.

17. Costs to the Respondent.

**Read in open Court this 20<sup>th</sup> day of February, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Muturi holding brief Munla for Applicant – Present

Respondent – Absent