



Kakay v Kenya Airways Limited (Miscellaneous Civil Application E402 of 2021) [2023] KEHC 17357 (KLR) (Civ) (3 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17357 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS CIVIL APPLICATION E402 OF 2021

DO CHEPKWONY, J

MAY 3, 2023

BETWEEN

MOHAMED KAKAY APPLICANT

AND

KENYA AIRWAYS LIMITED RESPONDENT

RULING

1. The Applicant, Mohamed Kakay, vide a Chamber Summons application dated 19th August, 2021 brought under Paragraph 11(2) of the Advocates Remuneration Order, 1962 seeking for the following Orders:-
 - a. That this Honourable Court be pleased to call for the National Civil Aviation Administrative Tribunal Complaint Case No.1 of 2019 (formerly 6674 of 2018) file and bring it to the High Court for purposes of reviewing the taxation of the Applicant's Party and Party Bill of Costs by the Honourable Tribunal.
 - b. That the Honourable Court be pleased to set aside the National Civil Aviation Administrative Tribunal's decision delivered on 19th March, 2021 as it relates to the reasoning and determination of item No.1 of the Applicant's Party and Party Bill of Costs dated 22 July, 2020.
 - c. That this Honourable Court be pleased to set aside the Tribunal's decision in so far as it relates to the reasoning and determination of Items No.2, 3, 4, 5, 6, 9, 10, 12, 13, 14, 15, 16, 18, 19, 20, 22, 23, 26, 29,30, 31, 32, of the Applicant's Party and Party Bill of Costs dated 22nd July, 2020.
 - d. That this Honourable Court be pleased to set aside the said Tribunal's decision in so far as it relates to the reasoning and determination of Item No.28 of the Applicant's Party & Party Bill of Costs dated 22nd July, 2020.



- e. That this Honourable Court be pleased to set aside the consequent taxation by the Tribunal under Paragraph (4) of the Ruling.
 - f. That this Honourable Court be pleased to tax the Applicant's Bill of Costs dated 22nd July, 2020 afresh; and
 - g. That the costs of this application be provided for.
2. The application is premised on the grounds set out in its face and supported by the affidavit sworn by the Applicant as follows:-
- a. That the Honourable Tribunal's ruling dated 19th March, 2021 is ambiguous, uncertain, incomprehensible and as such it is not possible on the face of it to determine that the total amount of costs awarded by the Tribunal on item No.1 of the Applicant's Party & party Bill of costs dated 22nd July, 2020.
 - b. That it is difficult to determine the total amount of costs awarded by the Honourable Tribunal on items No. 2, 3, 4, 5, 6, 12, 13, 14, 15, 16, 18, 19, 20, 22, 23, 24, 26, 30, 31, 32 of the Applicant's Party & Party Bill of Costs since the ruling is phrased in ambiguous, uncertain and incomprehensive terms.
 - c. That the Honourable Tribunal's ruling on the determination of Item No.28 of the Applicant's Party & Party Bill of Costs is shrouded in ambiguity and uncertainty.
 - d. That the consequent of the Applicant's Party & Party Bill of Costs is also uncertain and ambiguous as it is difficult to determine the total amount taxed by the Honourable Tribunal.
 - e. That the Honourable Tribunal failed to take into account the nature and importance of the proceedings-including the complexity and difficulty of the matter when taxing the Applicant's Party and Party Costs.
 - f. That consequently, the Honourable Tribunal erred in holding that Kenya Shillings Thirty Thousand (Kshs.30,000/=) only was reasonable and adequate as professional fees notwithstanding the value of the subject matter claimed by the Applicant, the volume of the pleadings and other documentation as well as the time expended by the Applicant's advocates in prosecuting the matter.
 - g. That the Honourable Tribunal wrongly erred in failing to consider and determine item No.7 of the Applicant's Party and Party Bill of Costs, which item related to Kenya Shillings Seventy Thousand (Kshs.70,000/=) paid by the Applicant as Court filing fees.
 - h. That the Honourable Tribunal wrongly exercised its discretion and erred in failing to award the Applicant the amount of Kenya Shillings Seventy Thousand incurred by him in filing the suit as court filing fees paid to judiciary.
 - i. That the Honourable Tribunal further erred by failing to consider or render its determination on Items 8, 17, 21, 25, 33 and 34 of the Bill of Costs, which items relate to the filing and service of various pleadings in the suit.
 - j. That the Honourable Tribunal erred by not considering or determining Item 27 of the Bill of Costs and by further failing to appreciate the expenses incurred by the Applicant in traveling to and from the Republic of Congo to testify at the hearing of the case when the matter was heard on 20th October, 2019.



- k. That the Honourable Tribunal erred by failing to consider and/or determine Item 28 of the Bill of Costs with respect to the accommodation expenses incurred by the Applicant while attending the hearing of the case in Nairobi.
 - l. That despite filing a Notice of Objection to the taxation of the costs, the Honourable Tribunal is yet to issue the Applicant with its reasons for the taxation as required under Paragraph 11(1) and (2) of the Advocates (Remuneration) Order, 1962.
 - m. That this Honourable Court has unfettered powers and discretion to grant the Orders sought herein.
 - n. That this application has been made timeously and in pursuit of the end of justice. Therefore, it is only fair that the application is heard and orders granted.
3. In opposition to the application, the Respondent filed an affidavit sworn by Peter Komo sworn on 23rd September, 2021. In the affidavit he deposes that he is employed by the Respondent as a Claims Assistant. That the ruling on the Applicant's Bill of Costs was delivered on 19th March, 2021 and the Applicant was represented by an advocate and the tribunal forwarded a copy of the ruling to the parties by email.
4. On 2nd November, 2021, parties agreed to canvass the application by way of written submissions. Both parties complied with the directions on filing of written submissions. The Applicant's submissions are dated 10th December, 2021 while the Respondent's submissions are dated 25th March, 2022.

Applicant's Submissions

5. The Applicant submitted that the background of this matter arose from a Judgment delivered on 22nd April, 2020 in favour of the Applicant before the National Civil Aviation Administrative Tribunal. The Tribunal awarded costs of the suit to the Applicant who subsequently filed a party and party Bill of costs on 22nd July, 2020. The Applicant submits that the Tribunal delivered its ruling on the party and party Bill of costs on 19th March, 2021. He however contends that the ruling is ambiguous, uncertain, incomprehensible and it is not possible to determine the total amount of costs awarded on each of the items.

Respondent's Submissions

6. In response, the Respondent submitted that this Honourable Court has no jurisdiction to deal with this current application before court. The decision sought to be challenged is a decision of a Tribunal and under Article 169(1)(d) of *the Constitution*, the Tribunal is a subordinate court. The Respondent cited Rules 10 and 11 of the Advocates (Remuneration) Order and stated that the Bill was taxed by a Tribunal. There is no provision for a reference to the High Court from the decision of the Tribunal on costs and as such the High court has no jurisdiction.
7. The Respondent further submitted that the inherent power of the court cannot come into the aid of the Applicant as this goes to the root of the court's jurisdiction and cannot be cured by Article 159(2) (d) of *the Constitution*.
8. The ruling was delivered on 19th March, 2021 and Rule 11(1) of the Advocates (Remuneration) Order requires that the Applicant to object to the decision within 14 days of the decision. The Applicant's objection on record is dated 26th April, 2021. It clearly shows that it was filed 24 days late which delay is inordinate, unexplained and inexcusable. For the said reason, the reference is incompetent.



9. I have read through the summons, the response, the written submissions in support and in opposition as well as the cited authorities. I will further consider them in my final analysis and determination.

Analysis and determination

10. Having considered the pleadings, the affidavits filed, the written submissions and the authorities relied upon in support and in opposition of the reference, the following are the issues that arise for determination by this Court;
- a. Whether this Honourable Court has jurisdiction to determine the application ; and if so,
 - b. Whether the application is merited.

a. Whether this Court has jurisdiction to determine this application.

11. Jurisdiction is the power of a court to decide a case before it. It emanates from either *the Constitution* or statute or both. In this instant case, the relevant statute governing the affairs of the National Aviation Tribunal is the *Civil Aviation Act*.
12. Under Section 72(2) of the *Civil Aviation Act* provides that:-
- “The Tribunal shall have power to award the costs of any proceedings before it and direct that the costs shall be taxed in accordance with any scale prescribed for suits in the High Court or to award a specific sum as costs.”
13. Further, Section 77(1) of the Act provides that:-
- “Any person aggrieved by a decision or order of the Tribunal may, within thirty days of such decision or order, appeal against such decision or order to the High Court.”
14. My reading of the aforementioned statutory provision is that the Tribunal has power to award costs of the proceedings before it and that any aggrieved party by the decision or order of the tribunal may lodge an appeal to the High court within thirty days.
15. Jurisdiction was ably discussed in the famous Court of appeal decision in the case of *Owners of Motor Vessel “Lillian S” –vs- Caltex Oil (K) Ltd* [1989] KLR 1, where (Nyarangi, JA) held as follows;
- “I think that it is reasonable plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
16. In this instant suit, the Applicant filed a reference challenging the decision of the Tribunal delivered on 19th March, 2021. A clear reading of the decision shows that it is a ruling in respect of a party and party bill of costs dated 22nd July, 2020 which was taxed by the National Aviation Administrative Review Tribunal. The Tribunal was exercising its jurisdiction having been seized of the matter.



17. Based on the cited statutory provisions, it is clear that this Court is seized of jurisdiction to determine this matter contrary to the Respondent's assertion. I now proceed to consider the second limb of the application dated 19th March, 2021.

b. Whether the application is merited

18. On this issue the applicant submitted that the Tribunal ruling stated that for professional fees Kshs.30,000/= is taxed off with respect to Item No.1 of the party and party bill of costs. It is impossible to know whether Kshs.30,000/= was taxed off thereby awarding Kshs.670,370/= to the Applicant or whether the Tribunal awarded Kshs.30,000/= to the Applicant.

19. The Respondent has urged that the reference is incompetent since the Applicant has not attached a copy of the impugned decision to the application for reference.

20. Upon consideration of the submissions, this Court agrees with the Respondent's assertion that the tribunal's ruling is vague and not clear. The Respondent has raised issue that the Applicant failed to attach a copy of the ruling. A perusal of the record shows that although the impugned ruling is not attached to the application, the same has been exhibited and is on record. Therefore, it is this Court's view that a technicality which can be cured by Article 159 of *the Constitution*.

21. The upshot of the foregoing is that the reference dated 19th August, 2021 is merited and is allowed on the following terms;

- a. That an order be and is hereby issued setting aside the National Civil Aviation Administrative Tribunal's decision delivered on 19th March, 2021.
- b. The Bill of costs be taxed afresh by the Deputy Registrar of this court.
- c. The applicant shall have costs of this reference.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 3RD DAY OF MAY 2023.

D.O CHEPKWONY

JUDGE

In the presence of:

Mr. Musembi counsel for Applicant

Mr. Adan holding brief for Mr. Ochieng counsel for Respondent

Court Assistant – Mwenda/Simon

