



**Oduor Siminyu & Company Advocates v Dock Workers Union (Judicial Review
Miscellaneous Application E002 of 2022) [2023] KEHC 24561 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 24561 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E002 OF 2022**

**MN MWANGI, J
JULY 13, 2023**

BETWEEN

ODUOR SIMINYU & COMPANY ADVOCATES APPLICANT

AND

THE DOCK WORKERS UNION RESPONDENT

RULING

1. The respondent/applicant filed a Notice of Motion application dated 28th June, 2022 brought under the provisions of Sections 1A, 1B, 3A, 27 and 34(3) of the Civil Procedure Act, Order 22 Rules 22 and 52 of the Civil Procedure Rules, 2010 and all enabling provisions of the law, seeking the following orders-
 - i. Spent;
 - ii. Spent;
 - iii. Spent;
 - iv. That this Honourable Court be pleased to set aside the Certificate of Taxation issued on 13th June, 2022 by the Deputy Registrar of this Honourable Court;
 - v. That the bill of costs be struck out; and
 - vi. That costs be borne by the respondent.
2. The application is premised on the grounds on the face of the Motion and is supported by affidavits sworn on 28th June, 2022, and 22nd September, 2022 by Simon Kiprono Sang, the General Secretary of the applicant herein. In opposition thereto, the applicant/respondent filed a replying affidavit and a further replying affidavit, sworn on 12th July, 2022 and on 22nd July, 2022, respectively, by Oduori



Siminyu, an Advocate of the High Court of Kenya who has conduct of this matter on behalf of the respondent.

3. The application was canvassed by way of written submissions. The applicant's submissions were filed on 5th October, 2022 by Leonard Rufus Ochieng C/o Dock Workers Union, whereas the respondent's submissions were filed by the law firm of Oduor Siminyu & Company Advocates on 14th October, 2022.
4. Mr. Ochieng, learned Counsel for the applicant referred to Section 2 of the *Labour Relations Act* which gives the legal interpretation of the term "an authorized representative" and submitted that the authorized representative of the Union (applicant) as can be seen from the extract from the Registrar of Trade Unions for the officers, members of the National Executive Committee and Trustees of the applicant between the years 2016 and 2021, was Simon Kiprono Sang, the General Secretary of the applicant. Mr. Ochieng submitted that there was no authority given to Mohamed Suleiman Sheria pursuant to the provisions of Section 2(e) of the *Labour Relations Act* to commence suit, file pleadings, and/or issue instructions to any person to act on behalf of the applicant. Counsel contended that there were no valid instructions given to the respondent to act for the applicant in Mombasa Constitutional Petition No. 82 of 2019. To this end, Counsel relied on the case of *Mwangangi & Company Advocates v Machakos County* [2020] eKLR.
5. It was stated by Mr. Ochieng that even in the event that the respondent was properly instructed, it was specifically instructed to withdraw the applicant from the Constitutional Petition and not to proceed with the said case in any other way whatsoever. Mr. Ochieng submitted that the respondent discontinued the applicant's involvement in the said Petition on 18th July, 2019 and as such, the respondent's bill of costs should only have contained instructions, filing of notice of change of Advocates, notice of discontinuance, and Court attendance on 18th July, 2019.
6. Mr. Ochieng stated that the Certificate of Taxation issued by the Taxing Officer was as a result of taxation done on 8th June, 2022 and not 18th May, 2022 as indicated in the taxation notice dated 19th April, 2022. He contended that the respondent did not serve the applicant with a taxation notice for 8th June, 2022 hence the decision arrived at therefrom, was oppressive and denied the applicant its right to be heard.
7. Mr. Siminyu, learned Counsel for the respondent submitted that the application herein does not invoke this Court's jurisdiction over matters arising from the decision of the Deputy Registrar. In addition, he stated that this application is anchored on irrelevant provisions of the law that do not give this Court powers to grant the orders sought. Counsel referred to Rule 11 of the Advocates (Remuneration) Order and stated that in matters taxation, this Court only has appellate jurisdiction over matters arising from the decision of a Taxing Officer. He however stated that under the provisions of Order 12 of the Advocates (Remuneration) Order and Order 35 of the Civil Procedure Rules, 2010, this Court may exercise original jurisdiction in taxation matters where parties refer the same to it by consent. Counsel stated that the issues raised by the applicant in the instant application should have been dealt with on a preliminary basis before taxation was done.
8. It was submitted by Mr. Siminyu that there was nothing wrong or wanting in the manner the respondent was instructed, as all the other allegations are basically indoor management issues that do not concern innocent outsiders contracted to conduct business for the applicant. On the issue of service of the bill of costs, Counsel submitted that the applicant was served with a taxation notice dated 19th April, 2022 for taxation of the respondent's bill of costs on 18th May, 2022, and that on the latter date, the applicant was represented by one Ms. Langat Advocate, who requested for time to respond to the amended bill of costs and the request was granted and the bill of costs was fixed for taxation on



8th June, 2022 by consent. Mr. Siminyu however stated that even if the issue of service was invalid, it would only call for the setting aside of the taxation for purposes of taxing the same de novo.

9. Mr. Siminyu submitted that the application herein is anchored on an incompetent supporting affidavit which offends the provisions of Order 19 Rule 3(1) of the Civil Procedure Rules, 2010 for deponing to matters based on information, without leave of the Court, in an application where final orders are being sought.

Analysis And Determination.

10. I have considered the application filed herein, the grounds on the face of it and the affidavits filed in support thereof. I have also considered the replying affidavits by the respondent and the written submissions by Counsel for the parties. The issues that arise for determination are-
 - i. Whether this Court has jurisdiction to determine the application herein in light of the fact that it is anchored on the wrong provisions of the law;
 - ii. Whether paragraph 13 of the supporting affidavit in support of the instant application offends the provisions of Order 19 Rule 3 of the Civil Procedure Rules, 2010; and
 - iii. If the Certificate of Taxation issued on 13th June, 2022 should be set aside and the bill of costs be struck out.
11. In the affidavit filed by the applicant, the deponent averred that he was the General Secretary of the applicant when Mombasa Constitutional Petition No. 82 of 2019 was filed. That pursuant to the provisions of the *Labour Relations Act*, 2007, the General Secretary and/or the Secretary General of a Trade Union, is the legally authorized representative of a Trade Union and that he can only delegate the said function in writing. The deponent averred that Mohamed Suleiman Sheria, Gunda Kaneno, Anthony Odera and Salim Bambaulo were registered as the National Chairman, Vice Chairman, Assistant General Secretary and a Committee Member, respectively, thus they lacked capacity to initiate a new representation unless legally authorized by the General Secretary.
12. It was stated by the deponent that with the concurrence of members of its National Executive Committee, jointly with two other petitioners, they instituted the Petition from which the impugned bill of costs arises, and all the petitioners jointly instructed the firm of Nyandieka & Associates Advocates to represent them in the said Petition. The deponent averred that he swore the affidavit in support of the Petition and the Notice of Motion application and thereafter travelled to Singapore. That while in Singapore, he was informed by Mr. Nyandieka that another law firm had come on record with specific instructions to withdraw the suit. That subsequently, a notice of change of Advocates and withdrawal of the applicant from the Petition were filed on 17th July, 2019.
13. It was averred that on 18th July, 2019, the applicant was discontinued from the proceedings of the Petition and the respondent never acted for it again in the said Petition. The deponent deposed that when he came back to Kenya, he gave fresh instructions to the law firm of Nyandieka & Associates to come back on record and reinstate the applicant. The deponent stated that he did not authorize the respondent firm of Advocates to act for the applicant in Mombasa Constitutional Petition No, 82 of 2019, and even if such authority was given since he was out of the country, such instructions could only be given by the National Executive Committee convened in compliance with *the Constitution* of the applicant. The deponent contended that the respondent was not legally appointed.
14. It was stated by the applicant that it was not served with the hearing notice for the taxation of the bill of costs on 8th June, 2022, and bearing in mind that the taxed bill of costs had been amended, it was imperative for the applicant to be allowed to respond to the amended bill of costs so as to guarantee



its right to a fair hearing. The applicant further stated that the taxation was excessive, oppressive and unfair, and that the applicant had already paid the firm of Nyandieka & Associates, thus the bill of costs herein will amount to double taxation on the applicant's part on a matter it diligently prosecuted through its lawfully appointed law firm.

15. In the replying affidavit by the respondent, Mr. Siminyu deposed that the instant application is incompetent, bad in law and an abuse of the Court process since none of the provisions of the law cited by the applicant gives this Court powers to grant the orders sought. He averred that the respondent was instructed by the applicant through its Chairman and Officials, and the Chairman swore an affidavit which became the basis of the respondent's instructions, and as such, the respondent acted within the instructions given by the applicant.
16. The respondent further averred that the applicant was served with a taxation notice for 8th June, 2022 and the amended bill of costs on 21st April, 2022 which documents were duly received as evidenced by the applicant's official receiving stamp on the principal copy.
17. It was contended by the respondent that paragraph 13 of the affidavit in support of the instant application offends the provisions of Order 19 Rule 3(1) of the Civil Procedure Rules, 2010 for containing information that is not of the deponent's own knowledge, without leave of the Court, in view of the fact that these are not interlocutory proceedings. He urged for the said paragraph not to be considered.
18. The respondent asserted that by virtue of the provisions of the *Advocates Act* together with the Remuneration Orders made thereunder, the High Court has only an appellate jurisdiction over taxation matters. He contended that this Court has no jurisdiction over the application herein. He prayed for the same to be dismissed and/or struck out, as the case may be.

Whether this Court has jurisdiction to determine the application herein in light of the fact that it is anchored on the wrong provisions of the law.

19. It is not disputed that the applicant has relied on the provisions of the *Civil Procedure Act* and Civil Procedure Rules which do not invoke this Court's jurisdiction over matters to do with taxation. The respondent contended that since the application has been anchored on irrelevant provisions of the law, it should be dismissed and/or struck out for being bad in law, and an abuse of the Court process. It is trite that when it comes to matters taxation of bill of costs, the Advocates Remuneration Order is self-sufficient. This was the legal position taken by the Court of Appeal in *Machira & Co. Advocates v Arthur K. Magugu & another* [2012] eKLR, where the decision by Ringera J (as he then was), was affirmed. The Court of Appeal stated thus-

“We agree with the decision of Ringera J (as he then was) in *Machira vs Magugu* [2002] 2 EA 428 that the Advocates Remuneration Order is a complete code which does not provide for appeals from taxing master's decisions. Rule 11 thereof provides for ventilation of grievances from such decision through references to a judge in chambers.”

20. Although the applicant has cited the *Civil Procedure Act* and the Civil Procedure Rules instead of the Advocates Remuneration Order, this only amounts to an irregularity which would not prejudice the respondent since it only affects the form and not the substance of the application thus excusable. It is trite that Courts are called upon to do substantive justice for the parties by giving effect to the overriding objective of Sections 1A and 1B of the *Civil Procedure Act* in the interpretation of its provisions and Rules which include; the just determination of the proceedings; efficient disposal of the dispute; efficient use of available judicial and administrative resources, and the timely disposal of



the proceedings at a cost affordable to the respective parties. I am bound by the decision of the Court of Appeal in *Stephen Boro Gitiha v Family Finance Building Society & 3 others* CA 363/2009, which states that-

“The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new “broom” of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible.”

21. The applicant’s reliance on the provisions of the *Civil Procedure Act* and the Civil Procedure Rules instead of the Advocates Remuneration Order is a procedural technicality that can be cured by the provisions of Article 159(2)(d) of *the Constitution* of Kenya, 2010 thus not a fatal mistake. It is therefore this Court’s finding that the instant application is properly before this Court.

Whether paragraph 13 of the supporting affidavit in support of the instant application offends the provisions of Order 19 Rule 3 of the Civil Procedure Rules, 2010.

22. Order 19 Rule 3 of the Civil Procedure Rules, 2010 provides as hereunder-

“(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents, shall (unless the court otherwise directs) be paid by the party filing the same.”

23. A perusal of paragraph 13 of the affidavit in support of the application is reproduced hereunder for ease of understanding. It reveals that the information therein was obtained from a third party whose source has not been disclosed. It states as follows-

“That I have been informed that the respondent did not serve the hearing notice for the hearing of the bill of costs before the taxing officer on 8th June, 2019 and specifically considering that the taxed bill of costs was amended and hence it was trite that the applicant be allowed to respond. There was no opportunity given for response to the amended bill of costs. The right of the applicant to a fair hearing was infringed in the circumstances.”

24. It is not in dispute that these are not interlocutory proceedings and leave of this Court has not been obtained prior to or after the filing of the said affidavit. Therefore, the contents of the applicant’s supporting affidavit ought to have been confined to such facts as the deponent is able of his own knowledge to prove. Accordingly, I hold that paragraph 13 of the affidavit in support of the instant application offends the provisions of Order 19 Rule 3 of the Civil Procedure Rules, 2010. The said averment in paragraph 13 has for all intents and purposes been disregarded.



If the Certificate of Taxation issued on 13th June, 2022 should be set aside and the bill of costs be struck out

25. The procedure for challenging the Taxing Master's decision in the High Court is provided for under Rule 11(1) & (2) of the Advocates (Remuneration) Order which states as hereunder-

“(1) Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which the 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...”

26. From the above, it is evident that the first step when challenging a Taxing Officer's decision in the High Court is by giving the Taxing Officer a notice in writing within fourteen (14) days of his decision, of the items of taxation to which the applicant objects. Thereafter, the Taxing Officer shall forward to the objector the reasons of his decision on the items objected to, and the objector may within fourteen (14) days from the receipt of the said reasons, make an application commonly referred to as a reference to a Judge by way of Chamber Summons, setting out the grounds of objection to the taxation.

27. In this instance, it is not disputed that no such notice was given to the Taxing Officer by the applicant prior to the filing of the application herein. One might argue that the requirement of giving notice to the Taxing Officer under Rule 11(1) is not couched in mandatory terms. It is however my finding that the notice is necessary for purposes of ensuring that the necessary timelines are observed, and that such references are filed and heard timeously. The ruling by the Taxing Officer was delivered on 8th June, 2022, whereas the application herein was filed on 29th June, 2022, approximately, 21 days later. Since the notice to the Taxing Officer was not exhibited in the applicant's supporting affidavit, this Court has no way of ascertaining if the application herein was filed within the provided by law. See OJSC Power Machines Limited, Trancentury Limited, and Civicon Limited (Consortium) v Public Procurement Administrative Review Board; Kenya Electricity Generating Company Limited & another (Interested Parties) [2019] eKLR.

28. It is therefore this Court's finding that there was non-compliance with Rule 11(1) of the Advocates (Remuneration) Order, for want of notice. In addition, I have perused the application herein and it does not state which items of taxation the applicant specifically objects to. This Court therefore finds that the instant application is wanting.

29. The upshot is that the application dated 28th June, 2022 is devoid of merit and it is hereby dismissed with costs to the respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF JULY, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:



Mr. Ochieng for the applicant

Ms Julu h/b for Mr. Siminyu for the respondent

