



**Kenya County Government Workers Union v Leonard K. Mbuvi t/a Katunga Mbuvi & Co.
Advocates (Miscellaneous Case E246 of 2021) [2024] KEELRC 999 (KLR) (7 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 999 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CASE E246 OF 2021**

JK GAKERI, J

MAY 7, 2024

BETWEEN

KENYA COUNTY GOVERNMENT WORKERS UNION APPLICANT

AND

**LEONARD K. MBUVI T/A KATUNGA MBUVI & CO.
ADVOCATES RESPONDENT**

RULING

1. Before the court for determination is the Client/Respondent's Notice of Preliminary Objection dated 15th February, 2024 praying for the dismissal and/or striking out of the Advocate/Applicant's Reference application dated 20th November, 2023 on the grounds that;
 1. The application is statutorily time-barred, incompetent and offends the provisions of Rule 11(2) of the *Advocates Remuneration Order* as it was filed more than 14 days after the Taxing Officer's decisions being objected to.
 2. The application is misconceived and bad in law as it was filed out of time without a corresponding or prior application for leave to enlarge/extend time within which to file the reference as provided under Rule 14(4) of the *Advocates Remuneration Order*.
 3. The application is fatally defective as the Advocate did not file the notice of objection to the taxing officer's taxation decision within 14 days of the decision as required by Rule 11(1) of the *Remuneration Order* prior to filing the same.
 4. The court lacks jurisdiction to entertain, hear or determine the Advocates Reference Application as it is time barred, stale, untenable, frivolous, hopeless, vexatious and an abuse of court process.



Response

2. In his Replying Affidavit, the Advocate/Applicant deposes that the Preliminary Objection dated 15th February, 2024 did not raise any point of law or a triable issue and was an afterthought.
3. The Applicant deposes that after the Taxing Officer delivered a ruling on the Bill on 3rd November, 2023 at Kshs.288,332.18, he requested for a copy of the ruling vide letter dated 6th November, 2023 and it was supplied on 15th November, 2023, sought clarification vide letter dated 16th November, 2023, was regularised on 17th November, 2023 and an objection notice dated 16th November, 2023 was filed within the 14 days period under Rule 11(I) of the Remuneration Order and the Reference was filed on 20th November, 2023 within the prescribed 14 days.
4. That in the computation of time, date of delivery, weekends and public holidays are excluded and there was no inordinate delay. In addition, the court has unlimited jurisdiction to hear and determine the application.
5. The affiant deposes that the Respondent's intention is to drag the case and delay justice and the Preliminary Objection ought to be dismissed.

Client/Respondent's submissions

6. Counsel opines that the practice of responding to a Preliminary Objection by a replying affidavit was unknown to the law as a Preliminary Objection raises a pure point of law and an affidavit is based on facts.
7. That there was no discrepancy between figures in the physical copy of the ruling and the one on the e-filing.
8. Counsel submits that advocate intentionally or inadvertently confused the figures as there was no evidence of any regularization of the ruling.
9. Reliance was made on the provisions of Section 57 of the *Interpretation and General Provisions Act* on computation of days.
10. As to whether the Preliminary Objection is properly before the court, reliance was made on the sentiments of the Court of Appeal in *Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Ltd* (1969) EA 696 to urge that the facts are not disputed as the Chamber Summons was filed on 20th November, 2023 without leave of the court and the notice of objection was filed on 20th November, 2023 after 14 days.
11. Counsel urges that the fact that Rule 11(4) of the *Remuneration Order* gives the High Court jurisdiction to enlarge time is an indication of the drafters intention that the 14 days requirement is mandatory and cited the sentiments of the court in *Karume Investments Ltd V Kenya Shell Ltd & another* (2015) eKLR to urge that the Advocates Reference is statute-barred, as was the holding in *KCB Ltd & another V Yeswa Antonny Joseph* (2022) eKLR and the court has no authority to determine an incompetent suit.
12. Counsel submits that since the advocate has not applied for leave to file the reference out of time, the court has no jurisdiction over it.
13. On the place of procedures, counsel cited the sentiments of Kiage JA in *Nicholas Kiptoo Arap Salt V Independent Electoral and Boundaries Commission & 6 others* (2013) eKLR as well as in *Neptune Credit Management Ltd & another V Jigisha P. Jani & another* (2021) eKLR.



Advocate/Applicant's submissions**

14. The Advocate maintains that the reference was filed on time and the court has jurisdiction to determine the same.
15. As to whether the reference is statute barred, the Advocate/Applicant urges that the Taxing Officer delivered a ruling on 3rd November, 2023 and taxed the Bill at Kshs.288,332.18 and a copy was requested for vide letter dated 6th November, 2023 and supplied on 15th November, 2023 and that was when he realized that the figures were different and requested for clarification vide letter dated 16th November, 2023 and the same corrected on 17th November, 2023 and filed a notice of objection on 16th November, 2023 and the reference was filed on 20th November, 2023, within 14 days after receipt of the reasons for the taxing.
16. According to the Application, time started running on 6th November, 2023 and as 13th November, 2023 was a public holiday and there is no demonstrable prejudice the Respondent stands to suffer and there was no indolence.
17. Reliance was made on the sentiments of the court in *Muri Mwaniki & Wamiti Advocates V African Banking Corporation Ltd* (2020) eKLR, *National Union of Mineworkers V Council for Mineral Technology* (1998) ZALAC 22 as well as the sentiments of Mativo J. in *Njoroge V Kimani* (2022) KECA 1188 to urge that even if there was some delay, the court could still determine the reference.

Determination

18. The issues for determination are;
 - i. Whether the Client/Respondent's Notice of Preliminary Objection is a competent preliminary objection, and dependent on the answer to (i);
 - ii. Whether the Preliminary Objection is merited.
19. On the 1st issue, the homeport as submitted by the Client/Respondent are the often cited sentiments of the Court of Appeal in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (Supra)*, where Law JA stated;

“ . . . A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. . . ”
20. According to Sir Charles Newbold V.P;

“ A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion . . . ”
21. The pith and substance of the Client/Respondent's Preliminary Objection is that the Advocate's reference is time barred and as a consequence the court lacks jurisdiction to determine the reference.



22. Since the Client/Respondent's Preliminary Object raises the issue of the jurisdiction of the court, the Preliminary Objection is properly before the court.
23. As to whether the Preliminary Objection is merited, while the Client/Respondent argues that the reference was not filed within the 14 days prescribed by the Advocate Remuneration Order and no application for leave for extension of time was made and granted, the reference is time barred, the Advocate/Applicant submits that as the reference was filed on 20th November, 2023, it was filed within the prescribed duration.
24. The gravamen of the Client/Respondent's case is that the provisions of Rule 11(1) and (2) of the Advocates Remuneration Order were not complied with.
25. Order 11 of the Advocates Remuneration Order provides;
 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 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."
26. Court record reveals that the Taxing Officer delivered the ruling, the subject matter of the reference herein virtually in November 2023 and taxed the bill at Kshs.288,332.18 being the sum due to the Advocate/Applicant.
27. Notably, the ruling was delivered in the presence of the Mr. Katunga Mbuvi for the Advocate/Applicant and Mr. Oginga for the Respondent.
28. Records further reveal that by letter dated 6th November, 2023, the Advocate/Applicant requested for a copy of the ruling delivered on 3rd November, 2023.
29. It is unclear to the court why the request was not made on 3rd November, 2023 since the advocate for the Advocate/Applicant was in court.
30. The Advocate/Applicant states that the copy was furnished on 15th November, 2023.
31. Puzzlingly, by letter dated 16th November, 2023, the Advocate/Applicant informed the Deputy Registrar that the Ruling typed in the E-Filing System had a taxed amount of Kshs.288,332.18 while the physical copy had the figure of Kshs.1,237,678.34.
32. The Advocate/Applicant referred to the same as "an open mistake the court can rectify on its own motion."
33. Similarly, the Advocate/Applicant states that the mistake was clarified on 17th November, 2023.
34. The Client/Respondent on the other hand submits that the figures in the physical copy in ELRC MISC. E246/2021 and the figure typed on the e-filing portal were not different and the Taxing Officer awarded Kshs.288,332.18 in the matter.
35. According to the Client/Respondent, the Advocate/Applicant confused or mistook the figures.
36. Strangely, the Advocate/Applicant's letter dated 16th November, 2023 is inquiring about Miscellaneous Application No. 2018 and 246 of 2021 and it is unclear to the court which of the two



- rulings had which figures, a situation exacerbated by the fact that the Advocate/Applicant did not avail copies of the alleged different figures.
37. The Ruling delivered on 3rd November, 2023 has the figure of Kshs.288,332.18 as the Advocate/Applicant's argument of the Client/Respondent confirms.
 38. The alleged different figures is unconvincing as he ought to have attached copies of three rulings but attached only one.
 39. The foregoing notwithstanding, the Advocate/Applicant filed a reference on 20th November, 2023, a fact the Client/Respondent acknowledges.
 40. Was the reference time barred?
 41. Whereas the Advocate/Applicant relies on the provisions of *Interpretation and General Provisions Act* and Order 50 Rule 1 of the *Civil Procedure Rules*, 2010 to urge that the reference was filed within time, the Client/Respondent relies on the provisions of the Advocates Remuneration Order and case law to urge that the reference is time barred.
 42. Section 57 of the *Interpretation and General Provisions Act* provides for the computation of time as regards commencement, last and excluded days, that the day on which the event occurs is excluded and if the last day is a Sunday, public holiday and non-working day, the period includes the next following day.
 43. It is not in dispute that the Taxing Officer delivered a ruling on 3rd November, 2023 and the Advocate/Applicant filed the instant Reference on 20th November, 2023.
 44. As 3rd November, 2023 was a Friday, the 14 days started running on 4th November, 2023 and lapsed on 18th November, 2023 as 13th November, 2023 was a public holiday (tree planting) and Saturday 18th November, 2023 is a working day.
 45. Contrary to the Advocate/Applicant's proposition that the running of time commenced on 6th November, 2023, the court is not persuaded that was the case. In the court's view, Saturdays are not non-working days in Kenya and time started running on that day.
 46. The Claimant did not raise any objection to the Ruling before 20th November, 2023 as the letter dated 16th November, 2023 seeks what may fairly be described as a clarification which the Advocate/Applicant failed to demonstrate evidentially.
 47. The letter makes no reference to an objection and does not identify any item of taxation being objected to and in any event, the reasons for the decision were in the ruling itself, a fact the Advocate/Applicant has not contested.
 48. The court's finding is fortified by the sentiments of the court in *Ahmed Abdikadir & Co. Advocates V National Bank of Kenya Ltd* (2006) 1 EA 5 cited by the Client/Respondent, where Ochieng J. stated as follows;

“ 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 reasons simply because of the unfortunate wording of sub-rule(2) of rule 11 of the Advocate Remuneration Order. 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 . . . Therefore, the reference having been filed way out of the period prescribed should have been dismissed.”

49. The court is further guided by the sentiments of the Court in *Karume Investment Ltd V Kenya Shell Ltd and another* (*Supra*) and *KCB Ltd & another V Yeswa Antonny Joseph* (*Supra*) for the proposition that a Reference filed after the prescribed duration without seeking leave of the court to enlarge time is incompetent and amenable to being struck out.
50. For the foregoing reasons, it is the finding of the court that Advocate/Applicant’s Reference dated 20th November, 2023 is irregular and incompetent and it is accordingly struck out.
51. Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 7TH DAY OF MAY 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court 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.

DR. JACOB GAKERI

JUDGE

