



**Ongwae v Kenya Bureau of Standards (Cause E509 of 2021)
[2024] KEELRC 1178 (KLR) (17 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1178 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E509 OF 2021**

**SC RUTTO, J
MAY 17, 2024**

BETWEEN

CHARLES ONGEGA ONGWAE CLAIMANT

AND

THE KENYA BUREAU OF STANDARDS RESPONDENT

RULING

1. Before me for determination is the Respondent/Applicant’s Notice of Motion Application dated 6th February 2024, brought under Article 159 of *the Constitution* of Kenya, 2010, Sections 1A, 1B, 3A and 63 (c) & (e) of the *Civil Procedure Act*, Order 40 Rule 11 and Order 51 Rule 1 of the *Civil Procedure Rules, 2010*. Through the said Motion Application, the Applicant prays for the following orders:
 - a. Spent.
 - b. That pending the hearing and determination of this Application, inter partes, this Honourable Court be pleased to stay the issuance of the Certificate of Costs and/or any Execution arising from the Certificate of Costs.
 - c. That this Honourable Court be pleased to set aside and vacate the Order made on 6th February 2024 allowing the Claimant’s Bill of Costs dated 19th January 2024 as drawn.
 - d. That the Honourable Court be pleased to make such further Orders as are necessary for the ends of justice.
 - e. That the Honourable Court be pleased to make the necessary Order as to the costs of this Application.
2. The Application is premised on the grounds therein and the depositions contained in the Supporting Affidavit sworn on 6th February 2024, by Mr. Maruti Khamala, Counsel on record for the Applicant.



3. Grounds on the face of the Application are that, on 6th February 2024, the Court allowed as drawn, the Claimant's Bill of Costs dated 19th January 2024 in the absence of the Counsel for the Applicant. That the absence of the Applicant's Counsel was not intentional nor deliberate as he had joined the Court session about 20 minutes late on account of a misunderstanding arising from the addendum cause list of the day. The Applicant is persuaded that had its Counsel had the audience of the Honourable Court, the Court would not have arrived at the decision it did, allowing the Claimant's Bill of Costs as drawn.
4. Further, the Applicant is persuaded that the Claimant's Bill of Costs dated 19th January 2024 was manifestly excessive and not drawn to scale and ought to be considered on the merits.
5. In his Affidavit, Mr. Maruti deposes that the Bill of Costs was served upon them on 31st January 2024 and the same was undergoing internal review before a recommendation could be placed with the Applicant to secure instructions on reasonable terms of settlement.
6. He holds the persuasion that a cursory perusal of the Instruction item of the Bill of Costs if drawn to scale using Schedule 6 of the Advocates Remuneration Order should be a sum of about Kshs 349,928.30 and it follows that the Instructions Cost of Kshs 1,250,000.00 is more three-fold the sum allowable to scale.
7. Mr. Maruti is of the view that a number of the other items have not been drawn to scale, though not as over-stated as the instruction fee.
8. He is further persuaded that the non-attendance by the Applicant's Counsel is excusable.
9. Mr. Maruti further avers that as soon as a misunderstanding was discovered by Counsel, the necessary remedial action was promptly taken by joining the Court and thereafter drawing up and lodging the instant Application.
10. The Claimant countered the Motion Application, through a Replying Affidavit sworn on 14th February 2023 by Ms. Judith Guserwa, his Advocate on record.
11. Ms. Guserwa deposes that she is aware that this matter had been slated for Taxation of the Claimant's Party & Party Bill of Costs dated 19th January 2024 on 6th of February, 2024 before Hon. Mbeja, the Deputy Registrar.
12. The Applicant's Counsel on record had been duly served with the Party and Party Bill of Costs on 29th January 2024 and both Counsel for the Claimant and the Applicant were aware of the date of the Taxation that had been issued by the Court as being 6th February, 2024 at 9.00 a.m.
13. The matter was called out more than once by the Honourable Deputy Registrar but the Applicant failed to address the Court nor appear on the platform without any justifiable reason. She further deposes that the matter did not appear on the addendum cause list as suggested by the Applicant but on the main cause list.
14. That the Honourable Court allowed the Claimant's Bill of Costs dated 19th January 2024 "as drawn" since the Applicant did not address the Court when the matter had been called out neither had they filed any objection to the Bill nor submissions in respect thereto following the service of the Party & Party Bill of Costs.
15. According to Ms. Guserwa, the Honourable Court exercised its discretion by allowing the Claimant's Party & Party Bill of Costs as taxed and drawn hence there was no irregularity with regards to the said taxation.



16. Ms. Guserwa has further termed the Application an afterthought, made in bad faith and intended to waste the Court's time and delay the payment of costs.
17. In her view, the Applicant's purported view of the taxation as set out in the Supporting Affidavit is belated and of no consequence and should be declined.

Submissions

18. The Application was canvassed by way of written submissions. Both parties complied and I have considered their respective submissions.

Analysis and Determination

19. I have considered the prayers sought in the Application before me, the grounds in support thereof, the Response thereto as well as the rival submissions and the singular issue that stands out for determination is whether the Court should set aside and vacate the order made on 6th February 2024 allowing the Claimant's Bill of Costs as drawn.
20. The record bears that the Claimant's Bill of Costs dated 19th January 2024, was allowed by the Taxing Master as drawn. This was in the absence of the Applicant's Counsel. In support of the Application, the Applicant's Counsel has stated that he joined the court session about 20 minutes late owing to a misunderstanding arising from the addendum cause list. The Applicant's counsel further avers that had he been given audience, the Taxing Master would not have arrived at the decision he did.
21. It is the Applicant's further contention that the Claimant's Bill of costs is manifestly excessive and not drawn to scale.
22. In view of the foregoing, the question that begs is whether this Court is the proper forum to hear the Application.
23. It is settled law that any grievance emanating from a Ruling on Taxation can only be ventilated through paragraph 11 of the Advocates Remuneration Order.
24. This position was reaffirmed by Ringera J (as he then was) in *Machira & Co. Advocates v Magugu* [2002]2 E.A as follows:

“As I understand the practice relating to Taxation of Bills of Costs, any complaint about any decision of the Taxing officer whether it relates to a point of law taken with regard to Taxation or to a grievance about the Taxation of any item in the Bill of Costs is ventilated by way of a Reference to a Judge in accordance with paragraph 11 of the Advocates Remuneration Order.”
25. The aforementioned Paragraph 11 sets out the procedure to be followed by an aggrieved party in challenging taxation or assessment of costs. It provides thus:
 - (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.
26. As stated herein, the Applicant has brought the instant Application under Article 159 of *the Constitution* of Kenya, 2010, Sections 1A, 1B, 3A and 63 (c) & (e) of the *Civil Procedure Act*, Order 40 Rule 11 and Order 51 Rule 1 of the Civil Procedure Rules, 2010.
27. It is thus evident that the Application herein is not a Reference or Objection to the Taxation within the meaning of paragraph 11 aforementioned. In my respectful view, it is more of a Review application.
28. In terms of paragraph 11 aforementioned, in the event the Applicant was aggrieved by the decision of the Taxing Master, it ought to have filed a reference to this Court to challenge the Taxation as opposed to filing an Application under Order 40 and Order 10 of the *Civil Procedure Rules*.
29. Needless to say, the Applicant herein has not followed the laid down procedure for objection to a decision on Taxation as is clearly set out under paragraph 11 of the Advocates Remuneration Order. As such, the Court cannot exercise its discretion in favour of the Applicant to revisit the Taxation and set it aside.
30. To this end, I cannot help but strike out the Applicant's Notice of Motion Application dated 6th February 2024.
31. There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MAY 2024.

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STELLA RUTTO

JUDGE

In the presence of:

Mr. Aloo instructed by Mr. Maruti for the Applicant/Respondent

Mr. Museve instructed by Ms. Guserwa for the Claimant/Respondent

Millicent Kibet Court Assistant

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 had 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.

STELLA RUTTO

JUDGE

