

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**  
**COURT AT KISUMU**

**CAUSE NO. E016 OF 2013**

*(Before Hon. Justice Dr. Jacob Gakeri)*

**JOHN OSEWE OGOLA & 46 OTHERS..**  
.....**CLAIMANTS**

**VERSUS**

**RAGHBIR SINGH SANDHU T/A**  
**HOTEL**  
**ROYALE.....**

**RESPONDENT**

**AND**

**BANK OF BARODA (K) LTD.....**  
**GARNISHEE**

**RULING**

Before the court for determination is the applicant's Notice of Motion dated 10<sup>th</sup> May, 2024 filed under Certificate of Urgency seeking Orders that:

1. Spent.
2. The court be pleased to grant leave to the claimant herein to lodge and file a Further Bill of Costs.
3. Upon grant of prayer 2, the Deputy Registrar be allowed to tax the Further Bill of Costs.

4. The court be pleased to allow the applicant to charge interest on the Taxed Bill of Costs.

5. The costs of the application be provided for.

The Notice of Motion is expressed under Sections 1A, 1B and 3A, 26, 27, 63 and 64 of the Civil Procedure Act, Rule 11(2) and 13 of the Advocates Remuneration Rules, and Order 51 Rule 1 and 15 of the Civil Procedure Rules, 2010 and is based on the grounds set forth on its face and the Supporting Affidavit of William Odongo Matero who deposes that the Bill was taxed by the Deputy Registrar on 27<sup>th</sup> March, 2019 and a Ruling of even date delivered and being dissatisfied with the said ruling the applicant filed a reference before the court and pursuant to the court's directions, the Bill of Costs was taxed by Hon. M. I. Shimenga and being dissatisfied with the Ruling of Honourable Shimenga filed a further reference before the learned Judge who dismissed the reference and dissatisfied with the Ruling, filed an appeal before the Court of Appeal.

The affiant deposes that the claimant filed a Further Bill of Costs dated 23<sup>rd</sup> January, 2023 and by a Ruling delivered on 26<sup>th</sup> September, 2023 the Deputy Registrar cited lack of jurisdiction to tax the Bill of Costs because the court had not allowed the filing of the Bill of Costs.

The affiant further deposed that after the Bill of Costs dated 26<sup>th</sup> June, 2016 was taxed, it became necessary to file more applications and appear in court several times due to the respondent's conduct of piecemeal payments. That the Judgment debtor was supposed to pay a court fee of Kshs.70,000.00 and the Bill of Costs pending before the Court of Appeal was different.

The applicant's case is that the applicant be allowed to file a Further Bill of Costs to cover the new expenses incurred in trying to recover the money since 2016.

### **Response**

By a Replying Affidavit sworn by Balbir Singh Sandhu on 28<sup>th</sup> May, 2024, the affiant deposed that application herein was an abuse of the court process as the court had made Rulings on similar applications by the claimant and the matter was *res judicata*.

That the ruling on 27<sup>th</sup> March, 2019 was set aside with costs to the respondent and the 2<sup>nd</sup> Ruling on 9<sup>th</sup> September, 2021 was before Hon. Shimenga and the reference was dismissed on 21<sup>st</sup> January, 2022 and the

Further Bill of Costs was dismissed by the Deputy Registrar for want of jurisdiction.

That on 11<sup>th</sup> April, 2024, the court ruled that the issue of costs was before the Court of Appeal and declined to make another ruling and could not find any record of the costs sought by the applicant as all applications were dismissed with costs to the respondent.

### **Applicant's submissions**

As to whether leave ought to be granted for the applicant to file a Further Bill of Costs reliance was placed on the sentiments of the court in **Arthur V Nyeri Electricity Undertaking [1961] EA 492** and **Premchand Raichand Ltd & another V Quarry Services of East Africa Ltd & another [1972] EA 162**, on how taxation was effected by taxing officers.

Counsel submitted that although the Bill of Costs was taxed in 2016, the respondent had refused to pay necessitating several applications to recover the same.

That taxation of Further Bill of Costs was provided for under NOTE 1 of Schedule 7 to the Advocates Remuneration Order.

Concerning applications for reference, reliance was made on the sentiments of the Court in **First American Bank of Kenya V Shah & Others [2002] E. A. L. R 64** at 69 on the threshold to be met by the applicant for the court to interfere with the decision of the taxing officer.

Reliance was further placed on the comments of the court in **Otieno Ragot & Co. Advocates V National Bank of Kenya Ltd [2020] eKLR**, to urge that in a reference, the Judge deals with the record placed before the taxing officer exclusively, to contend that the claimant incurred further costs not covered by the earlier Bill of Costs and will suffer if the Further Bill of Costs was not allowed.

Counsel submitted that Section 12 of the Advocates Remuneration Order recognised instances in which the taxing officer may seek the opinion of the High Court on matters parties may not agree on.

Finally, reliance was placed on the sentiments of the court in **Kanu National Elections Board & 2 Others V Salah Yakub Fana [2018] eKLR**, to urge that the taxing master had discretion to determine what costs were necessary and properly incurred.

## **Respondent's submissions**

As to whether leave can issue to the applicant to file a Further Bill of Costs, counsel submitted that since Bill of Costs was an award of costs by the court and costs were discretionary under Section 12(4) of the Employment and Labour Relations Court Act, the applicants argument that they incurred further costs not covered by the original Bill of Costs on account of having filed other applications yet no costs were awarded by the court and the respondent was awarded costs in two instances and the reference was dismissed with costs.

Reliance was placed on **Schenker (EA) Ltd V Kenya Shipping, Clearing and Warehousing Workers Union and another [2017] eKLR**, where the court cited **Party of Independent Candidate of Kenya V Mutula Kilonzo & 2 Others** which cited **Leuben Products V Alexander Films (SA) (PTY) Ltd [1957] (4) SA 225 SR 91227** on the discretionary nature of costs under Rule 28(1)(c) of the Employment and Labour Relations Court (Procedure) Rules 2016 and Rule 29(1).

Counsel submitted that in the post judgment applications, the court exercised its discretion and no costs were granted to the applicant and the question was whether a

litigant could seek a blanket award of costs where no costs were decreed.

Counsel further submitted that the applicant was by the instant application seeking costs from the court through the backdoor to the detriment of the respondents and ought not be permitted.

Counsel invited the court to peruse the directions issued by the court in the post judgment applications by the applicant and where costs were awarded, the court was clear on the matter.

That the Further Bill of Costs attached was filed away after the Deputy Registrar issued a ruling on another Bill of Costs by the applicants, thus they were litigating by instalments which ought to be discouraged as there was an end to litigation.

Counsel submitted that since no costs were awarded to the applicant in the applications filed post judgment in this case, the instant application was an abuse of the process of the court and burdensome to the respondent and the court was *funtus officio* the issue of costs and the application ought to be dismissed with costs.

## **Analysis**

This case has had a long and chequered history having been in the court system since October 2012 and this Ruling may not be the end of it.

From the records, it is difficult to locate when judgment in this case was delivered. Many applications were filed and determined thereafter and not all of them were typed, thus, making it difficult to discern from the mass of handwritten notes.

In a Ruling delivered by Honourable Beryl M. A. Omollo on 17<sup>th</sup> July, 2019, the Magistrate directed that parties bear their own costs.

Similarly, in a Ruling delivered by the court on 9<sup>th</sup> March, 2023, no costs were awarded as was the Ruling on 27<sup>th</sup> November, 2020 where the court directed that the Party and Party Bill of Costs be re-taxed a fresh.

By a Ruling dated 9<sup>th</sup> September, 2021 Hon. M. Shimenga taxed the Bill of Costs dated 2<sup>nd</sup> June, 2016 at Kshs.496,453.00 and in a Ruling delivered by the court on 9<sup>th</sup> March, 2023, no costs were awarded.

Similarly, by a Ruling on the Decree-Holder's, Further Party and Party Bill of Costs dated 23<sup>rd</sup> January, 2023, the Deputy Registrar struck out the Bill of Costs with no Orders as to costs for want jurisdiction, on 26<sup>th</sup> September, 2023 which precipitated a Notice of Motion dated 9<sup>th</sup> October, 2023 under Certificate of Urgency to stay further proceedings and set aside the taxing masters ruling dated 23<sup>rd</sup> September, 2023.

The court dismissed the application with costs to the respondent on 11<sup>th</sup> April, 2024, which gave way to another application dated 10<sup>th</sup> May, 2024 before this court.

The foregoing sketchy background of the case was intended to highlight the history of the case and in particular the Bill of Costs, with a view to contextualize the instant Notice of Motion.

After the applicant's Further Party and Party Bill of Costs dated 23<sup>rd</sup> January, 2023 was struck out by the Deputy Registrar for want of jurisdiction, the applicant sought Orders to set aside the decision of the Deputy Registrar dated 26<sup>th</sup> September, 2023, Order re-taxation of the Bill

of Costs dated 23<sup>rd</sup> January, 2023, or remit the Bill of Costs to another Taxing Officer for re-taxation.

Instructively, the applicant asserted that the Bill of Costs pending before the Court of Appeal was different but did not disclose any information relating to the Bill of Costs. The court expressed its reluctance to contradict a superior court. The Bill of Cost is still pending before the Court of Appeal to date.

In its Ruling delivered on 11<sup>th</sup> April, 2024, the learned Judge expressed herself as follows:

*“Further and most importantly, the record does not show an award of costs to the applicant to support the Bill of Costs subject of this reference. It is trite law that taxation flows from an Order of the court. In whole I find the Applicant’s application dated 9<sup>th</sup> October, 2023 devoid of merit and a gross abuse of the court process. It is dismissed with costs to the respondent. It is so ordered.”*

This Ruling precipitated the instant application whose objective and purpose is to overturn the decision of this court delivered on 11<sup>th</sup> April, 2024.

It is in essence seeking reinstatement of the Further Party and Party Bill of Costs dated 23<sup>rd</sup> January, 2023.

Somewhat, the applicant has succeeded in keeping two files on the same matter and parties active in this court and the Court of Appeal.

The argument that the two Bill of Costs are different does not in the court's view ameliorate the harm likely to be occasioned if conflicting orders were issued. Both matters relate to Bill of Costs and the matter before the Court of Appeal ought to be given preference as the directions in that matter could impact on this matter.

The pith and substance of the applicants' case is that they filed other applications post judgment in an endeavour to have the respondent pay up the decretal sum and other monies owed, which according to them was necessary.

Strangely, the applicants did not identify the applications in which the court awarded costs to them.

The court addressed this issue in its Ruling delivered on 11<sup>th</sup> April, 2024 and as the court underscored "Taxation

flows from an Order of the court”. An important addition would have been that costs are discretionary as correctly submitted by the respondent’s counsel.

Section 12(4) of the Employment and Labour Relations Court Act, provides:

**In proceedings under this Act, the court may, subject to the rules, make such orders as to costs as the court considers just.**

Rule 70(1) of the Employment and Labour Relations Court (Procedure) Rules, 2024 provides that:

**The court shall be guided by Section 12(4) of the Act and Advocates (Remuneration) Order (Sub.leg) in awarding costs.**

The long-standing principle that costs are discretionary has been recognised and applied by courts consistently, the principle that of costs follow the event notwithstanding.

In **Jasbir Singh Rai & 3 Others V Tarlochan Singh Rai Estate of & 4 others [2012] KESC 31 (KLR)**, the Supreme Court of Kenya held:

*“It emerges that the award of costs would normally be guided by the principle that “costs follows the event” the effect being that the party who calls forth the event by instituting the suit will bear the costs if the suit falls; but if the party shows legitimate occasion, by successful suit then the defendant or respondent will bear the costs.*

*However, the vital factor in setting the preference is the judiciously exercised discretion of the court, accommodating the special circumstances of the case, being guided by the ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior to, during, and subsequent to the actual process of litigation.”*

**See also John Florence Martitime Services Ltd & another V Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR), John Harun Mwau & 3 others V Attorney General & 2 Others [2012] eKLR, Sonko V Clerk County Assembly of Nairobi City & 12 Others [2022] KESC 17 (KLR), Kidero & 4 Others V Waititu & 4 Others [2014] KESC 4 (KLR), Kenya Revenue Authority V Export Trading Company Ltd [2022] KESC 31 (KLR).**

These decisions emphasize and underscore the fact that award of cost is a judiciously exercised mandate by invocation of discretion of the court depending on the circumstances of each case.

Since the applicants' have not cited any instance in which the court awarded them costs in the numerous applications they allege to have filed, allowing the instant application would be tantamount to making an award of costs to justify the Further Party and Party Bill costs.

Whereas nothing prevents an advocate from filing Further or Supplementary Bill of Costs as and when circumstances render it necessary, an application to the court to grant an advocate leave to file a Further Bill of Costs ought to be supported by demonstrable justifications of the costs.

Regrettably, in the instant Notice of Motion, the court is being invited to revive an undertaking which the Deputy Registrar struck out for want of jurisdiction and the Employment and Labour Relations Court subsequently declined to set aside the striking out of the Further Bill of Costs.

Finally, and as adverted to elsewhere in this Ruling, having failed to evidentially demonstrate that the instant Bill of Costs and the Bill of Costs before the Court of Appeal were different and having further failed to demonstrate that the court awarded costs on any of the several applications the applicants instituted, the court is satisfied that the applicants have failed to make a sustainable case for the grant of the Orders sought.

Consequently, the applicants' Notice of Motion dated 10<sup>th</sup> May, 2024 is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT  
KISUMU ON THIS 27<sup>TH</sup> DAY OF OCTOBER 2025.**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**