



REPUBLIC OF KENYA



KENYA LAW
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Kenya Electricity Transmission Company Limited v Ongadi (Civil Appeal (Application) 284 of 2017) [2024] KECA 777 (KLR) (5 July 2024) (Ruling)

Neutral citation: [2024] KECA 777 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 284 OF 2017**

K M'INOTI, JA

JULY 5, 2024

BETWEEN

KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED ... APPELLANT

AND

AGNES ONGADI RESPONDENT

(Reference on Taxation from the ruling of the Registrar of the Court of Appeal (Hon. Ogombe) as a taxing officer, dated 5th April 2023 in Civil Appeal No. 248 of 2016)

RULING

1. This is a reference from the ruling of the Deputy Registrar of the Court of Appeal (Hon. Ogombe) in her capacity as a taxing officer, dated 5th April 2023. By that ruling, the taxing officer declined to tax a bill of costs by the respondent, Agnes Ongadi on the basis that this Court had not awarded her costs.
2. The brief background and context to the reference is as follows.

At all material times the respondent was employed by the appellant, Kenya Electricity Transmission Co. Ltd. as a chief manager, human capital and administration, on permanent and pensionable terms. On 25th April 2016 her employer asked her to show cause why she should not be disciplined for insubordination and gross misconduct. After responding, she was suspended on 28th April 2016 with immediate effect.
3. Subsequently the respondent appeared before a committee for disciplinary hearing. Before completion of the disciplinary process, on 14th July 2016 the appellant informed the respondent that her office had been declared redundant and purported to appoint her as acting senior manager, human resources and administration, with effect from 1st July 2016, pending competitive recruitment.
4. The respondent was aggrieved and moved to the Employment and Labour Relations Court (ELRC) where she obtained from Mbaru, J. ex parte orders prohibiting the appellant from proceeding with the



disciplinary proceedings or filling the respondent's position pending the hearing and determination of her interlocutory application. The court also lifted the respondent's suspension and reinstated her to her former office.

5. The appellant was aggrieved and lodge an interlocutory appeal to this Court contending, among other things that the court had erred by granting final orders at an interlocutory stage, by acting in excess of jurisdiction and by granting reliefs that the respondent had not applied for.
6. By a judgment dated 9th February 2018, this Court allowed the appeal after finding that the ELRC had erroneously, without evidence and the benefit of cross-examination, determined the entire claim and its merits at an interlocutory stage, when it was merely required to determine whether there was a prima facie case. The Court further found that the ELRC had erred by awarding remedies that the respondent had not sought.
7. Accordingly, the Court remitted the matter back to the ELRC for the main claim to be heard by a judge other than Mbaru, J.
8. As regards costs of the interlocutory appeal, the Court made the following order:

“The just order would be to protect the respondent's office pending the resolution of the dispute. The appeal is allowed because of the error committed by the court. Thus, it is just that costs of the appeal should abide the determination of the dispute...

Costs of the appeal shall be costs in the main suit.”
9. Back in the ELRC, the respondents claim was heard by Radido, J., who, by a judgment dated 15th February 2019, held that although the respondent's summary dismissal was valid, it was not fair. Accordingly, he awarded the respondent compensation equivalent to seven months' gross salary and costs of the claim. There can be no doubt therefore, that the suit in the ELRC was ultimately determined in the respondent's favour.
10. On 12th April 2023, the respondent filed in this Court her party and party bill of costs for the interlocutory appeal, claiming a total of Kshs. 1,453,415.00. The appellant raised a preliminary objection to the bill of costs, contending that the respondent was awarded only costs of the main dispute in the ELRC and not costs of the appeal.
11. After hearing the matter, the taxing officer, in a ruling dated 5th April 2024, upheld the preliminary objection. The taxing officer held that the Court did not award separate costs in the appeal and that the costs of the appeal were to be in the main suit before the ELRC. In her view, such costs cannot be taxed separately and ought to be taxed by the taxing officer in the ELRC. Accordingly, the Registrar dismissed the Bill of Costs.
12. By a letter dated 12th April 2024, the respondent made the present reference under rule 117(4) of the Court of Appeal Rules. I suspect, *ex abundanti cautela*, on the same day the respondent also filed a motion on notice under the same rule praying that the decision of the taxing officer be referred to a single judge, be set aside, and that the bill of costs be taxed by a different taxing officer. In the alternative the respondent sought clarification of the judgment of the Court dated 9th February 2018 as regards costs.
13. In her written submission dated 15th May 2024, the respondent submitted that in light of the Court's order that costs of the appeal shall be costs in the main suit, the taxing officer made an error of principle and law when she held that the Court had not awarded costs. It was contended that the Court expressly



awarded costs to the party who would prevail in the ELRC and since it was the respondent who ultimately prevailed, she was entitled to the costs of the interlocutory appeal.

14. The respondent further submitted that the Court's order on costs must be read holistically with the rest of the judgment for it to make sense. Relying on the opinion of the Supreme Court in Kenya National Commission on Human Rights, Advisory Opinion No. 1 of 2012 [2014] eKLR, the respondent submitted that, like the *Constitution*, the order on costs must be read in context together with rest of the judgment so as to achieve a rational explication. The respondent contended that the taxing officer had failed to read the order in context and therefore ended up committing an error of law and principle.
15. The appellant's advocates, Messrs. Lutta & Company Advocates, though duly served with a hearing notice on 13th May 2024 and directions to file their written submissions, they did not comply.
16. I have considered the application. I will start with the procedure that the respondent used to approach the Court. In addition to an application for reference vide a letter dated 12th April 2024, the respondent also applied for reference vide a motion on notice of even date.
17. A party wishing to make a reference on taxation under rule 117 of the rules of this Court does not have to move the Court by way of a notice of motion. The relevant provisions of rule rule 117 provide as follows:
 - “(1) A person who is dissatisfied with a decision of the Registrar in his or her capacity as taxing officer may require any matter of law or principle to be referred to a judge for the judge's decision and the judge shall determine the matter as the justice of the case may require.
 - (2) ...
 - (3) ...
 - (4) An application for a reference may be made to the Registrar informally at the time of taxation or in writing within seven days thereafter.”
18. This is the same procedure that applies in a reference to the full court from a decision of a single judge under rule 57 of the rules of the Court. At the heart of this procure is informality. The application for reference is made either orally before the single judge or registrar as the case may be, or in writing, in both cases, within seven days from the date of the impugned decision. This informal procedure is intended to ensure that in a reference no new evidence, other than what was before the single judge or taxing officer, is introduced. In a reference on taxation, this is critical in so far as the reference is restricted only to matters of law or principle.
19. I will accordingly ignore the respondent's notice of motion and consider the reference made by the letter dated 12th April 2024. I take note that the reference was made within the period prescribed by rule 117(4). It is also noteworthy that the prayer in the motion for “clarification” of the judgment, if at all there is such jurisdiction outside the slip rule, is the province of the full Court, not of a single judge.
20. There is no dispute that in the interlocutory appeal, it was the appellant who prevailed once the Court allowed the appeal and set aside the ruling of Mbaru, J. In its judgment dated 9th February 2018, this Court did not award costs of the interlocutory appeal either to the appellant or the respondent. The reason for this is because the Court opted to remit the matter back to the ELRC for the hearing and determination of the respondent's substantive claim. Rather than award costs of the interlocutory appeal separately, the Court expressly stated that “it is just that costs of the (interlocutory) appeal should abide the determination of the dispute.” For that reason, the Court made the order that “costs



of the appeal shall be costs in the main suit.” Having decided to so proceed, the Court could not award costs to either of the parties because, as of that date, it did not know which of the parties would prevail in the main claim, which was yet to be heard by the ELRC.

21. I agree with the respondent that the effect of the Court’s order that “costs of the appeal shall be costs in the main suit” was to award the costs of the interlocutory appeal to the party that would ultimately prevail in the ELRC after the determination of the respondent’s substantive claim. There is absolutely no dispute that after the ELRC heard the substantive dispute, it found in favour of the respondent and even awarded her costs of the claim in the ELRC.
22. Accordingly, I am satisfied that the taxing officer made an error of law and principle when she held that the Court did not awarded costs in the interlocutory appeal. A proper reading of the judgment shows that the Court did award costs of the interlocutory appeal, but to the party who would ultimately prevail in the ELRC, and that party is the respondent. I accordingly allow the reference on taxation and set aside the ruling on taxation by the taxing officer dated 5th April 2023. The respondent’s bill of costs dated 12th April 2023 shall be taxed by a taxing officer other than Hon. Ogombe. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF JULY, 2024.

K. M’INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

