



**Kenya County Government Workers Union (Formerly Kenya Local Government Workers Union) v Mbuvi t/a Katunga Mbuvi & Co Advocates (Miscellaneous Application E244 of 2021) [2024] KEELRC 24 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELRC 24 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
MISCELLANEOUS APPLICATION E244 OF 2021**

**L NDOLO, J**

**JANUARY 25, 2024**

**IN THE MATTER OF ADVOCATE CLIENT BILL OF COSTS ARISING OUT OF  
LEGAL SERVICES IN COLLECTIVE AGREEMENT C.A NO. 19 OF 2013-NAIROBI**

**BETWEEN**

**KENYA COUNTY GOVERNMENT WORKERS UNION (FORMERLY KENYA  
LOCAL GOVERNMENT WORKERS UNION) ..... CLIENT**

**AND**

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

**RULING**

1. Pursuant to a ruling on taxation delivered by Hon. Fredrick M. Nyamora on 28<sup>th</sup> August 2023, both the Client and Advocate filed reference applications. By its Chamber Summons dated 18<sup>th</sup> August 2023, the Client asks the Court to set aside the ruling by the Taxing Master.
2. The Advocate filed his own Chamber Summons dated 20<sup>th</sup> November 2023 also seeking to set aside the ruling by the Taxing Master.
3. Subsequently, the Client filed a Notice of Preliminary Objection dated 29<sup>th</sup> November 2023 asking that the Advocate’s application dated 20<sup>th</sup> November 2023 be dismissed and/or struck out on the following grounds:
  - a. That the application is statutorily time barred and offends the provisions of Rule 11(2) of the Advocates Remuneration Order as it has been filed three (3) months after the Taxing Officer’s decision;



- b. That the application is misconceived and bad in law as it has been filed out of time, without a corresponding or prior application for leave to enlarge time as required under Rule 11(4) of the Advocates Remuneration Order;
  - c. That the application is therefore untenable, frivolous, vexatious and constitutes an abuse of the court process.
4. Although the Court gave directions to the effect that the Preliminary Objection raised by the Client would be dispensed with first, the Advocate went ahead to submit both on the Preliminary Objection and the merits of its reference, whose competence the Client questions.

In the circumstances, I will in this ruling, only consider the portion of the submissions that relate to the Preliminary Objection.

5. In its submissions in support of the Preliminary Objection, the Client cited the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696* where the Court of Appeal stated as follows:

“A Preliminary Objection consists of a pure 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.”

6. The Client’s case is that the Advocate’s reference is incompetent on account of limitation of time. In this regard, the Client relies on Rule 11(1) and (2) of the Advocates Remuneration Order which provides as follows:

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 or 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.

7. The Client faults the Advocate for failing to seek leave for enlargement of time as provided under Rule 11(4) of the Advocates Remuneration Order.

8. On his part, the Advocate asks the Court not to succumb to the procedural strictures set by Rule 11 of the Advocates Remuneration Order but rather, proceed to render substantive justice. He relies on the decision in *Nicholas Kiptoo Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR* where the Court of Appeal stated the following:

“The power to strike out pleadings, and in the process deprive a party of the opportunity to present his case has been held over the years to be a draconian measure which ought to be employed only as a last resort and even then only in the clearest of cases. Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting heavy punishment of the offending party, who may in many cases be innocent since the rules of



procedure are complex and technical. Instead, in such instances, the Court should rise to the highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.”

9. I am aware that the procedural flexibility offered by Article 159(2) of *the Constitution* is not to be used as a magic potion for every procedural misstep. I think however, where such a misstep does not amount to an abuse of the court process and will not occasion injustice to the opposite party, the Court ought to cast its eyes on the end goal of substantive justice.
10. In this case, the Client who objects to the Advocate’s reference has itself filed its own reference. In fact, the Advocate’s reference is aptly referred to as a cross reference. If the matter is referred for re-taxation as the Client desires, the entire Bill of Costs will be re-opened for scrutiny. In such a case, there can be no injustice to any of the parties.
11. For the foregoing reasons, I will overrule the Preliminary Objection raised by the Client with no order for costs.
12. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 25<sup>TH</sup> DAY OF JANUARY 2024**

**LINNET NDOLO**

**JUDGE**

