



REPUBLIC OF KENYA



**KENYA LAW**  
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**Council - University of Embu v Kudheih Workers (Miscellaneous Application E002 of 2023) [2024] KEELRC 201 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 201 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU**  
**MISCELLANEOUS APPLICATION E002 OF 2023**  
**ON MAKAU, J**  
**FEBRUARY 9, 2024**

**BETWEEN**

**COUNCIL - UNIVERSITY OF EMBU ..... CLAIMANT**

**AND**

**KUDHEIHA WORKERS ..... RESPONDENT**

**RULING**

1. This Ruling relates to the Respondent’s Notice of Motion dated 4<sup>th</sup> August, 2023. It is brought under sections 3 and 12 of the *Employment and Labour Relations Court (ELRC) Act*, Article 22 and 159(2) of *the Constitution*, and all other enabling provisions of the Law. It seeks the following orders, That:
  - a. This Honourable Court be pleased to set aside the ruling delivered on 19<sup>th</sup> April 2023.
  - b. This Honourable Court be pleased to grant unconditional leave to the applicant to defend the Bill of Costs dated 16<sup>th</sup> February 2023, by filing her response to the same.
  - c. Costs be in the cause.
2. The application is supported by the affidavit sworn by one Albert Njeru Obed, the Secretary General of the applicant union in which he deposed that the Bill of Cost was never served upon the Respondent’s Authorized Officer and hence there was no proper service upon the Respondent. He deposed that the bill of costs was served upon one James Nderitu Kamunge, who was not authorized, and he locked the documents then went on sick leave. Hence the Respondent only became aware of the same upon service of Notice of taxation and intended execution on 31<sup>st</sup> July 2023.
3. He further deposed that paragraphs 1 and 2 of the bill of costs were exaggerated and beyond the fees provided for in the Remuneration Order and hence should be set aside. He contended that if the impugned ruling is not set aside, then the Respondent will have been condemned unheard. *Vide* his further affidavit sworn on 19<sup>th</sup> October 2023, he sought to clarify that, provision of paragraph 11 of



- the *Advocate's Remuneration Order* does not apply to this application since the Bill was never served on an authorized officer.
4. The Applicant opposed the Application *vide* Replying Affidavit sworn by its Legal Officer one Anne Wambere Ndegwa, on 22<sup>nd</sup> September 2023. In brief, she deposed that service of the Bill of Costs was served upon the applicant union on 28<sup>th</sup> February, 2023 and duly acknowledged by stamping; that the service was proper and *bona fide*, since it was done in the same manner as pleadings in the main suit; and that the issue on whether or not the person who received locked it in his desk is purely an internal issue for the union to deal with.
  5. Ms. Ndegwa further deposed that the Court cannot interfere with the Taxing Officer's decision unless the same was based on an error of principle, or the fee was manifestly excessive. In her view, the said threshold has not been demonstrated herein since the applicant never opposed the bill of costs.
  6. She also deposed that the Court has no power to grant the orders sought and advised that the only recourse for the applicant was to file an objection under Rule 11 of the *Advocates Remuneration Order*. In her view the applicant squandered that opportunity when he failed to file an objection within 14 days of delivery of impugned ruling. Therefore, she prayed that the Application be dismissed with costs.
  7. The Application was canvassed by way of written submissions.

### Submissions

8. It was submitted for the applicant that being a body corporate, service on the union was to be effected upon it through an authorized officer. Reliance was placed on the case of *Agigreen Consulting Corp Limited v National Irrigation Board* [2020] eKLR.
9. As regards the issue of procedure, it was submitted that the application does not fall with provision of Rule 11 of the *Advocates Remuneration Order* because it is for leave to file a response to the bill of costs and not to contest the taxing master's ruling. It was argued that there will be a miscarriage of justice if the leave sought is denied. For emphasis, reliance was placed on the cases of *Harrison Wanjohi Wambugu v Felista Wairimu Chege & another* [2013] eKLR and *Cecilia Wanja Waweru v Jackson Wainaina Muiruri & another* [2014] eKLR.
10. It was reiterated that the fees charged under paragraphs 1 and 2 of the Bill were exaggerated beyond what is in the order and therefore the ruling should be set aside and the union given leave to defend.
11. On the other hand, it was submitted for the respondent that the ruling delivered on 19<sup>th</sup> April 2023 by Taxing Master and the subsequent Certificate of cost dated 24<sup>th</sup> July 2023 should not be set aside since the principles on setting aside decision of taxing matter are well established. The principles include an error of principle, the award being manifestly excessive, that the successful litigant ought to be fairly reimbursed for costs he has incurred, and that as far as practicable there be consistency in the award.
12. For emphasis reliance was placed on the case of *Premchand Rainchard Ltd & anor v Quarry Services of East Africa Ltd & another* [1972] EA 162, *Joreth v Kigano & Associates*, Nairobi CA No. 66 of [1999] 1 EA 92 and *First American Bank of Kenya v Shah and others* (2002) EA 64, where courts formulated the aforesaid principles.
13. It was submitted that there was no error of principle in the ruling of 19<sup>th</sup> April 2023 and the items in paragraph 1 and 2 were instruction fees for Kshs. 112,730/= and getting up fees for Kshs. 37,576.67 respectively were not exaggerated. To buttress the above submission, reliance was placed on the case of *Mwangangi and Company Advocates v Machakos County* [2020] eKLR where the court held that once costs have been taxed and a certificate of costs issued, the same is final as to the costs covered thereby.



14. It was further submitted that Order 11 of the Remuneration Order provided for a mandatory the procedure which is aimed at aiding administration of justice and not to cause injustice. It was argued that the applicant ought to have sought for enlargement of time to file a reference instead of filing the instant motion. It was therefore argued that the applicant had not exhausted all the available mechanisms before filing of the instant application. Consequently, the respondent maintained that the application lacks merits.

### **Issues for analysis and determination**

15. Having considered the Application, the Response and the parties' submissions, the issues that fall for determination:
- a. Whether the court has jurisdiction to determine the application.
  - b. Whether the application has merit.

### **Jurisdiction**

16. Section 51(2) of the *Advocates Act* grants the Court the power to set aside a certificate of taxing officer. The said section provides as follows:

“(2) The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”

17. The Respondent also argued that the issue in contention was not the taxing by the taxing master but denial of right to hearing caused by lack of proper service of the Bill of Costs. However, the above section of law does not provide that a decision of the taxing master can be impugned through procedure invoked by the applicant herein. Such procedure only applies with respect to judicial decisions, and before the court which made the decision.

18. However, when it comes to challenging of decisions of the Taxing Officer in a case like the one before me, the procedure availed to an aggrieved party is set out under Paragraph 11 of the *Advocates Remuneration Order* 1962 (the Order) which provides that:

- “(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."

19. In view of the above express provision of the law, I agree with the respondent that the applicant has not invoked the jurisdiction of this court properly. There is a clear procedure set out under Paragraph 11 of the *Advocates Remuneration Order* but the applicant has chosen to walk down the wrong lane. With much sympathy, I must pronounce that I have no jurisdiction to determine the application before the court. This court's jurisdiction over decisions of a taxing master is limited to an appeal by way of a reference under paragraph 11 aforesaid. I must down my tools.

20. In the case of the case *Owners of the Motor Vessel, Lilian S v Caltex Oil (Kenya) Ltd* [1989] KLR 1 the court of Appeal held that: -

"Jurisdiction is everything. Without it, a court of law has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

21. The applicant cited Article 159(2) of *the Constitution* to cure the procedural defects of its application. However, in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR, the Court of Appeal expressed itself as follows: -

"I am not in the least persuaded that Article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."

22. The above precedents are binding on me and they are portraits of good law. Consequently, and for the reasons highlighted above, I strike out the applicant's Notice of Motion dated 4<sup>th</sup> August 2023 with costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**ONESMUS N MAKAU**

**JUDGE**

**Order**



This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N MAKAU**

**JUDGE**

