



Mwaura & 11 others v Kenya Power & Lightinig Company (Employment and Labour Relations Cause 2575 of 2016) [2024] KEELRC 226 (KLR) (9 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 226 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2575 OF 2016**

**AN MWAURE, J
FEBRUARY 9, 2024**

BETWEEN

- RAPHAEL NJOROGE MWAURA 1ST CLAIMANT**
- SAMUEL MIGWI THEURI 2ND CLAIMANT**
- MARY WAENI WAMBUA 3RD CLAIMANT**
- ANNE ELIZABETH OWUOR 4TH CLAIMANT**
- CHARLES LWANGA OOKO 5TH CLAIMANT**
- CHARLES THINWA MATHENGE 6TH CLAIMANT**
- CLEOPHAS SIMIYU WEKESA 7TH CLAIMANT**
- FLORENCE K OBURA 8TH CLAIMANT**
- GODFREY KIGARIE GATHIGE 9TH CLAIMANT**
- JAMES NGUGI NJUGUNA 10TH CLAIMANT**
- NATHANIEL WAITHAKA WANYAGI 11TH CLAIMANT**
- SAMUEL NJOROGE NJOGU 12TH CLAIMANT**

AND

THE KENYA POWER & LIGHTINIG COMPANY RESPONDENT

RULING

1. The Respondent filed a Chamber Summons dated 30th March 2023 seeking orders that:
 1. The decision of the Taxing Officer of 14th March 2023 on the Claimant’s Bill of Costs dated 19th August 2022 with respect to item numbers



2,3,5,12,13,14,15,21,22,23,24,25,26,27,28,30,32,33,37,38,39,43,44,45,47,49,53,54 and 56 be set aside.

2. The court be pleased to assess item 1 on instruction fee at 2,229,484 and item 28 on getting up fees at Kshs 743,161.33.
3. the court be pleased to assess item numbers 3,5,12,13,14,15,21,22,23,24,25,26,27,30,32,33,37,38,39,43,44,45,47,49,53,54 and 56 with respect to the Claimant's Bill of Costs dated 19th August 2022 at the scale provided in the [Advocates \(Remuneration\)\(Amendment\) Order, 2014](#).
4. In the alternative to prayer numbers 2 and 3 above, the court be pleased to remit the Claimant's Bill of Costs dated 19th August 2022 back to a different Taxing Officer for re-taxation of item numbers 2,3,5,12,13,14,15,21,22,23,24,25,26,27,28,30,32,33,37,38,39,43,44,45,47,49,53,54 and 56
5. the costs of this application be provided for.

Respondent/ Applicant's Case

2. The Respondent/ Applicant avers that Schedule 6 of the [Advocates \(Remuneration\)\(Amendment\) Order, 2014](#) provides that the value of the subject matter can be determined from the judgment sum, the judgment sum was Kshs 135,298,934.11. therefore, the Taxing Officer erred in assessing the instruction fee at Kshs 9,000,000 and getting up fees of Kshs 3,000,000, hence unreasonable in the circumstances.
3. The Respondent/ Applicant avers that the instruction fee based on the value of Kshs 135,298,934.11 is Kshs 2,229,484 and would make the getting up fees at Kshs 743,161.33.
4. The Respondent/ Applicant avers that the Taxing Officer failed to give any reasons for the determination of item numbers 2,3,5,12,13,14,15,21,22,23,24,25,26,27,28,30,32,33,37,38,39,43,44,45,47,49,53,54 and 56 of the Claimant's Bill of Costs dated 19th August 2022 despite its objections in the submissions dated 5th December 2022.

Claimant's Case

5. In opposition to the application, the Claimant filed an affidavit dated 15th September 2023.
6. The Claimant avers that the Application is misconceived and intended to mislead the Honourable Court with regard to the taxation of the Party and Party Bill of Costs dated 19th August 2022.
7. The Claimant avers that the Taxing Master gave the justification in the manner she taxed all items on the Bill; and the sums taxed were indeed well founded as provided under the [Advocates Remuneration Order, 2014 \(ARO\)](#).
8. The Claimant avers that the Taxing Master gave a detailed ruling on the basis of allowing instruction fees of Kshs 9 million and getting up fees of Kshs 3 million where the judgment sum is Kshs 135,298,934.11.



Respondent/ Applicant's Submissions

9. The Respondent/Applicant submitted that in its submissions dated 5th December 2022, it highlighted that Schedule 6, Paragraph 1(b) of the ARO provides for basic instruction fees at Kshs 2,229,484 which the Taxing Officer at page 1 of her ruling also arrived to. However, in exercising her discretion, the Taxing Officer increased the same to Kshs 9,000,000 which is an astronomical increase that should not be allowed unless justified by special circumstances.
10. The Respondent/ Applicant submitted that in increasing the instruction fees, the Taxing Officer stated:

“Even when exercising jurisdiction to increase, the taxing master has to bear in mind the care and labour necessary, the length of papers perused, the nature and importance of the subject matter to parties and other circumstances that may be deemed fair and reasonable. Justice Ojwang argued that taxation of instruction fees should seek no more and no less than reasonable compensation for work done while avoiding any prospect of unjust enrichment.”
11. The Respondent/ Applicant submitted that the Taxing Officer did not set out the care and labour necessary, the length of papers perused, the nature and importance of the subject matter to parties and the fair and reasonable circumstances in the proceedings to justify the astronomical increase of the basic instruction fees.
12. The Respondent/ Applicant submitted that the responsibility entrusted on the Claimant's counsel was ordinary and no more than normal diligence of a professional; there was nothing novel as to justify the increase of the basic instruction fees.
13. The Respondent/ Applicant submitted that the increase of the basic instruction fees was excessive, unjustified and in so doing the Taxing Officer committed an error in principle.
14. The Respondent/ Applicant submitted that the assessment of the instruction and getting up fees should be set aside and reassessed at the scale fee provided in the ARO or the Claimant's Bill of Cost dated 19th August 2022 be remitted back to a different Taxing Officer for re taxation.

Claimant's Submissions

15. The Claimant submitted that the application is fatally defective for want of substance and want of procedure as the Respondent/ Applicant has not placed evidence before this court that they engaged the Taxing Officer within the 14-day period as required under Rule 11(1) of the ARO.
16. The Claimant submitted that their Party and Party Bill of Costs was contained in her ruling dated 14th March 2023 while this application is dated and filed on 30th March 2023 which indicates it was filed 15 days after the ruling. Hence the application was filed outside the statutory period of 14 days which was out of time without leave of the court and therefore fatally defective.
17. The Claimant submitted that the it is trite law that a reference application is lodged by filing a miscellaneous application before the court and in the instant matter, the Respondent has filed a reference application in the instant cause, therefore, the application is incompetent and by extension fatally defective.
18. The Claimant submitted that the Respondent having not filed a supporting affidavit and not specifically challenged the determination of item numbers 2, 3, 5,12, 13, 14, 15,



21,22,23,24,25,26,27,28,30,32,33,37,38,39,43,44,45,47,49,53,54 and 56, as a result, no sufficient grounds have been disclosed by the Respondent for interfering with the impugned decision.

19. The Claimant submitted that the Taxing Master in her ruling dated 14th March 2023 indicated she considered the parties' submission and proceeded to tax the Bill of Costs as per the scale provided under Schedule 6 of the ARO.

Analysis and Determination

20. The Claimant submitted that the application is incompetent and fatally defective as it is trite law that a reference application is lodged by filing a miscellaneous application before the court and in the instant matter, the Respondent has filed a reference application in the instant cause.

21. Further, that the application was filed out of time without leave of the court as it was filed 15 days after the ruling.

22. Rule 11 of the Advocates (Remuneration) Order 2014 Rev 2022 provides for the procedure of objection of the Taxing Officer's decision thus:-

“ a) 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.

b) 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.”

23. In *Muriu Mungai & Co. Advocates v New Kenya Co-Operative Creameries Ltd* Nairobi (Milimani) HCMC No 692 of 2007, Mwilu, J was of the view that:

“It is mandatory for an applicant who objects to a taxation to annex the ruling, giving reasons by the taxing master supporting the taxation. Nowhere is it provided that if there be a delay in the taxing master giving reasons for taxation then a party may file a reference. Instead, rule 11(4) gives the court power to enlarge time if the same lapses before a step needed to be done is done or taken...Under the rules the taxing officer is required forthwith, upon receipt of the notice of objection to give reasons for the decision and where they fail to do so, the thing to do is not to file a reference to the High Court. In the court's view, the applicant moved the court too soon. More reminders should have been sent to the taxing officer for reasons or any other legal action that would have resulted in the taxing officer giving reasons to be taken to have the reasons given. Nobody else can give those reasons but the taxing officer and it has not been shown that the taxing officer is not available. And more importantly the court cannot determine the matter in the absence of the taxing officer's reasons for her decision in taxing the bill of costs as she did”.

24. Further, in *Paul Gicheru T/A Gicheru & Co. Advocates v Kargua (K) Construction Co. Ltd* Eldoret HCMCA No 124 of 2007, where the court observed:

“In such a case, if the ruling is detailed and answers the inquiry, it is arguable that it would be superfluous for the taxing master to give any other reasons or repeat himself...But it is not correct to say that if the ruling of the taxing master is actually a ruling then there is no need



to request for such reasons. If this was correct interpretation, then there would be no need for the Rules Committee to set out an elaborate and long procedure as set out in the Rules. All an aggrieved person would have required to do is to give notice of objection within 14 days of the decision being made and thereafter file the application/reference within another 14 days. The words in Rule 11(2) are certain and clear that the taxing master must give the reasons for the decision within 14 days of the Notice of Objection being filed. He could thereafter do either of the following:

- a. if he is satisfied that the Ruling is so elaborate, detailed and sufficient to express clearly all the reasons for the decision on each item, then he could state that the reasons are in the ruling; or
- b. he could summarise specific reasons for decision on each item; or
- c. if the ruling/decision given earlier is not detailed enough to enable the objector lodge an effective and proper reference, then the taxing master would be obliged to give reasons for the decisions on each of the items complained.

26 It would appear that the requirement for the reasons to be given was to ensure that an objector fully knows the basis for the decision. Such a requirement appears reasonable since it is quite common and usual that the rulings or assessment of taxation are brief, precise and to the point. It is only where there is serious contentions and arguments that the taxing master would go into in-depth reasoning. In any event, the Court must apply the law as it is, as there is no room for any other interpretation or need to use any other method of interpretation than the “Golden Rule” to meet the ends of justice...In the instant case, after the notice, the taxing master was required to record and forward the reasons for the decision on items 1 and 2. No time is given for this and it is presumed that it must be done within a reasonable time. However, no sooner, the notice was filed than the applicant the next day filed the reference. This did not give any time to the taxing master to discharge her duty under Rule 11(2). The applicant acted prematurely and pre-empted the giving of the reasons by the Deputy Registrar as taxing officer/master...There are no reasons on record after the Notice of Objection. The application/reference herein is null and void ab initio. It is a nullity. This omission is incurable as the requirement for recording and forwarding of reasons is a mandatory one and the effect of this is that this Court truly in the circumstances has no jurisdiction to entertain the application. Jurisdiction being everything, without it a Court has no power to make one more step”.

25. In the instant case, the Taxing Officer delivered her ruling in respect to the Party and Party Bill of costs dated 19.08.2022 on 14th March 2023. The Respondent filed this reference application just 3 days after delivery of the ruling on 17th March 2023, clearly exhibiting that the Respondent did not bother to lodge a notice of objection as provided under Rule 11(1) of the ARO. The objector did a letter to the Deputy Registrar dated 15th March 2023 and inquired for reason for the decision. He did not patiently await the response. He should then have approached court for leave to file reference but rushed to court without directions from the taxing master as to the reasons for her decision.
26. Rule 11(2) clearly provides that upon receipt of the notice of objection, the taxing officer shall 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.

27. The Respondent/ Applicant did not receive from the Taxing Master the reasons for her decision on the items it has issues on. This also leaves the court exposed as it has no basis as to what reasons informed the taxing master.
28. Having established the reference application is fatally defective, the court cannot proceed to make any determination on the issues raised as the Respondent/ Applicant is in breach of Rule 11 (1) and (2) of the *Advocates Remuneration Order*.
29. The Application herein is found unmerited and is therefore struck off and it is prudent that each party meets their respective costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9TH DAY OF FEBRUARY 2024

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ANNA NGIBUINI MWAURE

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 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 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 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.

A signed copy will be availed to each party upon payment of Court fees.

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ANNA NGIBUINI MWAURE

JUDGE

