



**Ondieki v Falcon Signs Limited (Cause 156 of 2017)
[2024] KEELRC 783 (KLR) (16 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 783 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 156 OF 2017
JK GAKERI, J
APRIL 16, 2024**

BETWEEN

LEAKY ONDIEKI CLAIMANT

AND

FALCON SIGNS LIMITED RESPONDENT

RULING

1. Before the court for determination is the Respondent’s Notice of Motion 4th August, 2023 filed under Certificate of Urgency seeking orders that;
 1. Spent.
 2. Spent.
 3. Spent.
 4. Spent.
 5. Spent.
 6. Spent.
 7. The Honourable Court be pleased to grant the Respondent/Applicant to file their written submissions in opposition of the Party to Party Bill of Costs dated 25th November, 2022 and give directions for the inter partes hearing of the said Party to Party Bill of Costs.
 8. The Honourable Court be pleased to issue further or better orders as shall meet the ends of justice.
2. The Notice of Motion filed under Certificate of Urgency is expressed under Article 159(2) of *the Constitution* of Kenya, 2010, Sections 1A, 1B, 3, 3A, 63 of the *Civil Procedure Act* and Order 51 Rule



- 1 of the *Civil Procedure Rules* and is based on the grounds set out on its face and supported by the Affidavit of Heena Joshi sworn on 4th August, 2023.
3. The affiant deposes that after judgment was delivered on 22nd October, 2022, the cumulative award was Kshs.34,000/= which was paid by cheque on 25th November, 2022.
 4. The affiant deposes that she speculates that the Warrants of Attachment and Proclamation dated 3rd August, 2023 arose from the Party to Party Bill of Costs dated 25th November, 2022 which was heard and determined without considering the opposition by the application and was thus undefended.
 5. The affiant states that allowing the Certificate of Taxation dated 3rd August, 2023 is tantamount to driving the Respondent/Applicant from the seat of justice as the Party to Party Bill of Costs is too high, Kshs.445,901/= and unjustifiable.
 6. That the warrants of attachment and the proclamation have critical errors and/or mistakes and thus defective and unenforceable.
 7. That it is in the interest of justice that the orders sought be granted for the matter to be heard on merit.

Response

8. In his Replying Affidavit sworn on 5th September, 2023, the Claimant/Respondent deposes that while the Respondent/Applicant paid the sum of Kshs.34,000/= awarded by the court, costs of the suit were still pending and the Party and Party Bill of Costs and taxation notice were served on the applicant's counsel on 24th April, 2023 but did not appear and the Bill was taxed as drawn and a ruling delivered on 6th June, 2023 wherein the Taxing Master taxed the Party to Party Bill of Costs at Kshs.306,236/= and a Certificate of Taxation dated 3rd July, 2023 was served on the applicant on 13th July, 2023 together with a letter dated 11th July, 2023.
9. That the Claimant's counsel applied for warrants of attachment and sale which were issued to Betabase Auctioneers.
10. The affiant states that the court has discretion in the awarding of costs and the Taxing Master exercised his discretion judicially and the court ought not interfere with the ruling simply because it would have awarded a different figure as the applicant had the opportunity to contest the Bill of Costs but did not and did not comply with the procedure under Rule 11 of the Advocates Remuneration Order.
11. That the Party to Party Bill of Costs is Kshs.306,236/= as opposed to Kshs.445,901/=.

Applicant's submissions

12. Counsel submitted on whether the Bill of Costs dated 25th November, 2022 was properly taxed, stay of execution of the warrants of attachment and costs.
13. On taxation of the Bill, counsel submitted that the Taxing Master exercised her discretion judicially and cited the sentiments of the court in *First American Bank of Kenya V Shah & others* (2002) E.A.CA 64 as well as the decision in *Joreth Ltd V Kigano & Associates* (2002) 1 E.A 92 on the discretion of the Taxing Master to assess costs and urge that the applicant had not proved that the Taxing Master erred in making the award.
14. Counsel submitted that the application offends Order 11(1) and (2) of the Advocates Remuneration Order and is a delaying tactic as the prescribed procedure was not complied with.



15. Reliance was made on the decision in *Sound Entertainment Ltd V Antony Burugu & Co. Advocates* (2014) eKLR where the court refused to extend time to file an appeal from a certificate of taxation of costs.
16. That the applicant was served with the ruling but opted not to oppose it till execution commenced.
17. Counsel urged that the applicant has not objected to the Bill of Costs and requested for reasons and has not filed a reference before the court and the application before the court is for dismissal.
18. On stay of execution, counsel cited the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010 on the test applicable in the grant of a stay pending appeal and relies on the decision in *County Government of Tana River V Miller & Co. Advocates* (2012) eKLR on the test.
19. Counsel urged that since there is no reference before the court, there was no legal basis for setting aside or staying execution of the certificate of costs.

Respondent's submissions

20. On stay of execution of the Warrants of Attachment and Proclamation, counsel submitted that the applicant did not defend the Bill of Costs dated 22nd November, 2022.
21. Counsel submitted that in the circumstances, the applicant requires an equitable remedy as held in *Absalom Dova V Tarbo Transporters* (2013) eKLR cited with approval by Nyakundi J. in *Sunsand Dunes Ltd V Raiya Construction Ltd* (2021) eKLR as the applicant could lose the property attached and pleads to be heard in arriving at an equitable figure for the Bill of Costs.
22. Reliance was also made on the sentiments of the court in *Republic V Kenya Urban Roads Authority & 3 others Ex Parte Cytonn Investments Management Ltd* (2018) eKLR on types of stay to invite the court to stay the execution for the applicant to file its submissions to the Bill of Costs.
23. As regards the re-taxation of the Bill of Costs dated 22nd November, 2022, counsel submitted that sum of Kshs.223,568/= claimed as instruction fees was dependent on the parameters prescribed by the Remuneration Order as highlighted in *Grace Wangui Ngenye V Wilfred Kiboro & another* (2013) eKLR and other decisions, namely; nature and importance of the cause of matter, value of subject matter, interest of the parties, general conduct of the proceedings, complexity of the matter among others.
24. It was submitted that the Bill of Costs is competently opposed by submissions dated 30th January, 2024 filed on 2nd February, 2024.
25. That the sum of Kshs.445,901/= is extremely high and prays for a re-taxation of the Bill of Costs as no ruling has been shared by the Claimant/Respondent.
26. That Party and Party Costs are not intended to punish losing litigants but compensate successful litigants for the expenses incurred in the course of prosecuting or defending the matter.

Determination

27. After careful consideration of the Notice of Motion, Replying Affidavit and submissions by counsel, the only issue for determination is whether the applicant's Notice of Motion dated 4th August, 2023 is merited.
28. In order to contextualize the dispute, it is essential to highlight the history of this suit.



29. It is common ground that the instant suit was filed on 31st January, 2017, responded to on 1st March, 2017 but was not heard until 23rd June, 2022 and judgement was delivered on 26th October, 2022 and the Claimant was awarded a total of Kshs.34,000/= comprising salary in lieu of notice and one month's salary as compensation for the unfair termination of employment together with costs of the suit and interest.
30. It is not in contest that the Respondent paid the Kshs.34,000/= on 24th November, 2022 but costs of the suit remained outstanding.
31. Subsequently, counsel for the Claimant/Respondent filed and served the Party to Party Bill of Costs on record dated 25th November, 2022 scheduled for taxation on 18th May, 2023 vide email dated 24th April, 2023 at 11.31 am to paulmuchiri155@gmail.com copied to address husseinmwaeadvocates@gmail.com from info@anyokaadv.co.ke. Both documents were sent as attachments to the email.
32. The Applicant/Respondent has not denied having been served with the Party to Party Bill of Costs and/or the hearing notice dated 24th April, 2023 or that the emails to which the documents were sent did not belong to the Respondent's counsel.
33. Equally not in dispute is the fact that the Deputy Registrar (Taxing Master) taxed the Bill of Costs on 18th May, 2023 as scheduled.
34. Counsel for the Claimant availed the affidavit of service and urged that as the Bill was unopposed, it ought to be taxed as drawn.
35. The Taxing Master noted that service notwithstanding, the Applicant/Respondent was absent.
36. A ruling was delivered on 9th June, 2023 and the Bill of Costs was allowed at Kshs.306,236/= as Kshs.139,665/= was taxed off in accordance with the provisions of Schedule VI of the Advocates Remuneration (Amendment) Order, 2014.
37. A Certificate of Taxation dated 3rd July, 2023 was issued thereafter together with the decree dated 3rd August, 2023 and a proclamation of even date.
38. This far, it is unambiguous that the Applicant/Respondent did not oppose the Party to Party Bill of Costs despite service and took no steps until execution commenced in October 2023.
39. Strangely, the Applicant's Notice of Motion dated 4th August, 2023 makes reference to inter partes hearing of the Party to Party Bill of Costs dated 25th November, 2022 which the Taxing Master disposed of by a ruling delivered on 9th June, 2023.
40. It also makes reference to setting aside of ex parte directions and/or ex parte orders that led to the Certificate of Costs dated 3rd August, 2023.
41. In sum, the applicant sought interim orders to;
 - i. Stay execution of warrants of attachment dated 3/8/2023.
 - ii. Review and/or set aside directions of the Taxing Master made on 18th May, 2023.
42. In addition, the applicant seeks leave to file its submissions in opposition to the Party to Party Bill of Costs dated 25th November, 2022 and directions on inter partes hearing.
43. It is unclear to the court whether the inter partes hearing is by this court or the Taxing Master.



44. As regards the stay of execution of the warrants, the court granted interim orders on 9th August, 2023 pending the hearing and determination of this application.
45. A stay of execution of the warrants of attachment is also sought pending hearing and determination of the Party to Party Bill of Costs dated 25th November, 2022, which is not before this court for determination as the same was disposed of by the Taxing Master by virtue of the Ruling on record dated 9th June, 2023.
46. To the court's mind, there is no Party to Party Bill of Costs pending determination by the Taxing Master or this court.
47. Puzzlingly, although counsel for the applicant states that the Claimant had not availed a ruling, no allegation was made that the same had not been delivered prior to the issuance of the Certificate of Taxation and Proclamation as the ruling is on record.
48. As correctly submitted by the Claimant/Respondent's counsel, the only way to challenge a Bill of Costs is by way of reference pursuant to the provisions of the [*Advocates Remuneration Order*](#).
49. In [*Donholm Rabisi Stones \(firm\) V E.A Portland Cement Ltd*](#) (2005) eKLR, Waweru J. held;
- “Taxation of costs whether those costs be between Party to Party or between advocate and client is a special jurisdiction reserved to the taxing officer by the Advocates Remuneration Order. The court will not be drawn into the arena of taxation except by way of reference (from a decision on taxation) made under Rule 11 of the Advocates Remuneration Order.”
50. Ringera J. expressed similar sentiments in [*Machira and Company Advocates V Magugu*](#) (2002) 2 EA 248.
51. Under Rule 10 of the Remuneration Order,
- The Taxing Officer for the taxation of bills under this order shall be the Registrar or a District or Deputy Registrar of the High Court, or in the absence of registrar, such other qualified officer as the Chief Justice may in writing appoint, except that in respect of bills under Schedule 4 to the order the taxing officer shall be the registrar of trade marks or any deputy or assistant registrar of trade marks.
52. Relatedly, Rule 11 of the [*Advocates Remuneration Order*](#) provides;
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.
53. Case law is categorical that failure by the Taxing Officer to give the reasons is not fatal as they are typically contained in the ruling itself.
54. (See [*Abmed Nassir V National Bank of Kenya*](#) (2006) EA, [*Bernard Gichohi Njira V Kanini Njira Kathendu & another*](#) (2015) eKLR).
55. The court is in agreement with the Respondent's counsel that the provisions of the Advocates Remuneration Order require the objector to the decision to do so in writing to the Taxing Officer



setting out the items the objector objects to and the Taxing Officer is obligated to give the reasons for the decision on the items and the objector may within 14 days thereafter apply to the court by chamber summons.

56. This is a reference which can only be filed after the taxing officer has pronounced himself or herself on the items of the Bill of Costs.
57. In the instant case, the applicant did not invoke the provisions of the Advocates Remuneration Order and did not give notice of objection to the Taxing Officer.
58. More significantly, the Notice of Motion dated 4th August, 2023 is not a reference as it makes no reference to the ruling by the Taxing Officer or any of the findings.
59. On the contrary, the Notice of Motion is challenging the ex parte directions and/or orders made by the Taxing Officer on 18th May, 2023.
60. Relatedly, neither the grounds relied upon nor the Supporting Affidavit faults the Taxing Officer's Ruling in any respect but assails the Warrants of Attachment and Proclamation which are consequences of a legal process.
61. As held in *Republic V Ministry of Agriculture & 2 others Ex Parte Muchiri W'Njuguna & others* (Supra);

“The court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle. Of course, it would be an error of principle to take into account irrelevant factors or omit to consider relevant factors . . .”
62. Similar sentiments were expressed in *First American Bank of Kenya V Shab & others* (2002) 1 EA 64 at 69, *Kipkorir Tito & Kiara Advocates V Deposit Protection Fund Board* (2005) eKLR and *Joreth Ltd V Kigano & Associates* (2002) eKLR among others.
63. In the instant application, the Applicant/Respondent has not demonstrated why the court ought to interfere with the taxing officer's ruling delivered on 9th June, 2023 which, intriguingly, the Notice of Motion does not make reference to.
64. Both the Notice of Motion and the Supporting Affidavit make reference to the sum of Kshs.445,901/= as the amount granted by the Taxing Officer, notwithstanding the fact that the award was Kshs.306,236/=.
65. The Ruling by the Taxing Officer addresses all the items which constituted the Party and Party Bill of Costs dated 25th November, 2022 and the applicant has not demonstrated the particular error of principle the Taxing Officer committed to warrant interference by the court.
66. In the circumstances and in view of non-compliance with clear provisions of the *Advocates Remuneration Order* and the judicial authorities relied upon, coupled with the fact that the ruling of the Taxing Officer is unchallenged, the court is satisfied that the Applicant's Notice of Motion dated 4th August, 2023 is for dismissal and it is accordingly dismissed.
67. Applicant/Respondent to pay the sum of Kshs.306,236/= without interest within 45 days failing which interest shall accrue from the date of award by the Taxing Officer.
68. Parties shall bear own costs.



Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 16TH DAY OF APRIL 2024

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 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 *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

