



Kemboy Law Advocates v Narok County Government (Miscellaneous Application E120 of 2023) [2024] KEELRC 2365 (KLR) (30 September 2024) (Ruling)

Neutral citation: [2024] KEELRC 2365 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E120 OF 2023**

**L NDOLO, J
SEPTEMBER 30, 2024**

BETWEEN

KEMBOY LAW ADVOCATES ADVOCATE

AND

NAROK COUNTY GOVERNMENT CLIENT

RULING

1. By a Chamber Summons application dated 7th February 2024, the Advocate seeks the following orders:
 - a. Review and discharge of the decision by Hon Fredrick M. Nyamora handed on 21st December 2023, declining to tax the Advocate-Client Bill of Costs dated 5th June 2023 and instead referring it to arbitration;
 - b. Appropriate directions for the taxation/assessment of the Bill of Costs before any other Taxing Officer, other than Hon Fredrick M. Nyamora.
2. The application is supported by an affidavit sworn by Julius K. Kemboy, Advocate and is premised on the grounds that:
 - a. The Advocate commenced proceedings on 9th June 2023, when it filed its Advocate-Client Bill of Costs dated 5th June 2023. Thereafter, a taxation notice was signed by the Deputy Registrar on 19th June 2023 and the matter was scheduled for taxation on 13th July 2023;
 - b. The Client was served with the Bill of Costs on 20th June 2023;
 - c. On 10th July 2023, the firm of Maina Ngaruiya & Company Advocates filed a Notice of Appointment on behalf of the Client;
 - d. On 13th July 2023, when the matter came up for taxation, the Client sought and was granted 14 days, to file their response and written submissions, in opposition to the Bill of Costs.



The Advocate was granted corresponding leave to file a rejoinder, together with written submissions. The matter was scheduled for mention on 5th October 2023;

- e. The Client proceeded to file a notice of Preliminary Objection dated 24th July 2023, objecting to the taxation of the Bill of Costs on the following grounds:
 - i. That the Court lacks the requisite jurisdiction to hear and determine the matter on account of the provisions of Sections 4 and 6 of the *Arbitration Act*;
 - ii. That the Advocate-Client Bill of Costs dated 5th June 2023 is an abuse of the court process, bad in law and incapable of being entertained by the Court as the Advocate had infringed the doctrine of exhaustion, in filing the matter.
- f. On 4th October 2023, the Client served the Advocate with a replying affidavit and composite written submissions, addressing both the Preliminary Objection and specific items in the Bill of Costs;
- g. On 15th November 2023, the Advocate filed an affidavit sworn by Julius K. Kemboy, together with composite written submissions on the preliminary Objection and in support of the Bill of Costs;
- h. On 21st December 2023, Hon Nyamora delivered a ruling allowing the Client's Preliminary Objection, staying the taxation and referring the matter to arbitration;
- i. Aggrieved by the said ruling, the Advocate asked for the Taxing Officer's reasons pursuant to Paragraph 11(2) of the Advocates (Remuneration) Order, as well as certified copies of the ruling and order emanating therefrom;
- j. The Taxing Officer did not issue his reasons or certified copy of the order as requested. However, on 30th January 2024, the Advocate was supplied with a certified copy of the ruling;
- k. The Advocate was thus forced to file the instant application to set aside the Taxing Officer's directions as they are illegal, unprocedural, unreasonable, null and void as they are not anchored in law, policy or court practice for the following reasons:
 - i. The learned Taxing Officer erred in law and in fact by disregarding the Advocate's submissions on the Client's Preliminary Objection and thus failed to consider and determine the issues raised therein;
 - ii. The learned Taxing Officer erred in law and in fact in making a finding that the Client's Preliminary Objection was meritorious even though it is clear that pursuant to Section 6 of the *Arbitration Act* as read together with Rule 2 of the Arbitration Rules, a Preliminary Objection is not the legal procedure for seeking stay of proceedings under Section 6 of the Act for parties to pursue arbitration;
 - iii. The learned Taxing Officer erred in law and in fact by allowing the Client's Preliminary Objection even though it did not raise pure points of law but dealt with disputed facts and derived its foundation from information and/or a supposed agreement dated 16th September 2019, which stood to be tested by the rules of evidence as its validity, operation, performance and enforceability is disputed;
 - iv. The learned Taxing Officer erred in law and in fact by staying taxation and referring the matter to arbitration, even though the Client did not meet all the conditions prescribed under Section 6 of the *Arbitration Act*;



- v. The learned Taxing Officer erred in law and in fact by failing to appreciate that the Client had disentitled itself from benefitting from Section 6 of the Arbitration Act as it had taken steps in acquiescing to the jurisdiction of the Taxing Officer by failing to lodge the requisite application for stay either before or on the day it entered appearance on 10th July 2023, but also proceeded to file its replying affidavit and written submissions;
 - vi. The learned Taxing Officer erred in law and in fact in failing to inquire and determine whether the issue before him, being taxation of a Bill of Costs, is a dispute that is capable of reference to arbitration;
 - vii. The learned Taxing Officer erred in law by arriving at an improper decision while placing undue reliance on the case of Geoffrey Muthiga Kabiru & 2 others v Samwel Munga Henry & 1756 others [2015] eKLR, which is distinguishable and of no relevance or bearing to the issues that were before him;
 - viii. The learned Taxing Officer’s misapplication of the applicable law and principles jeopardises the Advocate’s rights and interests and risks occasioning injustice.
3. The Client opposes the application by an affidavit sworn by its County Secretary, John Mayiani Tuya, on 11th March 2024.
 4. Tuya depones that the Advocate has not demonstrated sufficient reasons to warrant review of the orders issued by Hon. Fredrick M. Nyamora on 21st December 2023.
 5. He counters the averment that the Advocate’s submissions were not taken into account by the Taxing Officer.
 6. Tuya maintains that the Advocate ought to have exhausted the arbitration option before approaching the Court.
 7. In his impugned ruling, the Taxing Officer states as follows:

“The respondent’s contention in paragraph 4 of their replying affidavit sworn by John Mayiani Tuya on 29th September 2023 on the PO is that there is a contract between the advocate and the client executed on 16th September 2019 marked JMT-1, in which parties thereto agreed under clause 8.9 that any dispute arising therefrom shall be referred to arbitration.”
 8. After citing Section 6(1)(a) of the Arbitration Act, the Taxing Officer goes on to state:

“The respondent however did not apply for stay of this court’s proceedings to allow parties time to explore the agreed alternative dispute resolution mechanism in arbitration as contemplated in the above section...The applicant...contends that the respondent should have approached the court by way of filing a chamber summons to have proceedings stayed in pursuit of the arbitration mechanism and relied on rule 2 of the Arbitration Rules, 1997...In view of the above, and the fact that the respondent has not sought stay of this court’s proceedings notwithstanding, this court in the spirit of Article 159(2)(c), is more concerned with delivering substantive justice as opposed to dwelling on technicalities of procedure. I therefore find that the respondent’s preliminary objection dated 24th July 2023 is meritorious. In the circumstances, I stay the taxation of the Advocate/Client’s bill of costs dated 5th June 2023 to allow the parties opportunity to subject themselves to the alternative



dispute resolution mechanism they chose in the contract giving rise to the bill. As to whether the contract is a forgery is a matter capable of being dealt with by the arbitrator.”

9. In the Advocate's written submissions dated 29th April 2024, reference was made to several cases where instances in which decisions of a Taxing Officer may be set aside, were established (see *Premchand Raichand Limited & another v Quarry Services of East Africa Limited & others* (No 3) [1972] E.A 162 (CAN); *First American Bank of Kenya v Gulab P. Shah & 2 others* [2002] eKLR and *Joreth Ltd v Kigano & Associates* [2002] eKLR). These instances include; an error of principle, a manifestly excessive award or inconsistency in awards.
10. The Advocate faults the manner in which the Client approached the Court, by raising a Preliminary Objection, rather than filing an application. He submits that a party seeking to invoke Section 6 of the [Arbitration Act](#) can only do so by way of a Chamber Summons application.
11. The manner by which a party may invoke an arbitration clause is set out in Section 6(1) of the [Arbitration Act](#) as follows:

6. Stay of legal proceedings

1. A court before which proceedings are brought in a matter which is the subject of an arbitration agreement, shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds-
 - a. that the arbitration agreement is null and void, inoperative or incapable of being performed; or
 - b. that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.
 2. Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.
 3. If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.
12. The converse is that an application for stay of proceedings under Section 6 of the [Arbitration Act](#) cannot be disguised as preliminary point of law (see *Agip (K) Ltd v Kibutu* [1981] eKLR).
 13. In its decision in *Eunice Soko Mlagui v Suresh Parmar & 4 others* [2017] eKLR the Court of Appeal confirmed that the foregoing remains good law, stating:

“After 2009, the provision still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance or before acknowledging the claim in question. In our mind, filing a defence constitutes acknowledgement of a claim within the meaning of the provision. Be that as it may, to the extent that after amendment, Section 6(1) still requires a party to apply for referral of the dispute to arbitration at the time of entering



appearance, the pre 2009 decisions of our courts on the application of section 6(1) are still good law to that extent. In *Charles Njogu Lofty v Bedouin Enterprises Ltd*, CA No 253 of 2003, this court considered section 6(1) and held that even if the conditions set out in paragraphs (a) and (b) are satisfied, the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application to do so is not made at the time of entering appearance or is made after filing of the defence.”

14. Following this trajectory in *Lipa Later Limited v Wanini (Cause E750 of 2023)* [2023] KELRC (KLR) (4 December 2023) (Ruling) my brother Dr. Gakeri J stated the following:

“A plain reading of section 6(1) of the *Arbitration Act* reveals that an arbitration agreement does not deny a court jurisdiction to hear and determine a suit based on the agreement and as courts have maintained, it merely gives the Respondent a defense to the claim which must be exploited by way of an application for stay for the dispute to be referred to arbitration.”

15. In his impugned ruling, the Taxing Officer appears to have been aware that the Client had not approached the Court properly. He however went ahead to uphold the Preliminary Objection, by invoking the provisions of Article 159(2)(d) of *the Constitution*, which instructs courts to avoid giving undue regard to procedural technicalities.

16. It has however been established that Article 159(2)(d) of *the Constitution* cannot be used to cure every legal misstep by parties (see *Nicholas Kiptoo Arap Salat v Independent Electoral & Boundaries Commission & 6 others* [2013] eKLR).

17. I do not think that the procedure set out in Section 6(1) of the *Arbitration Act* is a matter of mere technicality. To this extent, I agree with the following holding in *Diocese of Marsabit Registered Trustees v Technotrade Pavillion Ltd* [2014] eKLR:

“...the requirement in Section 6(1) of the *Arbitration Act* is not a mere technicality which can be diminished by Article 159(2)(d) of *the Constitution*...It is a substantial legal matter which aims at promoting and attaining efficacious resolution of disputes through arbitration by providing stay of proceedings but only where a party desirous of taking advantage of an arbitration clause in a contract has applied promptly to the Court for stay of proceedings and made a request to have the matter referred to arbitration...”

18. In reaching his decision therefore, the learned Taxing Officer went against established jurisprudence, which was binding on him.

19. Consequently, the decision by Hon Fredrick M. Nyamora dated 21st December 2023, is set aside and the Advocate-Client Bill of Costs dated 5th June 2023, is remitted for taxation before another Taxing Officer, other than Hon Nyamora.

20. The Advocate will have the costs of the application.

21. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY SEPTEMBER 2024

LINNET NDOLO

JUDGE

Appearance:

Mr. Kere for the Advocate/Applicant



Mr. Kaloki for the Client/Respondent

