



Silei t/a Leteipa Silei Law Advocates v Bomet County Public Service Board (Miscellaneous Application E001 of 2024) [2024] KEELRC 13209 (KLR) (26 November 2024) (Ruling)

Neutral citation: [2024] KEELRC 13209 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
MISCELLANEOUS APPLICATION E001 OF 2024**

**J RIKA, J
NOVEMBER 26, 2024**

BETWEEN

**DESMOND LETEIPA SILEI T/A LETEIPA SILEI LAW
ADVOCATES APPLICANT**

AND

BOMET COUNTY PUBLIC SERVICE BOARD RESPONDENT

RULING

1. The Applicant Law Firm, represented the Respondent County Public Service Board, in Kericho E&LRC Petition No. 15 of 2022.
2. Subsequently, the Applicant filed an Advocate-Client Bill of Costs, which was taxed in the absence of the Respondent at Kshs. 6,631, 429.
3. Certificate of costs issued on 23rd May 2024.
4. The Respondent filed an application dated 8th July 2024, seeking orders that:-
 - a. Leave is granted to Chepng'eno Micah Kirui, to come on record for the Respondent.
 - b. Extension of time is granted for the Respondent to file an objection and taxation reference to this Hon. Court, against the ruling of the Taxing Master delivered on 23rd May 2024.
 - c. Leave so granted, to operate as an order of stay of execution against the ruling of the Taxing Master dated 23rd May 2024.
 - d. The decision of the Taxing Master in respect of the Bill of Costs dated 24th April 2024, be set aside, and the entire Bill of Costs be struck out, or be taxed afresh by this Hon. Court.
 - e. In the alternative, the Hon. Court orders that the Bill of Costs is taxed afresh, before another Taxing Master.



- f. Costs be provided for.
5. The application is founded on the grounds stated in the face of the application, and on the affidavit of the Acting Chief Executive Officer of the Respondent, Kipng'etich Towett, sworn on 10th July 2024.
 6. The Respondent states that the Bill of Costs was drawn and taxed by an unqualified Advocate. The Respondent's Legal Officer was not aware about taxation, because she was on maternity leave, between 2nd April 2024 and 2nd July 2024.
 7. The Legal Officer followed up on the matter, and was informed by the Applicant that the Bill of Costs was served, received and stamped by the Respondent's Receptionist.
 8. The Receptionist however did not bring the Bill of Costs to the attention of the Acting Chief Executive Officer.
 9. The Respondent failed to object to the Bill of Costs, due to the mistake of its Receptionist.
 10. The Bill of Costs was not drawn to scale. The instruction fees as taxed was erroneous. The Petition subject matter of taxation was not complex, and was determined preliminarily. Instruction fee ought to have been Kshs. 75,000.
 11. Other objection is that, the Respondent did not receive any legal opinion from the Applicant at any time; the fees for getting up was not justified, as the matter did not go on full trial; perusal fees of Kshs. 4,000 was not established; instruction fees, ought to have included instruction for drawing up pleadings; attendances were repeated; and no receipts were produced to support disbursements.
 12. The Respondent exhibits a search carried out from the Law Society of Kenya, showing that Silei Desmond Leteipa, the Applicant, did not have a current practicing certificate for the year 2024, at the time of taxation. The Respondent states that its application has been presented without delay; the Applicant will not suffer prejudice if the orders sought are granted; and the Court has a duty to safeguard public funds.
 13. The Applicant relies on grounds of opposition, which appear to be undated. He states that the document from the Law Society of Kenya, annexure KT-2, showing that he did not have a current practicing certificate at the time of filing and taxing his Bill of Costs, does not meet the requirements of admissibility of electronic evidence, and cannot be relied upon.
 14. Without prejudice, he submits that a Bill of Costs drawn and taxed by an Advocate, who has not taken out a current practicing certificate, while he represents himself, is properly before the Court. He cites the case of *Mwangi Kengara & Company Advocates v. Invesco Assurance Company Limited* [2017] e-KLR in support of this alternative submission.
 15. The Applicant submits that the Respondent did not issue him, not less than a 3- clear day notice, as provided for under paragraph 11 [4] of the Advocates [Remuneration Order]. The Respondent's Legal Officer was not a party to the Bill of Costs, and her being away on maternity leave, was irrelevant. The Accounting Officer is the Secretary to the Respondent.
 16. The orders sought for setting aside and striking out of the Bill of Costs, are not awardable, as the Respondent has not obtained leave under Order 11[4] of the Advocates [Remuneration Order]. There is no proper reference filed, to enable the Court delve into the substance of the Application. The Applicant relies on the Supreme Court decision in *Nicholas Kiptoo Korir Arap Salat v. Independent Electoral and Boundaries Commission and 7 Others* [2014] e-KLR, where it was held that, where the law provides for the time within which something ought to be done, if that time lapses, one needs



first to seek extension of time, before he can proceed to do that which the law requires. In High Court decision, *Gathenji & Company Advocates v. David N. Thuku & Another* [2019] e-KLR, the Applicant submits, it was held that it is inappropriate to join an application for extension of time to file a reference, with the substance of the reference.

17. Lastly, the Applicant submits that the Petition in which he acted for the Respondent at the E&LRC Kericho, raised important and complex issues of the law, relating but not limited to advertisement, interview, vetting and appointment of public servants in the County. The Petition cut across public and private interest litigation. The Applicant urges the Court to decline the Application dated 8th July 2024.
18. The Respondent filed submissions dated 18th September 2024, while the Applicant filed his submissions which again, appears to be undated.

The Court Finds: -

19. The background to this application is largely not disputed. The Applicant, an Advocate of the High Court of Kenya, represented the Respondent in Kericho E&LRC Petition No. 15 of 2022. The Applicant subsequently filed his Bill of Costs, which was taxed at Kshs. 6,631,429.98. The certificate of costs issued on 23rd May 2024. Taxation took place in the absence of the Respondent.
20. There is evidence from the Respondent, that the Bill of Costs was served upon the Respondent, received and stamped in acknowledgement. The failure to object to the Bill of Costs, is attributed to the Receptionist, who is said to have failed to inform the Acting Chief Executive Officer, about service and receipt of the Bill of Costs. Secondly the Respondent states that, its Legal Officer was on maternity leave between 2nd April 2024 and 2nd July 2024, when the Bill of Costs was filed, served and taxed.
21. The Court is not persuaded that the reasons proffered by the Respondent, for failing to object to the Bill of Costs, are sufficient to warrant extension of time to file a reference to this Court, and to have the Bill of Costs re-taxed.
22. Whenever an Employee goes on maternity leave, a reasonable Employer is expected to find a reliever, for the duration an Employee is away. The office does not shut down. It remains functional. It is unlikely that the Legal Officer's absence, rendered the legal office inoperative. County /public offices are designed to be fully functional, even when their holders are on maternity leave. There is continuity in county/ public offices. The Court is not persuaded that failure by the Respondent to participate in taxation of the Bill of Costs, could be excused on the ground that its Legal Officer, was on maternity leave, at the time taxation took place.
23. While the law does not prescribe what the length of delay in taking a legal step should be, to be excusable or inexcusable, Courts have held that there must always be plausible and satisfactory explanation for delay, to unlock the Court's flow of discretionary favour [see *George Kagima Kariuki & 2 Others v. George M. Gichimu & 2 Others* [2014] e-KLR]. Further, the Supreme Court, in *County Executive of Kisumu v. County Government of Kisumu & 8 Others* [2017] e-KLR, underscored that extension of time is not a right of a party, but an equitable remedy, and that a party seeking extension must give a reasonable explanation for delay. The Respondent acknowledges receipt of the Bill of Costs before taxation, and failure to object, cannot plausibly and satisfactorily be explained, on the basis of the Respondent's Legal Officer, having been of maternity leave.
24. The submission that the Applicant, did not have a current practicing certificate on taxation, and therefore disabled from filing and taxing his Bill of Costs, is without merit. The Applicant filed and prosecuted the Bill of Costs in person. To argue that he needed a current practicing certificate, to represent himself, and tax his own Bill of Costs, would amount to a prohibition of actions brought



- before the Courts, by persons acting in person. An Advocate does not need a current practicing certificate, to pursue his own legal costs, or to otherwise access justice, in his own cause.
25. There are decisions cited by the Applicant, upholding the position that a Bill of Costs, drawn and taxed by an Advocate without a current practicing certificate, is not necessarily invalid. The decisions include *Upward Scale Investment Co. Limited and 8 Others v. Mwangi Kengara & Company Advocates*, CA Appl. No. 8 of 2015, and Supreme Court in *National Bank of Kenya v. Anaj Warehousing Limited* [2015] e-KLR.
 26. The Respondent countered these decisions with the case of *Devyan Food Industries Kenya Limited [formerly Sameer Agriculture & Livestock] Kenya Limited v. Khalwale & Company Advocates* [2023] KEELRC 806 [KLR], where the Court held that a Bill of Costs filed by an Advocate without a current practicing certificate, should not have been filed in the first place, quashed the Bill of Costs and set aside the ruling of the Taxing Master.
 27. [Khalwale] is a decision of the E&LRC. It involves Section 9 of the *Advocates Act*, which concerns Advocates attending Court and representing clients, without valid practicing certificates. It does not concern Advocates attending Court, and representing themselves in person. The Court in [Khalwale], made reference to Section 34 of the *Advocates Act*, and cited the Court of Appeal in *National Bank of Kenya Limited v. Wilson Ndolo Ayah*, Civil Appeal No. 119 of 2002, in finding that a document prepared or drawn by an Advocate, without a current practicing certificate is invalid.
 28. But these decisions, which the Respondent relies on, do not hold that an Advocate pursuing his own cause of action, his legal costs, needs to hold a current practicing certificate. He is not acting for a client, and being paid by a client, in coming to Court; rather, he is merely enforcing a retainer agreement, validly entered into and executed, which is personal to him.
 29. The position would be different in the view of the Court, if the Applicant, is alleged to have been acting for the Respondent in the E&LRC Petition, without a valid practicing certificate. It would be different if the Applicant did not have a valid practicing certificate, at the time he was instructed, and acted on instructions given by the Respondent. He would not be able to recover legal costs, sustained in the absence of a current practicing certificate. He would be deemed to have been engaged in an illegality, by holding himself out as an Advocate, and representing a client for a fee, while not qualified to act as an Advocate. The Respondent does not have a dispute with the currency of the Applicant's practicing certificate, at the time the Applicant represented the Respondent, in the Petition.
 30. The Court agrees with the Applicant, that the application is procedurally flawed. It is irregular to seek extension of time to file a reference under Rule 11 of the Advocates Remuneration Order, while at the same time, praying the Court to consider and determine the reference.
 31. There is a catena of decisions, underlining the inappropriateness of the procedure adopted by the Respondent. The decisions include, *Gathenji & Company Advocates v. David N. Thuku & Another* [2019] e-KLR; *Purity Gathoni Githae & Another v. Excelo Structures Limited & Another* [2018] e-KLR; and notably, the Supreme Court decision in *Nicholas Kiptoo Korir Arap Salat v. Independent Electoral & Boundaries Commission & 7 Others* [2014] e-KLR. The common thread in these decisions, is that when the time within which something ought to be done lapses, one needs to first seek extension of that time, before he can proceed to do that which the law requires.
 32. The Respondent not only seeks leave to file the reference, but also simultaneously, seeks leave for its Legal Officer to come on record; stay of execution of the Taxing Master's ruling; and consideration and determination of the reference. These prayers cannot be considered and orders granted concurrently.



33. In *Murithi Wanjao t/a Wanjao & Wanjau Advocates v. Samuel Mundati Gatabaki & Another* [2015] e-KLR, the Court characterized an application which sought several orders concurrently, as an omnibus application. It was explained that an omnibus application, is incapable of proper adjudication by the Court, for each of the reliefs sought, apart from being governed by different rules, is also subject to long-established and different judicial principles.
34. As it is, there is no valid reference before the Court, as no extension of time was granted to file one. The Court cannot proceed to consider the arguments made by the Respondent concerning the itemized Bill of Costs, set aside the ruling of the Taxing Master, and quash the Bill of Costs.

It is ordered: -

- a. The application filed by the Respondent, Bomet County Public Service Board, is declined.
- b. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT KERICHO, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 26TH DAY OF NOVEMBER 2024.

JAMES RIKA

JUDGE

