Uzuri Foods Limited v Mutisya (Miscellaneous Reference Application E151 of 2022) [2023] KEELRC 592 (KLR) (2 March 2023) (Ruling)

Neutral citation: [2023] KEELRC 592 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISCELLANEOUS REFERENCE APPLICATION E151 OF 2022

BOM MANANI, J

MARCH 2, 2023

BETWEEN

UZURI FOODS LIMITED ..... APPLICANT

AND

BENJAMIN KIOKO MUTISYA ..... RESPONDENT

RULING

Introduction

1. This dispute arises from the taxation of the Party and Party Bill of Costs dated 5th May 2022 arising from ELRC No. 1427 of 2016. The Applicant is aggrieved by the ruling of the Taxing Master on the said Bill delivered on 18th August 2022. Hence this reference brought under rule 11 of the Advocates Remuneration Order (ARO).

2. The Respondent has opposed the reference. In the Respondent's view, the action is incompetent for want of a formal objection against the ruling of the Taxing Master in terms of rule 11(1) of the ARO. Further, the reference does not meet the parameters for filing a reference against taxation. Consequently, the action should be dismissed.

Analysis

3. The Respondent has objected to the competence of the reference on the grounds that no objection against the ruling of 18th August 2022 was lodged with the Taxing Master prior to the filing of the reference. Rule 11 of the ARO on the basis of which the Respondent's objection is premised provides as follows:-

    i. 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.

ii. 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.

4. Whilst it is true that this provision sets out the procedure to be followed when challenging the decision of a Taxing Master, it is perhaps inaccurate to suggest that it is now common ground that all the steps prescribed in the rule are mandatory. One aspect of the rule that remains indeterminate is whether a party wishing to challenge a Taxing Master's decision must give notice of the items that he contests to the Taxing Master. A plethora of decisions suggest that the notice is mandatory. Yet, others suggest that it is not.

5. The divergence of opinion on the issue is understandable. It is, in my view, informed by the way the rule is framed. By using the word ''may'' the rule implies that it is not mandatory for an aggrieved party to file an objection to a taxation before filing a reference particularly where the reasons for the Taxing Master's decision are self evident in the ruling.

6. In *Evans Thiga Gaturu, Advocate v Kenya Commercial Bank Limited* [2012] eKLR, the learned Judge expresses the view that this rule does not obligate an aggrieved party to file his objection with the Taxing Master before preferring his reference where the Taxing Master's ruling contains reasons for the decision. The aggrieved party may only file the objection with the Taxing Master where the ruling is silent on the reasons for the decision. But again, it remains discretional for the party to elect whether to call for the reasons for the decision. The court however emphasized that it is desirable for the aggrieved party to call for the reasons through the objection where the taxation ruling is not clear on the reasons informing the decision as this will assist the High Court examine whether the Taxing Master committed an error of principle during the taxation.

7. I am persuaded by the reasoning in the Evans Thiga Gaturu, Advocate v Kenya Commercial Bank Limited case. It is important for the court to ask itself what value the objection would serve in the case before it before throwing out the reference. Where the reasons for the Taxing Master's decision are discernible from the ruling, it appears unjust to throw out a reference that has been filed timeously solely on the ground that the applicant did not file an objection to the Taxing Master's ruling before lodging the reference. To do so would be tantamount to doing what the court in *Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited (2)* [2006] 1 EA discourages: paying ritualistic attention to procedural rules.

8. For this reason, I decline to terminate these proceedings wholly on the premise that they were commenced without the Applicant first filing a notice of objection under rule 11(1) of the ARO. I have looked at the Taxing Master's ruling delivered on 18th August 2022 and I am satisfied that sketchy as it may appear, it provides the reasons for the Taxing Master's decision.

9. Having held thus, I now turn to the merits of reference. The law on references arising from taxation of Bills of Costs is now well settled. In *Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR, the court observed as follows on the role of the court at this stage of the proceedings:-

> " On reference to a Judge from the Taxation by the Taxing Officer, the Judge will not normally interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer, erred in principle in assessing the costs."

10. In *Rogan-Kamper v Lord Grosvenor (No 3)* [1977] eKLR, the learned Judge observed as follows:-

> '' As I understand ....., a judge will not substitute what he considers to be the proper figure for that allowed by the taxing officer unless, in the judge's view, the sum allowed by the taxing officer is outside reasonable limits so as to be manifestly excessive or inadequate."

11. In determining the matter before me I must then ask myself whether in rendering her decision on the Respondent's Bill of Costs, the Taxing Master proceeded on the wrong principle of law or whether the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle.

12. In their submissions, the Advocates for the Applicant assert that the Taxing Master did not provide a formula for her decision. They argue that the Taxing Master did not give reasons for the figure she awarded as instructions fees. That the Taxing Master did not explain why she allowed getting up fees in the cause.

13. With respect, I do not understand the aforesaid submissions as pointing to an error of principle on the part of the Taxing Master. The formula for computing instruction fees is inbuilt in the ARO. Similarly the grounds for allowing getting up fees and the methodology for ascertaining the quantum thereof are set out in the ARO.

14. In the cause leading to the impugned taxation, the Respondent was awarded Ksh. 85,224/= as compensation for unfair termination. This award was made in a suit that was defended and went through full trial.

15. As the cause was filed in 2016, the applicable ARO is the 2014 one. Under Schedule 6 rule 1 of the Order which is applicable to the dispute, a case whose value is Kenya Shillings Five Hundred Thousand (Ksh. 500,000/=) and below if defended attracts instruction fees of Ksh. 75,000/=.

16. Under Schedule 6 rule 2 of the ARO getting up fees is provided for. The rule provides as follows:-

> ''In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation.''

17. As mentioned earlier, the cause that gave rise to the impugned taxation was defended and went to full trial. Therefore, the successful party was entitled to getting up fees being one-third of the instruction fees of Ksh. 75,000/=. This works out to Ksh. 25,000/=.

18. From the ruling by the Taxing Master, she awarded instruction fees of Ksh. 75,000/= and getting up fees of Ksh. 25,000/=. Going by the aforesaid provisions of the ARO, 2014, this was strictly on scale. There is no evidence of the Taxing Master having committed an error of principle in awarding these amounts. The formula for computing the amounts is inbuilt in the ARO. It is noteworthy that in her ruling, the Taxing Master stated that she had considered the Bill in line with the guidelines provided under the 2014 Advocates Remuneration Order, Schedule 6 A. Consequently, I see no merit in the objection raised by the Applicant in this respect.

19. Besides the generalized complaint about the Taxing Officer not having indicated what items were taxed off, the Applicant does not raise any specific complaints with respect to items two (2) to thirty five (35) of the Bill of Costs which are mainly on: drawing of documents; perusal of documents; court and registry attendances; and service of documents. The Applicant does not point to any specific items under these sub-titles that the Taxing Master allowed without justification.

20. In the absence of specific grievance on any of the items aforesaid, this court finds that what the Applicant is attempting is to ask this court to re-tax the Bill without sound basis. I should perhaps point out that a perusal of the parent file confirms that there were indeed approximately thirteen (13) attendances shared between registry and courtroom activities. This number nearly corresponds with the attendances billed for in the Bill of Costs.

Determination

a. The present reference is without merit in law.

b. Accordingly, it is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 2ND DAY OF MARCH, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties 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.