



**Judicial Service Commission v Njora (Miscellaneous Cause
E134 of 2022) [2023] KEELRC 1423 (KLR) (2 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1423 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CAUSE E134 OF 2022
NZIOKI WA MAKAU, J
MAY 2, 2023**

BETWEEN
JUDICIAL SERVICE COMMISSION APPLICANT
AND
LUCY MOTHONI NJORA RESPONDENT

RULING

1. The Applicant seeks vide the application dated 29th August 2022, expressed to be brought under Rule 11 of the Advocates Remuneration Order, to set aside the decision of the Learned Deputy Registrar dated 19th July 2022 and remit the matter for fresh taxation before a different taxing master pursuant to the Honourable Court’s directions on the relevant principles. The motion was supported by the grounds on the face of it as well as the annexed affidavit of Hon. Anne A. Amadi Chief Registrar of the Judiciary and Secretary to the Judicial Service Commission, the Applicant herein. The Applicant asserts that it was not informed of the date of the taxation ruling and as such became aware of the same later and moved with dispatch hence the application before court.
2. The Respondent responded through the affidavit of her advocate Mr. Okemwa and she also filed a preliminary objection dated 9th September 2022 principally asserting that the application offends mandatory provisions of Rule 11 of the Advocates (Remuneration) Order.
3. Rule 11 of the Advocates (Remuneration) Order provides as follows:-
 - (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.

- (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
- (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

4. The parties have submitted at length on the various aspects of their respective positions and availed authorities. The Applicant submits that the grounds underpinning the Applicant's application are that:

- a. Vide a ruling delivered on 19th July 2022, the Hon. Kyany'a, taxing master, assessed the Respondent's party and party Bill of Costs dated 26th January 2022 (the "Bill of Costs"). The Bill of Costs was taxed at the sum of Kshs. 1,164,117/-.
- b. In arriving at the said costs, the Learned Deputy Registrar, inter alia, made serious errors of principle in the computation of the Party to Party costs under Item No. 1 (I LXXXI) of the Bill of Costs and thereby arrived at an erroneous decision, including for the following reasons:
 - i. The Learned Deputy Registrar erred by proceeding to tax the Bill of Costs on mistaken principles and consequently failed to exercise her discretion judicially; and
 - ii. The amount awarded to the Respondent as party and party costs is significant and manifestly excessive thereby warranting an interference by this Honourable Court.

5. The Applicant submits that the issues for determination are whether:-

- a) This Honourable Court has jurisdiction to entertain the instant Reference;
- b) The Learned Deputy Registrar failed to exercise judicial discretion in accordance with established principles of law; and
- c) The amount offered by the learned Deputy Registrar was manifestly excessive whilst offering to unjustly enrich.

6. The Applicant submits the Learned Deputy Registrar's decision should be set aside and the matter submitted for reassessment.

7. The Respondent filed a notice of Preliminary Objection dated 9th September 2022. The objection principally asserts that the application offends mandatory provisions of Rule 11 of the Advocates Remuneration Order 2009 Act. The Respondent submits that the Court therefore despite having jurisdiction is divested of jurisdiction. It is submitted that it is not in a contest that this Court has jurisdiction to determine a reference. However, to exercise such jurisdiction certain mandatory



condition precedent must be met, otherwise the court is divested with jurisdiction. The Respondent submits that the Court of Appeal held in *National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others* (Civil Appeal 656 of 2022) [2023] KECA 80 (KLR) (3 February 2023) (Judgment) Par 22 that one ingredient of jurisdiction is that;

- (c) the case comes before the Court initiated by due process of law, and upon fulfilment of any condition precedent.

8. It was submitted that parties agree that the court cannot arrogate jurisdiction exceeding what is conferred in law as per paragraph 15 of the Applicant's submission and the decision of the Supreme Court in *Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 others* [2012] eKLR. It was submitted that a reference filed out of time divest court jurisdiction. It is pleaded and submitted and therefore not in contest that the decision of the Registrar was delivered on 19th July 2022. The Respondent filed its reference on 22nd August 2022. This is 34 days' outside limitation. On that score alone, the court has no jurisdiction as per Rule 11(4) of the Advocates remuneration order. The Respondent cited the case of *N. W. Amolo t/a Amolo Kibanya & Co. Advocates v Samson Keengu Nyamweya* [2016] eKLR:

“This Court is divested with jurisdiction to determine the merits of a reference that is filed outside the statutory stipulated period and without jurisdiction, the Court can do no more than down its tools.”

9. It was submitted that where a court is drained of the jurisdiction to entertain a matter, the proceedings flowing from it, no matter the quantum of diligence, dexterity, artistry, sophistry, transparency, and objectivity injected into it, will be marooned in the intractable web of nullity. The Respondent referred to the case of *National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others* (Civil Appeal 656 of 2022) [2023] KECA 80 (KLR) (3 February 2023) (Judgment). It was submitted that there is no specific notice to the Deputy Registrar on the items objected to per Para 11(1). The Application is filed 34 days' outside limitation and without leave, divesting the Court from jurisdiction.
10. It was submitted that without any reasons for the specific items objected to the Court [sitting as an Appellate Court] cannot take up jurisdiction the matter and impose its discretion or fault the Learned Deputy Registrar. And that without jurisdiction the rest of the Respondent's submissions are irrelevant. It was submitted that it is an “overkill” and waste of judicial time to proceed further to probe other issues. This court cannot move a single step and neither can jurisdiction be cured by Article 159(2)(d) and or cure violation of the law. The Respondent cited the case of the *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] 1 KLR and asserts that a court devoid of jurisdiction cannot take one more step.
11. The Respondent submits that needless to say this is not an advocate bill of costs as per section 51 of the *Advocates Act* and that even if the court peeps at the Supporting affidavit, a jurisdiction it doesn't have, the same is equally responded to by Affidavit of Mr. Jason Okemwa Advocate, setting the chronology of the matter uncontestably and termed as false. The Respondent submits that the court cannot exercise its discretion in such a manner and prompting through submissions and cited in aid the case of *Odinga & 16 others v Ruto & 10 others; Law Society & 4 others (Amicus Curiae)* (Presidential Petition E005, E001, E003, E004, E007 & E008 of 2022 (Consolidated)) [2022] KESC 54 (KLR) (Election Petitions) (5 September 2022) (Judgment) Par 138.
12. The Respondent submits that there cannot be merit in violation of the law, which compliance must be determined in limine. The courts judicial authority is sacrosanct and must be exercised in strict



conformity with the law. The application is an abuse of court process, null and void, and long dead before arrival. It's for striking out in limine and with costs. Costs which follow the event as per Section 27 of the *Civil Procedure Act* and the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR.

13. The Court has considered the motion which is strictu sensu, the reference, the objection made and treats the preliminary objection as part of the reply to the reference. The Taxing Master is said to have arrived at an incorrect decision or taken into account extraneous factors. The Rules provide that a Court to whom the reference is made may on its own discretion enlarge time notwithstanding that the time sought to be enlarged may have already expired. The Court in exercise of its inherent power under Rule 11(4) has enlarged the time for the reference and as such the reference is properly before this court.

14. This Court is guided by precedent and the law as regards the basis for interference with the decision of the taxing master. In the case of *Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR the Court of Appeal held:-

“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.”

15. Bearing these principles in mind, the issues that I distil to fall for determination are whether the Taxing Master rightly exercised her discretion to determine the instruction fees or took into account extraneous matters in doing so.

16. The decision sought to be reversed, was made by the Taxing Master and is said to have been made without notice to the parties. Evidence adduced by the advocate for the Respondent Mr. Jason Okemwa shows that there was a notice served. Even assuming there was no service, would this vitiate a taxation? I hazard that it would not as the principles the Court would be guided in appreciating the taxation would be the same as where a notice was issued.

17. The instruction fees were determined, as held in the Taxation Ruling on the premise of Schedule 6 of the 2014 Advocates Remuneration Order. The Respondent herein sought a sum of Kshs. 6,000,000/- on the item of instruction fees. The Taxing Master appreciated the fee could not be less than Kshs. 100,000/- and relied on the case of *Jerioth Limited v Kigano and Associates* [2002] 1 EA 92 to rationalise the increase in instruction fees. In the cited case a sum of Kshs. 1,460,000/- was awarded as instruction fees. Using a string of cases which are good law, the Learned Taxing Master reduced the amount by taxing off Kshs. 5,400,000/-. I do not discern any improper exercise of discretion in the taxation of this item. On the other items, the Learned Taxing Master reduced the sums to the lower scale in some instance to nil (no proceedings). In her conclusion the sum allowable in the bill of costs was a sum of Kshs. 1,164,117/-. In my considered view, this is not an unreasonable amount as was found by the Learned Taxation Master.

18. In the case of *Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri W'Njuguna & 6 others* [2006] eKLR it was held as follows:-

“Taxation of costs as a judicial function is to be conducted regularly, on the basis of rational criteria which are clearly expressed for the parties to perceive with ease. Regularity in this respect cannot be achieved without upholding fairness as between the parties; the taxing officer is to provide only for reasonable compensation for work done; the taxing officer should avoid the possibility for unjust enrichment for any party and ought to refuse any claim that tends to be usurious;...”



19. The taxed amount avoids a situation where a contention could be rightly made on a possibility of unjust enrichment for the Respondent. The foregoing leads to the inescapable conclusion that I have not found any basis to interfere with the taxation by the Learned Taxing Master whose taxation I hereby uphold. The reference is found to be without merit and accordingly dismissed with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF MAY 2023

NZIOKI wa MAKAU

JUDGE

