



REPUBLIC OF KENYA



KENYA LAW
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**Kemunto v Leo Investment Limited t/a The Concord Hotels (Cause
539 of 2017) [2023] KEELRC 1762 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1762 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 539 OF 2017
JK GAKERI, J
JULY 24, 2023

BETWEEN

CONEX KEMUNTO CLAIMANT

AND

LEO INVESTMENT LIMITED T/A THE CONCORD HOTELS .. RESPONDENT

RULING

1. What is before the court for determination is the Applicant's Chamber Summons dated 6th April, 2023 filed under Certificate of Urgency seeking Orders that;
 1. Spent.
 2. Spent.
 3. Spent.
 4. The court be pleased to set aside the Taxation of the Claimant's Bill of Costs vide a Ruling and/or decision of the Taxing Master made on 21st day of March, 2023 and refer the same for assessment for costs under Schedule VII of the *Advocates Remuneration Order* thereof.
 5. Costs of this application be provided for.
2. The Chamber Summons is based on the grounds set out on its face and the Supporting Affidavit sworn by Mr. Martin Mwangi, the General Manager of the applicant who deposes that in a judgement delivered on 13th December, 2022, the Claimant was awarded Kshs.86,176/= with costs and the same was paid on 31st January, 2023 via Cheque No. 011046.
3. That subsequently, the Claimant filed a Bill of Costs seeking the sum of Kshs.215,995/= as costs based on Schedule VI of the Advocates Remuneration Order, 2014 and the Taxing Master assessed the costs



at Kshs.192,205/= and at the applicant's instigation, the reasons were provided via a Ruling dated 21st March, 2023.

4. The affiant states that the Taxing Master misdirected himself and erred in principle and arrived at an erroneous decision by relying on Schedule VI as opposed to Schedule VII thereof.
5. That the Taxing Master erred by awarding Kshs.192,205/= as costs almost 3 times the amount awarded by the court to the Claimant and did not take into consideration the applicant's submissions on Section 58 of the Remuneration Order.
6. The affiant urges the court to set aside the assessment or be re-assessed under Schedule VII of the Remuneration Order.

Response

7. In the Replying Affidavit sworn by Onenga Clement Omongo, counsel for the Claimant and dated 18th April, 2023, the affiant states that since the matter commenced and was concluded in a court of the status of the High Court, the party and party costs were taxed under the provisions of Schedule VI of the Remuneration Order, 2014 and reasons demanded by the applicant were supplied as evidenced by the detailed ruling dated 21st March, 2023 which states that the bill was largely drawn to scale but for a few items that were taxed off.
8. The affiant states that the applicant had not challenged any item as erroneously taxed off or included in the Bill of Costs and nothing had been placed before the court to warrant the order of stay or setting aside of the Ruling dated 21st March, 2023.
9. The affiant urged the court to strike off the Chamber Summons with costs.

Applicant's submissions

10. The applicant did not avail a copy of the submissions as directed.

Respondent/Claimant's submissions

11. Counsel submitted that the applicant had not pointed out any item as being excessive and the Bill was taxed in accordance with the provisions of Schedule VI of the Advocates Remuneration Order, 2014.
12. That the argument that the Bills should be taxed under Schedule 7 was demeaning the standard and stature of the court.
13. Counsel submitted that the argument that the applicant's submissions were not considered was misleading as they were filed on 7th March, 2023 and the ruling was delivered on 21st March, 2023 and it had not filed any objection to the Bill of Costs.
14. Counsel submitted that the matter was defended and witnesses testified and the amount awarded was below Kshs.500,000/= and the sum of Kshs.75,000/= was provided for.
15. Counsel urged that if the Taxing Master had applied any schedule other than 6, that would have been an error in principle or taxing any item below the prescribed rate.
16. Counsel urged that there was no error in principle and the Advocates Remuneration Order, 2014 had no Section 58 as alleged.
17. That the applicant had not sought the re-taxing of any item by a different taxing master.
18. Counsel urged the court to dismiss the application with costs.



Determination

19. The singular issue for determination is whether the instant Chamber Summons is merited.
20. The pith and substance of the applicant's case is that the sum of Kshs.192,205/= assessed by the Taxing Master in his ruling delivered on 21st March, 2023 was excessive and the Taxing Master erred in principle by applying the 6th Schedule to the *Advocates (Remuneration) (Amendment) Order*, 2014 and the provisions of Section 58 of the *Order* and its submissions were not considered.
21. The Claimant/Respondent on the other hand submitted the Taxing Master did not commit any error of principle as none of the items had been isolated as excessively assessed and Section 58 of the *order* did not exist and the applicant's submissions were considered.
22. Clause 11 of the *Advocates Remuneration (Amendment) Order*, 2014 provides that;
 1. Should any party object to the decision of the Taxing Officer, he may within 14 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.
23. In *Republic V Ministry of Agriculture & 2 others Ex Parte Muchiri Njuguna & others* (2006) eKLR, Ojwang J. (as he then was) held that;

“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 to omit to consider relevant facts . . .

The taxation of costs is not a mathematic exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other . . .”
24. The Court of Appeal expressed similar sentiments in *Kipkorir, Tito & Kiara Advocates V Deposit Protection Fund Board* (2005) eKLR.
25. In the instant Chamber Summons Application, it is the obligation of the applicant to demonstrate that the Taxing Officer either committed a specific or many errors of principle or the amount assessed was manifestly excessive to occasion injustice on its part.
26. The Supporting Affidavit dated 6th April, 2023 makes no reference or mention of any error of principle committed by the Taxing Officer. The applicant makes no allegation that the Taxing Officer considered or did not take into account any particular circumstance.
27. Similarly, the applicant tendered no evidence of its objection to any specific item(s) as itemised by the Claimant/deed holder's party and party Bill of Costs dated 13th January, 2023.



28. Strangely, the letter dated 28th March, 2023 is an objection to the entire Bill of Costs and all the items therein listed and in particular Taxation under Schedule 6 to the [Advocates \(Remuneration\) \(Amendment\) Order](#), 2014.
29. Failure by the applicant to isolate the items it was objecting to would appear to suggest that the Taxing Officer got everything wrong which is not the case as the applicant tendered no evidence to that effect.
30. The applicant's case is hinged on the fact that the operative schedule of the [Advocates Remuneration Order](#) was Schedule VII. The Taxing Officer is faulted for having relied on Schedule 6 yet according to the applicant, he should have relied on the VII Schedule to the [Remuneration Order](#), 2014.
31. Needless to emphasize, Schedule 6 to the [Advocates \(Remuneration\) \(Amendment\) Order](#), 2014 addresses "Costs of proceedings in the High Court" while Schedule 7 deals with "Costs of Proceedings in subordinate courts."
32. Both Schedules address party and party costs and Advocate and client costs.
33. From the foregoing, it is manifestly clear that Schedule 7 to the [Advocates \(Remuneration\) \(Amendment\) Order](#), 2014 was inapplicable to the instant case.
34. In the court's view, the applicant's suggestion that Schedule 7 was applicable in this case is tantamount to suggesting that the Employment and Labour Relations Court is a court Subordinate to the High Court which is patently inconsistent with the provisions of the Article 162(2) of the [Constitution of Kenya](#), 2010.
35. Finally, the applicant alleged that its submissions were not taken into consideration by the Taxing Officer. The Claimant/Respondent's counsel submitted that since the submissions were filed on 7th March, 2023 and the Ruling was delivered on 21st March, 2023, they were taken into consideration.
36. Puzzlingly, the applicant did not attach a copy of the submissions for perusal by the court to ascertain whether the allegation was sustainable or not.
37. The applicant failed to demonstrate the arguments or issues it addressed in its submissions and which the Taxing Officer did not take into consideration.
38. More significantly, however, even if the applicant's allegations were truthful, would it have affected its case before the Taxing Officer? Perhaps not.
39. Although courts are enjoined to consider submissions by the parties and must not ignore them, submissions are neither evidence nor pleadings.
40. The place of submissions was aptly captured by the Court of Appeal in [Daniel Toroitich Arap Moi V Mwangi Stephen Muriithi & another](#) (2014) eKLR as follows;

"Submissions are generally parties "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented . . ."
41. Similarly, submissions are not binding on the court. (See [Imperial Bank Ltd V Bakari Juma Bechpende](#) (2016) eKLR.)
42. Finally, having been granted a temporary stay of execution pending the hearing and determination of the instant application, the order is spent.



43. For the above stated reasons, it is the finding of the court that the Chamber Summons dated 6th April, 2023 is unmerited and it is accordingly dismissed with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 24TH DAY OF JULY 2023

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

