



**Laikipia County Public Service Board v Public Service Commission & another;
Laikipia County Government (Interested Party) (Miscellaneous Application
E017 of 2023) [2023] KEELRC 2612 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2612 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
MISCELLANEOUS APPLICATION E017 OF 2023
ON MAKAU, J
OCTOBER 27, 2023**

BETWEEN

LAIKIPIA COUNTY PUBLIC SERVICE BOARD APPLICANT

AND

PUBLIC SERVICE COMMISSION 1ST RESPONDENT

**KENYA MEDICAL PRACTITIONERS, PHARMACISTS AND DENTISTS
UNION 2ND RESPONDENT**

AND

LAIKIPIA COUNTY GOVERNMENT INTERESTED PARTY

RULING

Introduction

1. By the Notice of Preliminary Objection dated 5th September 2023, the 2nd respondent objects to the Applicants Reference in the Chamber Summons dated 29th August, 2023 on the following grounds: -
 - a. The Affidavit in support of the summons is commissioned by Mr.Patrick Odira Advocate who is an employee of Awuor Ramogy & Co. Advocates who is representing the Applicant in this suit.
 - b. The summons is bad in law for being filed out of time.
 - c. The prayer for enlargement of time in the summons is untenable.
 - d. The rest of the prayers in the summons are untenable and are only dependent on enlargement of time to file the summons out of time.



Background

2. The facts leading up to this matter are that the Applicant herein sued the respondents in case No.ELRC Petition 26 of 2020 and a judgment was delivered in favour of the respondents on 19th July 2021. The respondents were also awarded costs of the suit.
3. On 6th October, 2022 a consent settlement on costs was entered in which the 2nd respondent's costs was assessed at Kshs.18,625.42 inclusive of VAT and disbursements. It was further agreed that the 2nd respondent would not file proceedings for taxation of costs of the suit. The consent was not honoured and on 5th July 2023 the consent was partially set aside to the extent that the costs of the suit would be taxed before the Deputy Registrar of the court.
4. A party and party Bill of costs was filed by the 2nd Respondent and upon taxation, the Taxing officer of the court rendered a ruling on 16th August, 2023 awarding the 2nd Respondent Kshs.15,000,000.00. A certificate of taxation and certificate of order against the Government were issued on 21st August 2023.
5. The Applicant was aggrieved and brought the impugned reference on 31st August, 2023 seeking the following orders: -
 1. That this application be heard in respect of the Certificate of Taxation issued in favour of the 2nd Respondent herein on 21st August 2023 pursuant to the Party and Party Bill of Costs against the Applicant dated 22nd June 2023.
 2. That this Honourable Court be pleased to set aside the Bill of Costs dated 22nd June 2023 together with the Ruling of the taxing master sitting at the Employment & Labour Relations Court in Nyeri in ELRC Pet No.26 OF 2020 as well as the certificate of taxation dated 21st August, 2023 and all the consequential orders thereof.
 3. That pending the hearing and determination of this application there be a stay of any further proceedings towards the enforcement of the Certificate of Taxation issued in favour of the 2nd Respondent, in this matter on 21st August 2023 pursuant to the Party and Party Bill of Costs against the Applicant dated 22nd June 2023 by M/s Wafula Washika & Co. Advocates; and
 4. That the court, if need be, do enlarge the time fixed under paragraph 11 of the Advocate Remuneration Order for filing this reference in respect of the taxation decision of the Hon. Lubia N. Merceline (DR) made and/or delivered on 16th August 2023 and this reference, in the wider interests of justice and expediency, be admitted for hearing on its merits, as the reasons for taxation are apparent on the face of the decision.
 5. That this Honourable court, for sufficient cause demonstrated, do set aside the taxation decision of the Hon. Lubia Merceline (DR) made and/or delivered on 16th August 2023 as well as the Certificate of Taxation thereafter issued on the 21st August 2023, and the same be remitted for taxation afresh, before any other taxing officer.
 6. That costs of this application be provided for.
6. The 2nd respondent has challenged the reference by the instant Notice of Preliminary Objection. The Objection mainly turns on the ground that the reference is time barred and the affidavit filed in support is fatally defective.



Submissions

7. Mr. Washika Advocate urged the objection on behalf of the 2nd Respondent. He submitted that the supporting Affidavit filed in support of the summons was commissioned by a counsel employed by the law firm that is representing the Applicant in this matter. For emphasis he relied on Section 4 of the *Oaths and Statutory Declarations Act* which bars a commissioner for oaths from exercising powers given by the said section in any proceeding or matter where he is the advocate for any of the parties or concerned matter.
8. With respect to the issue of time bar, the counsel submitted that the reference was filed on 31st August, 2023 while the impugned decision was rendered on 16th August 2023. He submitted that the time given by Rule 11(2) of the *Advocates (Remuneration) Order* 1962 provides a mandatory term that a reference shall be filed within 14 days. Therefore, he submitted that the time to file a reference lapsed on 30th August, 2023.
9. Mr. Odira opposed the objection by the respondent and prayed for the same to be dismissed. On the issue of defective supporting affidavit, he submitted that he left the Firm of Awour Ramogy & Company Advocates and registered his own firm in the name and style of P.O Odira & Co. Advocates on 9th December, 2022. However, he admitted that on several occasions he has been called upon to hold brief for Mr. Awuor Ramogy Advocate in his matters.
10. He contended that the said ground is not a valid ground for a preliminary objection because it requires evidence to prove whether or not he is still employed by Awour Ramogy Advocate. For emphasis, he relied on the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 699.
11. As regards the issue of time bar, he submitted that he forwarded the chamber summons to the court for filing on 29th August 2023 at 17.02PM and served Advance copy the same day at 17.05PM. He contended that the filing was done within time. He contended that time is not a ground upon which to raise a preliminary objection because it is a matter requiring court discretion. Consequently, he prayed for the objection to be dismissed with costs.
12. By way of rejoinder, Mr. Washika submitted that the Applicant's counsel has admitted that he filed on the last day past working hours that is, at 5.02PM. As regards the issue of conflict of interest, he submitted that Mr. Odira has been acting for the applicant from the beginning and the information at the Law Society Website indicate that Mr. Odira works for Awour Ramogy & Co. Advocates.

Analysis and Determination

13. The issues that fall for determination are:-
 - a. Whether the 2nd Respondent has raised a valid Preliminary Objection.
 - b. Whether the supporting Affidavit is fatally defective.
 - c. Whether the reference is statutory barred.



Valid objection

14. The law on validity of preliminary objections was stated by the Court of Appeal in Mukisa Biscuits case, *supra* in the following terms:-

“ A preliminary objection consists of a point of law which has been pleaded or which arises by clear implications out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertain or if what is sought is the exercise of judicial discretion.”

15. Applying the above precedent to the facts of this case, its correct to say that the objection raises only one pure point of law, namely, the issue of time bar. As regards the issue of conflict of interest in the context of section 4 of the *Oaths and Statutory Declarations Act*, I am satisfied that it is not a pure point of law since it requires adduction of evidence to establish.

Time bar

16. The 2nd respondent contended that the reference was filed on 31st August 2023 which was outside the 14 days period given by Rule 11 of the *Advocates Remuneration Order*. The Applicant is in denial and contends that the application was sent to court on 29th August 2023 at 5.02pm and secured an Advance copy at 5.07pm.
17. I have perused the court record. The chamber summons bears the court receiving stamp for 31st August 2023. I have also seen a payment receipt generated on 6th September 2023 at 9.28am. There is nothing on record to suggest that the summons was received in court before 30th August 2023 which was the last day for filing the reference.
18. Paragraph 11(2) of the *Advocates (Remuneration) Order* provides that:-
- “...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.”
19. The ruling on the taxation was rendered on 16th August 2023. The Taxing Officer gave her reasons for the taxation in the ruling. Nothing prevented the appellant from filing the reference within the 14 days period given by the law.
20. Having considered all the relevant facts, I find that on 31st August 2023 when the summons was received in court was already outside the statutory period. The matter became worse when the filing fees was paid on 6th September 2023. Consequently, this reference is time barred and I have no jurisdiction to determine it.
21. The applicant has on abundance of caution, prayed for leave to enlarge the time for filing the reference. However, going through the supporting affidavit by Mr. Charles Kiarie, no explanation has been given for the late filing. As such there is basis upon which to exercise discretion. Consequently, I allow the preliminary objection and strike out the chamber summons dated 29th August 2023 with costs.



22. As a parting shot, I wish to state that the reference herein ought to have been filed in the primary suit (Petition No.26 of 2020) because issue involves party and party Bill of Costs. By the counsel bringing a fresh case through a Miscellaneous Application was wrong and misleading to the registry staff. It is also untidy for the court because, one is forced to chase after the primary file at the registry to kind of reconstruct the Miscellaneous file in order to determine the reference.

DATED, SIGNED AND DELIVERED AT NYERI THIS 27TH DAY OF OCTOBER, 2023.

ONESMUS N MAKAU

JUDGE

ORDER

This ruling has been delivered to the parties via Teams video conferencing with their consent, 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.

ONESMUS N. MAKAU

JUDGE

