



**Kenya Local Government Workers Union & another v Industrial Court of Kenya;
National Union of Water & Sewerage Employees & another (Interested Parties);
Kenya County Government Workers Union (Respondent); Leonard K. Mbuvi
t/a Katunga Mbuvi & Co. Advocates (Applicant) (Miscellaneous Application
E211 of 2021) [2023] KEELRC 2755 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2755 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E211 OF 2021**

JK GAKERI, J

NOVEMBER 2, 2023

BETWEEN

KENYA LOCAL GOVERNMENT WORKERS UNION .. EXPARTE APPLICANT

AND

REPUBLIC APPLICANT

AND

INDUSTRIAL COURT OF KENYA RESPONDENT

AND

NATIONAL UNION OF WATER & SEWERAGE EMPLOYEES INTERESTED PARTY

**ASSOCIATION OF LOCAL GOVERNMENT EMPLOYEES
(ALGE) INTERESTED PARTY**

AND

KENYA COUNTY GOVERNMENT WORKERS UNION RESPONDENT

AND

**LEONARD K. MBUVI T/A KATUNGA MBUVI & CO.
ADVOCATES APPLICANT**



RULING

1. Before the Court for determination is a Notice of Motion Application dated 3rd July, 2023 brought pursuant to Order 51, rule 1 of the Civil Procedure Rules, 2010, Section 12 of the Employment & Labour Relations Court Act, the Employment and Labour Relations Court (Procedure) Rules, 2016 and any other applicable provisions of the seeking orders that:-
 1. Spent
 2. That this matter ELRC MISC/E211/2021, be transferred to the High Court of Kenya at Nairobi for re-taxation
 3. That in the alternative, the Advocate be ordered and/or directed to withdraw the bill of costs filled herein with costs to the client and file the same in the right court being the High Court.
 4. That this honourable court be pleased to grant any other orders as it may deem just in the circumstance of the case
 5. That costs of this application be provided and the same be borne by the Advocate Respondent herein
2. The grounds in support of the application are detailed on the face of the application and in the Affidavit sworn by Roba Duba the General Secretary of Kenya County Government Workers on 3rd July, 2023 That reiterates the grounds in support of the application.
3. The applicant's case is That the filed Advocates Bill of Costs dated 11th November 2021 emanates from the legal services rendered pursuant to instructions issued to the Advocate in High Court Misc. JR App No. 30 of 2011.
4. That the matter giving rise to the Bill of Costs was heard and determined by Hon. Justice Odunga (as he then was) at the High Court in the Constitutional & Judicial Review Division before the operationalization of the Employment and Labour Relations Court.
5. It is the Applicant's case That there is no record That the matter was ever transferred to the Employment and Labour Relations Court therefore the Deputy Registrar of the ELRC court sitting as a Taxing Officer did not have jurisdiction to hear, determine and /or tax the Advocates Bill of Costs.
6. The Applicant urged the court to transfer the file to the High Court which has the requisite jurisdiction.
7. The Applicant avers That the Respondent will not suffer any prejudice if the orders sought are granted.
8. The Applicant further filed a Notice of Preliminary Objection dated 8th August 2023 premised on the following grounds;
 - i. That this Honourable court's Taxing Officer lacks the jurisdiction to reconsider and/or Re-tax the Advocates Bill of Costs, the same having emanated from a High Court matter, being High Court Judicial Review Miscellaneous Application No. 30 of 2011 filed, heard and determined at the High Court's Constitutional and Judicial Review Division.



- ii. That jurisdiction is everything and where a court lacks it, it must immediately down its tools.
- iii. That there is no parent file from which this Honourable court can properly conduct re-taxation of the Advocates Bill of Costs.

Respondent's case

9. In Response to the Application Dated 3rd July 2023 and Notice of Preliminary Objection dated 8th August, 2023 the Respondent filed replying affidavits sworn on, 11th August 2023 and 18th August 2023.
10. It is the Respondents case That there is indeed a ruling calling for a re-taxation of the Bill of cost dated 11th November, 2021 as regards instruction fees.
11. The affiant states That he had been on record for the Applicant and successfully defended its members where he conducted extensive research and consulted widely and as a result shaped the jurisprudence of labour laws in the country.
12. That he used to move from Malindi to Kisumu, Kisii and Nakuru High courts with voluminous documents and court files bearing evidence in pursuit of justice for the Applicant.
13. The affiant further states That the Notice of Preliminary Objection does not raise any point of law nor any triable issues as it was a tactic to delay the process of justice in the matter.
14. The affiant deposes That the matter was heard, determined and concluded at the Industrial Court as Judicial Review Misc. App 30 of 2011.
15. The affiant avers That the matter has had hearing dates and mentions which the Applicant was aware of but failed, ignored or refused to raise any Notice of objection only to file one when the matter is pending ruling.
16. The affiant states That the Applicant has come to court with dirty hands with the intention to mislead the court.
17. The affiant further states That he will be greatly prejudiced if the Bill of Costs is dismissed/or transferred as the same was concluded and is just awaiting re-taxation Ruling by the Deputy Registrar on the issue of instruction fees.
18. In a further affidavit sworn on the 11th August 2023, the affiant states That while the matter was before Hon. Noelle Ky'anya for taxation, the respondent failed to produce any proof of payment but in its Replying Affidavit dated 8th August 2023 has attached cheques which are similar to copies attached to the other bills pending in different courts.
19. The affiant avers That he is a stranger to the said cheques as no such amount has been paid to him for this particular case.

Applicant's submissions

20. The Applicants counsel submitted That the Bill of Costs having emanated from an application That was heard and determined at the High Court the same was wrongly filed before the Employment and Labour Relations Court. Counsel submitted That the same ought to be withdrawn with costs or transferred to the High Court whose Taxing Officer is properly seized of the jurisdiction to tax it.



21. Counsel relied on the sentiments of the court in *Ali Jarso Wako & another V Ministry of Interior & Coordination of National Government & 5 others (Interested Parties)* 2020 eKLR for the holding That

“In my view lack of jurisdiction is limited to the handling of disputes at hand substantially. Transfer or referring cases to the court with proper jurisdiction is an administrative matter which is aimed at facilitating the speedy disposition of the case at hand. It has nothing to do with the jurisdiction all That the court will be saying is That you have come to the wrong forum please take your file to the correct forum.....”
22. The Applicant urged the court to transfer the matter to the High Court to facilitate expeditious disposition of this matter and further relied on the holding in *Kinyua Muyaa & Co. Advocates vs Kenya Ports Authority Pension scheme & 8 others* (2015) eKLR where the court stated as follow;

“It is the courts considered opinion That a court which presided over court proceedings is best placed to determine the costs and fees to the parties and their Advocates. The court finds and holds That it has jurisdiction to determine the fees of an Advocate in relation to legal services provided to a client in proceedings filed before the court.”
23. The Applicant further submitted That That the court in writing a ruling for the reference application dated 23rd June, 2022 lamented the lack of the parent/original file which lends credence to the Applicant’s assertion That this court is not the right forum to tax the Advocates Bill of Costs.
24. Counsel urged the court to make an order transferring the matter to the High Court whose Taxing Officer is properly seized of jurisdiction to tax the bill.

Respondent’s submissions

25. The Respondent isolated one issue for determination, namely; whether the file herein should be transferred from Employment and Labour Relations Court, Nairobi, to the High Court at Nairobi.
26. Counsel submitted That the power to transfer files is discretionary and therefore a party seeking to transfer a matter from one court to another has the burden of providing sufficient reasons to warrant the transfer. Reliance was made on the holding in *David Kabungu vs Zikarenga & 4 Others* Kampala HCC No. 36 of 1995.
27. The respondent submitted That the Applicant appeared in the matter several times but never raised any issue on the transfer and the application was a tactic calculated to frustrate and deny the advocate his right to seek legal fees for work done.
28. Counsel submitted That despite the Applicant having not submitted any evidence to convince the court to transfer the Bill of Costs, it has not complained of any bias by this court against him or That he is likely to suffer any difficulties or hardship should the case remain at the Employment and Labour Relations Court at Nairobi.
29. Counsel further submitted That it is not true That the parent file is non-existent as the Applicant has been part of the proceedings in *Judicial Review Misc. App No. 30 of 2011* Nairobi
30. The Respondent submitted That they will be greatly prejudiced if the file is transferred as the Applicant enjoyed good sound services and the matter is at its conclusion awaiting re-taxation ruling by the Deputy Registrar and a transfer will cause more delays contrary to the legitimate expectation of the respondent.



31. The respondent urged the Court to dismiss the Notice of Preliminary Objection as it does not raise any point of law or any triable issues.

Analysis and Determination

32. Having considered the application, responses and rival submissions by the parties, the issues for determination are;
- i. Whether the preliminary objection has met the threshold
 - ii. Whether the ELRC MISC /E211/2021 should be transferred to the High Court of Kenya at Nairobi for re-taxation.
33. As regards the Preliminary Objection, counsel asserts That the court lacks jurisdiction to reconsider and or re tax the Advocates Bill of Costs dated 11th November, 2021.
34. Needless to emphasize, the threshold of Preliminary Objection was enunciated by the Court of Appeal in the celebrated decision in Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Ltd (1969) EA 696 where Law JA stated as follows;
- “So far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which raises by clear implication 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 a plea of limitation, or a submission That the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration . . .”
35. Since the Preliminary Objection herein questions the jurisdiction of the court, which is a point of law, it meets the threshold of a Preliminary Objection.
36. It is trite law That a court derives its jurisdiction from *the Constitution* or an Act of Parliament or both as held by the Supreme Court in Samuel K. Macharia & another V Kenya Commercial Bank & 2 others (2012) eKLR.
37. Article 162(2) of *the Constitution* of Kenya, 2010 provides for the establishment of the Employment and Labour Relations Court as a court of equal status with the High Court of Kenya and to all intents and purposes, the court has jurisdiction including taxation of the Bills of Costs. (See Section 12 of the *Employment and Labour Relations Court Act*, 2011).
38. Instructively, in Macharia & Co. Advocates V Magugu (2002) EA 428, Ringera J. held That;
- “Taxation of costs, whether those costs be between party and party or between Advocate/ Client is a special jurisdiction reserved to the Taxing Officer by the Advocates Remuneration Order . . .”
39. Granted That the Employment and Labour Relations Court has jurisdiction to hear and determine matters relating to employment and labour relations, the Registrar and Deputy Registrars of the Employment and Labour Relations Court sitting as a Taxing Officer, has jurisdiction to tax Advocates Bill of Cost in employment and labour relations matters.
40. Paradoxically, the applicant herein is challenging the court’s jurisdiction and concomitantly seeking the transfer of the suit to the High Court. It is trite law That if a court has no jurisdiction to hear and determine a suit before it, there is nothing capable of being transferred to another court.



41. In this instance, the court is persuaded That the Deputy Registrar of Employment and Labour Relations Court sitting as a Taxing Officer has jurisdiction to tax the Advocate Bill of Costs dated 11th November, 2011.
42. It is the finding of this court That the Notice of Preliminary Objection is unmerited and it is accordingly dismissed.
43. As to whether the ELRC MISC E211 OF 2021 should be transferred to High Court, the applicant urges That the parent file giving rise to the Advocates Bill of Costs herein emanates from JR. No. 30 of 2011 That was heard and determined by the High Court’s Constitutional and Judicial Review Division before the establishment of the Employment and Labour Relations Court yet there is no record to show That the file was transferred to the Employment and Labour Relations Court.
44. It is the Applicant’s argument That the Bill of Costs should be withdrawn or transferred to the High Court of Kenya for taxation by the Taxing Master at the High Court, Nairobi.
45. What is not disputed is the content of the court file and whether it related to employment or labour relations as the same was handled by the High Court prior to the establishment of the Employment and Labour Relations Court.
46. In determining this issue, the court is guided by the decision in *Ali Jarso Wako & another v Ministry of Interior & Coordination of National Government & 5 others; Public Service Commission & 5 others (Interested Parties)* [2020] eKLR where the court held That;

“ Transfer or referring cases to the court with proper jurisdiction is an administrative matter which is aimed at facilitating the speedy disposition of the case . . . ”
47. Recognizing That the transfer of a file is an administrative action, the court is of the view That the matter is at an advanced stage as a ruling has already been issued directing re-taxation of the Advocates Bill of Costs dated 11th November, 2011 by a different Taxing Officer as regard instruction fees only.
48. It is unclear to the court why the applicant did not apply for the transfer of the Bill of Costs when it was placed before the Deputy Registrar of the Employment and Labour Relations Court or challenge the court’s jurisdiction to review the award by the Deputy Registrar.
49. The court is persuaded by the Respondent’s argument That the application herein is calculated to slow down the final disposition of the matter to the detriment of the Respondent.
50. In the upshot, the court is satisfied That the Notice of Motion dated 3rd July, 2023 is unmerited and is accordingly dismissed with no orders as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 2ND DAY OF NOVEMBER 2023

DR. JACOB GAKERI

JUDGE

