



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT KERICHO

CAUSE NO. 27 OF 2018

RAYMOND KIPLANGAT KIRUI.....CLAIMANT

VERSUS

MOGOGOSIEK TEA COMPANY LTD.....RESPONDENT

RULING

1. This ruling concerns the claimant's Chamber Summons dated 22.6.2021, brought under paragraph 11 of the Advocates

(Remuneration) Order, 2009 and section 3A & 95 of the civil procedure Act. It seeks for the following Orders: -

a) That the decision of the Learned Taxing officer, Honourable S.K. Ng'etich dated 9th June 2021 with respect to *Item 1 on Instruction Fees in the Bill of costs dated 14th December 2020* be set aside and taxed afresh by this Honourable Court.

b) That the costs of this application be provided.

2. The summons is supported by the Affidavit sworn on 22-6-2021 by the Applicant's Counsel Mugunya Rodgers. The gist of the application is that the costs awarded is too low considering that 17 matters were consolidated. Further, the taxing officer made serious errors of principle while taxing the bill of costs and as such, the award should be enhanced to align it with the work done. Therefore, the applicant prays for the Ruling on the item 1 in the Bill of Costs to be set aside and direction be issued for bill to be taxed with respect to the other consolidated matters.

3. For emphasis the applicant relied on the case of **First American Bank of Kenya –V- Dhh& Others [2002] EA, Korean United Church of Kenya and 3 Others –Vs- Seng Ha Sang [2014] eKLR, Geoffrey Eric Wasongat/a Wesonga Mutembei Kigen Advocates –Vs- Arn Security & Training Services Ltd & Another [2021] eKLR and Nyandi Tuiyott & Co. Advocates –V- Tarrita Development Ltd [2016] eKLR** where the court discussed the Principles for interfering with the taxing Officers decision on a bill of costs

4. The Respondent opposed the reference by the Grounds of opposition dated 5/11/2021. In brief, the respondent avers that the reference is bad in law because it offends paragraph II of the Advocates, (Remuneration) Order; that the grounds advanced for the reference are not cogent and do not justify interference with the discretion of the Taxing officers; that the reference is frivolous, scandalous, vexation and an abuse of the court process; and that it is premature, misplaced and should be dismissed with costs.

5. The Respondents submitted that the taxation was properly done in line with the judgment of the trial court which only awarded costs in the lead case and excluded the other consolidated suits; that costs are granted at the discretion of the court by dint of section 2 of the Civil Procedure Act; that if the applicant was aggrieved with the judgment of the trial court, he ought to have appealed or sought review; and that the prayer by the applicant for costs in the other suits consolidated herewith cannot be granted.

6. The respondent maintained that costs should only be awarded in the lead file only as awarded by the trial court and that any other interpretation could amount to interfering with the discretion and reasoning of the trial judge.

7. For emphasis if cited the case of **Eve Malenya –V - Orange Democratic Party & Others {2020} e KLR** where the court under covered that costs are at the discretion of the court.

8. Finally, the respondent submitted that the applicant has not shown good ground for interfering with the decision of the taxing officer. It contended that the taxing office properly followed the judgment of the trial court and further assessed the costs due in full compliance with the Advocate Remuneration Order.

Issues for Determination and Analysis

9. The issues for determination are -

- a) Whether the reference is bad in law and premature.
- b) Whether the taxing officer erred by assessing costs for the lead file alone and excluding other suits.
- c) Whether the costs allowed for Item I of the bills of costs was manifestly too low.
- d) What orders should be made in the circumstances?

Whether the Reference is bad in Law and Premature

10. The Respondent did not prosecute the ground that the reference is bad in law and premature. Consequently, I treat the same as abandoned.

Whether the Taxing Officer erred in awarding costs in the lead file alone.

11. The applicant contends that the taxing officer fell into error when he assessed costs for this file and declined to assess for the other suits consolidated therewith. However, the respondent is in denial and contends that the trial court only awarded costs for the lead file.

12. I have carefully considered the above trial arguments and the judgment by Marete J dated 29.6.2018. There is no dispute that 17 suits were consolidated and the instant suit was the lead file in which the judge entered judgment for the claimant in the sum of Kshs 409,859.50 and stated as follows on costs;

“(iv) The costs of this claim shall be borne by the Respondent

(v) Costs of the consolidated claims shall be head in

the lead case only”

13. The said judgment was never challenged on appeal or by review. It is therefore binding on the parties and the taxing officer of the court. In my view, the judge did not award costs to all claimants but only the claimant in the lead file only. My interpretation of the court's directions on the costs was that the judge in his desecration did not wish to award costs in all the other suits consolidated with this one. Although the judge did not assign reasons for exercising discretion as he did, it is not my mandate to venture into that matter.

Whether the Item 1 of the Bill of Costs is too Low

14. The applicant contended that the costs allowed for the item of instruction was too low considering that the work done was for 17 matters consolidated. The respondent reiterates that the judgment by the trial court granted costs only in the lead file. I have already made my decision on the fact that costs were only awarded in the lead file and the said judgment has not been never set impugned on appeal on upon review.

15. The reference is premised on the ground that the costs allowed was too low because it did not consider the aggravated award of Kshs 6,035,664 in all the consolidated files. The applicant argues for the assessment on item 1 (instructions fee) should be re-assessed and enhanced considering that the aggregate sum was Kshs 6,035,664 for all the consolidated suits. However, in view of the fact that the trial court only awarded costs to the claimant in the lead file, the ground advanced for enhancing the costs for item 1 (instructions fees) is without merits.

16. Evidently, the reference does not challenge the amount assessed based on the errors of principle as discussed in the cited precedents, but because the taxing master excluded the other suits, which were consolidated with this suit. Consequently, I find and hold that the reference is misconceived and bereft of merits, and I dismiss it with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 27TH DAY OF JANUARY , 2022.

ONESMUS N MAKAU

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 April, 2020, this judgment 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.

ONESMUS N. MAKAU

JUDGE