



**Kenya National Union of Teachers v Mutai & 2 others; Lelgo & 4 others (Interested Parties) (Miscellaneous Reference Application E009 of 2022) [2022] KEELRC 12820 (KLR) (13 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12820 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO  
MISCELLANEOUS REFERENCE APPLICATION E009 OF 2022  
ON MAKAU, J  
OCTOBER 13, 2022**

**BETWEEN**

**KENYA NATIONAL UNION OF TEACHERS ..... APPLICANT**

**AND**

**STANLEY KIPKURUI MUTAI ..... 1<sup>ST</sup> RESPONDENT**

**DAVID K. RONO ..... 2<sup>ND</sup> RESPONDENT**

**GEDION K. MUGUN ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**CHRISTOPER K. LELGO ..... INTERESTED PARTY**

**PAUL K. BETT ..... INTERESTED PARTY**

**SIMON K SEREM ..... INTERESTED PARTY**

**KENYA NATIONAL UNION OF TEACHERS KERICHO  
BRANCH ..... INTERESTED PARTY**

**REGISTRAR OF TRADE UNIONS ..... INTERESTED PARTY**

**RULING**

1. This ruling is in respect of the reference contained in the chamber summons dated March 24, 2022 and filed in court on the May 13, 2022. The summons is by the 5<sup>th</sup> respondent in the primary suit (herein after called the applicant) and it is brought under section 12 of the *Employment and Labour Relations Court Act*, section 1A,1B ,3,3A of the *Civil Procedure Act*, rule 11(4) of the *Advocates Remuneration Order* (ARO), and all enabling provisions of the law. The reference seeks the following orders that; -

a) Spent.



- b) Spent.
  - c) This honorable court be pleased to review and/or set aside the decision of the taxing officer dated February 11, 2022 in the sum of Kshs 832,517.
  - d) Cost of this application be in the cause.
2. The application is supported by affidavit of Mr Collins Oyuu, the secretary general of the applicant, sworn on March 24, 2022. In brief the affiant admits that the trial awarded costs to the claimants in the primary suit (herein after called the respondents) and they filed a party and party bill of costs dated August 26, 2021 for Kshs 1,570,810. However, he contends that the applicant is aggrieved by the impugned decision because: -
- a) The taxing officer failed to take into consideration the fact that the proceedings were carried out virtually and thereby arrived at a wrong decision.
  - b) The taxing officer failed to take into account the fact that service of the court process was done through electronic mail and thereby arrived at a wrong decision.
  - c) No explanation has been given by the taxing officer in allowing the party and party bill of costs in the sum of Kshs 832,517.
3. Finally, the affiant contends that it is in the interest of justice that the orders sought by the reference be granted as prayed.
4. In response to the reference, the respondents filed replying affidavit sworn on May 25, 2022 by their counsel Mr Daniel O Rakoro in which he deposes that his clients were awarded costs by the trial court in a judgment rendered on March 4, 2021 and they filed party and party bill of costs dated August 26, 2021; that the applicant did not file anything to oppose the bill of costs upon service; that a ruling on the bill was rendered on February 11, 2022 allowing the sum of Kshs 832,517; that no proof has been made that the applicant's letter dated February 14, 2022 was filed in court or served on the taxing officer within the statutory period; and that the application was filed out of time without leave of the court and it is therefore fatally defective.
5. The application was canvassed by way of written submission.

### **Submissions.**

6. The applicant has submitted on only one issue, namely, whether there are sufficient grounds for interfering with the taxing officer's impugned ruling. From the onset the applicant appreciates that the court would not interfere with the decision of a taxing officer's decision except if it is shown that there was an error in principle or that the quantum is manifestly excessive or too low that it amounts to an injustice.
7. In this case, it is the applicant's contention that the award of Kshs 300,000 as instructions fees was an error and not justified given that the taxing officer at page 3 of his ruling indicated that the matter was not complex. Accordingly, the applicant submits that the taxing officer did not provide any basis on which he allowed the sum of Kshs 300,000. In its view that the respondents are only entitled to Kshs 75,000 as instruction fees under the appropriate scale since the value of the matter could not be ascertained from the judgment or the pleadings.
8. The applicant further argues that the award of Kshs 100,000 as getting up fees was also made in error and therefore the same should reviewed down to Kshs 25,000 being 1/3 of the instruction fees of Kshs 75,000.



9. The applicant also faulted the amounts awarded for service of the court process in items (a) – (i) of the bill of costs and maintained that the same was an error because service was done electronically. Therefore the applicant submitted that since there is no evidence of physical service, a sum of Kshs 1400 should be the appropriate sum for the respective items.
10. As regards the costs awarded for court attendance, again the applicant contends that the same was done online and for very short durations of less than one hour. Therefore it urged the court to reduce the amount to Kshs 1100 per item.
11. In the end the court was urged to tax off the excess amounts for being an unjust enrichment. For emphasis, the applicant relied on Misc cause No E001 of 2020 *County Assembly of Kericho & another v Bett & another* and Misc application No E005 of 2021 *Jane ngetho t/a Ngetho & company v Violet Mukabi Joram* where the court interfered with decision of the taxing officer.
12. The respondents, on the other hand, submit, that no sufficient grounds have disclosed by the applicant for interfering with the impugned decision. According to them, the award of Kshs 300,000 as instructions fees was after careful consideration and is therefore justified.
13. They submit further that the applicant has not said why, exactly the instructions fees should be Kshs 75,000 and argued that the said amount is only the minimum that can be charged and not the maximum. Therefore, they maintain that the applicant has not shown that the taxing officer exercised his discretion unjustly.
14. As a consequence of the foregoing submission, the respondents content that the getting up fees is also covered herein and the Kshs 100,000 awarded should not be interfered with.
15. As regards the items on attendances, the respondents submit that the taxing officer indicated that the applicable law is paragraph 7 and that under rule 50 and 50A of the ARO, the lower scale is used. They argue that the taxing officer held that the hearing took about one hour and submit that the applicant has not proved that the hearing took less than 30 minutes as it alleges. Further, they argue that attendance was from 9.00 am when the court started with call over of all the matters followed by the lengthy submissions made by each party in this matter. Therefore, in their view, a duration of one hour was a fair assessment of the time taken in court.
16. In addition, the respondents submit that the reference is fatally defective for non-compliance with paragraph 11 of the ARO since it was filed out of time and without leave of the court. They reiterate that there is no evidence that the applicant's letter dated February 14, 2022 was ever served on the taxing officer. Besides, the instant application, though dated March 24, 2022, it was only filed on May 16, 2022 way off the 14 days allowed by the law.
17. The respondents relied on the case of *Vincent Kibiwot Rono v Abraham Kiprotich Chebet & another* [2022] eKLR and *County Government of Tana River v Miller & Co Advocates* [2021] eKLR in urging for the dismissal of the reference with costs.

### **Analysis And Determinations**

18. After considering the applications, the responses thereto and the submissions filed, the main issues for determination are:
  - a. Whether the application/reference is fatally defective.
  - b. Whether there are sufficient grounds for interfering with the taxing officer's ruling dated February 11, 2022.



### **Whether The Application/reference Is Fatally Defective.**

19. The respondents contend that the reference is fatally defective because it was filed out of time and without leave of the court contrary to paragraph 11 of the ARO. The paragraph states that:

“(1) Should any party object to the decision of taxing officer, he may within fourteen after the decision give notice in writing to the taxing officer of the items of the taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for the 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) ...”

20. The applicant alleged that it complied with the above provision by serving the taxing officer with notice of objection dated February 14, 2022 but no response was made as required under sub paragraph (2) above.

21. I have carefully considered the said rival contentions. There is on record a letter by the applicant’s counsel dated February 14, 2022 addressed to the deputy registrar of this court and copied to the respondents’ counsel. The letter objected to the entire decision of the taxing officer and sought his reasons for the “high award” of Kshs 832,517 to enable the applicant file a reference to the High Court. The letter was written three days after the impugned decision and was on all fours with an objection notice under paragraph 11(1) of the ARO.

22. However, there is no evidence to show that the letter was ever filed in court, or served on the taxing officer on time. A stamped copy or email correspondence forwarding the same to the deputy registrar and the respondents’ counsel would have persuaded me. Without such evidence, I find that the applicant did not give any notice of its objection to the decision of the taxing officer within 14 days after the delivery of the impugned decision as required by paragraph 11 (1) of the ARO. The only time the letter dated February 14, 2022 was filed in court was on May 13, 2022, as annexed to the affidavit filed in support of the instant reference, which was way off the said limitation period.

23. As it appears from the record, the applicant did not utilize the leeway afforded by paragraph 11(4) of the ARO which provides that:

“(4) The High Court shall have the power in its discretion by order to enlarge any time fixed by subparagraph (1) or subparagraph (2) for 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.”

24. Having taken into account all the facts of this case, I must agree with the respondents that the reference contained in the chamber summons dated March 24, 2022 is time barred for offending the provisions of paragraph 11 of the ARO. The same having been filed without leave of the court, remains fatally incompetent and is therefore struck out with costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 13<sup>TH</sup> DAY OF OCTOBER, 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 15<sup>th</sup> April 2020, this ruling 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**

