



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

ELRC PETITION NO.10 OF 2015

(Before D.K.N.Marete)

KENYA COUNTY GOVERNMENT WORKERS UNION.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF NYERI

NYERI COUNTY PUBLIC SERVICE BOARD SCHOOL.....RESPONDENT

RULING

This is an application by way of Preliminary Objection dated 19th November, 2020 and comes out as follows;

- 1. That the Chamber Summons Application dated 6th November, 2020 has been filed outside time as contemplated by Rule 11 (2) of the Advocates Remuneration Order.*
- 2. That the Chamber Summons Application by the Respondents is defective for not complying with the mandatory provision of section 5 of the Oaths and Statutory Declarations Act and Order 19 Rule 4 of the Civil Procedure Rules, 2010.*
- 3. That the Chamber Summons Application dated 6th November, 2020 as filed and canvassed is fatally and incurably defective in law and as such cannot stand and/or be ventilated before this Honorable Court.*
- 4. That the continued pendency of the application is an abuse of this Honourable Court's process and should be dismissed before this Honourable Court.*

The Respondent in her written submissions dated 11th January 2020 submits that the objection is without merit and should be dismissed with costs.

The history of the matter is that a ruling was delivered in respect to the Petitioner's Bill of Costs dated 7th August 2019 where the Bill of Costs was taxed at Kenya Shillings six million nine hundred and eighty two thousand eight hundred and seventy two (KShs.6,982,872.00) as costs awarded to the Petitioner. Upon delivery of the ruling the Respondents filed an Objection of taxation. The same was responded to by the Deputy Registrar giving reasons for taxation of the Bill of Costs and that the items had been taxed in accordance with the provisions of the Advocates Remuneration Order, 2014. The Respondent being dissatisfied by the ruling of the Court filed a chamber summons application dated 7th November, 2020 orders seeking, *inter alia*, that the order be set aside.

It is the Petitioner's submission that the ruling on the taxation was delivered on 13th March, 2020 and thereon the Respondents notified the taxing master of their objection on the same day. The taxing master responded to the objection promptly on the same day.

However, the Respondents moved to court in protest against the taxation on 10th November, 2020, 7 months after the event of the delivery of the ruling on taxation. This was way after the prescribed statutory period of 14 days in accordance with Rule 11(1) and (2) of the Advocates Remuneration Order. There is no sufficient reason adduced by the Respondent to explain this delay and therefore the same should be dismissed. It is trite law that statutory time lines are set for good reason and instances where the court is permitted to exercise its discretion, the reasons for failure to meet the timelines must be sufficiently set out.

In the instant case, the Respondents filed their reference and did not seek the court's leave so to do. This is the fallacy and ground for dismissal.

Again, the Petitioner submits that the supporting affidavit in regard to the application does not comply with Section 5 of the Oaths and Statutory Declarations Act and Order 19 Rule 4 as it does not state the place and date when it was signed and therefore should be struck out.

The action of the Respondent to post-date his supporting Affidavit and/or failure to swear the same before the Commissioner for oaths on the same date and place where the oath was made or taken in line with the date of the application cannot be a technicality that could be cured by Order 19 Rule 7 of the Civil Procedure Rules or Article 159 (2) (d) of the Constitution of Kenya, 2010- *a regard to undue technicalities*. This is another deficit rendering the application untenable and material for dismissal.

The Respondent in rebuttal submits that the application was filed on time. This was within the fourteen (14) days period. This is illustrated by paragraph 5 of the Supporting Affidavit and paragraphs 2, 4, and 5 of the Further Affidavit. In the circumstances, the reasons for taxation were received on 30th October, 2020 at 1229 hours. A filing on 6th November, 2020 was therefore apt. The delay in the issue of reasons for taxation, despite the ruling being delivered on 13th March, 2020 is that soon thereafter, on 16th March instant, courts were closed due to the Novel Corona pandemic.

The Respondent further submits that this preliminary objection is not compliant with the celebrated authority of **Mukhisa Biscuits Manufacturing Company Ltd Vs West End Distributors Limited (1969) EA 696** in that it is not based on a pure point of law but would require facts to ascertain. A verification of when the taxing master forwarded the reasons for taxation and when this was received by the Respondent is a purely a matter of evidence and investigation. Therefore the preliminary objection becomes untenable.

On the premises of the respective cases of the parties, this application tilts in favour of the Respondent. Her case is self telling. From the onset, she has established and set out a case of a preliminary objection which is non-compliance with the law on the subject. It would require investigation on the factual basis of the delivery and receipt of the reasons for taxation by the taxing master to the Respondent. This eliminates the pure point of law element of preliminary objection.

Secondly, the respondent submits and illustrates that his application was prompt and timely. The Respondent has premised that the delay in the delivery of the reasons for taxation could have been caused by the onset of the pandemic and subsequent closure of the courts on the onset of the pandemic. This is good ground, excusable and understandable.

Lastly, the Respondent submits that there is no anomaly in her Supporting Affidavit. A look at the Commissioner of oaths stamp the court concluded that everything is in order and provides for all the details needed. The absence of the place and address of the *jurat* can be cured by the fact that at the end the Advocate who has sworn the affidavit has provided all his details being the address and place where the office is.

Additionally, she submits that in deciding this, the court is guided by Section 3A of the Civil Procedure Act and Article 159 2(d) of the Constitution of Kenya, 2010. This comes out as follows;

Section 3A,

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

Again,

Article 159 (2)(d)

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles-

(d) justice shall be administered without undue regard to procedural technicalities

The Respondents therefore takes the day and the preliminary objection dated 19th November, 2020 be and is hereby dismissed for want of merit. The costs of the application shall be borne by the Petitioner/Applicant.

DATED AND DELIVERED AT NYERI THIS 16TH DAY OF JUNE, 2021.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr.Brian Otieno instructed by Brian Otieno & Company Advocates for the Petitioner/Applicant.
2. Mr.Gikonyo instructed by Wahome Gikonyo & Company Advocates for the Respondent.