



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSES NO. 744, 745, 746, 747 AND 748 ALL OF 2016

SAMUEL MANGALE MADZAO.....1ST CLAIMANT
ELIAS AKIBA BALO.....2ND CLAIMANT
IBRAHIM KHAMBU SAID.....3RD CLAIMANT
KAZUNGU KAHINDI KIRAO.....4TH CLAIMANT
CHENGO KATANA KITSAO ALIAS EVANS BAYA.....5TH CLAIMANT

- VERSUS -

**DHANJAL INVESTMENTS LIMITED T/A TRAVELLERS BEACH HOTEL &
CLUB.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 19th November, 2021)

RULING

On 18.05.2021 an order by consent was given thus, “**2) The payment of decretal sum herein is also subject to costs of the suits as will be taxed or agreed upon.**” It appears the parties failed to agree on the costs and taxation fell due. The claimants filed on 02.12.2020 their respective party & party bill of costs. The ruling by the taxing master was delivered on 27.08.2021 with respect to cause 744 of 2016 taxing the bill at Kshs. 200, 475.00. Certificates of costs were then issued on 31.08.2021 in each of the five cases.

The respondent in the suits has filed on 10.09.2021 a chamber summons dated 09.09.2021 through Aoko Githara & Company Advocates. The application is under section 51(2) of the Advocates Act and rule 11 of the Advocates Remuneration Order. The application is for orders:

- 1) (spent).
- 2) (spent).
- 3) There be reference to this Court from the taxation dated 27th August 2021 of the Deputy Registrar and Taxing Master of the Employment and Labour Relations Court at Mombasa.
- 4) The certificates of taxation dated 31.08.2021 and all consequential orders be set aside.
- 5) The claimant’s party and party bill of costs dated 28.10.2020 be referred for fresh taxation.
- 6) Costs of the reference be provided for.

The application was based on the supporting affidavit of Kevin Githara Chuchu Advocate and upon the following grounds:

- 1) On 03.09.2021 counsel for the claimants informed counsel for the applicant that the taxing master had delivered a ruling on 27.08.2021 with respect to claimant’s party and party bill of costs dated 28.10.2020 and the same was to apply in all the files as consolidated. The resultant certificates of taxation dated 31.08.2021 were also shared.

- 2) The claimants' advocate did not serve the applicant's advocates with the notice of taxation or a notice when the taxing master was to deliver the ruling.
- 3) The claimants' counsel failed to inform the taxing master that the applicant had filed and served submissions in response to the bill of costs.
- 4) The applicant's submissions had not been considered and there is an error apparent on the record. The applicant enjoyed a sacrosanct constitutional right to be heard on the bill of costs filed for the claimants.
- 5) In the further affidavit of Kevin Githara Chuchu, it is urged that there is no dispute that the applicants' submissions had not been considered. Further, it was upon perusal of the Court file in preparation of the decree that the applicant's counsel discovered that the bill of costs had been filed and a single set of submissions in cause 748/2016 was filed because the cases had been consolidated.

The claimants opposed the application by filing on 08.10.2021 the replying affidavit of William C. Kenga Advocates, counsel for the claimants on record. Learned counsel urged as follows:

- 1) The five respective bills dated 28.10.2020 and notices of taxation dated 21.05.2021 were served alongside written submissions per affidavit of service in each of the files sworn on 02.06.2021 and 03.06.2021 respectively. Service was by email per prevailing rules of the Court during the Covid 19 pandemic.
- 2) The applicant filed on 17.08.2021 its submissions in cause 748/2016 confirming the bills had been served.
- 3) The application is therefore an abuse of Court process.

The Court has considered the respective positions and the submissions filed for parties and finds as follows:

First, in view of the affidavits of service exhibited, there is no reason to doubt that the respective bills of costs and the notices of taxation had been served upon the applicant's counsel.

Second, the Court finds that in so far as the claimants say they proceeded with taxation in one of the cases and as though it applied to all the suits as consolidated, there is an error apparent on record when the taxing master ruled thus, "**The claimant submitted that the bill is drawn to scale and urged that the same be taxed as drawn, the respondent did not file a response to the bill despite service.**" That was on 27.08.2021 whereas the applicant had filed on 17.08.2021 its submissions in cause 748/2016. The Court finds that the applicant has established that its submissions on record in response to one of the bills of costs was not considered at all. The application would succeed on that account.

Third, while certificates of costs on taxation were issued in all the five files, the ruling was clearly with respect to cause 744/2016 and nowhere was it stated that it applied to all the five cases. In view of that finding, the Court returns that the five certificates of costs on taxation were issued in a clear mix up as there is no evidence that the taxing master ever considered and directed the mind to the other four files as consolidated and with respect to the bills of costs as had been filed therein. Thus, again, the application should succeed on that account.

Fourth, in view of the established service of notice of taxation and the bills of costs, the applicant shall bear costs of the application.

In conclusion the application by the chamber summons dated 09.09.2021 and filed 10.09.2021 is hereby allowed with orders:

- 1) There be reference to this Court from the taxation dated 27th August 2021 of the Deputy Registrar and Taxing Master of the Employment and Labour Relations Court at Mombasa.
- 2) Consequential to the reference, the ruling by Deputy Registrar and Taxing Master delivered on 27.08.2021 together with the respective certificates of taxation herein dated 31.08.2021, and, all consequential orders or processes therefrom be and are hereby set aside.
- 3) The claimants' respective party and party bill of costs dated 28.10.2020 be and are hereby referred for fresh taxation.
- 4) The applicant to bear costs of the application.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 19TH NOVEMBER, 2021.

BYRAM ONGAYA

JUDGE