



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 454 OF 2012

(Before Hon. Lady Justice Hellen S. Wasilwa on 21st May, 2020)

HELLEN WASEKA.....CLAIMANT

VERSUS

MIDDLE EAST BANK KENYA LIMITED..RESPONDENT

RULING

1. The Application before Court is the Respondent/Applicant's, Middle East Bank Kenya Limited, Notice of Motion filed on 18/11/2019 seeking the following reliefs:-

- 1. The directions/orders given herein by the Deputy Registrar on 5th November 2019 to tax the Claimant's Bill of Costs dated 15th January 2019 be set aside or declared a nullity;***
- 2. The orders declining to place the Respondent's Preliminary Objection to the taxing before a learned Judge be set aside; and***
- 3. The said Preliminary Objection be determined by a learned Judge of this Honourable Court;***
- 4. The costs of this application be granted to the Respondent.***

2. The Application is premised on grounds that:-

- 1. The Deputy Registrar of this Court has no jurisdiction to conduct a taxation of a Bill of Costs which is based on the Advocates (Remuneration) Order.***
- 2. Rule 29 of the Employment and Labour Relations Court Rules does not give the Deputy Registrar the mandate to tax costs pursuant to the said Advocate (Remuneration) Order. This rule is to be used as a guide in awarding costs and not a basis for taxation of a Bill of Costs.***
- 3. The Applicant has filed a Preliminary Objection to the taxation of the Respondent's Bill of Costs, which it has sought to be placed and heard before the Presiding Judge and not by the Deputy Registrar.***
- 4. By the order that the Preliminary Objection of the Applicant and taxation of the Respondent's Bill of Costs is to be heard concurrently before the Deputy Registrar is a denial of a fair hearing to the Applicant.***
- 5. The Employment and Labour Relations Court is not a High Court under Section 165 (3) (e) of the Constitution, 2010 and therefore cannot apply the Advocates (Remuneration) Order to tax Bills of Costs which is strictly and lawfully meant for the High Court only.***

3. The Application is supported by the Affidavit of Felix Ng'ang'a Karanja, an Advocate of the High Court of Kenya, sworn on 14/1/2019. He depones that on 6/11/2019, the matter had been listed for hearing of the Applicant's Preliminary Objection (P.O) before the Deputy Registrar in view of the jurisdiction of the Court to tax a bill of costs based on the Advocates (Remuneration) Order.

4. He depones that the Deputy Registrar declined to enforce her previous orders that parties were to take a convenient date before the presiding judge in respect to the matter. He avers that the Deputy Registrar issued fresh orders that she would hear both the Preliminary

Objection and simultaneously conduct taxation on 20/11/2019.

5. It is his averment that the Preliminary Objection ought to be heard by the Presiding judge and not the Deputy Registrar as she does not have jurisdiction to hear the same.

6. In response to the application, the Respondent filed a Replying Affidavit sworn by Geoffrey Eric Odongo, an Advocate of the High Court of Kenya on 11/12/2019. He avers that the applicant blatantly refused to comply with the Orders of this Honourable Court made on 30/4/2019 requiring that the Applicant deposit the decretal sum in a joint interest earning account.

7. He avers that when the parties appeared before the Court on 15/10/2016 for hearing of the P.O., counsel for the Applicant concede that upon delivery Judgment, the Court became *functus officio*. Consequently, the Court referred the hearing of the P.O. and taxation of the pending Bill of Costs to the Deputy registrar on 15/10/2019.

8. He avers that by virtue of Rule 29 (1) of the Employment and Labour Relations Court Rules 2016, Section 12 (4) of the Employment and Labour Relations Court and Rule 13 A of the Advocates Remuneration Order relates to taxation of the Applicant's Bill of Costs therefore the Preliminary Objection falls under the ambit of determination of costs. He avers that the application is in bad faith and is meant to delay conclusion of the matter.

Applicant's submissions

9. The Applicant submits that Bill of Costs cannot be taxed by the Deputy Registrar as there is no provision for taxation of costs in this Court. It submits that Rule 2 of the Advocates (Remuneration) Order 1962 clearly states that the Order applies to proceedings in the High Court, subordinate Courts and Rent Tribunals.

10. It submits that this Court is not a High Court as it is a separate Court pursuant to Article 162 (2) (a) of the Constitution and Section 4 of the Employment and Labour Relations Court(ELRC) Act. In support of this it cites the case of **Republic v Karisa Chengo & 2 Others [2017] eKLR**.

11. It avers that this Court is not governed by the Advocates Remuneration Order but section 12 (4) of the ELRC Act and Rule 29 of the ELRC (Procedure) Rules 2016. It is the case that these provisions are to guide the Court on matters of quantum of costs and do not authorise taxation of costs.

12. It avers that there is no provision that taxation of costs awarded to a party will be conducted to ascertain quantum of costs.

Respondent's submissions

13. It is the Respondent's submission that a taxing officer has jurisdiction to determine all matters relating to the determination of costs whether advocate-client or party and party. She relies on the case of **Wilfred N. Konosi t/a Konosi & Co. Advocates v Fiamco Limited [2017] eKLR** where the Court of Appeal held that the taxing officer sits in taxation as a judicial officer.

14. She avers that Article 162 (2) (a) of the Constitution provides that Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to employment and labour relations. In support of this position she relies on the cases of **Kinyua Muyaa & Co. Advocates v Kenya Ports Authority Pension Scheme & 8 Others [2015] eKLR**. She submits that the case of **Republic v Karisa Chengo & 2 Others [2017] eKLR** relied on by the Applicant is distinguishable because it concerned jurisdiction of judges of the ELRC and ELC to preside over criminal matters and not the status of those Courts.

15. She relies on the **Geoffrey Makana Asanyo v Nakuru Water & Sanitation Company Ltd & 8 Others [2015] eKLR** where the Court held that:-

“For myself, I am ready and do accept that the various Advocate (Remuneration) Orders and more so schedule 6 is applicable to proceedings in this Court, though with a rider that considering the types of disputes presented before the Court, a more specific and tailored schedule should be prepared...”

16. It is her submission that the Advocates Remuneration Order does not have a scale for ELRC matters. However, the Constitution confers the ELRC a status equal to that of the High Court thus appropriate scale for taxation is the scale for matters before the High Court. It finally submits that the Applicant's Preliminary Objection and Application dated 14/11/2019 are misplaced and should be dismissed.

17. The applicant filed further submissions. It avers that the Applicant's contention is that in the absence of any provision in law providing for taxation, it is to be implied that the Registrar of this court has similar jurisdiction as a Registrar if the High Court to tax Bill of Costs under the Advocates Remuneration Order.

18. It also relies on the case of **Kinosi v Flamco Limited [2017] eKLR** where the Court of Appeal held that jurisdiction cannot arise by implication. He submits that in the Asanyo case relied upon by the Respondent, Radido J held that the Advocates Remuneration Order applied to proceedings before the Court but the learned judge does not explain on what basis he arrived at that conclusion.

19. It further submits that the Court in **K Muyaa v Kenya Ports Authority Fund [2015] eKLR** it was not contested that a Registrar had jurisdiction to tax a party bill of costs and what was at issue was whether a Registrar could also tax an advocate and client bill and advocates did not address the Court on the issue.

20. It is its submission that the Court is of the same status as the High Court but powers of the Registrars are spelt out in relevant legislation. Further, Registrars of the Court can only perform “administrative” acts.

21. I have examined the averments of the Parties herein. The main contention by the Applicant is that Rule 2 of the Advocates (Remuneration) Order 1962 relates to the High Court for which this Court is not.

22. The Applicant avers that this Court is not governed by the Advocates (Remuneration) Order but Section 12 of the ELRC Act and Article 162(2) (a) of the Constitution.

23. The Respondent’s submission is that the Court established under Article 162 (2) of the Constitution is a Court with the status of the High Court and so the Court should be considered as a High Court for purpose of taxation.

24. I do agree that this Court being of the same status as the High Court, under the provision of Article 162 (2) of the Constitution, the issue of taxation before this Court, should be as provided for the High Court.

25. A Taxing Master/Mistress is indeed a Judicial Officer and the issue of this Court’s jurisdiction vis a vis the High Court has been handled severally by the Courts where the holding has been that the reference to the High Court will be applied mutatis mutandis in reference to the ELRC – see - **United States International University (USIU) vs Attorney General (2012) eKLR** where Majanja J held that:-

“Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in Section 12 of the Industrial Court Act, 2011 or to interpret the Constitution would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of Employment and Labour Law.....”

26. The Court of Appeal in case of **Daniel N. Mugendi versus Kenyatta University & 3 Others (CACA No.6/2012 (2013) eKLR** reaffirmed the position in the case of **USIU vs. Attorney General** above.

27. In determining this application therefore, I find that the issue of taxation as applied by the High Court has by use and custom been applied to this Court as provided for under Rule 29 of the ELRC Rules 2016 which states as follows:-

“Costs and interest

The Court shall be guided by Section 12 (4) of the ELRC Act (No 20 of 2011) and the Advocates (Remuneration) Order in awarding costs”.

28. It is therefore my finding that this application has no merit. I there dismiss it and order the DR to proceed with the taxation as earlier scheduled as this Court is already functus office.

29. Costs to the Respondents.

Dated and delivered in Chambers via zoom this 21st day of May, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ismael for Respondent/Applicant – Present

Respondents – Absent