



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 34 OF 2016**

**ALBERT CHIVINI MWIROTSI.....1<sup>ST</sup> CLAIMANT**

**SIMON DICKSON.....2<sup>ND</sup> CLAIMANT**

**DANIEL NTAWAUSA WUANTAL.....3<sup>RD</sup> CLAIMANT**

**- VERSUS -**

**REGISTRAR OF TRADE UNIONS.....1<sup>ST</sup> RESPONDENT**

**KENYA ELECTRICAL TRADE & ALLIED**

**WORKERS UNION.....2<sup>ND</sup> RESPONDENT**

**RAPHAEL MACHARIA.....4<sup>TH</sup> RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 15<sup>th</sup> March, 2019)**

**RULING**

The 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed on 05.09.2018 a notice of motion through Onyony & Company Advocates. The application was under sections 3, 16 and 20 of the Employment and Labour Relations Court Act, Cap 234B Laws of Kenya, Rules 33 and 34 of the Employment Court Rules 2016, and all other enabling provisions of the law. They prayed for orders:

- a) That there be a review of the order of taxation taxing the applicants' bill of costs dated 11.09.2017 at Kshs.27, 880.00.
- b) The Honourable Court be pleased to enlarge the time fixed by order 11(1) of the Advocates (Remuneration) Order for giving notice to the taxing officer of the items of taxation to which the applicants object with regard to the bill of costs dated 1.09.2017 and filed in court on even date.
- c) That the Honourable Court be pleased to deem the annexed notice to the taxing officer of the applicants' objection to the items of taxation to the bill of costs dated 11.09.2017 as duly filed.
- d) That the order of taxation of applicants' bill of costs delivered on 25.04.2018 be set aside.
- e) That the deputy registrar proceeds to admit and re-tax the applicants' bill of costs filed herewith.
- f) That there be an order of re-taxation on item no.1 of the applicants bill of costs dated 11.09.2017.
- g) That costs of the application be in the cause.

The application was based on the supporting affidavit of Cyprian Onyony Advocate and upon the following grounds:

- a) The applicants filed the bill of costs on 11.09.2017 and a decision delivered thereon on 25.04.2018. It was taxed at Kshs.27, 880.00.
- b) Time for filing notice of objection to the taxation and for re-taxation has lapsed and the Court has power to extend the time in the

circumstances.

- c) The taxing officer misdirected herself by taxing item no.1 in the bill as perusal per paragraph 8 of schedule 6 of the Advocates (Remuneration) Order 2014 instead of taxing it as instruction fees as provided under paragraph 1 of the schedule.
- d) If the application is not allowed the applicants will suffer substantial damage.
- e) The bill of costs as drawn in item 1 inadvertently omitted “**instruction fees for**” thereby causing confusion and it is an oversight to be remedied without causing prejudice to the other parties. The bill should be re-taxed in the interest of justice.
- f) The application had been made with reasonable dispatch.

The applicants narrated item no. 1 as, “**Receiving and perusing certificate of urgency, notice of motion, supporting affidavit, memorandum of claim, verifying affidavit, witness statements, claimant’s list of documents, claimant’s list of witnesses all under certificate of urgency dated 15<sup>th</sup> January 2016 from Jumba & Company Advocates (278 folios)**” and charged Kshs.100,000.00. In the present application the applicants purport to seek to amend that narration to, “**Receiving instructions to defend a claim against the claimant; fees for defending a claim.**” The ruling on taxation dated 25.04.2018 by Hon. Ngumi, Deputy Registrar stated as follows, “**Noting that parties are bound by their pleadings, Item No.1 is taxed at Ksh.4, 300.00/= as there were 86 folios perused at Kshs.50/= per folio.**”

The claimants filed the grounds of opposition on 12.09.2018 through Jumba & Company Advocates. The grounds of opposition were as follows:

- a) The application was incurably incompetent, incurable and fatally defective as the Hon. Deputy Registrar has already pronounced herself rendering the Court *functus officio* and cannot therefore reopen the matter unless grounds for review under Order 45 of the Civil Procedure Rules.
- b) The bill of costs cannot be amended after a ruling has been delivered thereon.
- c) There is no prayer to amend the bill as desired by the applicants.
- d) The application fails to meet threshold for review and the Court is being invited to sit on appeal of its own decision.
- e) A similar application dated 21.06.2018 by the applicants had been withdrawn.
- f) The application is dead on arrival and is a waste of judicial time.

The supplementary affidavit of Cyprian Onyony Advocate was filed on 21.09.2018 in reply to the grounds of opposition. He urged that the application was for review and an amended bill of costs had been exhibited on the supporting affidavit. Review was applied for based on an error on the bill of costs as filed. Further withdrawal of a similar earlier application had been discretionary.

The parties filed their respective submissions. The Court has considered the submissions and the parties’ respective positions. The Court makes findings as follows:

- 1) As submitted for the claimants, under the applicable order 11 of the Advocates (Remuneration) Order under the Advocates Act, a party aggrieved by the decision of a taxing officer is required to object in writing by requesting the taxing officer to give reasons for the items of taxation that he is objecting to and thereafter file reference to the Court. The Court returns that in the instant case the applicants are seeking to challenge the decision by the taxing officer by way of an application for review instead of a reference as prescribed in law. The Court returns that the same amounted to abuse of court process.
- 2) It is clear that the applicants are seeking to amend the bill of costs long after it was taxed and without a substantive prayer in that regard and the Court returns that such irregularity will not be entertained.
- 3) The Court returns that the applicants, while irregularly invoking the jurisdiction for review as already found, they have failed to establish an error apparent on record as per the findings by the taxing officer. The narration in item 1 of the bill as earlier quoted in this ruling was for perusal and the same was considered accordingly. It is a belated afterthought for the applicants to allege error when the narration was clear and not ambiguous. There is no error on record established on the face of the ruling by the taxing officer. As submitted for the claimants, an error in the bill of costs (which is a document in the nature of a pleading) which was in the nature of a pleading cannot be such an error on the record of the Court to justify a review and the Court finds that such view on the part of the applicants was misconceived.
- 4) The Court finds that it is established that a review is by the same person or authority that made the decision subject of the application for review. Thus the Court lacks jurisdiction to review a decision by the taxing officer and the Court further finds that an attempt to distinguish a review and a reference to justify a review as submitted for the applicants was misconceived. Accordingly the present application will fail.

In conclusion the application filed on 05.09.2018 and dated 03.09.2018 is hereby dismissed with costs.

Signed, dated and delivered in court at Nairobi this Friday 15<sup>th</sup> March, 2019.

**BYRAM ONGAYA**

**JUDGE**