



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**MISC. APPLICATION NO. 5 OF 2017**  
**P. OCHIENG OCHIENG & COMPANY.....APPLICANT**  
**SUNSET HOTEL LIMITED.....RESPONDENT**  
**CONSOLIDATED WITH**  
**KISUMU ELRC CAUSE NO. 75 OF 2015**  
**KENYA HOTELS AND ALLIED WORKERS UNION.....CLAIMANT**  
**VERSUS**  
**SUNSET HOTEL LTD.....RESPONDENT**  
**RULING**

Before me for determination are two applications. The first is filed by P. Ochieng Ochieng & Company Advocates (**the Advocate**) by motion dated 23rd August 2017 through Kirenga & Company Advocates. It seeks the following orders-

1. **That** the court do order the amount certified on the certificate of taxation herein dated the 23<sup>rd</sup> August 2017 as judgment against the respondent.
2. **That** the taxed costs do attract interest at the rate of 14% per annum from the 20<sup>th</sup> April 2017 which would be 1 month from the delivery of the Advocates bill to the Respondent.
3. **That** a decree be issued in respect of the certificate of taxation dated the 23<sup>rd</sup> August 2017 and the applicant be at liberty to execute for recovery of the same in such manner as a Decree of the honourable Court.
4. **That** cost of the application be provided for.

It is supported by the affidavit of Patrick Ochieng, Esquire, Advocate for Sunset Hotel the Respondent in MISC. APPLICATION NO. 5 OF 2017 and on the grounds on the face of the application.

The second application is dated 22nd September 2017 and is filed by Sunset Hotel Ltd (**the Client**) on 23rd September 2017 seeking the following orders-

1. **THAT** this Honourable Court be pleased to order the Client/Applicant to pay the Advocate/Respondent the sum decreed in the Certificate of Costs issued by this Honourable Court

on June 30, 2017 by equal monthly instalments of Kshs.30,000/- each.

2. **THAT** the costs of this application be provided for.

The applications came for hearing on 28th September 2017 when Mr. Ochieng, Esquire appeared for P. OCHIENG OCHIENG & COMPANY while Mr. Katambani a manager with Sunset Hotel appeared on its behalf.

### **Background of Applications**

The background of the two applications as set out in the grounds and affidavits in support of the applications is that P. OCHIENG OCHIENG & COMPANY Advocates successfully represented Sunset Hotel in Cause No. 75 of 2015. Thereafter Sunset Hotel failed to pay the advocate's full fees compelling the firm to file a bill of costs which was taxed in the sum of Kshs. 585,404 and a certificate of taxation issued in the said sum. The advocate now seeks judgment in the said sum against the client.

Sunset Hotel has not refused to pay but seeks this court's orders to pay by instalments on grounds that it is facing cash-flow problems and cannot pay the entire sum at a go.

### **Determination**

I have considered both applications, the grounds and affidavits in support thereof. The Client does not contest the bill as taxed but only pleads for time to pay the advocate in instalments. Ordinarily the advocate would in such circumstances be entitled to the prayers as sought. However while perusing the Advocate Client Bill of costs which I have been asked to confirm, I noted that the Bill was taxed on the basis of a draft collective bargaining agreement (CBA) which was not the subject matter of the suit. According to the Memorandum of Claim the cause of action is "Refusal to negotiate CBA". In the defence to the Claim filed by the advocate whose bill is the subject matter hereof it is stated that there was no recognition agreement between the Claimant and the Respondent and therefore the respondent had no obligation to negotiate the CBA with the Claimant. In the judgment the court upheld the defence as it found that there was no recognition agreement between the parties and Sunset Hotel had no obligation to negotiate the CBA. In my opinion therefore the subject matter is "refusal to negotiate CBA" which is the subject of defence. The advocate was not defending a CBA but the right to negotiate or not to negotiate. At no time did the CBA feature during the hearing of the case. The subject matter therefore has no monetary value and should have been taxed as a matter where the subject matter cannot be ascertained. This is borne out of both the proceedings and judgment. It would be unconscionable for the court to confirm a certificate of costs arising from a bill of costs that is based on the wrong subject matter. This would be against the Principles of Article 159(2).

For these reasons I am unable to grant the orders sought in both applications and refer the case back to the Deputy Registrar with instructions to tax the bill afresh based on the fact that the subject matter of the suit has no ascertainable value.

**Dated, Signed and Delivered this 12<sup>th</sup> day of October, 2017**

**MAUREEN ONYANGO**

**JUDGE**