



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT LABOUR AND RELATIONS COURT AT MOMBASA**

**MISC CIVIL 13 OF 2015**

**KINYUA MUYAA & CO. ADVOCATES.....APPLICANT**

**VERSERS**

**KENYA PORTS AUTHORITY PENSION SCHEME & 8 OTHERS....RESPONDENTS**

**RULING**

**Introduction**

1. On 6.7.2015, the applicant filed her advocates/client's Bill of costs dated 2.7.2015 for taxation by the Deputy registrar (DR) of this court. The bill is for Ksh 227,922,220.73 in respect of legal services rendered to the respondents by the applicant in respect of industrial cause No 116 of 2013. When the bill of costs came up for taxation by the DR on 14.8.2015, the respondent raised a preliminary objection (P.O) contending that the DR of this court lacks jurisdiction to tax an advocate/client's bill of costs as that was only a preserve of the Registrar or DR of the High court. The respondent maintained that the jurisdiction of this court was only limited to industrial matters and taxation of costs between parties to such disputes and not between advocates and their clients. After hearing both parties, the DR dismissed the preliminary objection and declared that he had the jurisdiction to determine the advocate/client bill of costs because it emanated from a dispute determined by this court.

2. The respondent (client) was dissatisfied and brought the present Notice of Motion dated 3.10.2015 for determination by this court. The motion seeks the following orders:

- 1) That pending the inter-parte hearing, the taxation of the bill of costs dated 2<sup>nd</sup> July 2015 be stayed.***
- 2) That orders made by the Deputy Registrar of this Honourable court on 18<sup>th</sup> September 2015 be reviewed or set aside.***
- 3) That the client-Advocate bill of costs dated 2<sup>nd</sup> July 2015 be struck out.***
- 4) That the costs of this application and before the taxing officer be provided for***

The motion is based on the grounds set out on its body and it is supported by the affidavit of Justus Omae Nuarandi. The applicant (Advocate) did not file any replying affidavit but opposed the motion on grounds of law when it came up for hearing on 14.10.2015.

**Applicant (Client's) Case**

3. Mr Gachuhi, learned counsel for the client submitted that the motion was neither original suit nor appeal (Reference) but an application *suit generis* seeking direction whether the DR of this court has jurisdiction to determine the Advocate/Client's bill of costs dated 2.7.2015. That the bill does not arise from an employer –employee relationship and does not arise from any proceedings under the employment and labour Relations court Act ( ELRCA) That section 12(4) of the ELRCA only gives the court the jurisdiction to determine party and party costs and not advocated /client costs.

4. He relied on **H.C Misc 527 of 2011 Abincha & Co. Advocates vs Trident Insurance Co Ltd (2013)** eKRL to show that the court has previously entertained a similar motion and set aside taxation by a DR of the High court. In the present motion, the client is asking the court to strike out the Advocates/Client's bill of costs and direct that it be filed before the DR of the High court.

### **Respondent (Advocate's )Case**

5. Mr Kinyua learned counsel for the advocate opposed the motion and contended that this court has jurisdiction to determine the Advocate /Clients costs. He submitted that the bill in question concerns a suit before this court which is related to employment and Labour relations as contemplated under Article 162 (2) of the Constitution. According to him this court has jurisdiction to determine fees of an Advocate for work done before it. That in taxing the bill, the taxing officer is obliged to refer to the primary file from where the bill emanates. That in his view, Article 165 (5) bars the High Court from dealing with matters reserved from this court. That under section 12 of the ELRCA, the court has jurisdiction to make any order on costs as it considers just. That allowing the motion is, to wrongfully subject this court to the supervisory powers of the High court. In conclusion however, he urged that the bill should not be struck out but be referred to the High Court should the court find that it has no jurisdiction.

### **Client's Rejoinder**

6. In a brief rejoinder, Mr Gachuhi submitted that the jurisdiction of this court was exhausted and it was rendered *functus officio* after the taxation of the party and party costs. In his view, Article 165(5) of the Constitution did not take away the jurisdiction of the High court to tax bills. He therefore urged that the bill be either struck out or be transferred to the High court. That such transfer will not in any way subject this court to the supervisory jurisdiction of the High court.

### **Analysis and Determination**

7. After carefully considering the material placed before the court, the following issues arise for determination:

- a) whether the court has properly been moved.
- b) whether the court has jurisdiction to determine Advocate's fees arising from suit before it.

### **Procedural Competence**

8. The Motion has been brought under order 16 of the industrial court Act, 2011 (ICA) and Rule 32 (c) and (e) of the Industrial court (procedure) Rules 2010 ( ICPRs). Assuming that the applicant intended to cite section 16 of the Employment and Labour Relations Court Act (ELRCA) the court find that the Motion is incompetent because it seeks to review a decision made by the DR (taxing officer) and not its own order. The said section provides:

***“The court shall have power to review its judgment, awards, orders or decrees in accordance with the Rules.”***

9. On the other hand, Rule 32 (2) allows an aggrieved party to move the court which passed the decree or made the order to review it under Rule 32 (1) (b) (c) (d) and (e). Rule 32 (1) (c) deals with review on account of the decision being in breach of any written law while Rule 32 (1) (e) deals with review for any

other sufficient reason. In the present case, the court is not being asked to review its own decision but a decision by the DR dated 18.9.2015. This court has not such jurisdiction under the said provision of the law and the rules.

10. In addition, the court is being asked to strike out the bill of costs dated 2.7.2012. The bill was filed for taxation by the DR of this court and not by judge of this court. The court has no original jurisdiction over the matter. The bill can only be referred to a judge of the court on appeal after the taxation or for any order made during the taxation. The motion is therefore premature and incompetent because the court is not yet seized with the jurisdiction to deal with the bill of costs until an appeal is made or the review sought in the proper way. Consequently the court finds that the notice of Motion dated 3.10.2015 is incompetent. Allowing the same would be invoking this court's supervisory powers through the wrong procedure. This court has not been persuaded by the decision of Waweru J in the **Abincha & company Advocates case** supra. In this court's view the court should not determine a bill of costs filed before the taxing officer unless it is referred to it on appeal or through supervisory jurisdiction.

### **Jurisdiction over Advocate/Client's bill of costs.**

11. This court is a superior court with the status of the High court. Its Registrar and Deputy Registrar is equal in status to that of the High Court for all purpose and intention of the law including taxation of the bills of costs whether party and party costs or Advocates/ clients costs. It is not rare to find the same magistrate serving as the DR for all the superior courts of equal status. Section 7 (1) of the sixth schedule of the constitution provides that:

***“All laws in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.”***

The rationale of the foregoing constitutional provision is that, if a state organ is allocated responsibility which was previously under another organ, the new organ shall exercise the power held by the previous organ in order to carry out the responsibility allocated under the new Constitution.

12. In that context, the original and appellate jurisdiction over disputes related to Employment and Labour relations was transferred from the High court to this court by Article 162 (2) read with Article 165 (5) of the new constitution. Prima facie, that meant that, any dispute emanating from the disputes contemplated under Article 162 (2) *supra*, must be determined by this court including a dispute on costs between parties or parties and their Advocates. It is this court's considered opinion that, a court which presided over court proceedings is best placed to determine the costs and fees to the parties and their Advocates.

13. It is further opinion of this court that, Kenyans did not intend to create a Superior court with a deficiency in determining fees for the advocates appearing before it. Instead, the Constitution intended to establish three parallel court with equal status and jurisdiction to conclusively and effectively adjudicate any dispute falling within their sphere of jurisdiction including determination of costs between parties and also between advocates and their clients. The foregoing is explained by the wide jurisdiction contemplated by the preamble to the ELRCA and section 12 (3) (Viii) of the Act. The preamble states:

***“ An Act of parliament to establish the Employment and Labour Relations court as a superior court of record; to confer jurisdiction on the court with respect to Employment and Labour Relations and for connected purposes.”***

14. On the other hand section 12 (3) (viii) of the Act allows the court to make any appropriate relief that the court may deem fit to grant in exercise of its jurisdiction under the Act. Consequently the court finds and hold that it has the jurisdiction to determine the fees of an Advocate in relation to legal services provided to a client in proceedings filed before the court.

### **Disposition**

15. For the reasons stated above the applicant (client) Notice of Motion dated 3.10.2015 is dismissed with costs.

Signed, Dated and Delivered at Mombasa this 18<sup>th</sup> day of November 2015.

**ONESMUS MAKAU**

**JUDGE**