



**Ngonze & Ngonze Advocates v Shah (Miscellaneous Application
E227 of 2021) [2024] KEHC 13248 (KLR) (29 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13248 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION E227 OF 2021**

JK NG'ARNG'AR, J

OCTOBER 29, 2024

IN THE MATTER OF THE ADVOCATES ACT

AND

IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER

AND

**IN THE MATTER OF TAXATION OF ADVOCATE/CLIENT BILL OF
COSTS**

BETWEEN

NGONZE & NGONZE ADVOCATES ADVOCATE

AND

ATUL SHAH CLIENT

RULING

1. The Advocate/Applicant filed a Notice of Motion application dated 24th March 2023 under Certificate of Urgency pursuant to Sections 1, 1A, 1B, 3, 3A, 63 (e) of the *Civil Procedure Act*, Section 51 (2) of the *Advocates Act*, Order 22 Rule 5, 6, 7, 35, Order 5 Rule 17, Order 51 Rule 1 of the *Civil Procedure Rules*, Articles 1, 2, 3, 10, 12, 19, 20, 21, 22, 23, 24, 25, 28, 39, 40, 47, 48, 50, 60, 64, 159, 162, 165, 169, 258, 259 of the *Constitution* of Kenya and all other enabling provisions of the law.
2. The Advocate/Applicant seeks for orders that the Certificate of Costs dated 6th July 2022 and issued on 20th September 2022 for Kshs. 5,500,000 be deemed as judgment of this court. That interest on the amount subject of the said Certificate of Costs do accrue at the rate of 14% p.a. from the date of issuance of the Certificate of Costs until payment in full. That Atul Shah, the Client/Respondent do attend court on a date to be allocated by the court for purposes of his examination as to whether any or what debts are owing to him, whether he has any and what property or means of satisfying the decree,



- and to produce his books/statements of accounts and other documentary evidence. That in default of compliance with the order herein above, this court be pleased to direct that Atul Shah, the Client/Respondent, do forthwith personally satisfy the entire decretal amount due to the Applicant/Decree Holder or be imprisoned and committed to civil jail for a period of not less than six months. That costs of this application be borne by the Respondent/Judgment Debtor.
3. The application is premised on grounds on its face and the Supporting Affidavit of Daniel M. Ngonze sworn on 24th March 2023 that vide Advocate-Client Bill of Costs dated 22nd October 2021, the Advocate/Applicant sued the Client/Respondent seeking costs of Kshs. 6,000,000 on the basis of instructions received from the Client/Respondent. That vide a ruling delivered on 6th July 2022, the court taxed the Bill of Costs at Kshs. 5,500,000 and the consequent Certificate of Costs was issued on 20th September 2022. That the Client/Respondent filed and/or served Reference Proceedings in Mombasa HC Misc. Civ. App. No. 148 of 2022, *Ngonze & Ngonze Advocates v Atul Shah*, which proceedings were struck out on 2nd March 2023.
 4. The Advocate/Applicant averred that the ruling and attendant Certificate of Costs have never been reviewed, varied and/or set aside but the Client/Respondent has never made any attempts to satisfy the Certificate of Taxation despite being fully aware of the ruling. That the Applicant is unable to initiate the execution process to recover the subject amount without the entry of judgment and supervision of execution by this court. That any funds and/or assets at his disposal ought to be attached to answer for the outstanding portion of the decretal sum herein of Kshs. 5,500,000 together with costs of these proceedings. That the Respondent is likely to spirit away any funds and/or deal with any assets in his possession considering that they have failed and/or blatantly refused to satisfy the decretal sum despite due notification in that regard. That unless this court grants the orders as prayed, the proceedings herein will be rendered nugatory and/or merely academic, it will stifle the Applicant's inalienable right to conduct the execution and compensation of the resultant loss, injury and damage whereof would be too onerous.
 5. The Client/Respondent filed a Notice of Preliminary Objection dated 4th July 2024 to the Advocate/Applicant's application dated 24th March 2023 on grounds that the application is bad in law and an abuse of the court process, that the application offends the provision of Section 7 of the *Civil Procedure Act*, that by consent, this matter was marked as settled with no orders as to costs and the court file closed forthwith, that the said consent has not been rescinded, vacated or set aside, and that the application is a waste of the court's judicial time and is solely meant to defeat the overriding objective of the court as per the provisions of Section 1A & B of the *Civil Procedure Act*. The Client/Respondent prayed that the Advocate/Applicant's application dated 24th March 2023 be dismissed with costs.
 6. The Client/Respondent then filed an affidavit in support of the Notice of Preliminary Objection sworn by Samuel Aduda Advocate on 5th July 2024 that Ngonze & Ngonze Advocates, Advocates for the Advocate/Applicant, and Aduda & Co. Advocates, Advocates for the Client/Respondent, signed a consent addressed to the Hon. Deputy Registrar High Court Mombasa where by consent the Parties/Advocates obliged to have the instant matter be marked as settled with no orders as to costs and to have the court file closed forthwith. That the said consent has not been rescinded, vacated or set aside and that the Applicant is prosecuting the application in an attempt to circumvent the executed consent which qualifies as a gross abuse of the court process and the same should be struck out.
 7. The Notice of Preliminary Objection by the Client/Respondent and the application by the Advocate/Applicant were canvassed by way of written submissions. The Advocate/Applicant in their submissions dated 17th July 2024 argued that upon delivery of the ruling on 6th July 2022 where the court taxed the said Bill of Costs at Kshs. 5,500,000 and the consequent Certificate of Costs issued on



- 20th September 2022, the Client/Respondent engaged the Advocate/Applicant with a view towards resolving the impasse herein, culminating in the undated consent letter. That prior to filing and/or adoption of the consent letter as an order of the court, parties fell out, consequent whereto the consent letter was never filed nor adopted as an order of the court.
8. The Client/Respondent in their submissions dated 22nd July 2024 contended that by its form, the consent was sent to the Hon. Deputy Registrar High Court of Kenya at Mombasa, Mombasa Law Courts from the advocates on record. That the Advocate/Applicant herein drafted the consent as agreed by the parties as they settled the issue amicably after the performance of an agreement dated 7th June 2023. That the consent was entered into by an advocate who had both express and ostensible authority on behalf of the Applicant and the same was binding upon the Applicant who recorded the consent. The Client/Respondent relied on the holding in *Flora N. Wasike v Destimo Wamboko* (1988) eKLR and submitted that it is clear a consent order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake, or for a reason which would enable a court to set aside a contract. That principles on setting aside of consent orders are well established in several cases such as *Brooke Bond Liebig v Mallya* (1975) EA 266 and *Kilonzo & Azizi Company Advocates v County Government of Kilifi* (2021) eKLR.
 9. On whether the Advocate/Applicant's application is bad in law, offends the provision of Section 7 of the *Civil Procedure Act* and an abuse of the court process, the Client/Respondent relied on the holding in the *Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others* (2017) KLR on the rule or doctrine of *res judicata*, which case cited with authority the Indian Supreme Court Case of *Lal Chand v Radha Kishan*, AIR 1977 SC 789. The Client/Respondent also cited the case of *Gurbachan Singh Kalsi v Yowani Ekori*, Civil Appeal No. 62 of 1958 and *Apondi v Canuald Metal Packaging* (2005) 1 EA 12 and maintained that they have proved that the application by the advocate herein has already been settled and the court file closed forthwith based on the consent in place. They therefore prayed that their Notice of Preliminary Objection dated 4th July 2024 is allowed as the Advocate/Applicant's application is a waste of the court's judicial time and an abuse of the court process.
 10. I have considered the Advocate/Applicant's Notice of Motion application dated 24th March 2023, the Client/Respondent's Notice of Preliminary Objection dated 4th July 2024, and submissions by the parties. The issue for determination is whether the Notice of Motion application and the Notice of Preliminary Objection are merited for grant of the orders sought.
 11. It is settled principle that a preliminary objection ought to be determined first especially where it is likely to dispose of the application entirely. In *George Oraro v. Barak Mbaja* (2005) 1 KLR 141, the court held that: -

“The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”



12. This court seeks to establish whether the grounds outlined in the Notice of Preliminary Objection has met the standards set out in the case above. Upon perusal of the Notice of Preliminary Objection, the same will be considered by this court on the basis of two grounds: whether by consent the matter was marked as settled with no orders as to cost and the file closed, and whether Advocate/Applicant's Notice of Motion application dated 24th March 2023 offends the provision of Section 7 of the Civil Procedure Act and is an abuse of the court process.
13. On the first ground, establishing whether by consent the matter was marked as settled with no orders as to costs and the file closed, raises pure points of law. According to the Client/Respondent, the consent was sent to the Hon. Deputy Registrar High Court of Kenya at Mombasa, Mombasa Law Courts from the advocates on record. That the Advocate/Applicant herein drafted the consent as agreed by the parties as they settled the issue amicably after the performance of an agreement dated 7th June 2023. The Advocate/Applicant on the other hand is of the view that the Client/Respondent engaged the Advocate/Applicant with a view towards resolving the impasse herein, culminating in the undated consent letter. That prior to filing and/or adoption of the consent letter as an order of the court, parties fell out, consequent whereto the consent letter was never filed nor adopted as an order of the court.
14. This court has perused a copy of the said consent letter availed to this court by the Client/Respondent and established that it is not dated, a copy had not been furnished to this court prior to filing of the application and Notice of Preliminary Objection herein, proceeding of the court have not mentioned its existence and no orders were issued thereto. This court is made to believe that the consent was neither filed nor adopted as an order of the court. I therefore find that this ground lacks merit.
15. Having established the position above, this court is therefore led to the second ground on whether Advocate/Applicant's Notice of Motion application dated 24th March 2023 offends the provision of Section 7 of the Civil Procedure Act and is an abuse of the court process.
16. Section 7 of the Civil Procedure Act provides as follows: -
No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.
17. This court therefore finds that lack of proof of existence of the consent letter in the court records and lack of proof of its adoption as an order of the court, it cannot therefore be said that the application has been settled and the court file closed.
18. In the circumstances, I find that the Client/Respondent's Notice of Preliminary Objection dated 4th July 2024 has no merit and is disallowed. Notice of Motion application dated 24th March 2023 is allowed as prayed. The Client/Respondent to bear costs.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 29TH DAY OF OCTOBER, 2024.

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

Ngonze Advocate for the Advocate/Applicant

Sirange Advocate for the Client/Respondent



