



**Kuria v Humphrey & Company LLP & 2 others (Miscellaneous Application E116 of 2022) [2023] KEHC 19353 (KLR) (Commercial and Tax) (30 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19353 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX**

**MISCELLANEOUS APPLICATION E116 OF 2022**

**FG MUGAMBI, J**

**JUNE 30, 2023**

**BETWEEN**

**PATRICK NJIRU KURIA ..... APPLICANT**

**AND**

**HUMPHREY & COMPANY LLP ..... 1<sup>ST</sup> RESPONDENT**

**DCI ATPU CYBER CRIME LAB ..... 2<sup>ND</sup> RESPONDENT**

**SAFARICOM PLC ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before the court is an application dated February 11, 2022. It is brought under Section 6 and 22 of the [Civil Procedure Act](#), Order 51 rule 1 of the [Civil Procedure Rules 2010](#) and all other enabling provisions of law.
2. The application seeks the following orders;
  - i. Spent
  - ii. That this Honorable Court be pleased to issue an order compelling the 2<sup>nd</sup> respondent to furnish the applicant with an extract of text messages of the applicant through his telephone number 0723483802, IMIE No 352542480583447/01 & 356342230583441 /01 and that of Mr. George Mbaye through telephone number 0720246342 for the period between May 1, 2021 to May 30, 2021.
  - iii. That this Honorable Court be pleased to issue an order compelling the 3<sup>rd</sup> respondent to furnish the applicant with call data records/subscriber details of 723483802, MIE Number the applicant through his telephone 352542480583447 /01 & 356342230583441 /01 and that of



Mr. George Mbaye through telephone number 0720246342 for the period between May 1, 2021 to May 30, 2021

- iv. That pending the hearing and determination this application, the court be pleased to issue an order staying the taxation of the 1<sup>st</sup> respondent's bill of costs in Misc Application No 802 of 2021. Humphrey and Company LLP vs Patrick Njiru Kuria which is coming up for taxation on February 2, 2022
  - v. Such further orders and reliefs as the court deems fit.
3. The application is supported by the grounds on the face of it, by the affidavit of Patrick Njiru Kuria, and submissions dated July 25, 2022. The applicant's case was that he approached the 1<sup>st</sup> respondent who represented him in Income Tax Appeal No E016 of 2021 and Income Tax Appeal no E009 of 2021. The applicant avers that the parties had an agreement for legal fees and it had been agreed that the advocates costs would be Kshs 3,000,000/= for the two suits. The agreement was allegedly reached by electronic messages and telephone conversation and it was the intention of the parties to form a legal and binding contract for fees.
  4. The applicant states that he paid the full amount and was surprised when the 1<sup>st</sup> respondent filed an application seeking to tax his costs. The applicant contended that it would be in the interest of justice to compel the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to release the records of the audio and message conversations as these could not be traced by the applicant. Counsel submitted that the records sought by the applicant were crucial as he intended to rely on them to prove the existence of a retainer agreement.
  5. The application was opposed by grounds of opposition dated March 23, 2022 and submissions dated July 21, 2022. The 1<sup>st</sup> respondent's contention was that the application was an abuse of the court process meant to frustrate the firm from taxing its bill of costs. The respondent stated that the prayer for staying the taxation was overtaken by events as the ruling had already been delivered on March 11, 2022.
  6. The respondent further stated that the applicant sought to extract text messages and the same had been annexed to the application. The respondent stated that the correspondences could not be admissible in law as a retainer agreement ought to be signed by the parties.

### **Analysis**

7. I have carefully considered the rival arguments made by the opposing parties, the authorities submitted and the arguments and pleadings made before the court. The applicant invoked section 22 of the [Civil Procedure Act](#) which states that;

Power to order discovery and the like subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party—

- a. make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;
- b. issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;
- c. order any fact to be proved by affidavit.



8. In *Lustman & Company (1990) Limited v Corporate Business Centre Limited & 4 others* (Civil Suit 311 of 2018) [2022] KEHC 42 (KLR) it was held that

From the decisions referred to above, the main aim of discovery and production of documents is to uphold the case of the party seeking discovery and production and in order to destroy or weaken the opponent's case. In that regard, for a party to succeed in getting order for discovery or production, he has a duty to establish that the discovery is aimed at fair disposal of the matter. The party must also show that the facts to be elicited will assist in establishing his case.

9. The applicant seeks orders against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. He is of the view that the information contained in the documents sought would help prove that there was a retainer agreement between himself and the advocate before the taxation of bill of costs. There is no evidence on record that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have been served with the application so as to allow them to respond to the same. Moreover, there is no evidence that has been produced to show that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are custodians of the said information and they are capable of producing the same. It would be foolhardy of this court to make orders that are incapable of being enforced.
10. It has been submitted by the respondent that the bill of costs has already been taxed, a matter that is not controverted by the applicant. This being so, the only recourse for the applicant would be filing a reference for the same. This court cannot however at this stage go into the merit of whether or not there exists a retainer agreement.

#### **Determination and orders**

11. In the premises, I find no merit in the application and the same is dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 30<sup>th</sup> DAY OF JUNE 2023**

**F. MUGAMBI**

**JUDGE**

**Court Assistant: Ms. Lucy Wandiri.**

