



Patriotic Guards Limited v Kenya Electricity Generating Company Limited (Civil Suit 1137 of 2006) [2023] KEHC 26745 (KLR) (Civ) (20 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26745 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL SUIT 1137 OF 2006**

**CW MEOLI, J
DECEMBER 20, 2023**

BETWEEN

PATRIOTIC GUARDS LIMITED PLAINTIFF

AND

KENYA ELECTRICITY GENERATING COMPANY LIMITED ... RESPONDENT

RULING

1. The subject of this ruling is the Chamber Summons dated 3rd March, 2023 (the Summons) filed by Patriotic Guards Limited (hereafter the Applicant) seeking the following substantive orders:

“ ...

- b) There be a stay of execution of the costs awarded by the Taxing Officer, the Hon. L.A. Mumassabba (DR) on the 11th February 2021, in HCCC 1137 of 2006, pending the hearing and determination of reference against the said award.
- c) The Honourable Court be pleased to enlarge the time within which the Applicant can file a Reference against his decision delivered on 11th February 2021, in HCCC 1137 of 2006, respectively.

...”(sic)

2. The Summons is expressed to be brought under Paragraph 11 of the Advocates Remuneration Order; Sections 1A, 1B, 3, 3A and 63 of the *Civil Procedure Act*; Order 45 & Order 51, Rules 1 and 3 of the *Civil Procedure Rules*. The grounds on the face of the Summons are amplified in the supporting affidavit sworn by Titus Kigen, Director of the Applicant, who deposes that the taxation proceedings



which resulted in issuance of the Certificate of Taxation dated 11th February, 2021 in favour of Kenya Electricity Generating Company Limited (hereafter the Respondent) for the sum of Kshs. 422,047.48 proceeded ex parte and without the participation of the Applicant. That consequently, the Applicant's constitutional right to a fair hearing was impeded. That furthermore, the Applicant has filed a memorandum of appeal before the Court of Appeal (Civil Appeal No. E519 of 2021) challenging a ruling delivered by the Honourable Serگون, J wherein the said Judge entered judgment pursuant to the Certificate of Taxation mentioned hereinabove.

3. The Summons is opposed through the replying affidavit of George Ominde, Legal Officer of the Respondent. He terms the Summons as being *res judicata* in view of an earlier application filed by the Applicant and dated 26th July, 2021 seeking a similar order for a stay of execution, and which application was dismissed with costs vide a ruling delivered on 18th February, 2022. The deponent avers that the Applicant has not provided any sufficient reasons to warrant an enlargement of time to file a reference at this stage and yet it was at all material times aware of the existence of the ruling on taxation. That upon the Respondent filing a Party and Party Bill of Costs to determine costs payable to it by the Applicant upon dismissal of the present suit for want of prosecution, the taxing officer awarded the same by way of the aforementioned sum of Kshs. 422,047.48 the Applicant having not opposed the Bill of Costs. The deponent further avers that the Applicant is taking advantage of the court process by seeking the aforementioned substantive orders whilst simultaneously pursuing an appeal with the Court of Appeal against the ruling allowing entry of judgment pursuant to the Certificate of Taxation. In conclusion he deposes that the court ought to dismiss the Summons as it is devoid of merit.
4. The Summons was canvassed by way of brief written submissions. Counsel for the Applicant by and large restated the averments set out in the Summons, including the existence of an appeal with the Court of Appeal as referenced hereinabove, which appeal he termed as arguable in nature. Counsel therefore urged the court to exercise its discretion by allowing the Summons as prayed.
5. The Respondent's counsel submitted on his part that the Summons is unmerited. Whilst citing Paragraph 11 of the [Advocates Remuneration Order](#) and the decisions in [Joseph Lekodi Teleu v Jonathan Paapai & another](#) [2022] eKLR and [Okoth and Company Advocates v Mount Kenya University](#) [2021] eKLR counsel contended that no reasonable explanation has been given by the Applicant to explain the inordinate delay of over 2 years, in filing the Summons. Counsel contended that the Applicant cannot be heard to seek both a review of the ruling on taxation and an appeal against the entry of judgment pursuant to the Certificate of Taxation. On those grounds, the court was asked to dismiss the Summons with costs.
6. The Court has considered the material canvassed in respect of the Summons. It is clear that the orders sought therein are two (2)-fold. However, before delving into the merits thereof, the court will first consider two (2) preliminary issues both raised on behalf of the Respondent. The first issue concerns whether the instant Summons is *res judicata*. Section 7 of the [Civil Procedure Act](#) stipulates that:

“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.”
7. Upon its perusal of the record, the court observed that the Applicant had previously filed an application similar to the instant Summons and dated 27th May, 2021. However, upon its further perusal of the record, there is no indication that the said application was either set down for hearing or determined



by way of a ruling. It seems therefore that the Applicant abandoned the said application and instead filed the instant Summons. Consequently, the court is not convinced that the plea of *res judicata* is applicable to the present circumstances.

8. The second preliminary issue touches on the competency of the Summons in view of the appeal lodged with the Court of Appeal. Upon its study of the record, the court observed that following a ruling on taxation which was delivered by the taxing master on 5th November, 2020, a Certificate of Taxation was issued on 11th February, 2021. Subsequently, the Respondent herein took out the application dated 20th April, 2021 and sought judgment in the line with the certified taxed sums, which application was opposed by the Applicant. Upon hearing the parties, the Honourable Serگون, J allowed the application and entered judgment on the certified taxed costs, vide the decision rendered on 23rd July, 2021.
9. Thereafter, the Applicant lodged a memorandum of appeal dated 9th September 2021 with the Court of Appeal vide Civil Appeal No. E519 of 2021 seeking to challenge the ruling of Serگون J. The status of the said appeal has not been disclosed by any of the parties herein. Suffice to say that, in view of the fact that the appeal essentially contains grounds similar to those upon which the instant Summons is predicated, the court must decline to consider the merits thereof.
10. Consequently, the Chamber Summons dated 3rd March, 2023 is hereby dismissed, with costs to the Defendant/Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 20TH DAY OF DECEMBER 2023.

C. MEOLI

JUDGE

In the presence of

For the Applicant: Mr. Were h/b for Mr. Wachakana

