



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**MISC. APPLICATION NO. 84 OF 2019**

**CONSOLIDATED WITH MISC. APPLICATION NO. 85, 121 & 122 OF 2019**

**ANTHONY THUO KANAI T/A A.THUO KANAI ADVOCATES.....APPLICANT/ADVOCATE**

**VERSUS**

**CANNON ASSURANCE LIMITED.....RESPONDENT/CLIENT**

**RULING**

1. By a Notice of Motion dated 1<sup>st</sup> April 2021, the applicant seeks an order that this court strikes out and/or expunge from the court record the Respondent's/Client's Chamber Summons dated 22<sup>nd</sup> July 2020 for want of payment of court filing fees and/or being time barred. The applicant also prays for costs of the application to be provided for.
2. The grounds in support of the application as I glean them from the application and the supporting affidavit are that even though the application is said to have been filed online on 23<sup>rd</sup> July 2020 and paid for under invoice no. EXHF4DQX against which receipt no. R-MILHGC/OI 1 169/2020 was issued, the said receipt number shows that it was for a totally different file that is, Misc. Application No. 89 of 2019 and in respect of a different application. The applicant states that in law, a document is deemed as filed on the date it is paid for and it cannot be deemed as filed unless it is paid for and therefore in absence of a payment receipt issued in respect of the said application, it has not been filed.
3. The applicant states that the application is time barred having been filed 14 days after delivery of the ruling on 25<sup>th</sup> June 2020 contrary to Rule 11(1) of the Advocates Remuneration Order. Lastly, that it is in the interests of justice that the application be allowed as prayed.
4. The Respondent replied vide the Replying affidavit of Anne Cherop Biwott dated 14<sup>th</sup> April 2021, a court clerk in the firm of Hamilton Harrison & Mathews Advocates. She deposed that she is advised by Ezra Makori, a partner in the firm of Hamilton Harrison & Mathews, that by consent Misc 84 of 2019 Anthony Thuo Kanai t/a Thuo Kanai Advocates v Cannon Assurance Limited, Misc 117 of 2019 Anthony Thuo Kanai t/a Thuo Kanai Advocates v Cannon Assurance Limited and Misc 119 of 2019 Anthony Thuo Kanai t/a Thuo Kanai Advocates v Cannon Assurance Limited were consolidated.
5. Further, that by a ruling dated 25<sup>th</sup> June 2020, the Deputy Registrar allowed the applicant's preliminary objection and the respondent wrote to the Deputy Registrar on 16<sup>th</sup> July 2020 giving notice that it would be objecting the decision in accordance with paragraph 11 (2) of the Advocates Remuneration Order. She averred that the respondent received a copy of the ruling on 2<sup>nd</sup> July 2020 and she was instructed to file the reference on 23<sup>rd</sup> July 2020 which she did on 23<sup>rd</sup> July 2020.
6. Additionally, she deposed that the court registry erroneously issued the fees assessment under Misc 120 of 2019, Anthony Thuo Kanai t/a Thuo Kanai Advocates v Cannon Assurance Limited, possibly owing to the fact that there are several matters in the division with the same parties and which have been consolidated. She averred that the firm of Hamilton, Harrison & Matthews is not at all linked to the said case, and, that she inadvertently did not detect the error immediately, but upon discovering it, she contacted the court registry and she was advised to upload the reference number together with the court receipt on the two matters Misc 84 of 2019 Anthony Thuo Kanai t/a Thuo Kanai Advocates v Cannon Assurance Limited and Misc 117 of 2019 Anthony Thuo Kanai t/a Thuo Kanai Advocates v Cannon Assurance Limited. Further, she was advised that the fees would be waived because they had already paid filing fees in the wrong file, and, at the time of filing the application, the e-filing system was still being developed hence the error. Lastly, she deposed that the applicant has not been prejudiced in any manner.

**The applicant's replying affidavit**

7. The applicant filed the Replying affidavit dated **14<sup>th</sup>** April 2021 in reply to the Respondent's affidavit. The substance of the averments are that the consolidated files were Misc. Application No.85 of 2019, Misc. Application No. **121** of 2019 and Misc. Application No. **122** of 2019, that the Deputy Registrar's ruling delivered online on **25<sup>th</sup>** June 2020 was on only one issue namely, i.e. the Respondent's objection to the applicant's bill of costs on grounds of *Res Judicata*. Further, that the Respondent has not explained why they did not give a Notice of Objection within the statutory period of **14** days which lapsed by the **9<sup>th</sup>** July 2020 as required under Regulation **11 (1)**.

8. Also, the applicant contends that the Respondent's letter dated **16<sup>th</sup>** July 2020 to the Deputy Registrar was time barred by **7** days, and, that the Respondent never sought extension of time nor is there a letter to the Deputy Registrar requesting for a copy of the ruling or anything to show that they received the ruling **2<sup>nd</sup>** July 2020.

9. Lastly, that it is not true that there was an error on the part of the court registry because as at **1<sup>st</sup>** July 2020 the e-filing system had been inaugurated nor did the Respondent provide a copy of the invoice no. EXHF4DQX generated by the e-filing portal prior to the payment of the filing fees to prove the details of the case they were paying for.

#### **Applicant's advocates submissions**

10. Mr. Thuo urged the court to expunge the application from the record for want of payment of court filing fees and for being time barred and award him costs. He argued that the receipt in support of the payment is for a different file and that a document is deemed as filed upon payment of court fees. He urged the court to find that the application was not properly filed. Additionally, he argued that no evidence was offered from the court registry to support the averments on the alleged error on the part of the court registry.

11. Additionally, Mr. Thuo argued that the application is time barred under Paragraph **11 (1) & (2)** of the Advocates Remuneration Order because it ought to have been filed within **14** days from **25<sup>th</sup>** June 2020, the date of the decision. He argued that time lapsed on **9<sup>th</sup>** July 2020 and that the application was filed **28** days late. Further, he argued that the Respondents letter of **29<sup>th</sup>** June 2020 requesting for the ruling was not availed to this court, and in any event, it does not comply with Paragraph **11 (1)** because it is not a Notice of Objection, and also, it was issued **21** days late.

12. Mr. Thuo relied on *Twiga Motors Limited v Hon. Dalmas Otieno Onyango*<sup>[1]</sup> which held that failure to adhere to time limits in Rule **11** of the Advocates Remuneration Order renders the application incompetent. He also cited *Republic v Public Procurement Administrative Review Board & 2 Others*<sup>[2]</sup> which implored the need for an applicant to avail an affidavit from the court registry to confirm the payment. He submitted that payment of court fees is a prerequisite for the court to entertain a matter. Lastly, he cited *Mombasa Cement Limited v Speaker, National Assembly & another*<sup>[3]</sup> which held that no suit can be filed without payment of court fees and faulted the applicant's failure to obtain an affidavit from the registry to clarify the position. Lastly, he argued that the Respondent has not acted in good faith nor did they attempt to rectify the error even after being served with the instant application.

13. Mr. Makori, the Respondent's counsel relied on the affidavit of M/s Anne Cherop Biwott and submitted that as at the date of filing the application, their firm had no access to the court file. He distinguished *Mombasa Cement Limited v Speaker, National Assembly & another*(supra) arguing that in the said case there was a clear avoidance of payment of court fees unlike the instant case where fees were paid in the wrong case number.

14. Regarding the submission that their application was filed out of time, counsel submitted that Mr. Thuo was delving into the merits of the application. He argued that the application was filed within the provisions of Regulation **11 (1)**. Further, he submitted that before the court is not a reference challenging items in a Bill of Costs but an application on points of law. He urged the court to dismiss the objection and to allow the reference to proceed on merits.

15. The applicant assails the Respondent's application dated **22<sup>nd</sup>** July 2020 on two fronts. *One*, that the applicant did not pay the requisite court fees. On this ground alone, he urged the court to dismiss the application. The parties adopted diametrically opposed positions on this issue. The applicant's position is that no court fees was paid at all for the application and the only payment shown was for a different file. The Respondent does not contest the fact that the receipt bears a different case number. However, the Respondent attributes the error to the court registry claiming that they issued them with a receipt bearing the wrong case number. Simply put, the Respondent's position is that the court fees were paid, but the assessment and receipting were on the wrong file, and upon seeking clarification at the registry, they were assured that the fees for their application had been waived.

16. A useful starting point is to refer to section **96** of the Civil Procedure Act<sup>[4]</sup>which provides:

Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, the court may, in its discretion, at any stage, allow the person by whom such fee is payable to pay the whole or part, as the case may be, of the fee; and upon such payment the document in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance.

17. The above section prescribes a discretionary power which empowers the court to allow a party to make up the deficiency of court fee payable on any document. However, I must hasten to point out that the circumstances of this case are different in that the Respondent maintains that they paid the court fees, but they were issued with a receipt on the wrong file. If it was a question of non-payment or part payment of fees, then the invitation to this court would have been the exercise of courts powers under the above provision. However, the issue before me is different. The question is whether the fees was not paid or whether the court will accept the Respondent's explanation that the fees was paid but the registry issued a receipt bearing the wrong case number. This is the acid test the respective party's contention must surmount.

18.. In civil cases the measure of proof is a preponderance of probabilities. Where there are two stories mutually destructive, before the onus

is discharged, the court must be satisfied that the story of the litigant upon whom the onus rests is true and the other is false. The question to be decided will always be: which of the versions of the particular witnesses is more probable considering all the evidence as well as all the surrounding circumstances of the case. In *Stellenbosch Farmers Winery Group Ltd & Another v Martell & Others*<sup>[5]</sup> the South African Supreme Court of Appeal explained how a court should resolve factual disputes and ascertain as far as possible, where the truth lies between conflicting factual assertions. It stated:-

“To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extrajudicial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(i), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.”

19. From the above dicta, the lesson that comes out is that where versions collide, the three aspects of credibility, reliability and probability are intermixed, and all three must be examined. This endeavor is not to be equated with box-ticking but to underscore the breadth of the field to be covered. The focal point of the exercise remains to find the truth.

20. Starting then with credibility, the trial court has the benefit of hearing the parties first hand. The application was determined by way of affidavit evidence and advocates oral submissions. This court is required to consider the affidavits and the submissions and assess the probabilities as they manifest within the circumstances prevailing, and as they apply to the particular deponents. The Respondent bears the burden of demonstrating that it paid the court fees and they were issued with the wrong receipt. Testing the credibility of the Respondent's deponent, several questions come to mind. *One*. How does the e-filing system operate? *Two*, upon accessing a file on line for the purposes of assessing the court fees, can the system issue an assessment on the wrong file. *Three*, was there an assessment of court fees on the instant application. *Four*, is there a possibility of a payee being issued with a receipt on the wrong file. I cannot claim to have perfect answers to these questions. The computer will yield results depending on the information fed into the system. Bearing in mind the foregoing, the explanation given for the error will help in persuading the court as to whether the omission is excusable.

21. As we search for answers to the above questions, and also as we ponder the question of credibility, we have to bear in mind the question of reliability. The Respondent's deponent maintains that upon realizing the error, they sought guidance from the court registry. This sounds attractive and I have no reason to doubt it. However, a written request to the court registry by the Respondent's counsel or a written explanation for the mix-up from the court registry could have vindicated the Respondent and buttressed their contention that the error is attributed to the registry and therefore excusable. Alternatively, a sworn affidavit by a registry official deponing that the mix-up was a human or system error or both would have served the salutary purpose of expounding the position. Such a confirmation either by way of an affidavit or a letter could have resolved the controversy. In absence of such evidence, the Respondent's explanation lacks the essential collaboration. More so, upon realizing the “error” and from the date of being served with the instant application, the Respondent had ample time to procure the required supporting document(s) or affidavit from the court registry. This omission, in my view leaves the Respondent's account in a precarious position compared with the sustained assault mounted by the applicant.

22. Turning to question of probabilities, these must be examined in view of the two issues discussed above. Where there are two mutually destructive stories, the party bearing the onus of proof can only succeed if he satisfies the court on a preponderance of probabilities that his version is true, accurate, and therefore acceptable, and the other version advanced by the other party is therefore false or mistaken and falls to be rejected. In deciding, whether that evidence is true or not, the court will weigh up and test the respective parties' allegations against the general probabilities. The inherent probability or improbability of an event is a matter to be taken into account when the evidence is assessed. When assessing the probabilities, a court will have in mind that the more serious the allegation, the more cogent will be the evidence required. In *Miller v Minister of Pensions*,<sup>[6]</sup> Lord Denning said: -

‘The...{standard of proof}...is well settled. It must carry a reasonable degree of probability...if the evidence is such that the tribunal can say: ‘We think it more probable than not’ the burden is discharged, but, if the probabilities are equal, it is not.’

23. As observed above, the Respondent had ample opportunity to assemble sufficient evidence to support their assertion. Securing a written confirmation, an affidavit or an explanation for the error from the Deputy Registrar or the person in charge of the court registry could have added the much-needed evidential value into their contention. In almost every legal proceeding, the parties are required to adhere to important rules known as evidentiary standards and burdens of proof. These rules determine which party is responsible for putting forth enough evidence to either prove or defeat a particular claim and the amount of evidence necessary to accomplish that goal. To meet this standard, the Respondent was required to do much more.

24. If the issue before me was a question of omission to pay court fees, then the matter would fall within the ambit of section **96** of the Civil Procedure Act in which event the court could invoke its powers under the said section. However, the issue before me requires the court to accept that payment was made but in a different file. The Respondent's failure or omission to procure an affidavit from the in charge of the court registry or a responsible person or even a letter deprived their argument the much-desired collaboration which could have shifted the ground in their favour. As I said in *Mombasa Cement Limited v Speaker, National Assembly & another* payment of court filing fees is a jurisdictional prerequisite to the commencement of an action. That being the position, I am afraid from the material before me, the Respondent's evidence falls short of the required standard to enable me to conclude that they paid the court fees as required. On this ground alone, the applicant's application is merited. Having so concluded, I find no need to consider the other ground raised by the applicant. I

therefore allow the applicant's application dated 1<sup>st</sup> April 2021 and dismiss the Respondent's application dated 22<sup>nd</sup> July 2020 with no orders as to costs.

Orders accordingly

**SIGNED AND DATED AT NAIROBI VIA E-MAIL THIS 26<sup>TH</sup> DAY OF JULY, 2021**

**JOHN M. MATIVO**

**JUDGE**

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[1] {2015} e KLR.

[2] {2013} e KLR.

[3] {2018} e KLR.

[4] Cap 21, laws of Kenya.

[5] 2003 (1) SA 11 (SCA) at para 5.

[6] {1947} 2ALL ER 372.