



**Mutai v Sang & another (Environment & Land Case 32 of 2016)  
[2023] KEELC 20915 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20915 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 32 OF 2016  
MC OUNDO, J  
OCTOBER 19, 2023**

**BETWEEN**

**PAUL KIPKEMOI MUTAI ..... PLAINTIFF**

**AND**

**WILSON SANG ..... 1<sup>ST</sup> DEFENDANT**

**COUNTY GOVERNMENT OF KERICHO ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a Notice of Motion Application dated 2<sup>nd</sup> February, 2023, the Applicant herein sought for an order of temporary injunction restraining the 1<sup>st</sup> Defendant/Respondent, his servants, employees and/or agents from attaching and illegally selling the Plaintiff /Applicant's properties being 16 cows, 6 calves and other household goods through public auction.
2. In response, the 1<sup>st</sup> Respondent filed a Preliminary Objection dated the 9<sup>th</sup> February 2023 contending that the Application lacked merit for offending paragraph 11(2) of the Advocates Remuneration Order, 2014 and that the said Application was fatally defective in substance and in form, incompetent, lacked in merit, scandalous, frivolous, vexatious and otherwise an abuse of the court process and should be struck out with costs.
3. There was no response from the 2<sup>nd</sup> Respondent.
4. Parties were directed to file their written submissions to dispose of the Preliminary Objection in the first instance to which the 1<sup>st</sup> Respondent filed his submissions dated 26<sup>th</sup> June, 2023 wherein he summarized the factual background of the matter before framing one issue for determination to wit; whether the Applicant's application was tenable in law because the court lacked the requisite jurisdiction to entertain and determine the same.



5. That the proper procedure to be followed when aggrieved by the decision of the taxing master was by way of Reference vide Chamber Summons under paragraph 11 of the Advocates Remuneration Order (Amended), 2014 and not the manner that the Applicant approached the court.
6. He relied on the decision in the decided case of *Odera Obar & Co. Advocates vs. Aly Enterprises Ltd & 3 Others* [2015] eKLR where the High Court had dismissed the Applicant's Application which had sought to challenge the decision of the Taxing Officer for having been filed under the wrong provisions of the law instead of Rule 11 of the Advocates Remuneration Order. That the Applicant's Notice of Motion Application was incompetent, incurably defective, bad in law and un-procedural on the grounds that the Applicant was seeking an order of temporary injunction restraining the Respondent from executing a decree arising from a decision or ruling of the Taxing Master dated 18<sup>th</sup> November, 2022 in the instant matter wherein the Taxing Officer had assessed Party and Party Bill of Costs at Kshs. 1,358,375/=.
7. That it was trite law that once a decision had been rendered by the Taxing Officer, the proper way to approach court was vide a Chamber Summons under Rule 11 of the Advocates Remuneration Order hence the Applicant's Notice of Motion was a clear departure from what was provided for under Rule 11 of the Advocates Remuneration Order the same having been filed under Order 40 Rule 1 (a) of the *Civil Procedure Rules*, Section 1A, 1B and 63 (e) of the *Civil Procedure Act*. Reliance was placed on a combination of the decisions in the decided cases of *Speaker of the National Assembly vs. James Njenga Karume* [1992] eKLR and *Machira & Co. Advocates vs. Arthur K. Magugu & Another* [2012] eKLR.
8. The 1<sup>st</sup> Respondent's further submitted that the Applicant had not demonstrated that the decision of the Taxing Officer in awarding costs as afore stated should be interfered with by the court since the said Applicant only sought for an order of temporary injunction restraining the Respondent from selling the Applicant's properties which placed the court in limbo as to the next step thereafter.
9. Regarding the Plaintiff's assertion that he was not served with Party and Party Bill of Costs nor with a taxation notice dated 28<sup>th</sup> February, 2022, the 1<sup>st</sup> Respondent contended that the Plaintiff's Party and Party Bill of Costs arose after the dismissal of the Plaintiff's suit on 28<sup>th</sup> February, 2022 and that from the onset, the firm of M/S Weldon Ngetich & Co. Advocates was in conduct of the matter on behalf of the Plaintiff since its inception.
10. He relied on the decision in the decided case of *Charles Omwata Omwoyo vs. African Highlands and Produce Co. Ltd* [2002] eKLR where it had been held that where a litigant filed a suit, it was up to him to follow up and check on the progress failure to which he could not come to court to claim that he had been let down by an Advocate after an adverse decision had been made against him. He submitted that the allegations put forth by the Plaintiff through his firm of Advocates that he was never served with Party and Party Bill of Costs and taxation notice was an afterthought meant to frustrate the defendant from enjoying the sweat of his labour.
11. That strangely, the Plaintiff filed another Replying Affidavit on 14<sup>th</sup> February, 2023 on an Auctioneer's Notice of Motion and Taxation Notice whereof the issue of service was never mentioned thus the same was a testimony and a clear indication that the Plaintiff was aware of the Bill of Costs against him all along. That the Auctioneer's application dated 1<sup>st</sup> February, 2023 was made ex-parte and the same was neither served upon the Plaintiff nor his Advocates yet the Plaintiff responded to the same meaning that he was fully aware of the steps taken in the instant matter.
12. The 1<sup>st</sup> Respondent thus urged the court to find that the Applicant's Notice of Motion as filed violated the provisions of Rule 11 of the Advocates Remuneration Order as the same was not a reference to the court and therefore the same should be dismissed with costs.



13. In response and in opposition to the Preliminary Objection, the Plaintiff vide his Submissions dated 18<sup>th</sup> July, 2023 submitted that the matter had been filed in court because of the illegality employed by the 1<sup>st</sup> Respondent who wanted to attach through auction his 16 cows, 6 calves and household goods which attachment was as a result of a Party and Party Bill of Costs dated 9<sup>th</sup> March 2022 which was never at all served upon the Plaintiff nor his Advocates on record.
14. The Plaintiff further submitted that the law required that and/or his Advocate on record be served with the bill of costs, taxation notices and taxation dates and since he was not served with the said documents, he had to file the instant application. He placed reliance on the provisions of Article 22(1) of the Constitution of Kenya.
15. With regards to the 1<sup>st</sup> Defendant first ground of Preliminary Objection asserting that his Application lacked merit for offending paragraph 11 (2) of the Advocates Remuneration Order, 2014, the Plaintiff submitted that the said assertion was purely on technicalities since the said 1<sup>st</sup> Respondent never served upon him anything to do with the Party and Party Bill of Costs dated 9<sup>th</sup> November, 2022 and that his Advocates had lied that they had properly served the same. That he had been denied a chance to put in his grounds of objection within the stipulated time frame. That his position would come out during the hearing of the instant Application hence the same could not be determined through the Preliminary Objection lodged herein.
16. Concerning the second ground of the Preliminary Objection, the Plaintiff submitted that if the same was allowed, he would suffer irreparable loss and damages which could not be compensated through monetary means in addition to being denied substantive justice. That the court was bestowed with the inherent powers to grant the orders sought in the instant Application since the 1<sup>st</sup> Respondent's Preliminary Objection did not qualify to be a Preliminary Objection. To buttress the foregoing assertion, reliance was placed on the decision in the decided case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696.
17. He further submitted that the Preliminary Objection filed by the 1<sup>st</sup> Respondent was vexatiously oppressive since the said 1<sup>st</sup> Respondent and his Advocates chose to ensure that the Party and Party Bill of Costs was taxed ex-parte and now wanted the execution of the said ex-parte orders which would cause the Plaintiff to suffer irreparable damage that could not be compensated through monetary means. The Plaintiff thus sought that the Application dated 2<sup>nd</sup> February, 2023 be heard and determined on merit for the ends of justice to triumph. That the 1<sup>st</sup> Respondent had cited the provisions of paragraph 11(2) of the Advocates Remuneration Order, 2014 yet the 2014 Advocates Remuneration Order had been amended, hence the provisions of law used by the 1<sup>st</sup> Respondent was non-existent and/or repealed law and therefore the Preliminary Objection ought to be dismissed with costs for failure to meet the threshold of law.
18. That Article 159 of the *Constitution* gave the court the inherent power to allow the instant application since upholding the Preliminary Objection would be draconian as there were substantive issues that had emerged that needed to be heard and determined at the hearing of the Application. That the Plaintiff/Applicant in his Application vehemently asserted that he was not served with the Bill of Costs which resulted in the issuance of execution orders and that the same could not be considered by the court at the Preliminary Objection stage since there was a likelihood of the court inadvertently delving into the merits of the Plaintiff /applicant's said application.



## Determination.

19. I have considered the application and the Preliminary Objection herein as well as the written submissions the law and authorities cited. For ease of reference in this ruling the parties shall maintain the status of their appearance in the original suit. The Plaintiff's Application dated the 2<sup>nd</sup> February, 2023 and filed under the provisions of Order 40 Rule 1 (a) of the *Civil Procedure Rules*, Section 1A, 1B and 63 (e) of the *Civil Procedure Act*, seeks for an order of temporary injunction restraining the 1<sup>st</sup> Defendant, his servants, employees and/or agents from attaching and illegally selling his properties being 16 cows, 6 calves and other household goods through public auction. The said Application stems from a decree arising from a ruling of the Taxing Master dated 18<sup>th</sup> November, 2022 wherein the Party and Party Bill of Costs was taxed at Kshs. 1,358,375/- by the taxing master after the dismissal of the Plaintiff's suit on 28<sup>th</sup> February, 2022.
20. The said application is opposed by the 1<sup>st</sup> Defendant's Preliminary Objection dated the 9<sup>th</sup> February 2023 wherein he had urged the court to find that the Plaintiff's Notice of Motion as filed violated the provisions of Rule 11 of the Advocates Remuneration Order as the same was not a reference to the court and therefore the same should be dismissed with costs.
21. I find the issue arising herein to be whether the Preliminary Objection is merited.
22. *Mukisa Biscuits Manufacturing Co. Ltd-v- West End Distributors Limited* (1969) EA. 696 was stated to be thus:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
23. It is evident that a Preliminary Objection consists of pure points of law and it is also capable of bringing the matter to an end preliminarily. See the case of *Quick Enterprises Ltd. vs. Kenya Railways Corporation*, Kisumu HCCC No.22 of 1999, where the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”
24. Rule 11 of the *Advocates Remuneration Order* reads as follows;
  - (1) Should any Party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
  - (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a Judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.



- (3) Any person aggrieved by the decision of the Judge upon any objection referred to such Judge under subparagraph (2) may, with the leave of the Judge but not otherwise, appeal to the Court of Appeal.
- (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested Party not less than three clear days notice in writing or as the court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”
25. The provisions of Rule 11 of the Advocates Remuneration Order are clear in as far as the procedure to be followed by a dissatisfied Party to the taxation of the taxing master is concerned. The intendment of the Rules Committee in providing for objections to Bills of Costs to be dealt with by references and not appeals or reviews was expedition. The Rules require a Party aggrieved by taxation to seek the taxing master’s reasons for taxing each item complained of and base his application to the High Court (read environment and land court) on those reasons in accordance with the law thereby enacted. Once the rules were legislated as law, it calls to be respected and complied with for failure to comply with the law portends anarchy.
26. Kiage JA in the case of *Nicholus Kiptoo Korir vs. IEBC* [2013] eKLR held as follows in relation to the practice of ignoring rules of procedure.
- “I am not in the least persuaded that Article 159 of *the Constitution* and the oxygen principles which both command the court to seek to do substantive justice in an efficient manner and to eschew defeatist technicalities were ever meant to aid the overthrow or destruction of the rules of procedure and to create an anarchical free-for-all in the administration of justice. This court, indeed all courts, must never provide succor and cover to parties who exhibited scant respect for rules and timelines. These rules and time lines serve to make the process of judicial adjudication and determination fair just, certain and even handed. Courts cannot aid in the bending or circumventing of rules and shifting of goal posts...”
27. I find in favour of the 1<sup>st</sup> Respondents Preliminary Objection to the effect that the Plaintiff’s Notice of Motion dated the 2<sup>nd</sup> February, 2023 having departed from the provisions as provided for under Rule 11 of the *Advocates Remuneration Order*, was fatally defective and otherwise an abuse of the court process and the same is herein struck out with costs.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 19<sup>TH</sup> DAY OF OCTOBER 2023.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

