



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS CIVIL APPLICATION CASE NO. 530 OF 2013

MWANGI KENG'ARA & CO. ADVOCATES:::ADVOCATE/RESPONDENT

VERSUS

UPWARD SCALE INVESTMENTS CO. LTD:::1ST CLIENT/APPLICANT

LINMERX HOLDINGS LIMITED:::2ND CLIENT/APPLICANT

GEOMAX CONSULTING ENGINEERS LTD:::3RD CLIENT/APPLICANT

GATH CONSULTING ENGINEERS LTD:::4TH CLIENT/APPLICANT

JAMES RIRIGI NJUGUNA:::5TH CLIENT/APPLICANT

TRIAD ARCHITECTS:::6TH CLIENT/APPLICANT

MASTERBILL INTEGRATED PROJECTS:::7TH CLIENT/APPLICANT

RULING

1. The **Notice of Motion** application before the court is dated **19th August 2014** and filed by the Client/Applicant under Section 1A, 1B and 3A of the Civil Procedure Act, Order 2 Rule 15 (1) (b), (c) and (d), Order 51 Rule 1 of the Civil Civil Procedure Rules

2. The application seeks the following orders:-

1. That this application be certified urgent and heard ex-parte in the first instance.

2. That this Honourable court be pleased to stay taxation of the Advocate/Client bills of costs filed in Nairobi High Court Miscellaneous Application numbers 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529 and 530 of 2013 and Nairobi High Court Miscellaneous application number 26 of 2014 between the parties herein pending inter-partes hearing and determination of this application.

3. That this Honourable court be pleased to strike out and/or dismiss the Bills of costs filed in the miscellaneous applications stipulated in prayer 2 above.

4. That costs of the this application be borne by the Advocate.

3. The application is premised on the grounds set out therein and is supported by affidavit of **Joseph Gitau Mburu**.

4. The Advocate/Respondent opposes the application through a replying affidavit by Mercy Nduta Mwangi dated 26th September 2014. The Advocate/Respondent also filed a Notice of Preliminary Objection on 29th September 2014. The Notice of Preliminary Objection raises the following grounds:-

1. That the grounds on the face of the application numbered as a, b, c, d, e, f, g, h, i, j, and paragraphs numbered 3, 4, 5 a to m, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 of the supporting affidavit of Joseph Gitau Mburu are a complete replica of facts that were indirect dispute as between the parties herein in High Court of Kenya originating summon No. 14 of 2013 and in High court of Kenya, Milimani Commercial Tax and Admiralty Division Miscellaneous application No. 516 of 213 where final Orders/Rulings have been delivered with respect to the same and therefore the said paragraphs and the application as a whole are res judicata and sub judice, and are an abuse of the due process of this Honourable Court and ought to be struck out and summarily dismissed.

2. That the Notice of Motion dated 19/08/2014 is incompetent, bad in law, lacks merit and is one for summary dismissal.

3. That the Notice of Motion seeks to impede the course of justice and specifically hinder the implementation of the Orders of this Honourable Court made on 19/11/2013 and 27/6/2014.

4. That the Notice of Motion is incompetent, incurably defective and filed in a vacuum and the orders sought cannot issue in law and the said Notice of Motion ought to be summarily struck out.

5. That the costs of this preliminary objection and the application be awarded to the Advocate/Respondent.

5. Parties agreed to have the Preliminary Objection determined first in time, and so this court will only concentrate on the said preliminary Objection.

6. Before I proceed any further in this matter I want to state at the outset that there are two Rulings of this court in relation to the matters before the court. The first Ruling is dated 19th November 2013 by Hon. Justice (Retired) Havelock, and the second one is dated 17th June 2014 by this very court. Those Rulings are on record herein and I will not repeat them. In the light of those Rulings I will also not write a long Ruling in this matter, as I consider most issues raised herein having been dealt with either in those two Rulings, or would have been raised in the last of the two applications to save court time. To be specific before the Client/Applicant application dated 4th March 2013 giving rise to my Ruling of 27th June 2014 was filed and determined the Client/Applicant herein already knew the contents of the 16 bills which the above application sought to consolidate and have taxed before one Tax Master. Why did the Client/Applicant then not apply to have them struck out at that stage?

7. The second observation by this court is that the 17th bill filed by the Advocate/Respondent herein need not raise any suspicion. The filing of a bill does mean that the bill is valid or shall be taxed as filed. If the Advocate/Respondent objects to the filing of the 17th bill of costs, it can seek a specific order against that very bill of costs without bringing a blanket application to have all the 17th bills struck out.

8. The third observation by the court is that it does not matter whether or not the fees as contained in the said bill of costs are inflated. In fact, the bills are for large sums of money. However, that is why there is the Taxing Master to deal with that. The Taxing Master is obligated by law to allow only applicable fees. The Taxing Master has the skills to determine which items to allow and what to tax off. If the Taxing Master errors on such an aspect, there is always the option of a reference to this court. Therefore the submission by the Client/Applicant that the said bills should be struck out because they are inflated is not logical and I dismiss it.

9. Fourthly, and for avoidance of doubt, the Advocate/Respondent cannot be limited on the number of bills she can bring for taxation. Every bill is supported, or is pursuant to, instructions given by the client. Where there are no instructions, a bill cannot ensure. Justice (Retired) Havelock direction that the Advocate/Respondent files 16 bills of costs did not stop the Advocate/Client from filing any other bill whose fee note had not been issued. Again, this is also a matter of proof. Filing a bill without showing instructions giving rise to the bill will ensure that the bill fails.

10. In this court's Ruling dated 27th June 2014 this court *inter-a-lia*, directed as follows:-

(a) “. . . that the said bills for taxation shall be presented for taxation before the same taxing officer at the same time.”

(b) The parties herein shall fix a date for the taxation of the said bills within 14 days from the date herein.

11. From the above orders, this court observes that the parties have failed to have the bills listed for taxation within the said 14 days. This is itself a disobedience of the orders of this court. Secondly, since the court has already directed that the said bills be taxed before the same Taxing Officer, this means that any cross cutting issues between the bills, including the 17th bill, will be determined by the same Taxing Master, and any party can bring any issue involving the said 17 bills before the Taxing Master.

12. As regards the Preliminary Objection before the court, I decline to consider the grounds 1 and 2 thereof as I do not wish to go into the merits of whether the application is *subjudice* or *resjudicata*. However, from the foregoing paragraph of the Ruling I uphold the Preliminary Objection on grounds 3, 4 and 5 thereof.

13. In the upshot the preliminary objection filed in court on 29th September 2014, is herewith upheld, and the said Notice of Motion dated 19th August 2014 is herewith dismissed with costs of both the Preliminary Objection and the application given to the Advocate/Respondent.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 18TH DAY OF NOVEMBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Mwangi for the Advocate/Respondent

No appearance for the Client/Applicant

Teresia – Court Clerk