



REPUBLIC OF KENYA



KENYA LAW
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**Mulinge & 2 others v Mponda & 5 others (Environment & Land Case
120 of 2011) [2022] KEELC 3125 (KLR) (19 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3125 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 120 OF 2011**

LL NAIKUNI, J

MAY 19, 2022

BETWEEN

FRANCIS MUNYAO MULINGE 1ST PLAINTIFF

ZIPORAH MUKONNY KIMEU 2ND PLAINTIFF

FREDRICK MUTUA MULINGE 3RD PLAINTIFF

AND

GLADYS MPONDA 1ST DEFENDANT

COMMISSIONER OF LANDS 2ND DEFENDANT

DIRECTOR OF SETTLEMENT SCHEME 3RD DEFENDANT

DIRECTOR OF SURVEY 4TH DEFENDANT

REGISTRAR OF LANDS KILIFI 5TH DEFENDANT

ATTORNEY GENERAL 6TH DEFENDANT

RULING

I. Introduction

1. Before this Honourable Court for its determination is the Notice of Motion application dated 19th August, 2021 by the Plaintiff/Applicant. It is brought under the provision of Sections 1, 1A and 3A of the *Civil Procedure Act*, Cap. 21 of the Laws of Kenya.

II. The Plaintiff/Applicant's case

2. The Notice of Motion application by the Plaintiff/Applicant seeks the following orders. These are:-
 - a. Spend;



- b. That pending the hearing and determination of this Application “inter Partes”, this Honorable Court be pleased to arrest its ruling on the 1st Defendants Party and Party Bill of Costs slated for 26th August, 2021.
 - c. That this Honorable Court be pleased to declare the entire taxation proceedings null and void *ab initio* for being instituted in the name of a dead person.
 - d. That Costs for this application be granted to the Applicant/Plaintiffs.
3. The said application is premised on the grounds, facts and averments of the 9 Paragraphed Supporting Affidavit of Francis Munyao Mulinge sworn and dated the 19th August, 2021. He deposed that he was a male adult of sound mind and understanding and the named 1st Plaintiff/Applicant herein hence competent to swear this affidavit. He indicated being aware that the 1st Defendant/Respondent had filed taxation proceedings in this suit, which proceedings had been slated for Ruling on 26th August, 2021. He stated that at all material times to the taxation proceedings, the 1st Defendant – Gladys Mponda - was deceased and thus could not have initiated the proceedings in her own name if not on the names of the administrators of her estate.
 4. He averred that the 1st Defendant’s death was never disclosed to the Court neither was there any documents being the Grand Letters of Administration granting whoever initiated the proceedings the requisite *locus standi* to do so. He deposed that there was a high comprehension that the proceedings could have been initiated by persons without authority who might have been out to disturb the Plaintiffs right to quiet and peaceful possession of their assets on the pretext of executing the Court order arising from the ruling which had been slated for 26th August, 2021. He emphasized that due to the circumstances under which this proceedings were initiated, they became null and void and therefore subjecting their legitimacy to serious question and doubt.
 5. He deposed that in the event the ruling was delivered requiring monies to be paid, it would be difficult to identify the correct party to be paid as no one has as yet to come forth with the letter of administration of the estate of the 1st Defendant a fact which may be taken advantage of by the third parties. He urged for the application to be considered and the orders sought granted thereof.
 6. Additionally, the 2nd Plaintiff/Applicant vide a six (6) Supporting Affidavit of one Zipporrah Mukonyo Munyao swore an the affidavit dated 21st March, 2022 and filed in Court on 23rd March, 2022 reinforcing what the 1st Plaintiff/Applicant had asserted above. She concurred with the prayer that this Court declares the 1st Defendant’s taxation proceedings null and void and *ab initio* for being instituted by a deceased person. In the given circumstance, she holds that there was no way the deceased would have issued an Advocate instructions to initiate such proceedings on her behalf.
 7. Thus, she opined that any order of this Court in favour of the taxation proceedings would amount to intermeddling of the deceased’s estate. She asserted that to proceed on with the matter would be prejudicial to the Plaintiffs as in the event of a successful ruling, the Plaintiffs could be defrauded by strangers on the pretext of enforcing the Judgement and/or ruling by the Court.

III. The Submissions

8. On 8th February, 2022, when all the parties appeared before the Court, it directed that the said Notice of Motion Application dated 19th August, 2021 be canvassed by way of written submissions. Subsequently, the parties complied and court reserved a date for delivering of the ruling.



A. The 1st Plaintiff's written Submissions

9. On 30th March, 2022, the Learned Counsel for the 1st Plaintiff/Applicant, the Law firm of Messrs. Miller George & Gekonde Advocates filed their written submissions dated 28th March, 2022 in support of the Notice of Motion application dated 19th August, 2021. Mr. Anangwe Advocate submitted that at the midpoint of this proceedings was a question whether taxation proceedings brought in the name of a party after they were deceased could be sustained. As a matter of legal preposition and fundamental principle, he strongly submitted and correctly so to speak, that a taxation proceeding was one "*sui generis*" even though they emanated from the proceedings and Judgement in the substantive suit. According to him the net effect of the taxation proceedings was determination on the quantum a party was personally entitled to a compensation for costs incurred in proceeding for defending the substantive suit. This was in the realm of the private law as opposed to public law where parties were litigating to enforce personal private rights. Therefore, he argued that as a matter of law, monies payable from this process should the decree holder die before the execution takes place should form part of proceeds to be garnered in the estate of the deceased for purpose of succession.
10. In terms of application of the above legal principle of law to the instant case, the contention of the Learned Counsel was that the taxation proceedings were willfully instituted by Advocates for the 1st Defendant/Respondent while they knew very well that the owing that the said 1st Defendant/Respondent was deceased. To buttress on this point they relied on the authority of "[Viktar Maina Ngujiri & 4 other v Attorney General & 6 Others](#)" (2018) eKLR whereupon the court faced in a similar situation it held that any action done in the name of a deceased person was a nullity and could not be sustained. This Court cannot agree with this legal position more.
11. Further, the Learned Counsel also posed a further issue on how to proceed in a situation where the main evidence was within the special knowledge of a party who failed to disclose and/or produce evidence. He opined that the said Advocates for the 1st Defendant/Respondents while instituting the taxation proceedings ostensibly on behalf of their client failed to discharge their burden of disapproving the question or issue of their client's death. To support their argument they relied on the provision of the Section 112 of the [Evidence Act](#), Cap. 80 to wit:-

“In Civil proceedings, when any fact is especially within the knowledge of any party to these proceedings, the burden of proving or disproving that fact is upon him”. And cited the decision of *Kenya Akiba Micro Financing Limited – Ezekiel Chebii & 14 Others* (2012) eKLR to the effect that where a party who was in control of or custody of their evidence failed to produce it the court was entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party.
12. In conclusion, the Learned Counsel urged Court to uphold the prayers in the Notice of Motion application dated 19th August, 2021 with Costs to the 1st Plaintiff/Applicant.

B. The 2nd Plaintiff's written Submissions

13. On 23rd March, 2022, the Learned Counsel for the 2nd Plaintiff the law firm of J. Katsiya & Associates Advocates filed their written submissions dated 1st December, 2021. M/s. Katsiya the Learned Counsel commenced by reiterating from the prayers made in their application to the effect that this Honourable Court be pleased to declare the entire taxation proceedings instituted by the 1st Defendant/Respondent as null and void "*ab initio*" for being instituted by a dead person. To support her argument she cited the provision of Section 45 (1) of the [Laws od Succession](#), Cap 160 where upon any dealing with the estate



of a deceased person without procuring the Grand Letters of Administration, would tantamount to intermeddling with the estate of a deceased person. To buttress that point she cited the cases of “*Keziah Supeyo v Yano T/a Yano & Company Advocates* (2019) eKLR”, *Veronicah Njoki Wakagoto (Deceased)* 2013 eKLR, “*Viktar Maina Ngujiri & 4 other v Attorney General & 6 Others*” (2018) eKLR and *Benjamin Leonard McFoy v United Africa Comaoany Limited* (1961) All ER 1169.

14. The Learned Counsel also submitted that the Advocates of the 1st Defendant on getting the knowledge or being in a situation where death had occurred of their client the best they would have done is to invoke the provision of Section 67 of the *Laws of Succession* and Rules 36 of the *Probate and Administration Rules* by applying for Grant Letters of Administration and/or Limited Grant *Ad Litem (Ad Colligenda)* purposely for the institution of the taxation proceedings instead of taking the route they did which was a nullity. She urged Court to allow the application with Costs.

C. The 1st Defendant’s written Submissions

15. On 5th April, 2022, the Learned Counsel for the 1st Defendant/Respondent the Law firm of Cootow & Associates Advocates filed written submissions opposing the Notice of Motion application dated 19th August, 2021. M/s. Baraza, the Learned Counsel recounted on the fact that this Honourable Court delivered its Judgement on 24th October, 2018 dismissing the suit instituted by the Plaintiff/Applicant. She submitted that the awarding of costs to the 1st Defendant was yet to be amended or set aside. She stated that the Applicant got dissatisfied by the decision and preferred an appeal at the Court of Appeal being Court of Appeal Civil No. 167 of 2016. According to her the appeal was heard but the same was dismissed with costs through a Judgment delivered on 26th September, 2019.
16. Subsequently, she informed Court that the Applicant herein filed a Notice of Motion application at the Court of Appeal seeking leave allegedly to file an appeal against the Judgement of the Court of Appeal to the Supreme Court. She stated that the said application was dismissed meaning that there is no dispute between parties capable of adjudication by either this Court or the Court of Appeal. She argued that the question of assessment of costs is not a dispute that requires any substitution or amendment of pleadings to have the matter proceed for taxation. The Learned Counsel argued that the matter of the costs for taxation had been pronounced by the Court of Appeal which in hierarchy was more superior than this Court. This Court cannot contradict the decision of that Court. It was her submission, therefore, that as thins stood, the Court was “*Functus Officio*”.
17. The contention by the Learned Counsel was that taxation was not execution. It was putting a value to what had already been ordered by the Superior Courts. Finally, she submitted that the Plaintiff/Applicant was abusing the due process of this Court and hence urged Court to dismiss the suit with Costs.

D. The 2nd Defendant’s Written Submissions

18. On 6th December, 2021, while opposing the preliminary objection, the Learned Counsel for the 2nd Plaintiff. filed their written submissions.

IV. Analysis and Determination

19. I have read and keenly considered the filed pleadings, the written Submissions, the cited authorities and the relevant provisions of the law by all the parties herein onto the filed the Notice of Motion Application dated 19th August, 2021 by the Plaintiff/Applicant. In order to arrive at an informed, fair and just decision to the raised objection, I have framed the following issues for consideration. These are:-



- a. Whether the Notice of Motion application dated 19th August, 2021 by the 1st Plaintiff/Applicant has any merit.
- b. Whether the ruling on the 1st Defendant's Party and Party Bill of Costs rendered on 26th August, 2021 is void taking that the taxation proceedings were initiated by a dead person as alleged by the Plaintiffs.
- c. Whether the parties are entitled to the orders sought.
- d. Who will meet the Costs of the Application.
- e. Whether the Notice of Motion application dated 19th August, 2021 by the 1st Plaintiff/Applicant has any merit.

ISSUE No. a). Whether the ruling on the 1st Defendant's Party and Party Bill of Costs rendered on 26th August, 2021 is void taking that the taxation proceedings were initiated by a dead person as alleged by the Plaintiffs.

Brief facts

20. This Honourable Court feels it imperative to provide some brief facts to this case before proceeding any further with the analysis of the framed issues hereof. In the year 2011, the Plaintiffs instituted this suit *vide* a Plaint dated 5th May, 2011 against the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants herein. Later on 12th October, 2012 the Plaintiff filed an amended Plaint. They sought for a permanent injunction restraining the Defendants from trespassing, into the suit land known as numbers 615, 616, 621, 619, 627, 628, 630, 611, 622, 614, 621, 607, 608, 609, and 610 all situated in North of Mtwapa Creek in Kilifi. They also sought for a declaration that the title No. Kilifi/Mtwapa No. 536 was null and void and for damages to these plots paid to the Plaintiffs. At all material times, the Plaintiffs claimed to be the joint owners to all these properties. On the other hand, the 1st Defendant filed a Defence and a Counter Claim dated 23rd January, 2013 in which they alleged that the Plaintiffs had trespassed on their parcels of Land and sought a declaration that the suit parcel of land belonged to the 1st Defendant. The 1st Defendant, further sought the orders for injunction directed at the Plaintiffs to prevent further trespass and from interfering with the 1st Defendant's quiet possession and/or enjoyment or occupation of Plot No. Kilifi/Mtwapa 1536. They argued that one of the Defendants – the Commissioner of Lands did not exist anymore upon the enactment of the *Land registration Act*. The matter was heard where 1st Defendant claimed that Plot No. 242 Mtwapa Settlement was offered to David Mitchell by the Settlement Fund Trustees.
21. On 24th October, 2018, this Court delivered a Judgement against the Plaintiffs hereof but in favour of the Defendants. They filed their party and party taxation as they were awarded Costs. Being aggrieved by this decision the Plaintiff preferred an appeal at the Court of Appeal. At the same time, they filed the instant application seeking have the taxation proceedings be declared null and void for being instituted in the name of a deceased person. Instructively, the Plaintiff held that the Advocate for the 1st Respondent who instituted the taxation proceedings never disclosed this fact and neither filed any documents in support or in the opposition to the said Application. That is adequate for the facts.
22. Now turning to the issues under the above sub heading. The main question here from the instant application is how to proceed in a situation where the main evidence was within the special knowledge while still at that point the other issue that comes to play is on the burden of proof. From the provision of Section 107 of the *Evidence Act*, Cap. 80 – he who alleges must prove. There was no proof of death of



the 1st Defendant by the Plaintiffs herein. Such proof would have been either a copy of the Certificate of death, burial permit or even an obituary announcement or burial programme of the deceased.

23. Besides, and the Learned Counsel for the Plaintiff concurs that taxation proceedings flow from the proceedings and Judgment in the substantive suit. The net effect of taxation proceedings is a determination on the quantum a party is personally entitled to as compensation for the costs incurred in the realm of private law and where parties are litigating to enforce personal private rights. The decision of the taxation Master can be enforced a Money decree.
24. In terms of application of the above legal principle of law to the instant case, the contention of the Learned Counsel was that the taxation proceedings were willfully instituted by Advocates for the 1st Defendant/Respondent while they knew very well that the owing that the said 1st Defendant/Respondent was deceased. To buttress on this point they relied on the authority of "[*Viktar Maina Ngujiri & 4 other Versus Attorney General & 6 Others*](#)" whereupon the court faced in a similar situation it held that any action done in the name of a deceased person was a nullity and could not be sustained. This Court cannot agree with this legal position more.
25. Further, the Learned Counsel also posed a further issue on how to proceed in a situation where the main evidence was within the special knowledge of a party who failed to disclose and/or produce evidence. He opined that the said Advocates for the 1st Defendant/Respondents while instituting the taxation proceedings ostensibly on behalf of their client failed to discharge their burden of disapproving the question or issue of their client's death. To support their argument they relied on the provision of the Section 112 of the [*Evidence Act*](#), Cap. 80 to wit:-

“In Civil proceedings, when any fact is especially within the knowledge of any party to these proceedings, the burden of proofing or disproving that fact is upon him”. And cited the decision of "[*Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 Others*](#) (2012) eKLR" to the effect that where a party who was in control of or custody of their evidence failed to produce it the court was entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party.

ISSUE No. b). Whether the parties are entitled to the orders sought.

26. In terms of application of the above legal principle of law to the instant case, the contention of the Learned Counsel was that the taxation proceedings were willfully instituted by Advocates for the 1st Defendant/Respondent while they knew very well that the owing that the said 1st Defendant/Respondent was deceased. To buttress on this point they relied on the authority of "[*Viktar Maina Ngujiri & 4 other Versus Attorney General & 6 Others*](#)" whereupon the court faced in a similar situation it held that any action done in the name of a deceased person was a nullity and could not be sustained. This Court cannot agree with this legal position more.
27. Further, the Learned Counsel also posed a further issue on how to proceed in a situation where the main evidence was within the special knowledge of a party who failed to disclose and/or produce evidence. He opined that the said Advocates for the 1st Defendant/Respondents while instituting the taxation proceedings ostensibly on behalf of their client failed to discharge their burden of disapproving the question or issue of their client's death. To support their argument they relied on the provision of the Section 112 of the [*Evidence Act*](#), Cap. 80 to wit:-

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eKLR” to the effect that where a party who was in control of or custody of their evidence failed to produce it the court was entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party.

28. “*Viktar Maina Ngujiri & 4 other v Attorney General & 6 Others*” This court took judicial notice that the 1st Defendant/Respondents deliberately failed to file any replies to the said application instituted by the 1st Plaintiff/Applicant as envisaged under the provision of Order 51 of the *Civil Procedure Rules*, 2010 and besides clear directions granted by this Court. The Court perceives mischief and deliberate act for non disclosure of certain essential material facts and also in order not to disapprove or divulge on the information pertaining to alleged demise of the 1st Defendant/Respondent as claimed by the 1st Plaintiff. The Learned Counsel for the 1st Plaintiff strongly held that the death of the 1st Defendant/Respondent was within the knowledge of the Advocates who instituted the taxation proceedings in such a name. This Court holds the view that the moment this issue was raised as it happened from the pleadings by the 1st Plaintiff/Applicant, the Advocates for the 1st Defendant/Respondent as professional and officers of this Honourable Court had the burden of disapproving that allegation or fact but they failed to do so. This Court is only left to conclude that deliberately avoided taking that route as the evidence on the death of their client would have adverse effect to their case.
29. Instead, they only filed written submissions. It is trite law that all written and oral submissions must be anchored on filed pleadings which is the fundamental legal essence of the provisions of Order 2 of the *Civil Procedure Rules*, 2010. The Court has keenly read through their written submissions and in as much as it has fully appreciated all the strong presentation made thereof but they all remain as submission from the bar without any substantive backing from averments adduced in an affidavit with supporting and empirical documentary evidence as envisaged under the provision of the *Evidence Act*, Cap. 80 and Order 19 of the *Civil Procedure Rules*, 2010. Furthermore, in such circumstances, even for nothing else it means that the application has gone without being opposed by any party and the Court is hell bound to grant the orders as prayed. It cannot rely merely on the written submissions.
30. For all these reasoning, the Honorable Court is fully satisfied that the 1st and 2nd Plaintiff/Applicants have successfully prosecuted their application. They have demonstrated that the taxation proceedings which are “*sui generis*” to the substantive proceedings are a nullity and void *ab initio*. thus they are entitled to all the orders they have prayed for from the said application.

ISSUE No. c). Who will meet the Costs of the Application.

31. It is trite law that Costs is a discretionary issue. The provision of Section 27 of the *Civil Procedure Act*, Cap. 21 and numerous decisions hold that Costs follow the events. In this case, the events mean the circumstances and the results of each case.
- In the instant case, the 1st Plaintiff/Applicant has succeeded in prosecuting the Notice of Motion application dated 19th August, 2021 by the 1st Defendant/Respondent. Therefore, they should be awarded costs of this application accordingly.

V. Conclusion & Disposition

32. Therefore, based on the forgoing analysis and issues hereof, I do hereby make the following orders. These are:-
- a. That the Notice of Motion application dated 19th August, 2021 be and is hereby allowed for being meritorious with Costs.



- b. That the Costs for this application be granted to the 1st and 2nd Plaintiffs/Applicants to be borne by the 1st Defendant/Respondent.

It is ordered accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19TH DAY OF MAY 2022

JUSTICE HON. L. L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT

MOMBASA

In the presence of:

Mr. Willis Rabongo – Court Assistant.

No Appearance for the 1st, the 2nd & 3rd Plaintiffs.

No appearance for the 2nd, 3rd, 4th, 5th and 6th Defendants.

