



**Mwadzaya Wachanda Clan Welfare Registered Trustees & 58 others
v Petro Oil Kenya Ltd & 70 others (Environment & Land Case
63 of 2020) [2022] KEELC 15059 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15059 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 63 OF 2020
EK MAKORI, J
NOVEMBER 24, 2022**

BETWEEN

**MWADZAYA WACHANDA CLAN WELFARE REGISTERED TRUSTEES & 58
OTHERS PLAINTIFF**

AND

PETRO OIL KENYA LTD & 70 OTHERS DEFENDANT

RULING

1. The pending application dated May 23, 2022 seeks a stay of proceedings and/or defer and /or arrest of proceedings and delivery of a ruling/taxation in respect of 1st defendant's party and party bill of costs dated September 1, 2021 pending hearing and determination of the appeal at the Court of Appeal herein being Malindi Court of Appeal Civil Appeal No E014 of 2022.
2. On the October 3, 2022, at the direction of the court, counsels for the parties submitted before me orally. Mr Ondabu for the applicant submitted that the appeal arising from the ruling and orders of this court (Olola J), delivered on July 30, 2021 have been stayed by the Court of Appeal and that any further litigation around this matter of whatever form, will run contrary to the orders of status quo issued by the superior court on March 4, 2022.
3. The purported taxation of the bill of costs for the respondent herein and intended execution runs contra to the orders in place issued by the superior court and therefore this court should order for an immediate stay of proceedings pending the determination of the appeal.
4. Mr Gikandi for the respondent on the other hand contends that this court has no jurisdiction to entertain the application. It is not the right forum since no reference has been filed challenging the already taxed bill of costs. The applicant ought to have either filed a reference or sought a stay before the deputy registrar of this court. The superior court did not stay the taxation of costs. If it did, it would



have been expressly stated in the substance of its ruling. The application further defeats the doctrine of exhaustion as enunciated in *Jeremiah Memba Ocharo v Evangeline Njoka & 3 others [2022] eKLR* and *Mustafa Tobiko Ole Tampul v Hassan Ole Naado & 17 others [2021] eKLR*, that the issues raised herein ought to have first been raised before the deputy registrar of this court.

5. In a rejoinder Mr Ondabu contends that he never took part in the taxation proceedings before the deputy registrar. The deputy registrar ought to have reckoned the orders of the superior court and downed tools.
6. The issues falling for determination is whether this court should grant orders of stay as pleaded by Mr Ondabu counsel for the applicant and whether this court has jurisdiction to entertain the application as it is or whether this is a wrong forum.
7. The pending application was brought on the March 23, 2022, its main purpose was to stop the deputy registrar of this court from the taxation of a pending bill of costs for the respondent which was before her. The proceedings show that the bill was taxed on May 25, 2022, from that ruling it will seem the bill was not opposed, so Mr Ondabu counsel for the applicant did not participate.
8. Meanwhile from the annexed ruling of the superior court, reported as *Mwadzaya Wachanda Clan Welfare Registered Trustees & 58 others v Petro Oil Kenya Ltd & 6 others (Civil Application E055 of 2021) [2022] KECA 402 (KLR) (4 March 2022)* stay orders were issued as follows: -

“On the whole, we are satisfied that the applicant’s application has met the threshold for granting relief under rule 5(2)(b) of the *Court of Appeal Rules*. We accordingly make orders as follows:

1. An order be and is hereby granted preserving the status quo obtaining as of March 4, 2022 about the physical possession and ownership of property known as Kilifi/Madzimbani/Mitangoni/835 and 841, pending the hearing and determination of the applicants’ intended to appeal.
 2. The applicants are directed to file and serve their record of appeal within forty-five (45) days of the date of this ruling.
 3. Upon default of order 2 hereinabove by the applicants, the orders on the preservation of the status quo granted herein shall automatically lapse.
 4. The costs of the application dated August 18, 2021 to abide by the outcome of the intended appeal.”
9. From the foregoing, there is a pending appeal before the Court of Appeal. An order to preserve the subject suit property was issued by the Court of Appeal in the manner I have stated above. Meanwhile, the deputy registrar of this court was moved to tax the respondent’s bill of costs arising from the proceedings before this court. The applicant in this application did not participate in the taxation before the deputy registrar to express reservation with the taxation. The pending application before me sought to inhibit that taxation from taking off. It has been overtaken by events as the deputy registrar has long taxed it. The stay sought here and the orders of stay already in place issued by the superior court were to be squarely placed before her to deal with and render a ruling on merit. It was her to tax the bill as a taxing master as held by Hon Justice Nyakundi in the case of *Vincent Kibiwott Rono v Abraham Kiprotich Chebet & Another [2022] eKLR* as follows: -

“In Donholm Rahisi Stores (firm) v EA Portland Cement Ltd [2005] eKLR Waweru J held:



“Taxation of costs whether those costs be between party and party or between advocate and client is a special jurisdiction reserved to the taxing officer by the Advocates Remuneration Order. The court will not be drawn into the arena of taxation except by way of reference (from a decision on taxation) made under rule 11 of the Advocates Remuneration Order.

It was stated, in *Bernard Gichobi Njira v Kanini Njira Kathendu & another* [supra], as follows:

On the question of jurisdiction, there is no dispute from both sides in this reference that magistrates or indeed subordinate courts in Kenya have jurisdiction to determine costs payable in cases filed before those courts. The applicant conceded that magistrates also have jurisdiction to assess costs but in the same breath contended that they lacked jurisdiction to tax costs presented to them by way of bill of costs. For me, this is simply a question of semantics because ‘taxation of costs’ and ‘assessment of costs’ mean the same thing.”

10. The first port of call on all taxation of costs was therefore before the deputy registrar of this court. Thereafter this court is moved through a reference. I do not have any yet.
11. Looking at the grievances raised in the application, in my view the same ought to have been canvassed before the deputy registrar before this court was moved. I am neither having a reference nor an appeal arising from orders made by the deputy registrar, on the issues raised in this application for consideration. As correctly submitted by Mr Gikandi, this court was moved prematurely and on an already spent application. The authority cited by Mr Gikandi - Mustafa Tobiko Ole Tampul v Hassan Ole Naado & 17 others [2021] eKLR provides that where the law prescribes a procedure and a forum to address grievances, one has to follow that procedure starting from the primary forum established before moving to the next one for review or appeal, Hon Justice Mrima thus held: -

“This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:

“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

12. To my mind, the issues raised in the instant application ought to have been first raised before the deputy registrar of this court in a formal application, for her to express herself in writing, any grievances reckoned thereafter, by way of formal orders, and then an appeal could fall for determination before this court. It is the deputy registrar vested with powers to tax bills of costs and also execute orders of this court. This court has been improperly moved on the manner the deputy registrar of this court handled the taxation oblivious (sic) of stay orders from the Court of Appeal. The applicant should approach the deputy registrar of this court raising wholly all the grievances in the instant application. This application in my humble view should then have been handled first before the deputy registrar of this court under the doctrine of exhaustion. The applicant has the window to do so.
13. The upshot is that application dated May 23, 2022 lacks merit and is hereby dismissed with costs to the respondent.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 24TH DAY OF NOVEMBER 2022.



EK MAKORI

Judge

In the Presence of: -

Mr Gikandi for the 1st defendant

Mr Ondabu for the Plaintiff

