



Isabirye v Lakeview Development Limited & another (Environment and Land Miscellaneous Application E304 of 2024) [2025] KEELC 4016 (KLR) (27 May 2025) (Ruling)

Neutral citation: [2025] KEELC 4016 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E304 OF 2024
CG MBOGO, J
MAY 27, 2025

BETWEEN

JAMES ABIAM MUGOYA ISABIRYE APPLICANT

AND

LAKEVIEW DEVELOPMENT LIMITED 1ST RESPONDENT

BELGO HOLDINGS LIMITED 2ND RESPONDENT

RULING

1. Before this court for determination are two notices of motion 16th January, 2025 filed by the 2nd respondent, and a notice of motion dated 28th January, 2025 filed by the 1st respondent respectively.
2. The 2nd respondent filed the notice of motion dated 16th January, 2025 expressed to be brought pursuant to Rule 11 (2) of the Advocates' Remuneration Order and Order 51 Rule 1 of the Civil Procedure Rules seeking the orders that this Miscellaneous (Reference) Application purporting to be an objection to Taxation in ELC case number E064 of 2020 be struck out or dismissed with costs including the costs of this application.
3. This application is premised on the grounds inter alia that this court does not have any jurisdiction to adjudicate a purported objection/reference from taxation in a separate originating cause being the reference application. The 2nd respondent argued that the chamber summons ought to be filed in the very proceedings in which the ruling was delivered, and secondly, one composite reference is not permissible in respect of the two separate rulings on taxation.
4. The 2nd respondent also filed a notice of motion dated 16th January, 2025 expressed to be brought under Order 51 Rule 3 of the Civil Procedure Rules seeking that the order for an indefinite interim stay of execution made herein on 24th December, 2024 be set aside and the costs of this application be awarded to the 2nd respondent.



5. This application is predicated on the grounds that this court has no jurisdiction to hear the application for stay of execution sought by the applicant in his application dated 20th December, 2024, and that no order can be granted on an application which is grossly defective. The 2nd respondent argued that in absence of any application for hearing during the vacation, the learned judge was not entitled to give directions or deal with the application during vacation. Also, it was argued that a reference is not an appeal, and therefore, Order 42 Rule 6 of the Civil Procedure Rules does not apply.
6. The 1st respondent filed the notice of motion dated 28th January, 2025, expressed to be brought under Rule 11 (2) of the Advocates Remuneration Order seeking the following orders: -
 1. The chamber summons dated 20th December 2024 filed by James Abiam Mugoya Isabirye (the application) be struck out; and
 2. The costs of this application be provided for.
7. The application is premised on the grounds inter alia that the application dated 20th December, 2024 is defective, improper and bad in law, as there is no requirement under paragraph 11 of the Advocates Remuneration Order to support the application by affidavit evidence. Also, that the application ought to have been filed in the same cause being ELC Case No. E064 of 2020. The 1st respondent further argued that the applicant has not demonstrated that the taxing master failed to apply the relevant principles while awarding it costs.
8. In response to the 2nd respondent's notice of motion dated 16th January, 2025, the applicant filed his replying affidavit sworn on 31st January, 2025. The applicant deposed that the application is fatally and incurably defective as it has been filed by a stranger under the firm of Esmail and Esmail Advocates. He deposed that the notice of motion dated 26th September, 2023 was dismissed with costs, and not the suit which was deemed as withdrawn with no costs in a ruling delivered on 21st May, 2024. Further, that the taxing officer chose to consolidate both bill of costs and delivered one ruling in respect of both applications. He deposed that during vacation, the court has the discretion to address urgent application, and in this case, the court gave orders with respect to the said application. He further deposed that it is improper for the 2nd respondent to appeal a valid order made through a notice of motion against established procedures for appeal.
9. The applicant deposed that the 2nd respondent's application is devoid of merit and attempts to delay the determination of the reference as directed by the orders granted on 24th December, 2024. Further, that no provision of the law expressly provides for where a reference must be filed, and that the rule only mandates that a dissatisfied party apply to a judge by chamber summons. He deposed that he has clearly identified the specific items objected to and set out the grounds of objection with respect to the taxation ruling. Further, that the prayer for stay of execution is valid under the inherent jurisdiction of the court to prevent injustice as the execution of taxed costs before the reference is determined would cause irreparable prejudice to the applicant, and render the reference before this court nugatory. He contended that the issues raised by the 2nd respondent that the taxing officer did not err is a substantive issue to be determined in the reference, and not a procedural bar to its hearing and determination on merit.
10. The 1st respondent filed a replying affidavit sworn on 31st January, 2025 in response to the 1st respondent's notice of motion dated 28th January, 2025. The same contains averments similar to the response to the 2nd respondent's notice of motion dated 16th January, 2025. There would be no need to rehash the same.



11. The three applications were canvassed by way of written submissions. The 2nd respondent filed its written submissions dated 10th February, 2025 with regard to its application dated 16th January, 2025. While relying on the case of *Okoth and Company Advocates v Mount Kenya University* [2019] eKLR, the 2nd respondent submitted that the reference is incompetent, and stands to be struck out. The 2nd respondent submitted that under Rule 11 (2) (sic), no affidavits are allowed to be filed with the chamber summons, and the same application ought to be filed in the very cause where all relevant evidence and documents are available. The 2nd respondent questioned how the court would proceed to determine the taxation when the essential elements are not before it.
12. On the allegation that the application dated 16th January, 2025 has been filed by another law firm, the 2nd respondent submitted that it has not disowned its application, and no third party has the authority to denounce it. The 2nd respondent relied on the case of *Attorney General v Okoiti and others* (2020) 2 EA 16. Further, that the orders made by Oguttu Mboya, J on 24th December, 2024 are null, void and of no legal effect as they were made without jurisdiction. To buttress on this submission, the 2nd respondent relied on the case of *Joseph Gicheru v Michael Gicheru* [2013] eKLR.
13. The 1st respondent filed its written submissions dated 10th February, 2025 with respect to the motion dated 28th January, 2025. In its submissions, the 1st respondent maintained that no explanation has been offered for the failure to file the reference in ELC Number E064 of 2020. It was submitted that the applicant ought to have filed a reference in the same cause where the taxation arose and where the record of the pleadings are contained. To buttress on this submission, the 1st respondent relied on the cases of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, *Machira & Company Advocates v Arthur K. Maguga & another* [CA 199/2002](#) [2012] eKLR, *Okoth & Company Advocates v Mount Kenya University* [2019] eKLR, and *Kimatta & Company Advocates v Joyce Wambui Jarvis* [2005] eKLR.
14. The 1st respondent submitted that the chamber summons is incompetent and this court ought to strike it out for want of jurisdiction for being non-compliant with clearly set out substantive rules of this court on how a reference should be raised. Further, that Article 159 (2) of *the Constitution* is meant to ensure that justice is done to the parties in cases where the court is properly seized of the matter. Further, that this court is not seized with the jurisdiction to hear the chamber summons, and cannot therefore invoke Article 159 of *the Constitution*. The 1st respondent relied on the case of *Board of Governors, Moi High School, Kabarak & another v Bell & 2 others* (Petition 6 &7 of 2013 & Civil Application 12 & 13 of 2012 (Consolidated) [2013] KESC 12 (KLR) (8 May 2013) (Ruling).
15. The 1st respondent further submitted that a reference is not an appeal, and that the chamber summons is in gross violation of the set procedure under Rule 11 of the Advocates Remuneration Order. It was submitted that no appeal can arise from the decision of the taxing master on a bill of costs, and that there is no basis for staying the execution of costs in this case. Further reliance was placed in the cases of *RWW v EKW* [2019] eKLR, and *Francis Kabaa v Nancy Wambui & another* [1996] eKLR.
16. With regard to the notice of motion dated 16th January, 2025 and 28th January, 2025, the applicant filed his written submissions dated 19th February 2025, where he raised two issues for determination as follows:-
 - i. Whether the application was properly instituted.
 - ii. Who should bear the costs of the application.
17. On the first issue, the applicant submitted that the respondents have conveniently omitted the fact that the bill of costs that they filed were in relation to the application dated 26th September 2023, and not



- ELC No. E064 of 2020. He submitted that he cannot be faulted since it was in response to the court's direction to pursue reliefs under the new case citation. Further, that miscellaneous applications are not borne out of a vacuum and that it is evident that it is related to the taxation decision. The applicant relied on the cases of *Njenga v Njeri & 2 others* [2023] KEHC 23991 (KLR), *Biegon v Langat* [2024] eKLR and *Lutere v Mwangi* (Environment and Land Appeal 14 of 2019).
18. The applicant further submitted that Rule 11 (2) of the Advocates Remuneration Order is not supposed to be robotically followed simply because of its wording. Reliance was further placed in the cases of *Ndambuki & another (Suing as administrators to the Late Gregory Ndambuki) v National Land Commission & 2 others* [2024] eKLR and *Law Society of Kenya v Standard Chartered Bank Kenya Limited* [2021] eKLR. The applicant submitted that it is on record that recess began on 21st December, 2024 and that it has not been explained how the application was part of the recess period. Further, that the orders issued on 24th December, 2024 during vacation were consequential to an application filed before the court went for recess.
 19. On the second issue, the applicant submitted that he rightfully instituted the applications seeking to arrest the execution of the taxing master's decision, and that this court has jurisdiction to determine them. He submitted that he will suffer prejudice and injustice if the respondents' prayers are upheld. He urged that the respondents' applications be dismissed with costs.
 20. The applicant filed written submissions in rejoinder dated 3rd March, 2025. While relying on the case of *Donholm Rahisi Stores (firm) v EA Portland Cement Ltd* [2005] eKLR, the applicant submitted that Section 89 of the *Civil Procedure Act* miscellaneous proceedings can follow suit procedures as far as it is applicable, and ensures that such proceedings remain valid. He submitted that the contention that the reference is improper merely because it was filed separately is without merit. Further, that contrary to respondents' assertion that a court is bereft of jurisdiction on account of the formality of the proceedings before this court, the provision does not state that a taxation reference must be filed under the same suit. He invited the court to adopt a holistic and purposive interpretation of Paragraph 11. Further, that the reference as filed is not an attempt to initiate a new suit but a procedural challenge to the taxation of costs which stands independent of the substantive cause. To further buttress on this submission, the applicant relied on the case of *Miller & Company Advocates v China Roads & Bridge Corporation (Miscellaneous Application 168 of 2019)* [2021] KEHC 408 (KLR).
 21. The 1st respondent filed written submissions in reply dated 25th February, 2025. The 1st respondent reiterated that jurisdiction is not a matter of mere procedural technicality since without it, the court has no basis in law for entertaining a case. Further reliance was placed in the case of *Mediterranean Shipping Company SA v International Agriculture Enterprises Limited & Eto (MSA)* [1990] KLR 183.
 22. With regard to the lack of affidavit evidence in its application as contended by the applicant, the 1st respondent submitted that the requirement for affidavit evidence is not mandatory for every application, and that it cannot in law swear an affidavit on matters of law. To buttress on this submission, the 1st respondent relied on the case of *Anyango & another v Ogutu (Miscellaneous Civil Application E122 of 2023)* [2024] KEHC 857 (KLR) (1 February 2024) (Ruling). In conclusion, the 1st respondent submitted that the applicant has not demonstrated why the chamber summons was filed as a new suit, and maintained that this court lacks jurisdiction to hear and determine the chamber summons.
 23. I have considered the applications, the replies, the written submissions as well as the authorities cited. I am of the view that the issue for determination is whether this court ought and should strike out the chamber summons dated 20th December, 2024.



24. Paragraph 11 (2) of the Advocates Remuneration Order provides:
- “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.”
25. Being dissatisfied with the ruling of the taxing officer delivered on 11th December, 2024, the applicant herein filed the chamber summons dated 20th December, 2024 challenging the said decision. In his application, the applicant expressed the provisions of law under which he has approached the court i.e. Paragraph 11 (2) of the Advocates Remuneration Order, Order 42 Rule 6 of the Civil Procedure Rules, Section 3A of the *Civil Procedure Act* and Article 159 of *the Constitution* of Kenya. Additionally, the applicant filed this cause under this reference, and sought to base his arguments on affidavit evidence.
26. Displeased with these acts, the 1st and 2nd respondent vehemently contended with the above, and argued that this court does not have jurisdiction to determine the chamber summons for the reasons that it has not been brought in the same file in which the ruling was determined i.e. ELC Case No. E064 of 2020. Further, they contended that a reference is not an appeal, and one cannot utilize the affidavit to introduce the evidence.
27. In essence, the respondents are inviting this court to determine the structural form of the chamber summons and not its merits. The court of appeal in the case of *DT Dobie & Company (Kenya) Ltd vs. Muchina (1982) KLR* laid down the principles applicable in considering whether or not to strike out pleadings, as follows:-
- a. The court should not strike out suit if there is a cause of action with some chance of success;
 - b. The power to strike out suit should only be used in plain and obvious cases and with extreme caution;
 - c. The power should only be used in cases which are clear and beyond all doubt;
 - d. The court should not engage in a minute and protracted examination of documents and facts; and
 - e. If a suit shows a semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward.”
28. It has been stated over and over again that the decision to strike out pleadings is discretionary and ought to be exercised judiciously. Its nature is draconian and can only be applied sparingly and in the clearest forms of cases. To begin with, the respondents were displeased with the fact that the chamber summons was not filed in the file which the ruling emanated from and instead, through a new cause. They supported their arguments with authorities which arrived at the conclusion that owing to the fact that the chamber summons was not filed in the original file, there was thus no reference before the court for determination. I have looked at these authorities, and while they bear semblance to the circumstances of this case, I do not think that it is fatal in this case. I say so for the reason that the reference was still at its infancy at the time of filing, and thus there was room to adjust accordingly.
29. Secondly, while the taxing officer chose to determine the bill of costs in one ruling, failure to file separate references was blamed on the applicant. It defies logic to even fathom that the applicant ought to have filed separate applications challenging one ruling.



30. More importantly, is the form of the chamber summons, the question that begs, is it so hopeless, and unreasonable, that it is beyond redemption and only fit for striking out? I do not think so. The applicant besides approaching the court under the relevant provisions of the Advocates Remuneration Order, sought to include the orders of stay pending appeal. While this was not necessary, a plain reading of the application shows that the applicant is intent on challenging the decision of the taxing officer. In addition, the affidavit in support thereof sought to supply the court and the parties with evidence, but, the grounds on the face of the application are very clear. I will say no more.
31. In my view, the respondents' arguments are not persuasive, and neither are they detrimental to the determination of the case. Instead, the applicant's form of approach are issues which the court can consider in its determination of the reference. Arising from the above, I decline to grant the prayers sought by the respondents. The two notices of motion dated 16th January 2025 filed by the 2nd respondent, and the notice of motion dated 28th January, 2025 filed by the 1st respondent are hereby dismissed. Costs in the cause.

Orders accordingly.

DATED, SIGNED & DELIVERED VIRTUALLY

THIS 27TH DAY OF MAY, 2025.

HON. MBOGO C.G.

JUDGE

