



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA  
AT NAIROBI  
COMMERCIAL DIVISION – MILIMANI  
MISC. APP. CASE NO.48 OF 2002**

**OWINO OKEYO & COMPANY ADVOCATES .....APPLICANT**

**VERSUS**

**PELICAN ENGINEERING & CONSTRUCTION CO.  
LTD .....RESPONDENT**

**RULING**

This Application is brought under Rule 10 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2001. The application seeks 2 main orders.

**1. A declaration that the intended taxation of the Applicant/Respondents bill of costs herein before the Applicant has complied with the orders of the Court made in HCCC No. 1574 of 2001 on 11th June 2002 is a contravention of the Respondent/Applicant's right under Section 77 (9) to the protection of Law in general and specifically to a fair hearing and is unconstitutional.**

**2. An Order that the intended taxation of the Applicant/Respondent's bill of costs herein be stayed until the Applicant complies with the said order.**

**3. As an alternative to above, an order that the taxation be stayed until the Respondent/Applicant is furnished all its files held by the Applicant/Respondent and a cash account is rendered to the Respondent/Applicant.**

The Application is based on the grounds that:

**(a) By refusing to obey the said Court order and release the Respondent/Applicant's files the Applicant/Respondent has rendered it impossible for the Respondent/Applicant to obtain a fair hearing within the meaning of Section 77(9) of the constitution**

**(b) The Respondent/Applicant needs its files and a cash account to oppose the bill of costs effectively.**

**(c) The Applicant/Respondent is conducting this litigation in an oppressive manner.**

The Application is supported by an affidavit sworn by Gibson Kamau Kuria the Respondent/Applicant's Advocate. The main complaints as can be condensed from the said supporting affidavit are that the Applicant/Respondent has refused to release the Respondent/Applicant's files and

render a cash account despite an order of the Court of 11th June 2002. As a result of the refusal, the Respondent/Applicant cannot defend the bill of costs lodged by the Applicant/Respondent. The action of filing and setting out to prosecute the taxation before releasing the said files is oppressive and the Respondent/Applicant is apprehensive that injustice will be caused to it if a stay of taxation is not granted. If taxation proceeds the Respondent/Applicant will be denied the right to the protection of the Law which includes the right to a fair hearing. The said affidavit has annexed to it 4 exhibits which includes the order of 11th June 2002.

The Applicant/Respondent opposed the Application and filed a replying affidavit sworn by Stephen Owino an Advocate in the Applicant/Respondent's firm of Advocates. The Applicant/Respondent deposes that the order of 11th June 2002 for the release of the files in question was conditional on the Respondent/Applicant giving an undertaking to pay taxed costs which undertaking has to date not been given. Notwithstanding this failure the Applicant/Respondent has complied with the said order and no right of the Respondent/Applicant has been contravened. The Applicant/Respondent therefore deposes that this application is frivolous, vexatious and is merely intended to delay the taxation of the Applicant/Respondent's bills of costs.

The Application was canvassed before me on 26th November, 2004 by Mr. Njagi Learned Counsel for the Respondent/Applicant and Mr. Owino Learned Counsel for the Applicant/Respondent firm of Advocates. The Learned Counsels recited the averments in the affidavits referred to above.

From the submissions of the Learned Counsels the following appear to be issues for determination in this application. Whether or not the Applicant/Respondent has complied with the order of 11th June 2002. If there has been disobedience of the said order whether or not there has been a contravention of the Respondent/Applicants' right under Section 77(9) to the protection of Law in general and specifically to a fair hearing which disobedience would therefore be unconstitutional.

The relevant paragraphs of the order of 11th June 2002 are as follows:-

***"1. The Respondent do forthwith surrender to the Applicants or Applicants' Advocates Messrs Kamau Kuria & Kiraitu Advocates, the files listed in exhibits SN 3 and SN 4 attached to Mr. Njuguna's affidavit herein upon the Applicant's Advocates' undertaking to return them to the Respondents upon conclusion of the on-going litigation, and upon the Applicants' undertaking to pay the taxed costs, if any.***

***2. That the Respondent do deliver such cash account in respect of***

***(i) sale of Lelyet***

***(ii) all the payments made to it between 1996 and 2001 within ninety (90) days."***

It is clear from a reading of this order that the release of the files in question was conditional on the Respondent/Applicant's undertaking to pay taxed costs if any. This condition was in addition to the Respondent/Applicant's Advocate's undertaking to return the files upon conclusion of the ongoing litigation. The Applicant/Respondent maintains that to-date the Respondent/Applicant has not complied with the condition set in the order of 11th June 2002. He was therefore not obliged to release the files to the Respondent/Applicant or its Advocates. The Respondent/Applicant has not denied noncompliance with the said condition. I have on my own not traced any such undertaking in the record of this matter. The irresistible conclusion is that the Respondent/Applicant did not comply with the order of 11th June 2002.

As regards the furnishing of a cash account in respect of sale of Lelyet and all payments made between 1996 and 2001, the Applicant/Respondent maintains that this was supplied. I was referred to the finding of my Brother Ochieng J. in Nairobi HCCC Misc. Application No. 1292 of 2003: Owino Okeyo & Co. Advocates -v- Pelican Engineering and Construction Company Limited.(UR) in which the Learned Judge found that both parties had confirmed that some form of accounts had been provided by the Respondent

and in the Learned Judge's view the Applicant/Respondent had complied with the Court order in respect of furnishing of a cash account.

The replying affidavit of Stephen Owino already referred to above has the following averment at paragraph 4:

***“That the aforesaid disobedience by the Applicants notwithstanding, the Respondents have complied with the order of this Honourable Court made on 11th June 2002 in HCCC No.1574 of 2001. Annexed hereto and marked as exhibit “SO1” are copies of acknowledgments for the delivery of files to the Applicants Advocates, cash account in respect of sale of Lelyet and a cash account in respect of all payments made to the Respondent between 1996 and 2001.”***

This deposition was not rebutted by the Respondent/Applicant in a further or supplementary affidavit. I find that the Applicant/Respondent has supplied the accounts ordered in the ruling of 11th June 2002. In the result I find that the Applicant/Respondent has fully complied with the order of 11th June 2002. Being of this view it follows that there has been no contravention of the Respondent/Applicants right under Section 77 (9) of the Constitution.

The Respondent/Applicant is not therefore entitled to any of the reliefs sought in the Application dated 5th April, 2004. The same is dismissed in its entirety with costs to the Respondent/Applicant.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2004.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of: