



Mosongo & another v Leiyen & another (Environment and Land Miscellaneous Application E063 of 2021) [2024] KEELC 5340 (KLR) (11 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5340 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E063 OF 2021
LC KOMINGOI, J
JULY 11, 2024**

BETWEEN

ROBINS NYANGAU MOSONGO 1ST PLAINTIFF

TABITHA MBUTE LAVI 2ND PLAINTIFF

AND

NGOITOI LEIYAN 1ST DEFENDANT

KAJIADO COUNTY GOVERNMENT 2ND DEFENDANT

RULING

1. This Notice of Motion application brought under: Section 51(2) of the *Advocates Act*, Paragraphs 2, 7, 49 and 52 of the Advocates Remuneration Order and Order 51 of the Civil Procedure Rules;
2. It seeks orders;
 - i. That the Hon. Court be and is hereby pleased to enter judgement for the Plaintiffs/ Applicants against the Defendants/Respondents in the sum of Kshs. 453,513 being certified costs as per Certificate of Taxation herein given under my hand and seal of this Hon. Court at Kajiado on the 28th day of February 2022 as issued by Hon. Edwin Mulochi Deputy Registrar.
 - ii. That the Hon. Court be and is hereby pleased in accordance with paragraph 7 of the Advocates Remuneration Order to charge interest at 14 percent per annum on disbursement and costs, whether by scale or otherwise, from the expiration of one month from the delivery of the Bill of Costs to the Defendants/Respondents on the specific date as hereunder:
 - a. Ngoitoi Leiyen: email dated 19th October 2021
 - b. Kajiado county Government: Email dated 19th October 2021
 - iii. That the Defendants / Respondents be condemned to pay the costs of this application.



3. The application is supported by the sworn Affidavit of Badia A. Fiona the applicants' advocate. She depones that the party to party bill of costs dated 16th October 2021 was taxed and allowed against the Defendants in the sum of Kshs. 435,513 on the 28th February 2022 and a Certificate of Taxation issued on the same date. As outlined under Order 5 of the Civil Procedure Rules, the Defendants were duly informed of the Certificate of Taxation on 8th April 2022 and 11th April 2022. However, they neither filed a reference nor settled the amount. The court therefore had the authority under paragraph 7 of the Advocates Remuneration Order to charge an interest at 14% per annum on the disbursements and costs from the expiration of one month from the delivery of the Bill of Costs until the amount is settled.
4. The 2nd Defendant contested this application and sought for dismissal of the application with costs on the grounds that:
 - i. The application was fatally defective because it was filed as a separate suit instead of being filed in the parent suit which was Kajiado ELC case No. 525 of 2017;
 - ii. The judgement was entered severally against the Defendants and the costs could only be recovered severally and not jointly as sought by the Plaintiffs;
 - iii. The Plaintiffs had not itemised what portion of costs was being sought against which Defendant and there was likelihood of joint execution against the Defendants contrary to the court's judgement;
 - iv. The claim of interest was misconceived because the plaintiffs did not claim for interest at the time of lodging of the Bill of Costs.
5. This application was canvassed by way of written submissions.

Submissions of the Applicant

6. On whether the application was defective for having been brought as a separate suit, counsel submitted that the Plaintiffs Party and Party Bill of Costs was drawn under the parent suit ELC No. 525 of 2017 but at the registry, it was assigned Misc. Application No. E063 of 2021 and served upon the Defendants. This was therefore no fault of the Plaintiffs. That notwithstanding, the court should exercise justice and fairness and not strike out the suit on that basis as enshrined in *the Constitution* under Article 159 (2)(d) and Sections 1A, 1B and 3A, of the *Civil Procedure Act*. To support this position counsel made reference to the following case laws: Gabriel Osimbo vs Chrispinus Mandare [2020] eKLR, Abok James Odera T/A A.J. Odera Associates vs John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR and Abdirahman Abdi v Safi Petroleum Products Ltd & 6 others [2011] eKLR.
7. On the issue that judgement was entered severally against the Defendants and not jointly and that the Plaintiffs had not itemised what portion of costs they sought for each Defendant, counsel submitted that these issues were premature and could only be raised at the point of execution if that arises. This is because the application was only dealing with Section 51(2) of the *Advocates Act* and Paragraph 2, 7, 49 and 52 of the Advocates Remuneration Order and Order 51 of the Civil procedure Rules. And on this, counsel submitted that the application was warranted together with interest since the Defendants had neither filed a reference nor settled the same. Reference was made to the following cases on the issue of costs and interest: Ndung'u Githula & Co. Advocates v Geoffrey Moriaso Ole Mailoy [2019] eKLR; Republic v City Council of Nairobi; Ivyland Park Ltd (Interested Party) Ex parte Inderpal Singh & 2 others Suing as Officials of Convent Drive South Residents'association[2021] eKLR; Amondi & Co Advocates v County Government of Kisumu [2021] eKLR and Nyaundi Tuiyott & Co Advocates v African Marchant Assurance [2018] eKLR.



8. Counsel thus prayed for dismissal of the Defendant's grounds of opposition and their application be allowed with costs.

Submissions of the 2nd Respondent

9. Counsel submitted that the application was fatally defective and incurable since it ought to have been filed the main suit and not as a separate suit. This therefore was not a mere procedural technicality as was held by the Supreme Court in *Moses Mwicigi & 14 others vs Independent Electoral and Boundaries Commission & 5 others* [2016] eKLR.
10. Counsel went on to submit that the costs could only be recovered severally and not jointly as per the judgement citing *Republic vs PS in charge of Internal security exparte Joshua Mutua Paul* (2013) eKLR in which Odunga J. elaborated the difference between several and joint liability. As such, the application should be dismissed because it had not itemised costs between the Defendants as was held in *African Planning and Design Consultants vs Sololo Outlets Ltd & another* [2018] eKLR.

Analysis and determination

11. I have considered the Notice of Motion, the grounds of opposition, the rival submissions and the authorities cited. The issues for determination are:
 - i. Whether the application dated 27th June 2022 and orders sought should be allowed;
 - ii. Whether the 2nd Respondents grounds of opposition are merited and should be allowed?
 - iii. Who should bear the costs of this application?
12. I will start by addressing the grounds of opposition as articulated by the 2nd Respondent.
13. Is this application is defective for not having been filed under its man suit Kajiado ELC case No. 525 of 2017?
14. As summarised hereabove, the 2nd respondents sought striking out of this application on grounds that it was filed as an independent suit which was procedurally incorrect. The Applicants stated that while filing this application, they filed it under its main suit but it was assigned the current number at the registry.
15. Does this make the application fatally defective?
16. I have perused the file and take note that indeed when the application was filed, it made reference to ELC Case Number 525 of 2017. Therefore, the assigning error should not be visited upon the applicants. That notwithstanding, has this occasioned any prejudice upon the Respondents? My answer is no. Does this error affect the substratum or go to the root of the application? Once again, my answer is no. Therefore, I find that this does not warrant the draconian step of striking it out. It is a legal principle that procedural errors should not invalidate substantive justice, as enshrined in Article 159(2)(d) of *the Constitution* and Sections 1A, 1B, and 3A of the *Civil Procedure Act*.
17. I rely on case law that urge courts to administer justice without undue regard to procedural technicalities. Prof. J. Ngugi J (as he then was) in *Anchor Limited v Sports Kenya* [2017] eKLR stated:
 9. I will simply state that our jurisprudence and decisional law no longer countenances this kind of technical and formalist justice. If it must be repeated the admonition that Courts can no longer deploy technicalities as the basis for their decisions comes from *the Constitution*: Article



159(2)(d).... both decisions substantively say that procedural technicality is a lapse in form that does not go to the root of the suit.

18. I therefore dismiss this objection and find that the application is not defective.
19. The 2nd Respondent also contends that the judgment was entered severally against the Defendants, and thus, the costs should be recovered severally and not jointly.
20. This argument hinges on the interpretation of the judgment and the principles governing joint and several liabilities and *Odunga J. (as he then was) in Republic v Permanent Secretary in Charge of Internal Security – Office of the President & another Ex-parte Joshua Mutua Paul [2016] eKLR* elaborated on the distinction between joint and several liabilities.
21. Be that as it may, I find that the procedural aspect of itemizing costs between Defendants, while crucial for execution, does not invalidate the application for entry of judgment. These procedural issues can be effectively addressed during the execution stage, ensuring compliance with the principles of joint and several liabilities as elucidated in the relevant case law.
22. The final issue for determination is whether judgement should be entered for the Applicant for Kshs. 453,513 together with 14% interest upon expiry of one month of delivery of the costs.
23. The Applicants have sought judgment in their favour, with interest, based on the Certificate of Taxation issued against the Respondents. This request is premised on the fact that the Certificate of costs has neither been appealed against nor settled. The Applicants argue that, in accordance with Paragraph 7 of the Advocates Remuneration Order, the Respondents should be compelled to pay the certified costs together with interest.
24. On 18th October 2021, the advocates filed their party and party bill of costs dated 16th October 2021. On 28th February 2022, the bill of costs was taxed by the Taxing Officer of this court and allowed in the sum of Kshs. 453,513 and a certificate of taxation issued. It is not in contention that the Certificate of Taxation issued on 28th February 2022 remains unchallenged. As such, it is conclusive as espoused under:
 - (1)
 - (2) The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”
25. Section 51 of the *Advocates Act*:
 - (1)
 - (2) The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”
26. Further, *Mwita J. in Ndungu Githuka and Company Advocates v Geoffrey Moriaso Ole Mailoy [2019] eKLR* held that the absence of an appeal or reference against a Certificate of costs implies its finality and enforceability.
27. I find that, the party and party bill of costs taxed at Kshs. 453,513 is allowed as prayed.
28. Finally, should it accrue an interest of 14% as prayed?
29. It is on record that the Respondents were informed of the Certificate of Taxation but failed to act either by settling the amount or filing a reference. It is my opinion that the rationale of interest is to serve as compensation for the delay in payment, ensuring that the creditor is not disadvantaged by the debtor’s failure to pay promptly. Awarding interest thus ensures that the party is compensated for the time and value of money lost due to the delay.



30. Further, Paragraph 7 of the Advocates Remuneration Order entrenches issuance of interest as follows:

An advocate may charge interest at 14 per cent per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, provided that such claim for interest is raised before the amount of the bill shall have been paid or tendered in full.

31. I therefore find that the Applicant is justified in seeking interest on the certified costs.

32. In conclusion, I find that the Application is merited and I grant the orders sought namely;

- i. That Judgment is hereby entered against the respondents in favour of the applicant for Kshs. 453,513 as contained in the certificate of taxation dated 28th February 2022.
- ii. That interest at the rate of 14% per annum on the certified costs from May 2022 until payment in full.
- iii. That the costs of this application be borne by the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 11TH DAY OF JULY 2024.

L. KOMINGOI

JUDGE.

In the presence of:

N/A for the Applicants.

N/A for the Respondents.

Court Assistant – Mutisya.

