



Sedco Consultants Limited v Kahingo (Environment and Land Miscellaneous Application 001 of 2023) [2024] KEELC 5196 (KLR) (9 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5196 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 001 OF 2023
FO NYAGAKA, J
JULY 9, 2024**

BETWEEN

SEDCO CONSULTANTS LIMITED APPLICANT

AND

WILSON KARANJA KAHINGO RESPONDENT

RULING

1. By a Chamber Summons dated 21st March 2024 the Applicant sought for a number of prayers some of which have been spent. The Application was brought under Order 49, Route 7 of the Civil Procedure Rules, together with all other enabling provisions of law. It sought the following prayers:
 1. ...spent.
 2. ...spent.
 3. That the time for lodging an appeal against the learned Deputy Registrar’s decision dated 30th June, 2023 be extended and the Memorandum of Appeal filed here in be validated.
 4. That this honorable court be pleased to allow the appeal, set aside the ruling of the Deputy Registrar delivered on 30th June, 2023 dismissing the Preliminary Objection raised by the Respondent and proceed to set aside the same and substitute it with an order allowing the Preliminary Objection by striking out the bill of costs with costs.
 5. That the costs of this appeal be awarded to the respondent.
2. The Application was based on a number of grounds which are summarized as follows. The learned Deputy Registrar rightly observed that there was no order for costs in the matter herein but proceeded to find that the party and party bill of costs was properly before the Court. He erred in failing to find that the Applicant ought to file a party and party bill of costs in the record of the suit in which the order awarding costs was made. It is in the interest of justice that the appeal be allowed. The seven days



- provided for lodging an appeal lapsed while the Respondent was pursuing a review as opposed to an appeal. The court gave directions that the appeal be pursued, not a review, but time had elapsed.
3. The application was supported by the affidavit sworn by one Wilson, Karanja Kahingo on 21st of March, 2020. He deposed that on 8th of March, 2023 the Applicant did file a party and party bill of costs dated 6th March, 2023 which he captioned as, “Arising from Kitale ELC Appeal No. E008 of 2022; Wilson Karungo, v. Sedco Consultants Co. Limited.” On 23rd March, 2023 the deponent was served with the bill of costs through his advocates and later, on 26th April, 2023, a notice of taxation was served. He filed a preliminary objection dated 28th March, 2023 by which he raised grounds that no order on costs had been made in the matter which was the subject of taxation of the party and party bill of costs. Further, a party and party bill of costs ought to be filed in the record of the suit in which the order awarding costs was made.
 4. The preliminary objection was canvassed by way of written submissions. On 30th of June, 2023 the Deputy Registrar delivered a Ruling dismissing the objection and directed the parties to file their submissions on the party and party bill of costs and the matter be mentioned on 28th of July, 2023 to confirm compliance. He annexed a copy of the Ruling and marked it as “A”.
 5. He deposed further that the jurisdiction of the taxing master arises from an order awarding costs, and there was none in the instant matter, Kitale Misc. No. E001 of 2023. Rather the order awarding costs was made in Kitale ELC Appeal No. E008 of 2022 between the Applicant and the Respondents. The Honorable Court should allow their appeal and set aside the decision of the Deputy Registrar dismissing the preliminary objection and proceed to substitute it with an order allowing the objection by striking out the bill of costs with costs.
 6. He deposed further that the Respondent had filed an application to challenge the decision of the learned Registrar by way of review under Section 12(1) of the Environmental *Land Act* and the Court disallowed it on 16th of October, 2023, on the basis that an appeal ought to have been preferred against the decision instead of an application for review. The court ordered an appropriate application to be filed by the Respondent. The Respondent did so by uploading the Chamber Summons on 28th of October, 2023. The application came for directions on the 19th of March, 2024 and the Respondent was ordered to file submissions on the same.
 7. When preparing the submissions, the Memorandum of Appeal, a primary document under Order 49 Rule 7(3) of the Civil Procedure, was omitted. The Applicant’s Advocate always thought the Memorandum of Appeal had been filed. As such he sought the validation in the instant Chamber Summons. The error was inadvertent and not deliberate. He annexed and marked as “B” a copy of the Memorandum of Appeal.
 8. He prayed for the extension of time and the validation of the appeal. He deposed further that the appeal was not res judicata as the issue of merits of the decision of the Deputy Registrar had not been addressed by the Ruling of this Court made on 16th of October, 2023.
 9. Their application was opposed through grounds of opposition dated 30th April, 2024 and filed the same date. The grounds were that the application was incompetent as the subject file is a taxation file and the application ought to have been filed in a separate matter. Further, the application was incompetent because the Respondent should have sought leave first to file an appeal out of time and then file the substantive appeal if leave was granted.
 10. Further, an appeal against the decision of the Deputy Registrar as given on 30th of June, 2023 was a substantive appeal which should be made before the judge in a separate file and not as filed in the instant taxation file. The prayer for allowing the appeal by setting aside the decision of the Deputy



Registrar as delivered on 30th of June, 2023 was res judicata since it was the same prayer, No. 3 in the application dated 5th July, 2023, which was dismissed by the honorable Court.

11. The application was canvassed by way of written submissions. The Applicant begun his argument by summarizing the application and emphasized that the reasons for delay were given in the supporting affidavit and were to the effect that he had sought a review instead of an Appeal. Therefore, he sought to the extension of time and validation of their appeal. He contended that the Applicant who is now the Respondent in this application had not filed an affidavit to contest the facts contained in the supporting affidavit and therefore the grounds of opposition which relate to matters of law would not suffice in challenging the application. As such the facts were therein not contested.
12. He relied on the case of Daniel Kibet Mutai and 9 others v Attorney General [2019] eKLR. He also relied on Section 59 of the *Interpretation and General Provisions Act*, Chapter 2 of the Laws of Kenya and Order 50 Rule 5 of the Civil Procedure Rules of 2010. Regarding the contention that the matter was res judicata he argued that Section 7 of the *Civil Procedure Act* was clear, that if the Rules Committee had intended that a new file be opened for the purpose of making an application of the nature herein it would have expressly stated so. Regarding the appeal, which was filed and sought to be validated he contended that the Learned Deputy Registrar erred in law in proceeding to order for the taxation of the bill of costs, while acknowledging that no order awarding costs was in place in the file. Therefore, the court had no jurisdiction to entertain the matter. He relied further on the case of Michael Gatete Thiongo v Barclays Bank of Kenya [2018 KLR.
13. The Respondent submitted too through written submissions dated 25th April, 2024. He began by summarizing the Application. Then he contended that the instant file was a Miscellaneous Application. E001 of 2023 which was a taxation file opened purposely for the taxing the bill of costs dated 6th March, 2023. The Deputy Registrar had already commenced the taxation process in it and finally dismissed their preliminary objection on 30th of June, 2023. It was therefore erroneous for the Respondent, now Applicant, to move the Court through and in the instant file. He contended that the Applicant should have filed a separate application for leave to appeal out of time.
14. Regarding the delay in filing the intended appeal within the statutory timelines he argued that there was no attempts to explain the delay of close to four months to bring the instant application. He relied on the case of Leo Sila Mutiso v. Rose Helen Wangari Mwangi - Nairobi Civil Application No. 251 of 1997 and the Supreme Court decision of Nichlas Kiptoo Arap Korir Salat v. Independent Boundaries and Electoral Commission & 7 others [2014] eKLR which lists principles governing extension of time. He added that the supporting Affidavit did not offer any explanation for failure to file their appeal out of time. He contended that the prayer sought for review or the Deputy Registrar's decision was res judicata as it had been determined by the same Court on 16th October, 2023. He relied on Section 7 of the *Civil Procedure Act* provides for a bar to res judicata. He relied on the case of Sachin Shaha V Jagat Mahendra Kumar Shah and another [2020] eKLR. He prayed that the application was missed with costs.
15. I have considered the application, the law and the parties' submissions. Three issues lie before me for determination. The first one is whether the application is competent. The second one is whether the application is merited. The third is how to bear the costs of the application.
16. In determining whether their application is competent or not, it is of importance to give the history of the instant application as borne by the Record. The history is simple.
17. On 8th March, 2023 the Respondent herein instituted this matter through a Miscellaneous Application Civil Application by which he sought to tax a Party and a Party bill of costs as against the now Applicant. The bill of costs was detailed 6th March 2023. The deputy Registrar issued a notice of



taxation of the bill on 14th of March, 2023. On 28th March, 2023, the Respondent filed a notice of preliminary objection to the bill's taxation. The parties appeared before the Deputy Registrar regarding the preliminary objection on various dates, namely, the 28th April, 2023, 12th May, 2023 and 9th June, 2023. The Deputy Registrar considered the Objection and fixed it for Ruling on 30th of June, 2023. The preliminary objection was basically that Court could not tax the bill of costs in the matter. Rather the Applicant should have filed it in the parent file, Kitale ELC Appeal No. E008 of 2022 as between the two parties herein, in which the judge had made an award for costs. Thus, the Respondent sought a prayer to dismiss the Bill of costs.

18. The Deputy Registrar dismissed the preliminary objection. This prompted the Applicant to file the instant application. As can be noted from the prayer sought the application seeks for an order for extension of time to file an appeal out of time and another one of validation of an appeal filed in the instant file. The appeal dated 21 March, 2024 was annexed to supporting affidavit to the instant application, as "B".
19. Having laid down the history of the matter I now proceed to determine the issues. The first issue is whether the application is competent. This should be determined first because if it is competent then it opens room for the determination of its merits.
20. It is important to note that for the purpose of taxation of bills of costs, the taxing master shall be the Registrar or Deputy Registrar or District Magistrate of the High Court or such other person as may be appointed by the Chief Justice. When the person acts as such, his/her decisions may be challenged by way of chamber summons to the judge. This is as per Sections 10 and 11 of the Advocates (Remuneration) Order Rules. This, in my view cannot do done in the same file as the one which contained the Bill against which an order for setting aside is prayed for. It has to be made directly to the Judge by a separate file.
21. In the instant suit both the Chamber Summons and the Appeal were filed in the same Miscellaneous File. It was registered as Misc. Appl. No. E001 of 2023, as shown by Annexure "B" to the supporting affidavit. Incredible! In the first place it is inconceivable that an appeal from an order of the Deputy Registrar can be filed properly in the same file in which the order impugned is made. In addition to the above anomaly, the Chamber Summons is made in the same Application as the one from which the order sought to be challenged is in. With due respect this is nothing but mixing up the procedures and making the application incurably defective.
22. In any event, this Court knows not any law that would give it power to grant a prayer for validation of an illegal document. This is because the Memorandum of Appeal was filed without leave of the Court. After that the Applicant now sought, through prayer 3 of the instant application, to validate the (illegal) Memorandum. In the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR, the Supreme Court stated that:

“By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.

To file an appeal out of time and seek the Court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court’s Registry. This is irregular as that document is unknown in law and the same should



be struck out. Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court's perusal when making his application for extension of time; and not to file an appeal and seek to legalize it."

23. Therefore, in my humble view, the Memorandum of Appeal filed herein is both null and illegal. It cannot be validated. It means that prayer No. 3 of the application is not merited and is refused. Since prayer No. 4 was depended on the grant or otherwise of the prayer No. 3 and the said prayer has failed, it means that the 4th prayer cannot be granted. Further, the leave for extension of time was sought in the parent file that contained the order impugned. It is wrong. The Applicant actually committed a similar error as the one he sought to challenge by way of a Preliminary Objection. He cannot have his cake and eat it. It is not open for one to file an appeal in the same file as the one an order or decree impugned is made and also seek leave to extend time in the same file. When the Application herein was file before the Deputy Registrar, it was done and was placed before him as a subordinate Court to this one. It is then inconceivable that one can appeal to this Court in the same file that was before the subordinate Court. The Application is incurably defective and incompetent.
24. This Court does not need to go deeper into all the merits of the Application than it has done. The upshot is that the Application fails. It is hereby dismissed with costs to the Respondent in the instant Application.
25. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 9TH DAY OF JULY, 2024.

HON. DR. IUR F. NYAGAKA

JUDGE, ELC KITALE

