



**Odera Obar & Co Advocates v Oudia (Miscellaneous Civil Application
163 of 2017) [2023] KEELC 922 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 922 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS CIVIL APPLICATION 163 OF 2017**

J OMANGE, J

FEBRUARY 9, 2023

BETWEEN

ODERA OBAR & CO ADVOCATES APPLICANT

AND

JAMES OUDIA RESPONDENT

RULING

1. The substratum of this suit is the Advocate's Bill of Costs which in January 2018, was taxed at Kshs. 536,426.99.
2. The Motions subject of this Ruling are ones which in my respectful opinion, unnecessarily protracted a simple dispute. When Advocates and clients battle about issues which should otherwise be resolved in their Law Chambers, courts are left to wonder whether the laws on legal fees due to Advocates or payable by Clients are there in the first place. Be so as it may, every party has his/ her day in court.
3. The applicant (Advocate) represented the respondent (Client) in CMCC 4844 of 2011 against Andrew Ndandong. There was a dispute on settlement of fees, and the Advocate filed a Bill of Costs which was taxed by the Taxing officer in January 2019 at Ksh.536,426.99.
4. The Client seems to have been aggrieved by the decision of the Taxing Officer, he filed an Objection and a Reference against the said decision. Though out of time, the Court enlarged the time to file the Reference by 14 days, and the same was filed on 5th December 2018.
5. In response to the Reference dated 28th November 2018 and filed on 5th December 2018, the Advocate filed a Preliminary Objection dated 13th October 2022 on the basis that the Court lacks jurisdiction, as the notice of objection and the chamber summons application were filed on 5th day of December, 2018 out of the time previously extended. and hence are a nullity.



6. The Client responded to the Preliminary Objection by filing a replying affidavit sworn on 10th November 2022. The client averred that he had been unable to file the reference within the 14 days initially given by the court as the file was missing. On the November 13, 2018 the court gave a further 14 days which they had not complied with. However, on the December 5, 2018 they sought and were granted leave to file the Reference on the same date which they duly complied with.
7. Parties were directed to file submissions on the PO when the Advocate filed submissions dated November 7, 2022 and the Client filed the submissions dated 1st November 2022.
8. In the Advocate's submissions dated 7th November 2022, the Advocate outlined some matters which he titled: The Undisputed facts giving rise to the Preliminary Objection can be summarized as follows...
9. It is these so-called undisputed facts which led the Client to file an Application dated 21st November seeking the following reliefs:
 - i. The Advocate's Submissions dated November 7, 2022 be expunged from the court record.
 - ii. the costs of this Application be provided for
10. The Application seeks the expungement of the Advocates' submissions on the PO as they purport to raise factual issues which are not in consonance with the Pleadings filed in Court. On the December 8, 2022 this court gave directions that the preliminary objection and the chamber summons application be dealt with together by way of written submissions.
11. I have considered all the pleadings filed in this matter, the proceedings in the file and the submissions by counsel.
12. It is trite law that parties are bound by their pleadings, and submissions that are not in consonance with pleadings must be rejected. Similarly, evidence or new facts cannot be introduced at submissions' stage.
13. I associate myself with the holding of the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & ano. vs. Stephen Mutinda Mule & 3 others* (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC* SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings:-

“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”
14. Having said so, looking at the impugned Paragraphs of the Advocate's submissions, it is submitted as follows:
 2. By a Ruling handed down on the 9th day of January 2018, the Taxing Officer assessed the Advocate Client Bill of Costs dated 31st day of August 2017 at the sum of Kshs. 536,426.99.
 3. It is common ground that the respondent did not file the Notice of Objection within the 14 days stipulated under Paragraph 11 (1) of the *Advocates Remuneration Order*.



4. Notably, by a Chamber Summons Application, dated 9th day of February 2018, the respondent sought the leave of court to enlarge time to file the Notice of Objection.
5. A quick glance at the record of the judicial proceedings of 20th day of September 2018, conducted by the Hon. Lady Justice Komingoi will reveal that:
 - i. The Chambers Summons Application dated 9th day of February 2018 was compromised by Consent of the parties. Therefore, the time for giving notice to the Taxing Officer of the items to which the Respondent objected, was enlarged by the consent of the parties.
(Hereinafter referred to as “the Consent Order.”)
 - ii. Furthermore, the Learned Judge issued directions on the Advocate’s/ Applicant’s Application dated 7th day of February 2018 to be disposed by way of written Submissions. Significantly, the Respondent was granted liberty to file a response to the Advocate’s Application within 14 days.
6. Equally significant, we once more humbly call your Ladyship’s attention to the record of judicial proceedings of the 13th day of November 2018 before the Hon. Lady Justice Komingoi. The following salient aspects emerge:
 - i. The Advocate/Applicant had fully complied with the directions of 20th day September 2018 by filing its Submissions in support of its Application dated 7th day of February 2018. The applicant prayed for date for Ruling. The Advocate/Applicant notified the court that the respondent had Notfiled a reply.
 - ii. Mr. Ndungu, counsel for the Respondent readily admitted that he had NOT filed a response to the Application dated 7th day of February 2018. Counsel then asked the Learned Judge for 14 days to file the Reference and Response.
 - iii. It is Notdebatable, that the respondent’s request for further enlargement of time to file the Reference by a further 14 days was Notgranted by her Ladyship. However, her Ladyship graciously granted the Respondent leave to file their response to the Applicant’s Application within 10 days. The matter was stood over to the 5th day of December 2018.
7. In the same vein, the judicial record of proceedings of 5th day of December 2018 are sufficiently important to merit this court’s attention:
 - i. The proceedings were a Mention to confirm compliance by the Respondent of the directions issued on the 13th day of November 2018 in relation to the filing of the response to the applicant’s Notice of Motion Application dated 7th day of February 2018.
 - ii. Not surprisingly, the respondent had not complied.
 - iii. The respondent applied for leave to file his response by close of business.
 - iv. The Learned Judge granted the respondent leave to file the Response by close of business and reserved the Ruling on the Application dated February 7, 2018 for the 26th day of March 2019.



8. Finally, on the 5th day of December 2018, the Respondent filed the Response to the Applicant's Application dated 7th day of February 2018, the Notice of Objection and the Reference under Rule 11 (2) of the *Advocates Remuneration Order*.
15. In my view, the Advocate's submissions in Paragraph 2-8 of the Submissions as outlined above attest to his observations of what is on the court record. In any event, the court would consider the observations against what would be found in the court record.
16. The Preliminary objection is premised on the argument that on the November 13, 2018 the respondents sought leave to file a reference out of time but this was denied as the court only granted leave to file a response to the application.
17. I have looked at the proceedings on November 13, 2018 and note that counsel for the respondent stated.... "we seek 14 days to file the reference and response to the application."
18. The court stated." leave granted to the respondent to file their response and... (not clear) within 14 days with corresponding leave to applicant. It not clear from the un typed record exactly what other document the Respondents were given leave to file. However, given that the Advocate did not swear an affidavit the account that must carry the day is that of the respondent who in his replying affidavit dated November 1, 2022 depose that he was given leave to file the response and the reference.
19. The upshot of the foregoing is that the preliminary objection and the Client's Notice of Motion Application dated November 21, 2022 have no merit, and are hereby dismissed. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 9TH DAY OF FEBRUARY 2023.

Judy Omenge

JUDGE

In the presence of: -

Mr. Migiro for the Plaintiff

Steve - Court Assistant

