



REPUBLIC OF KENYA



KENYA LAW
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**Makumu & another v Herkenrath & 3 others (Environment & Land
Case 388 of 2010) [2023] KEELC 16177 (KLR) (8 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16177 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 388 OF 2010**

**SM KIBUNJA, J
MARCH 8, 2023**

BETWEEN

PAULINE MUTEI MAKUMU 1ST PLAINTIFF

KILUNGU JUSTUS MULI 2ND PLAINTIFF

AND

URSU KRESZENNTIA MONIKA HERKENRATH 1ST DEFENDANT

PETER JURGEN HERKENRATH 2ND DEFENDANT

JAFFARALI KASSAM ABDULLA 3RD DEFENDANT

OSCAR JUMA 4TH DEFENDANT

RULING

1. The 3rd defendant filed the notice of preliminary objection dated the April 5, 2022 raising six (6) grounds summarized as follows;
 - a. That as a pleading is deemed filed after filing fees are paid, and there is no evidence of the fees in respect of the special damages of Ksh 53,000,000 having been paid, then no claim of special damages existed and the bill of costs cannot be taxed on the basis of the subject matter of that value.
 - b. That no decree can issue of the said amount as it was not included in the amended plaint.
 - c. That item 1 in the bill of costs has no value of the subject matter and no valuation report is attached.



- d. That failure to pay the court fees has prejudiced the 3rd defendant as he cannot access the Court of Appeal without the decree.
2. The plaintiffs filed a reply dated the June 27, 2022 to the notice of preliminary objection summarized as follows;
 - a. That the notice does not meet the test set out in *Mukisa Biscuits Manufacturing Co Ltd versus West End Distributors* (1969) EA 700.
 - b. That the amended plaint dated the September 11, 2012 had no prayer for special damages, but upon presentation of the decree for approval the additional court fees of Ksh 62,225 requested for was paid.
 - c. That failure to pay additional court fees should not delay the taxation of a bill of costs.
 - d. That the preliminary objection should be dismissed with costs and the party to party bill of costs proceed to taxation before the Deputy Registrar.
3. The record shows that when the matter came up for taxation before the Deputy Registrar on the April 13, 2022, the court was informed of the notice of preliminary objection. The court directed counsel to have a convenient date fixed at the registry. When the matter came up on the February 7, 2023, counsel for the plaintiff moved the court to fix the matter for ruling and further indicated that they had filed their submissions and authority on the preliminary objection. In the process of preparing the ruling, the court noted that there were no submissions filed by any of the parties on the preliminary objection, and on the February 20, 2023 detailed one Gillian, court assistant, to call the counsel to avail copies of the same. The report received from the said court assistant is that counsel confirmed to her that they could not trace copies of filed submissions on the preliminary objection from their respective chamber files. The court will therefore proceed to prepare and render its ruling on materials before it.
4. The following are the issues for the determinations by the court;
 - a. Whether the amended plaint had a claim for special damages of Ksh 53,000,000 and if so, whether the court filing fees for the claim had been paid by the date the preliminary objection was raised, and if not when, if at all, it was paid.
 - b. Whether a bill of costs and decree can be drawn on a claim whose court filing fees has not been paid.
 - c. Whether the delay in paying the court filing fees has prejudiced the 3rd defendant access to the Court of Appeal.
 - d. Who pays the costs in the preliminary objection.
5. The court has carefully considered the grounds on the preliminary objection by the 3rd defendant, the reply thereto by the plaintiffs, the court record, pleadings filed and come to the following findings;
 - a. That upon perusing the court record, I have noted the amended plaint dated the September 11, 2012 that amended the initial one dated the November 3, 2010 was stamped as received by the court on the September 12, 2012. The



amended plaintiff has nine (9) prayers marked (a) to (i) respectively, and none of them contained a prayer for Ksh 53,000,000. Prayer (h) however sought for;

“(h) An order of compensation of the value of the buildings, fixtures and movables destroyed on 28th, 29th, and 30th, July 2012 and all the consequential business losses by the 1st, 2nd, 3rd, and 4th, defendants jointly and severally.”

I have further noted that under paragraph 11L of the said plaintiff on particulars for damages, loss of buildings valued at Ksh 50,000,000, loss of business, loss of goodwill, emotional stress and social stigma were pleaded. The amount of filing fees assessed on page one of the amended plaintiff is Ksh 7,725. I have traced receipt No 4196274 dated the September 11, 2012 of Ksh 7,725 on the court file, which I take to be for the payment of the filing fees for the said amended plaintiff.

- b. That on record is the court’s judgment dated the September 23, 2019, and delivered on the October 7, 2019 as amended on the March 18, 2021, which at paragraph 93 and 94 rendered as follows;

“93. Given that the valuation presented by the plaintiffs through the evidence of Mr Paul Wambua (PW3) has not been contradicted/controverted by any other valuation report, I find that the plaintiffs are entitled to compensation for the demolished improvements at Kshs 53 million as stated in that report (as prayed in paragraph (h) of the plaintiff).

94. In summary, I enter judgement for the plaintiffs as prayed in the amended plaintiff as against the 1st, 2nd, and 3rd defendants jointly and severally. The costs of the suit is also awarded to the plaintiffs.”

- c. On the record is the party to party bill of costs dated the November 26, 2019 that was filed on the January 14, 2020 that was set for taxation on the April 13, 2022. That before that date the 3rd defendant filed the notice of preliminary objection dated the April 5, 2022 that is subject matter of this ruling. That on the same date the counsel for the 3rd defendant also wrote to the Deputy Registrar with copies to the ELC Registrar and other counsel in this matter among others stating that;

“We draw your attention to the provisions of Order 3 Rule 3(2) of the Civil Procedure Rules which provides that every plaintiff (including amended plaintiffs) shall be presented to the registry during office hours together with any fees payable on its filing. In Kenya, under no circumstances can court fees be assessed on a plaintiff or amended plaintiff at Kshs 7,725.00 for a sum of Kshs 53,000,000.00.

Our client cannot pay the maximum court filing fees on behalf of the plaintiffs. We cannot file the appeal without the decree. The



court ought not have heard the suit before court fees were paid. You can see the disbursements in the bill of costs on the amended plaint only Kshs 7,725.00 was paid even though the plaintiffs ended up with an award of Kshs 53,000,000.00 as special damages.

Lastly we write to request you not to proceed any further with the matter until the shortfall of the court fees is paid.”

When the bill of costs came up for taxation on the April 13, 2022, counsel addressed the court before the Deputy Registrar directed that the taxation will await the outcome of the preliminary objection, as already captured in (3) above. There is however no indication whether the Deputy Registrar responded to the letter by counsel for the 3rd defendant dated the April 5, 2022.

- d. On the file is an assessment for further court fees totaling Ksh 65,225 under customer reference EYFWKJAC dated the May 28, 2021 addressed to counsel for the plaintiffs for payment. The payment was however not made until the April 12, 2022 through transaction number QDCI97KIZJ as per the e-receipt on the file. This leaves no doubts to the court that as of the date the preliminary objection dated the April 5, 2022 was filed, the further court fees totally Ksh 65,225 that had been invoiced on the May 28, 2021 had not been paid. The delay by the Deputy Registrar in demanding for the further court fees, and the plaintiffs’ counsel in paying the same, has not been explained to this court. That delay definitely meant no decree could have been issued by the court before the said payment had been made, and that may have caused delay to any of the parties desiring to move to the Court of Appeal. That the record also confirms that the decree was finally issued on the November 4, 2022, and as such, any party may consider moving the appropriate court for extension/enlargement of time as required.
- e. That the preliminary objection raised herein being mostly about whether or not the further court filing fees had been paid could have been decided by the Deputy Registrar, under whose docket the day to day registry operations and other ministerial functions falls, in addition to the exercise of the special powers of Registrars under Order 49 of the *Civil Procedure Rules*. The Deputy Registrar would have thereafter proceeded to fix the bill of costs for taxation.
- f. That in view of the fact that the basis of the preliminary objection to the taxation of the bill of costs no longer exists as further court filing fees, was paid on the April 12, 2022, a few days after the filing of the notice, and taking judicial notice that it is not uncommon to call for and receive further court filing fees after a judgement has been delivered, the court finds and holds that the preliminary objection has been overtaken by events. The parties should direct their energies to other pending legal processes, including taxation of the party to party bill of costs, without any further delay.
- g. That in view of the obvious delay in paying of the further court filing fees, each party will bear their own costs in the preliminary objection the provision of section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya notwithstanding.



6. Flowing from the foregoing, the 3rd defendant's preliminary objection dated the April 5, 2022 is found to have been overtaken by events and the court orders as follows;
- a. The preliminary objection is hereby rejected.
 - b. Each party to bear their own costs.
 - c. Parties be at liberty to proceed with other legal processes, and the pending bill of costs be set down for taxation before the taxing master.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 8th DAY OF MARCH 2023.

S. M. KIBUNJA

JUDGE

