



Steve Kithi & Co Advocates v County Government Of Mombasa (Environment and Land Miscellaneous Application 38 of 2021) [2023] KEELC 21621 (KLR) (7 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21621 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 38 OF 2021
LL NAIKUNI, J
NOVEMBER 7, 2023
IN THE MATTER OF: THE ADVOCATES' ACT, CHAPTER 16
OF THE LAWS OF KENYA
AND
IN THE MATTER OF: TAXATION OF COSTS BETWEEN
ADVOCATE & CLIENT
AND
IN THE MATTER OF: A SALE BY SUB – LEASE AGREEMENT
BETWEEN
STEVE KITHI & CO ADVOCATES PLAINTIFF
AND
THE COUNTY GOVERNMENT OF MOMBASA DEFENDANT

RULING

I. Introduction

1. Before this Honourable Court for its determination is an objection raised by the Applicant, the Stephens Kithi Ngombo T/A Steve Kithi & Co. Advocates, against the Respondent herein – the County Government of Mombasa. The objection was through a Notice of Preliminary Objection dated 24th February, 2023 by and large challenging the jurisdiction of this Honourable Court to entertain this and other five (5) proceedings being Miscellaneous numbers 39, 40, 41, 42 and 43 hereof which are all on the same subject matter.



II. The Applicant's Case

2. The Notice of Preliminary Objection by the Applicant was premised under the provision of Article 162(2)(b) of *the Constitution* of Kenya (2010). It raises the following objections:-
 - a. This Honourable Environment & Land Court has no legal Jurisdiction whatsoever to entertain an Application and/or a Bill of Costs for the Taxation of Legal Fees in so far as the Taxation of Legal Fees is neither “a dispute relating to the environment” nor “a dispute relating to the use and occupation of, and title to, land.” As mandated by *the Constitution* of Kenya (2010);
 - b. This Honourable Environment & Land Court has no legal Jurisdiction whatsoever to entertain an Application and/or a Bill of Costs for the Taxation of Legal Fees in so far as the Taxation of Legal Fees is Not a matter relating to:
 - i. Environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - ii. Compulsory acquisition of land;
 - iii. Land administration and management;
 - iv. Public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land;
 - v. Any other dispute relating to environment and land;

As mandated by Section 13 (1) & (2) of the *Environment & Land Court Act* (2012).

III. Submissions

3. On 27th February, 2023, when the six (6) matters to wit Miscellaneous numbers 38, 39, 40, 41, 42 and 43 respectively came up for directions the parties agreed to canvass the said preliminary objection dated 24th February, 2023 by way of written submissions. Pursuant those directions given by the Court, the Honourable Court slated the matter for the oral highlighting of submissions on 26th April, 2023. At this juncture, the Honourable Court will not hesitate to sincerely express its gratitude to Mr. Ngombo and M/s. Kaguri Advocates in the manner in which they executed their professional duties and tasks with extreme resilience, diligence, devotion and dedication an exemplary model to all other Counsels particularly the young ones in the profession. Thereafter, a Ruling date was reserved on notice accordingly.

A. The Oral submissions by the Applicant

4. On 26th April, 2023, Mr. Ngombo Advocate trading as Steve Kithi & Company Advocates for the Applicant orally submitted on the Preliminary objection dated The Learned Counsel referred the Honourable Court to the Preliminary Objection dated 24th February, 2023. He commenced by stating that the objection was based on provision of Article 162(2)(b) of *the Constitution* of Kenya, 2010 and Section 13 of the *Environment and Land Court Act*, No. 19 of 2011 that gives the jurisdiction of the Honourable Court. According to him, none of these provisions related to the payment of legal fees between Advocates and Clients for professional legal services rendered thereof.



5. The Learned Counsel averred that that being the case, and in support of their case, they had provided the Court with the case of “*MISC Application number 119 of 2013, - Stephen Kithi Ngombo T/A Steve Kithi & Company Advocates – Versus – Bernard Onkundi Otundo*” in Taxation decision delivered on 25th June, 2015 by Justice Angote. In that case, Mr. Kiti Advocate for the Respondent had submitted that the ELC Court was only mandated to hear disputes relating to the Environment and the use and occupation of land and title to land and not to dispute relating to the payable fees between a Client and his Advocate. In that matter it was a dispute about the payable fees to the Advocate for drawing a conveyancing instrument and had nothing to do with the use of land or occupation of land or title to land. Mr. Kithi to support his case cited the famous case of “*Karisa Chengo & Others – Versus R – Malindi Criminal Appeal No. 44, 45 and 76 of 2014*”
6. However, the opposing Counsel had argued that the Bill of Costs arose out of a land transaction and therefore the Court had the requisite jurisdiction. In the long run, the Court agreed that it had no Jurisdiction in the given circumstances by stating that:-

“ This suit was commenced by the Advocate purely for the purposes of the Advocate pursuing his fees and nothing else. In the given circumstances, and considering the Court of Appeal decision in Malindi Criminal Appeal No. 44 of 201, I find that I do not have jurisdiction to determine the Application before me or any Reference that may be filed in respect to the decision of the Taxing officer”
7. As such, the Learned Counsel fully agreed on the proposition taken before that Court to the effect that the Environment and Land Court has no jurisdiction to deal on a matter of Advocate Client on legal fees. He urged the Court to be guided by that decision while writing its Ruling.
8. With regard to the Court and his colleague concerns and wondering on the lateness in him raising the preliminary objection, the Learned Counsel held that an objection would be raised any time. It had no specific time for so doing. Further on the same point, the Learned Counsel informed Court that they objected to the Bill of Costs being received by the Environment and Land Court to a gentleman called Thuku of the ELC Registry, Mombasa. Hence it was not a last-minute endeavor. On the written submissions by the Respondent, the Learned Counsel stated that he had seven (7) issues to raise thereof. Firstly, he objected to the Respondents’ assertion that they held got instructions from the client to file the Bill of Costs. According to the Learned Counsel, issues of costs never derived from the clients instructions. They must be based on Court and until the time of the highlighting the Respondent had not cited any provisions for costs subsequent to the withdrawal of the suit by the Applicant.
9. Secondly, the Learned Counsel drew the Court’s attention to the Advocates Remuneration (Amendment) Order, 2014 Rule 13 (3) which provides that an advocate fees shall be taxed and no advocate shall be entitled to legal fees on instructions i.e. there shall be party to party payable arising from an Advocate Client.
10. Thirdly, the fact that the Respondent held that they vigorously defended the Bill of Costs. The Learned Counsel urged the Honourable Court to take judicial notice to the fact that the appointment of the Counsel for the Respondent was by Mr. Jimmy Waliaula. From his affidavit, Mr. Waliaula stated that he was the County Attorney for the County Government of Mombasa and hence duly authorized to swear the same. To the Counsel that was pertinent falsehood. Mr. Waliaula had never been appointed the County Attorney for Mombasa. He had never been appointed in the Kenya Gazette. Therefore any instruction allegedly from the office of the County Attorney to the Law firm of Messrs. Cecil Miller Advocate was irregular and could not form the basis of the costs being pursued by them in Court.



11. Fourthly, the Learned Counsel argued that the provision of Order 25 (1) of the *Civil Procedure Rules* 2010 provided that where a suit had been set down for hearing, the Court may grant leave among other prayers to withdraw any part of his claim. His contention to this was that in the *Advocates Act*, other than of the suits filed under the provision Order 48, a bill of costs was a form of a suit. However, the ELC never has jurisdiction to deal on matter of taxation of the Bill of Costs. This was to be done by the Taxing Master. He noted that this Court granted an order staying the taxations of the bills of costs in the suit and not the application which had already been stayed.
12. Fifthly, the Learned Counsel submitted that, ideally the provision of Order 25 referred to an application for leave to withdraw. The reason was permissive and discretionary, as the words used there is “May”. The Court may grant leave upon presentation. Their withdrawal of the suit was not done under Order 25 (1) but under the provision Order 24(1) i.e. (Order XXIV Rule 1 of the old *Civil Procedure Rules*).
13. Sixthly, he asserted that the Respondent needed to demonstrate the intention of the Applicant and super impose the intention of the client. If there was short – coming or silence from the Advocates’ Act and one had to seek recourse from the *Civil Procedure Rules*.
14. In conclusion, at page 5 of the Respondent’s submissions specifically the averments made out under Paragraph 16 of the Affidavit by Jimmy Waliula. In particular where he stated that there was no official correspondence between the Applicant and the County Government of Mombasa. To him, they had addressed this issue from their submissions filed on 3rd June, 2022. It amounted to allegation of fraud committed by the applicant as seen at page 6. If there had been any allegations of fraud, they had had 6 years to have lodged a complaint to the appropriate authorities. But they had not demonstrated any reporting to the police and the action taken. This was from the year 2017. To the Counsel, there was no averment made out on page 1 of the bundle of documents. The County Government of Mombasa was a legal and perpetual succession body could not deny that Mr. Mwashimba Mtalaki as seen from page 39 had never received a letter on behalf of the County Attorney. To the Counsel, he had already filed his Bills of Costs in another Court and this was just a way to intimidate him.

B. The Oral submissions by the Respondent

15. Ms. Kaguri, the Learned Counsel for the Respondent commenced highlighting her submissions by stating that they shall rely on their written submissions dated 2nd February, 2023 and the cited authorities thereof. On the issue whether this Court had no jurisdiction as claimed by the Applicant. Should that be the case, she wondered the reason why he decided to file the Bills of costs before this Court in the first place. Indeed, the Applicant had seen it fit that the ELC had jurisdiction to hear and determine the said Bill of Costs before he eventually withdrew the suit through a Notice of Withdrawal dated 9th September, 2022. This was done even after the application was canvassed. They waited for the submissions of the Bills of Costs for them to have cleverly withdrawn the suit.
16. She referred the Honourable Court to the Notice of Withdrawal of the suit by the Applicant. According to her, the withdrawal of the suit by the Applicant was not automatic. It was a fact of intention which the Court had to decide. In October 2022 the court admitted the withdrawal and the only issue remaining was that on costs. It will be noted that the Application was on the bill of costs. The Respondent had attended to many cases filed by the Applicant and hence entitled to costs after the withdrawal of the suit by the Applicant. To buttress on this point, the Learned Counsel referred



court to the case of “[Pacis Insurance Company Limited – Versus – Francis Njeru Njoka \(2018\)](#) eKLR” where the Court held that:-

“It is evident that the Defendant had taken steps to oppose Plaintiffs claim and was also intending to amend defence filed to include a Counter Claim. Defendant had instructed a lawyer to defend him. It is also not disputed that the suit had been set down for hearing. Defendant was invited to the registry to fix the suit for hearing and they were given a date for hearing on which date the Plaintiff failed to attend. No doubt the Defendant had incurred expenses by the time the suit was withdrawn and should have been notified of the intention to withdraw and invited to appear before the Registrar for issues of costs to be addressed. A party having been caused by the other to participate in a suit, is entitled to costs incurred in the event the party instituting the suit decides to withdraw it unless parties agree otherwise or Court on exercising its discretion decided otherwise after giving the parties opportunity to submit on costs. In the instant case, the suit was withdrawn after hearing date was set, Defendant had engaged an Advocate to defend the suit. Defendant is therefore expected to have incurred expenses and entitled to costs expended”.

17. The Learned Counsel referred the Court to the affidavit of Mr. Jimmy Waliaula. The case had already been closed. They cannot be looking at the issue of the case after it had already been closed. This amount to re-opening the matter. As a matter of fact, the law firm of Messrs. Cecil Miller & Advocates formally represented the County Government of Mombasa. The Learned Counsel urged the Court to look at the expenses incurred by the Law firm being external advocates for the Respondent in these matters. Indeed, she stressed that they had incurred costs. The Respondent was a public institution and had legal prudence and responsibilities to be accountable for all its finances to the people of Kenya in accordance with the legal dictum and principles of the Public Finance and Management Act. Public monies should not be wasted as the same would lead to dire consequences to the Respondent’s officers. According to Learned Counsel costs follow the events. The Respondents was entitled to costs. On this point she relied on the decision of “[Sberwin Njoroge & Associates – Versus – Bridge International Academies Limited \(2016\)](#)eKLR where Court held that:

“I however find and hold that the Advocate who files a Bill of Costs is entitled to withdraw it subject to costs incurred by the client, on the basis that costs follow the event”

18. Finally, the Learned Counsel held that the Applicant had confirmed that the provision of Order XXIV of the [Civil Procedure Rules](#) never existed. It could only move under the provision of Section 15 of the [Advocates Act](#) and then it could have the Bill of Costs be taxed by the Taxing officer. That was not the case herein. She urged the Court to have the objection by the Applicant be dismissed with costs to the Respondents.

IV. Analysis and Determination

19. I have considered the Notice of Preliminary Objection dated 24th February, 2023 by the Applicant herein, the oral and written submissions by the parties herein, the relevant and appropriate provisions of [the Constitution](#) of Kenya, 2010 and statutes.
20. There are three (3) issues for the Courts determination for it to reach an informed, Just and fair decision with regard to the raised objection found in the Notice of Preliminary Objection. These are:-
- a. Whether the objection by the Applicant meets the required threshold of such objections based on law and precedents.



- b. Whether this Honourable Court has jurisdiction on matters pertaining to tax bill of costs.
- c. Who will bear the costs of the objection?

Issue No. a). Whether The Objection By The Applicant Meets The Required Threshold Of Such Objections Based On Law And Precedents.

21. Under this Sub – heading, the Honourable Court notes that the main substratum of the matter is a preliminary objection by the Applicant to the whole suit. For this reason, in determining this instant Notice of Preliminary Objection, the Court will first consider what amounts to a Preliminary Objection and then Juxtapose the said description herein and come up with a finding on whether what has been raised herein fits the said description.
22. According to the *Black Law Dictionary* a Preliminary Objection is defined as being:
“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
23. Conventionally, this very pertinent legal issue has now become a common phenomenon in our courts and hence there exist a myriad of precedents on it. Therefore, there will be no need for this Court to re – invent the wheel but to refer to a few of the said cases on the subject matter. The legal preposition has been made graphically clear in the now famous case of “*Mukisa Biscuits – Versus - Westend Distributor Ltd* [1969] EA 696”, the court observed that: -
“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. ”.
24. The same position was held in the case of “*Nitin Properties Limited – Versus - Jagjit S. Kalsi & another* Court of Appeal No. 132 of 1989[1995-1998] 2EA 257” where the Court held that;
“A preliminary Objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of Judicial discretion.”
25. Similarly in the case of “*United Insurance Company Limited – Versus - Scholastica A Odera Kisumu* HCC Appeal No. 6 of 2005(2005) LLR 7396”, the Court held that;
“A preliminary Objection must be based on a point of law which is clear and beyond any doubt and Preliminary Objection which is based on facts which are disputed cannot be used to determine the whole matter as the facts must be precise and clear to enable the Court to say the facts are contested or disputed .”
26. Therefore from the above holdings of the Courts, it is clear that a preliminary Objection must be raised on a pure point of law and no fact should be ascertained from elsewhere. See also the case of



“In the matter of Siaya Resident Magistrate Court Kisumu HCCMisc. App No. 247 of 2003” where the Court held that;

“ A Preliminary Objection cannot be raised if any facts has to be ascertained.”

27. I have further relied on the decision of “*Attorney General & Another – Versus - Andrew Mwaura Gitbinji & another [2016] eKLR*”:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-
- (i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
 - (ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
 - (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
28. The Applicant has questioned the Jurisdiction of this Court on matters regarding taxation of the Advocates – Clients payable fees for the professional services rendered thereof. Taking into account the above findings and holdings of various Courts on what amounts to a preliminary Objection, I am satisfied and strongly hold that the objections on the Jurisdiction of Court is a pure point of Law. Therefore, the Court now turns to the grounds raised by the Applicant herein.

Issue No. b: Whether This Honourable Court Has The Jurisdiction To Tax A Bill Of Costs

29. Jurisdiction means a courts power to decide case or issue a decree. From the very onset, on the issue of Jurisdiction of a Court of Law, I am compelled to cite now famous case of “Owners of Motor Vessel “Lilian S” – Versus - Caltex Oil (Kenya) Limited (1989) IKLR” dealt with a court, jurisdiction thus:-

“Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction.....where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given”.

16. Additionally, still on the same point, in the case of “County Government of Migori – Versus - I N B Management IT Consultant Limited (2019) eKLR” whereby court being faced with an objection regarding jurisdiction, analyzed the law and observed as follows:-

“10 The jurisdiction point raised by the Respondent herein clearly meets the foregone criteria being a pure point of law. That jurisdiction is everything is a well settled principle in law. My Lordship Ibrahim, JSC in Supreme court of Kenya Civil application No 11 of 2016-“Hon (Lady) Justice Kalpana H Rawal Versus Judicial Service Commission and others when in demystifying jurisdiction quoted from the decision in Supreme court of Nigeria supreme case No 11 of 2012- “Ocheja Immanuel Dangama – Versus - Hon. Atoi Aidoko Aliaswan and 4 others



where Walter Samuel Nkanu Onnoghen, JSC and expressed himself as follows:-

“.....it is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity deed on arrival and of no legal effect whatever that is why an issue of jurisdiction is granted and fundamental in adjudication and has to be dealt with first and foremost.....”

30. In Kenya, the Environment and Land Court is a statutory creation by *the Constitution* of Kenya under the provision of Article 162 (b). Here, the Courts are vested it with original and unlimited jurisdiction. From the preamble of the *Environment and Land Court Act*, No. 19 of 2011 the jurisdiction of the court is defined as “.....a Superior court to hear and determine disputes relating to the environment and the use and occupation of, and the titles to, land and to make provisions for its jurisdiction functions and powers and for connected purposes.....”.
31. Under the provision of Sections 4 and 13 (1) of the *Environment Land court Act* this court has the legal mandate to hear any matter related to environment and land including the one filed by the Applicant hereof. In the case of the ELC (Malindi) in the “*Kharisa Kyango – Versus - Law Society of Kenya (2014) eKLR*”.
32. The jurisdiction of the ELC Court is limited by the provision of Article 162(2) and (3) of *the Constitution* of Kenya and Sections 101 of the *land Registration Act*, No. 3 of 2012, Section 150 of the *land Act*, No. 6 of 2012 and 13(2) of the *ELC Act* No. 19 of 2011. Article 162(2)(b) which states that ELC Court has the mandate to hear and determine disputes relating to use and occupation and title to land.
33. In particular the provisions of Article 162(2) of *the Constitution* of Kenya 2012 provide as follows: -
 - “(1) The superior Courts are the Supreme Court, the Court of Appeal, the High Court and the Courts mentioned in clause (2).
 - (2) Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to—
 - (a); and
 - (b) the environment and the use and occupation of, and title to, land.
 - (3) Parliament shall determine the jurisdiction and functions of the Courts contemplated in clause (2)”.
34. The provision of Section 13 of the *Environment and Land Court Act* contains the following detailed jurisdiction of the Court:-
 13. Jurisdiction of the Court
 - (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.



- (2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—
- (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land. CAP. 12A Environment and Land Court [Rev. 2012] Environment and Land Court [Issue 1] E11 – 9
- (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.
- (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
- (5) Deleted by Act No. 12 of 2012, Sch.
- (6) Deleted by Act No. 12 of 2012, Sch.
- (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—
- (a) interim or permanent preservation orders including injunctions;
 - (b) prerogative orders;
 - (c) award of damages;
 - (d) compensation;
 - (e) specific performance;
 - (g) restitution;
 - (h) declaration; or
 - (i) costs

35. In this instant case, the Applicant filed a notice of motion application dated 27th October, 2021 seeking to have judgment entered in his favour for the sum of Kenya Shillings One Twelve Million Four Eighteen Thousand Five Hundred (Kshs. 112,418,514/-) only as per the draft Bill of Costs emanating from various other five (5) related matters being Miscellaneous Numbers 36, 37, 38, 39, 40, 42 and 43 of 2019 served upon the Respondent via cargo Courier on the 15th September, 2021 with interest at Court rates. Subsequently, this Honourable Court rendered itself through a ruling dated 19th May, 2022 staying these proceedings. Being aggrieved by this decision, the Applicant filed a notice of appeal. However, in the course of time and in turn of sudden events, the Applicant filed a Notice to



withdraw suits being the Advocate Client bill of Costs dated 14th October, 2021 dated 9th September, 2022 under Order XXIV Rule 1 of the *Civil Procedure Rules* with no orders as to costs. On 4th October, 2022, there being no objection, this Honourable Court allowed the withdrawal of the suits and the same was adopted as an order of the Court.

36. Immediately thereafter, the Respondent moved this Court through filing of an application and submissions seeking to be granted their costs for having diligently and actively participated in these six (6) proceedings for a long period and incurred expenses. That is what the Applicant now raised an objection to as the pith and substance of the matter before Court.
37. There is common ground that at all material times, the Applicant was involved retainer agreement with the Respondent pursuant to a sub- lease. Rendering itself on that question, the Court of Appeal in the “Peter Kangethe case (*Supra*)” stated as follows:

“Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the *ELC Act* ought to be understood within the context of the court’s jurisdiction to deal with disputes connected to “use” of land as discussed herein above. Such contracts, in our view, ought to be incidental to the “use of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court”

38. The Court of Appeal rendered itself in “*Nakumatt Holdings Limited & Another – Versus - Ideal Locations Limited (2019)* eKLR” as follows:-

“29. In rejecting the contention that the ELC did not have jurisdiction, the Judge stated that it was not contested that the dispute between the parties stemmed from a landlord and tenant relationship in which the landlord claimed that Nakumatt had breached the terms of the lease agreement by defaulting in the payment of rent, service charge and promotion fund. The Judge expressed that the ELC was established under Section 4 of the ELC Act enacted pursuant to Article 162(2) of *the Constitution*; that under Article 162(2) of *the Constitution* and Section 13 of that Act, the ELC has exclusive jurisdiction to hear and determine disputes relating to the use and occupation of and title to land; that under Article 165(5) of *the Constitution*, the High Court is prevented, in express terms, from exercising jurisdiction in matters reserved for the ELC. The Learned Judge held that *the Constitution* does not prohibit the ELC from hearing a dispute over use and occupation of land where there is a pending insolvency cause involving one of the parties. Being satisfied that the dispute related to use and occupation of land, the Judge concluded:

“...under Article 162 (2)(b) of *the Constitution* and Section 13(2)(a) of the *Environment and Land Court Act*, this Court has jurisdiction to hear the suit and the application and issue the orders sought by the plaintiff. In my view, the plaintiff’s action does not in any way contravene Section 430 of the *Insolvency Act* as the Plaintiff in this case is not undertaking or seeking to undertake any of the actions listed in Section 430. The plaintiff has not taken any action against the assets of the 1st defendant, whether attachment, sequestration, distress or execution. The plaintiff is only seeking to exercise its rights to peaceable re-entry which in my view, is not prohibited by Section 430 of the *Insolvency Act*.”



30. Given the background to the matter as set out above, there can be no doubt that the subject matter of the suit, and the cause of action arose from the sub-lease over L.R. No. 14407 and 16088 under which the landlord leased a portion of those premises to Nakumatt.

That, as the learned Judge correctly concluded, is a matter within the class of “use and occupation” of land under Article 162(2) of *the Constitution* and therefore within the jurisdiction of the ELC under Section 13 of the ELC Act. Under Article 162(2) of *the Constitution*, Parliament was empowered to “establish Courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land” and to “determine the jurisdiction and functions of such Courts”. Pursuant thereto, Parliament enacted the *Environment and Land Court Act*. Section 13(1) of that Act outlines the jurisdiction of the ELC as follows:

- “(2) In exercise of its jurisdiction under Article 162(2) (b) of *the Constitution*, the Court [the ELC] shall have power to hear and determine disputes-
- (a) relating to environmental planning and protection, climate issues, land use, planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.
- (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.”

31. Given those provisions, we are fully in agreement with the learned Judge that the dispute between the parties, stemming as it did, from the sub lease over the leased premises over L.R. No. 14407 and 16088, is a matter falling within the jurisdiction of the ELC.

39. There was a contract between the Parties on a sub lease which involved the proprietary rights in land which confers the jurisdiction of the issue under the environment and land court but being that this matter involved fees and a bill of costs, this Honourable Court has not jurisdiction to determine the fees payable to the Advocate in the transaction and that jurisdiction lied with the Taxing master.



40. It is trite, I believe, that the existence of an Advocate-Client relationship is central as it gives jurisdiction to the Taxing Master to entertain a bill of costs. In “[Wilfred N. Konosi T/A Konosi & Co. Advocates – Versus - Flamco Limited \[2017\]](#) eKLR”, the Court of Appeal stated as follows:

“The issue whether an advocate-client relationship exists in taxation of a Bill of Costs between an advocate and his/her client is core. The jurisdiction is conferred on the Taxing Officer by law. It is derived from the [Advocates Act](#) and the Advocates Remuneration Order. The Taxing Officer sits in taxation as a Judicial Officer. His or her task is to determine legal fees payable for legal services rendered. The jurisdiction cannot arise by implication nor can parties by consent confer it. And inherent jurisdiction cannot be invoked where adequate statutory provision exists. It was held in *Taparn vs Roitei* [1968] EA 618 that inherent jurisdiction should not be invoked where there is specific statutory provision to meet the case. The [Advocates Act](#) and the Advocates Remuneration Order confer on the Taxing Officer jurisdiction to tax bills of costs between advocates and their clients (as well as between party and party in litigation) so as to determine legal fees for legal services rendered. The nexus between the advocate and his or her client is the advocate/client relationship which springs from instructions by the client to the advocate. Absent such relationship, the Taxing Officer would be bereft of jurisdiction to tax a bill.

41. Under the provision of Rule 10 of the Advocates Remuneration Order provides that:

“The taxing officer for the taxation of bills under this order shall be the registrar or district or deputy registrar of the High Court or, in the absence of a registrar, such other qualified officer as the Chief Justice may in writing appoint; except that in respect of bills under schedule IV, the taxing officer shall be the registrar of trademarks or any deputy or assistant registrar of trademarks.”

42. As regards the issue of taxation jurisdiction, I find that the provision of Section 13 of the [Civil Procedure Act](#), has ousted the jurisdiction of this court as vested by Article 162 (2)(a) of [the Constitution](#) as regards to the actual taxation of the bill of costs. Interestingly, all the way through the oral and the written submissions by the Respondents, which I keenly listened to and read in between the lines, no where have I found them opposing the objection by the Applicant on the basis that the ELC has Jurisdiction to enter this taxation proceedings before it. I am left to assume that they seem to be conceding to the objection. For these reasons, I strongly hold that the jurisdiction on matters before me, lies with the Taxing Master in this case the Environment and Land Court Deputy Registrar – Mombasa and this Court can only revise the ruling of the Taxing Master. Certainly, by this Ruling, it does not bar the parties from submitting themselves by filing References a fresh before the Taxing Master.

Issue No. c). Who Will Bear The Costs Of The Objection?

43. The issue of Costs is at the discretion of the Court. Costs are the award granted to a party at the conclusion of any legal action in a litigation process. The provision of Section 27 (1) of the [Civil Procedure Act](#), Cap. 21 holds that costs follow the event. By the event it means the result of the legal action.
44. In the Instant case, although the Applicant has succeeded in the Preliminary Objection dated 24th February, 2023, but in the given circumstances, its just fair and reasonable that each party bear their own costs of the objection herein.



V. Conclusion and Disposition.

45. Ultimately in view of the foregoing detailed and expansive analysis to the Preliminary Objection dated 24th February, 2023 by the Applicant herein, the Honourable Court arrives at the following decision and make below orders:-
- a. That the Preliminary objection dated 24th February, 2023 be and is hereby found to have merit and hence sustained the extent that this Honourable Court cannot assess a bill of costs and tax the same in the process.
 - b. That for avoidance of doubt, the Environment and Land Court as a superior Court cannot tax a bill of Costs and only the Deputy Registrar had the mandate and discretion to assess and tax a bill of Costs as a Taxing Master.
 - c. That both the Applicant and Respondent be and is hereby guided to consider filing their appropriate Bill of Costs expeditiously emanating from these six (6) cases before this Court before the Deputy Registrar, as the Taxing Officer for the ELC for appropriate taxation.
 - d. That this order applies Mutatis Mutandis to related matters in this Court to wit:- ELC Miscellaneous Application No. 37, 39, 40, 41, 42 & 43 OF 2021; this order to be extracted and be replicated to all the said files.
 - e. That there shall be no orders as to Costs.

It is so ordered accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 7TH DAY OF NOVEMBER 2023.

HON. JUSTICE L. L. NAIKUNI (MR.)

ENVIRONMENT AND LAND COURT

MOMBASA

