



Radio Africa Limited & 3 others v Detiland Company Limited (Miscellaneous Civil Application E022 of 2024) [2025] KEHC 374 (KLR) (Civ) (23 January 2025) (Ruling)

Neutral citation: [2025] KEHC 374 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E022 OF 2024
LP KASSAN, J
JANUARY 23, 2025**

BETWEEN

**RADIO AFRICA LIMITED 1ST APPLICANT
STAR PUBLICATION LIMITED 2ND APPLICANT
JULIUS OTIENO 3RD APPLICANT
HENRY MAKORI 4TH APPLICANT**

AND

DETILAND COMPANY LIMITED RESPONDENT

RULING

1. At the onset, Detiland Company Limited (hereafter the Respondent) instituted HCCC No. 60 of 2020 (the suit) against Radio Africa Limited, Star Publication Limited, Julius Otieno and Henry Makori (hereafter the 1st, 2nd, 3rd and 4th Applicants). Subsequently, the Respondent withdrew the suit vide the Notice of Withdrawal dated 4th November, 2021.
2. The Notice of Withdrawal prompted the filing of a Party and Party Bill of Costs dated 16th May, 2023 (the Bill of Costs) by the Applicants, seeking costs in the sum of Kshs. 5,460,188.33 against the Respondent. The said Bill of Costs was opposed by the Respondent through written submissions. The Applicants similarly filed written submissions thereon.
3. The Bill of Costs then proceeded for taxation before the taxing officer, Hon. S.K. Motari (Deputy Registrar) who taxed the same at the sum of Kshs. 158,880/- by way of her taxation ruling delivered on 24th November, 2023.



4. Being dissatisfied with the ruling on taxation, the Applicants brought the Chamber Summons Reference dated 15th January, 2024 (the Chamber Summons) seeking an order setting aside the aforesaid ruling and further seeking an order to the effect that the Bill of Costs be taxed afresh by the court. The Applicants similarly sought an alternative order that the Bill of Costs be returned to the taxing officer for re-assessment. The Chamber Summons stands supported by the grounds laid out on its face and the facts stated in the supporting affidavit of the 1st Applicant's Group Head of Legal, Grace Wambui.
5. The Respondent in response, moved this court by way of the notice of preliminary objection dated 29th January, 2024 challenging the competency of the Chamber Summons on the grounds that:
 1. The Honourable Court lacks jurisdiction to hear and determine the Reference.
 2. The said application is bad in law and incurably defective as it offends the mandatory provisions of Rule 11(2) and (4) of the Advocates Remuneration Order 2014.
 3. The entire application dated 15th January, 2024 is fatally defective, incompetent, misconceived, misplaced and an abuse of the process of this Honourable Court and ought to be dismissed with costs.

Reasons wherefore the Respondent will pray that the Chamber Summons Application dated 15th January, 2024 herein be dismissed or struck out with costs. (sic)

6. When the parties attended court on 31st May, 2024 it was ordered that the preliminary objection would be determined first. The parties were therefore directed to put in written submissions thereon.
7. The court has considered the notice of preliminary objection together with the written submissions supporting and opposing it.
8. To begin with, the question as to what constitutes a preliminary objection was aptly considered by the court in the renowned case of *Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696* and defined in the following manner:

“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 in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”

9. The above definition was further advanced by the Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR* when it rendered itself thus:

“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”

10. In the present instance, the preliminary objection is essentially challenging the jurisdiction of this court to entertain the Chamber Summons pursuant to Paragraph 11 of the Advocates (Remuneration) Order, with the Respondent arguing in support thereof, that the Chamber Summons has been brought outside the stipulated timelines set out in the above mandatory provision. According to the Respondent, the Applicants ought to have filed the Chamber Summons on or before 8th December, 2023, failing which the same would be rendered time barred. That taking into account the fact that the Chamber Summons was filed 39 days late, on 15th January, 2024, this court lacks jurisdiction to



entertain it. The Respondent cited various authorities on the subject of jurisdiction, including the case of *Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] KESC 8 (KLR) where the Supreme Court affirmed the legal position that jurisdiction of a court flows either from the Constitution or from legislation or both.

11. On that basis, the Respondent deems the Chamber Summons to be fatally defective, incompetent and an abuse of the court process, with reference being made to the case of *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others* [2009] KECA 453 (KLR) in which the Court of Appeal defined what constitutes an abuse of the court process.
12. For the foregoing reasons, the Respondent has urged the court to dismiss the Chamber Summons Reference, with costs.
13. In retort, the Applicants collectively submitted that pursuant to Rule 11(1) and (2) of the Advocates (Remuneration) Order, a party desiring to object to the decision of a taxing officer shall do so by giving a notice of objection within 14 days from the date of the decision, and that the taxing officer shall forward the reasons for his or her decision to the objector, within a period of 14 days from the date of receipt of the notice of objection. The Applicants maintain that they fully complied with the above proviso and hence the Chamber Summons is competently before this court. To support their submissions, they cited inter alia, the case of *Otieno & Ragot Company Advocates v National Bank of Kenya Limited* [2016] KEHC 5543 (KLR) where the court found that a reference which had been filed six (6) days after the reply by the taxing officer, was well within the stipulated timelines.
14. Consequently, the Applicants urged the court to dismiss the preliminary objection, with costs.
15. The legal principle is that jurisdiction is everything and that without it, a court cannot perform any further action in a matter. This position was reaffirmed by the Court of Appeal in *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR when it held thus:

Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction. In another locus classicus in this subject, this Court pronounced; *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd.* (1989):

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that 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.”

These words were echoed by this Court in *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR in the following words: -

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under S.18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court



with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign, It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of the *Constitution* to remedy the same.

...In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer.” (Emphasis ours)

Decided cases on this issue are legion and we cannot cite all of them. The case of Joseph Muthee Kamau & Another v. David Mwangi Gichure & Another (2013) eKLR is however on all fours and addresses the issue raised by Ms. Wambua as to whether the subordinate court could still hear the suit but only allow the maximum damages allowable within its pecuniary jurisdiction. The Court succinctly settled this point in the following words: -

“When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being Kagenyi v. Musirambo (1968) EA 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court’s pecuniary jurisdiction.

We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.”

16. Having established the above, the court now turns to the relevant Paragraph 11 of the Advocates (Remuneration) Order which provides for the procedure and timelines for objecting to a decision on taxation and for filing a Reference, as seen hereunder:
 - (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
 - (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by Chamber Summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
17. Upon the court’s study of the record, it is apparent that upon delivery of the taxation ruling on 24th November, 2023 the Applicants, through their advocates, sent an email dated 15th December, 2023 to the Deputy Registrar-Civil Division, requesting for reasons relating to the taxation ruling and forwarding a letter dated 29th November, 2023.
18. From the foregoing, it is apparent that while the Applicants purported to rely on the letter dated 29th November, 2023 requesting for reasons on the taxation ruling, the said letter was not forwarded to



the Deputy Registrar until 15th December, 2023 which date fell outside the 14-day period stipulated under Paragraph 11(1) of the Advocates (Remuneration) Order. No explanation has been given as to why the Applicants chose to wait 21 days before forwarding their notice of objection and request for reasons, from the date of delivery of the taxation ruling.

19. More importantly, from a reading of the aforesaid taxation ruling, it is apparent that the same contained the reasons therein from the onset and hence there was no need for the Applicants to apply for the same in any event. This position was confirmed by the Deputy Registrar-Civil Division, by way of an email sent to the Applicants' advocate and dated 21st December, 2023. In any event, there is nothing to indicate that the Applicants were absent from court on the date of delivery of the taxation ruling. From a reading and understanding of Paragraph 11 (supra), the Applicants ought to have complied by either filing the Chamber Summons or at the very least applying for the reasons for the taxation ruling or on or before 8th December, 2023, but did not. Furthermore, no mention was made by the Applicants as to when they received the ruling and reasons, if at all an application was indeed made for the same, pursuant to the directions given by the Deputy Registrar vide the email of 21st December, 2023.
20. Upon consideration of all the foregoing factors therefore, the court is satisfied that owing to non-compliance on the part of the Applicants, the Chamber Summons Reference is time barred.
21. In the end therefore, the notice of preliminary objection dated 29th January, 2024 succeeds. Consequently, the Chamber Summons Reference dated 15th January, 2024 is hereby struck out with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF JANUARY 2025.

HON. L. KASSAN

JUDGE

In the presence of:

Chepngeno holding brief Gichoyu for 1st, 2nd and 3rd for the Applicants

Cheron holding brief Otieno Respondent

Guyo - Court Assistant

