



Mwazonga & another v Chief Land Registrar & 6 others; Sifuna Kinisu & Company Advocates (Respondent) (Environment and Land Judicial Review Case E004 of 2021) [2025] KEELC 103 (KLR) (23 January 2025) (Ruling)

Neutral citation: [2025] KEELC 103 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E004 OF 2021
FM NJOROGE, J
JANUARY 23, 2025

BETWEEN

CHRISTOPHER MWANDEJE MWAZONGA 1ST PLAINTIFF

BI ASHA BAYA HAMISI 2ND PLAINTIFF

AND

CHIEF LAND REGISTRAR 1ST DEFENDANT

VIPINGO DEVELOPMENT LIMITED 2ND DEFENDANT

VIPINGO ESTATES LIMITED 3RD DEFENDANT

VIPINGO ENERGY LIMITED 4TH DEFENDANT

REA VIPINGO PLANTATION LIMITED 5TH DEFENDANT

VIPINGO DEVELOPMENT PLC 6TH DEFENDANT

MOMBASA CEMENT LIMITED 7TH DEFENDANT

AND

SIFUNA KINISU & COMPANY ADVOCATES RESPONDENT

RULING

1. For determination is the Amended Originating Summons dated 3/6/2024 brought under the provisions of Article 46 and 48 of the Constitution, Section 51 (1) of the Advocates Act, Rules 4, 8, 9, 10, 11, 12, 13, 14 and 15 of the Advocates (Accounts) Rules, Section 1A and 1B of the Civil Procedure Act, Order 37 Rule 14, 17 and 20 and Order 52 Rule 4 of the Civil Procedure Rules, 2010. The Applicants seek the following orders: -



1.Spent;
 2. That the honourable court be pleased to issue a declaration that the Applicants did not enter into a special agreement for legal fees with the Respondent in respect to prosecuting the Applicants' claim for recovery of the property known as LR No. 11843/III/MN Original No. 291/1 (Title No. CR 75503) other than the agreements expressly admitted to by the Applicants and/or provided in evidence before the honourable court;
 3. That the honourable court be pleased to order the Respondent to furnish a cash book account in respect to the sum of Kshs. 41, 750,000.00 received by the Respondent on behalf of the Applicants being the decretal sum issued in favour of the Applicants by the consent agreed by the parties in the suit herein;
 4. That in the alternative to order (3) above, the Honourable Court be pleased to issue an order that the Respondent do deliver forthwith a bill of costs in respect of services rendered to the Applicants for taxation by the Honourable Court;
 5. That the Honourable Court be pleased to order the Respondent to pay or refund the Applicants the residue of the sum of Kshs. 41, 750,000.00 being the decretal sum issued in favour of the Applicants by the consent agreed by the parties in the suit herein less the proved payments made to the Applicants by the Respondent and less the Respondent's legal fees as agreed with the Applicants or according to the taxation of the Respondent's bill of costs by the Honourable Court as prayed in order (4) above;
 6. That the Honourable Court be pleased to issue an order that the sums prayed for in order (5) above be paid to the Applicants by the Respondent within a period of 14 days of issuing the order, failure to which interest to accrue on the said amounts at the court rates from the date of the order until payment in full;
 7. That the Honourable Court be pleased to assess the costs of this summons and order the Respondent to satisfy the same within a similar period of 14 days from the date of the order as prayed in order (6) above.
2. The Summons, which was supported by the affidavits sworn by the Applicants on 14/5/2024, was based on the grounds that following a consent order recorded in this suit, the 6th Defendant agreed to purchase some 20 acres out of LR No. 11843/III/MN Original No. 291/1 (Title No. CR 75503) together with developments thereon (hereinafter "the suit property") for a consideration of Kshs. 41, 750,000/- inclusive of costs of the primary suit, the cost of each acre being Kshs. 1,500,000/=.
 3. The primary suit Malindi ELCC No. 71 of 2011, was based on a claim for adverse possession where judgment was entered on 24/6/2016 awarding the Applicants the said 20 acres. Prior to filing that suit, the Applicants had agreed to transfer 15 acres out of the total 47 acres of the suit property to the Respondent as payment for legal fees. Following the judgment, the acreage to be transferred to the Respondent was reviewed to 4 acres vide an agreement dated 28/10/2018; out of the said sum, the 1st Applicant was entitled to a sum of Kshs. 23,500,000.00 being the total cost of his 9 acres plus developments thereon; the 2nd Applicant was entitled to a sum of Kshs. 11,250,000 being the cost of her 7 acres plus developments thereon; and the Respondent a sum of Kshs. 7,000,000 being the cost of the 4 acres plus costs of the suit; that despite the above arrangement, the Respondent has only paid to the Applicants the sum of Kshs. 16, 561, 440.00 and Kshs. 6, 707, 550.00 respectively, and declined to remit the balance.



4. The Respondent filed grounds of opposition dated 6/9/2024 through the firm of Ms. Caroline Oduor & Associates stating that the Originating Summons are fatally defective for purporting to originate judicial review proceedings in a manner that is inconsistent with Order 53 of the *Civil Procedure Rules*; for purporting to enforce elements of the judgment in ELCC No. 71 of 2011 through a separate suit; for purporting to challenge the contents of a remuneration agreement between advocate and client in a manner that is contrary to Section 45 (2) of the *Advocates Act*; for being filed 1 year after the making of the remuneration agreement; for being filed before this court instead of the Advocates Complaints Commission and Disciplinary Tribunal; for being filed contrary to the legal doctrine of approbation and reprobation; and that the orders sought are untenable as they are being sought against the Respondent that is neither a natural nor juristic person.
5. The Summons were canvassed by way of written submissions.

Applicants' Submissions

6. The two issues addressed were whether the court has jurisdiction to hear and determine the Summons and whether the Applicants are entitled to the orders sought.
7. In relation to the first issue, counsel submitted that the Applicants are in the right forum in so far as taking out summons herein seeks a determination of the questions arising out of the execution, discharge and or satisfaction of the consent order recorded in this Court.
8. Counsel submitted that the Applicants are entitled to prayer 2 as it is settled that in matter such as those before the court, the onus is on the advocate to produce documentary evidence in accounting to the Applicants; that the prayer is not disputed since the Respondent failed to produce evidence of such an agreement despite being the author and custodian thereof. In relation to prayer 3 and 4, counsel argued that the Respondent has not produced any other evidence to controvert the agreements produced by the Applicants and that the same can be deemed spent in the face of the said agreements. Counsel added that in determining whether or not to grant prayer 5, 6 and 7 the court should consider the agreement dated 9/9/2023 and the Respondent did not produce any evidence to the contrary, to exercise discretion in favour of the Applicants.

Respondent's Submissions

9. Relying on the case of *Institute for Social Accountability & another v Parliament of Kenya & 3 others* [2014] eKLR Counsel argued that the amended originating summons was not filed together with any supporting affidavits as is required under Order 52 rule 4 (2) of the *Civil Procedure Rules*; that the Applicants cannot rely on pleadings that have since been amended to buttress its case; that in the absence of the affidavit, the Court ought to find that the Applicants have failed to tender any evidence and thus failed to satisfy their incidence of burden of proof stipulated under Section 107 and 108 of the *Evidence Act*.
10. On jurisdiction, counsel argued that the jurisdiction of the court under Article 162 (2) (b) of the *Constitution* and Section 13 (2) of the *Environment and Land Act*, does not encompass matters of advocate conduct, advocate-client relations and or remuneration agreements; that such matters are a preserve of the Advocates Complaints Commission and the Disciplinary Tribunal and that procedure must be strictly followed. To support her argument, counsel relied on the case of *Eliud Wafula Maelo v Ministry of Agriculture & 3 others* [2016] eKLR, *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR, *Samuel Kamau Macharia & another v KCB Limited* [2012] eKLR, and *Owners of Motor Vessel 'Lilian S' v Caltex Oil Kenya Limited* [1989] KLR 1.



11. Counsel further submitted that by dint of Section 34 (1) of the *Civil Procedure Act*, property awarded through a particular court’s judgment cannot be enforced or claimed in a separate suit from that in which an award was made. She explained that the purpose of judicial review is to interrogate processes and procedure, not to delve into the merits of a dispute between an advocate and a client. To buttress this point, counsel relied on the case of *South Nyanza Sugar Company Limited v Alfred Sagwa Mdeizi t/a Pave Auctioneers* [2010] eKLR.
12. Counsel further submitted that the Applicant has introduced a new party, the Respondent herein, without leave of the court, long after the file had been closed.

Determination

13. The preliminary point raised by the Respondent is the issue of jurisdiction which I must first address. This is because in any litigation, jurisdiction is central and a court of law cannot validly take any step without jurisdiction. The moment a party in a suit successfully challenges the jurisdiction of the court, the court must down its tools. The Supreme Court in *In The Matter of Interim Independent Electoral Commission* [2011] eKLR held as follows:

Assumption of jurisdiction by Courts in Kenya is a subject regulated by the *Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited* [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”

[30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the Recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the *Constitution*.”

14. Article 162 of the *Constitution* as read with Section 13 of the *Environment and Land Court* expounds on the jurisdiction of this Court as follows:
 - (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.”

15. The issue at hand, though not entirely straightforward, revolves around dispute over legal fees for legal representation in a matter that was filed in this Court. Inasmuch as issues of legal fees between advocate and client are not necessarily disputes regarding land and environment, as long as they are consequential to proceedings before the ELC, then there is no reason why such disputes should not be filed before this Court. I do not find any basis in the Respondent’s objection on jurisdiction.

16. The other issue raised by the Respondent was that the application is incompetent for want of a competent Respondent. Order 30 of the Civil Procedure Rules makes provision for filing of suits by or against firms and other persons carrying out business in names other than their own. Rule 1 allows any two or more persons claiming or being liable as partners to sue or to be sued in the name of the firm. Rule 2 clarifies that if the suit is filed by partners in the name of their firm, the plaintiff or their advocate shall on demand in writing by or on behalf of the defendant declare in writing within 7 days, the names and place of residence of all names constituting the partnership. Rule 5, provides that where persons are sued as partners in the name of the firm, they are to appear individually in their own names but all the subsequent proceeding are to continue in the name of the firm sued. Lastly, Rule 9 provides that

“Any person carrying on business in a name other than his own name may be sued in such name or style as if it were a firm and so far as the nature of the case will permit, the rules under this order shall apply.”

17. There is no doubt that the above rule allows any person carrying on business to be sued in the name or style in which he carries the business as if it were a firm. My interpretation of Rule 9 above is that the suit should target the proprietor essentially but using his business name. In this case therefore, I find that the Respondent has been rightly sued as a firm.

18. Turning to the substantive issues, it is evident that the Respondent’s objection to the application is based on the allegation that there exists a remuneration agreement therefore the application as filed is incompetent by dint of Sections 45 (2) and (2A) of the Advocates Act which provide as follows: -

“(2) A client may apply by chamber summons to the Court to have the agreement set aside or varied on the grounds that it is harsh and unconscionable, exorbitant or unreasonable, and every such application shall be heard before a judge sitting with two assessors, who shall be advocates of not less than five years’ standing appointed by the Registrar after consultation with the chairman of the Society for each application and on any such application the Court, whose decision shall be final, shall have power to order—

- (a) that the agreement be upheld; or
- (b) that the agreement be varied by substituting for the amount of the remuneration fixed by the agreement such amount as the Court may deem just; or



- (c) that the agreement be set aside; or
- (d) that the costs in question be taxed by the Registrar, and that the costs of the application be paid by such party as it thinks fit.

(2A) An application under subsection (2) may be made within one year after the making of the agreement, or within three months after a demand in writing by the advocate for payment under the agreement by way of rendering a fee note or otherwise, whichever is the later.”

19. The above provision envisages a situation where the client is challenging an agreement with respect to remuneration, which is not the case herein. The Applicants want the agreements enforced by the Respondent. I note that the Respondent does not deny the existence of the agreements and contents thereof.
20. The Applicants exhibited 3 copies of agreements. One is dated 28/10/2016 and two are dated 9/9/2023 respectively.
21. According to the agreement dated 28/10/2016, both applicants agreed that the land would be surveyed into 3 portions respondent would receive 3.5 acres while the applicants would share the remainder between them. The respondent is said to have received the 3.5 acres for valuable consideration.
22. According to the agreement dated 9/9/2023 signed between the 2nd applicant and the respondent, the 2nd applicant is entitled to Kshs 9,890,550/-. It is also expressly stated that she has received Kshs 6,707,000/= and the balance outstanding and owed to her is only Kshs 3,183,000/-. The agreement has been thumb printed by the 2nd applicant in execution.
23. According to the agreement dated 9/9/2023 signed between the 1st applicant and the respondent, it is stated that the litigation was finalized by the respondent by way of a settlement in the sum of Kshs 41,750,000/- and that amount is to be shared between the applicants after deduction of the respondent’s legal fees. According to the computations set out in that agreement the 1st applicant is entitled to Kshs 12,183,000/- out of which he has been paid Kshs 8,000,000/- thus leaving a balance outstanding of Kshs 4,183,000/-.
24. I find the issue arising herein to be purely mathematical and which should not have reached this court. However, this court having received it, it must be resolved for once and all. The issue arising is what amount was to be paid to the respondent out of the entire settlement sum as his fees, and what balance was to be remitted to the applicants. These being adversarial proceedings the respondent was obliged to respond in substance to the claims of the applicants. All the applicants are to him through these proceedings is simply this:

“You, Mr. Respondent, received a total of Kshs 41,750,000/- on our behalf in the final settlement; we acknowledge your right to your fees of Kshs 6,000,000/= to be settled from that same global sum; however, in lieu of your fees you agreed to take 3.5 acres of land valued at Kshs 1,500,000/- per acre plus a further 0.5 acre valued at Kshs 750,000/- plus Kshs 1,000,000/- (awarded as costs in the Judicial Review); you have paid us both only a total of Kshs 23,268,990/-; the balance outstanding is thus Kshs 18,481,010. Kindly give us that balance. It belongs to us by right.”

25. It is noteworthy that none of the three agreements state who drew them and it can only be concluded that the respondent being a law firm, drafted them. Indeed it has not asserted otherwise.



26. The respondent filed grounds of opposition. It does not oppose the assertions regarding quantum disbursed and the quantum as to fees. Consequently, it is the case that it does not dispute the quantum outstanding.
27. As it was paid its legal fees by way of land measuring 4 acres, it is entitled to only Kshs 1000,000/- being the legal fee amount awarded in the consent in the Judicial review. Consequently, the Kshs 18,481,010/- need be reduced by that specific consensual legal fee award, to make the final balance outstanding and which the two applicants are jointly entitled to but in varying proportions, to be Kshs 17, 481,010/-.
28. The Applicants did not demonstrate that they had prior to the present proceedings computed the sum of Kshs 17, 481,010/- due and subsequently demanded remittance of the same to them by the Respondent. Perhaps had they done so, the respondent would have immediately remitted it to them and there would be no need for the present application. However, I also find that in terms of transparency and accountability in respect of both the advocates fees and client funds, the respondent is under a strict duty to keep final accounts clean and give a statement in closure of a concluded matter which it has apparently not done. Failure to do so exacerbates what should have been a very minor issue into a major dispute necessitating application of this court's precious judicial time resource to its resolution yet courts were not established to do simple mathematical computations which I have found to be the only issue herein, but to resolve more complex issues. These are within the capacity of the parties to sit and perform. Each party is at fault in these proceedings as I have set out herein above and consequently, each party shall bear their own costs of the application.
29. The upshot is that the amended originating summons succeeds, and I grant it in terms of prayer no 5 and 6 thereof. For the avoidance of doubt, the following are the final orders issued herein:
 - a. The respondent shall remit to the applicants the residue claimed in prayer no 5 of the Originating summons which this court has verified to be Kshs 17, 481,010/- (Seventeen million four hundred and eighty one thousand and ten shillings) within 14 days of this order in default of which interest shall accrue on that sum at court rates from the date of the order until payment in full;
 - b. Each party shall bear its own costs of the present originating summons.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 23RD DAY OF JANUARY, 2025.

MWANGI NJOROGE

JUDGE, ELC MALINDI

