



Kenya Ports Authority v Dock Workers Union (Environment and Land Miscellaneous (Reference) Application 162 of 2021) [2024] KEHC 16989 (KLR) (7 February 2024) (Ruling)

Neutral citation: [2024] KEHC 16989 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
ENVIRONMENT AND LAND MISCELLANEOUS
(REFERENCE) APPLICATION 162 OF 2021**

F WANGARI, J

FEBRUARY 7, 2024

BETWEEN

KENYA PORTS AUTHORITY APPLICANT

AND

DOCK WORKERS UNION RESPONDENT

RULING

1. This ruling relates to three (3) applications preferred by the parties herein. The first application is dated 29th July, 2021 filed by the Applicant and it sought for the following orders: -
 - a. That the decision of the Taxing Master delivered on 16th June, 2021 in so far as the same relates to the reasoning and determination pertaining to the Applicant's Bill of Costs dated 19th February, 2007 and the consequent Certificate of Taxation issued on 5th July, 2021 be set aside;
 - b. That this Honourable Court be pleased to refer the matter back for re-taxation of the Applicant's Bill of Costs dated 19th February, 2007 with proper and appropriate directions thereon;
 - c. That in the alternative, this Honourable Court do exercise its inherent jurisdiction and be pleased to re-tax the item relating to instruction fees in the Applicant's Bill of Costs dated 19th February, 2007 afresh and/or make appropriate directions for taxation afresh;
 - d. That the costs of this application be awarded to the Applicant.
2. The grounds in support of the application were that the Taxing Officer's decision on taxation was based on an error of principle and as a result of this error, the Taxing Officer awarded a fee that was manifestly low as to be highly unjust and detrimental to the Applicant and that the Taxing Master exercised his jurisdiction in taxing the Applicant's Bill of Costs capriciously and whimsically instead



of doing so judiciously. Several averments were set out in the supporting affidavit among them that the Taxing Master made a fundamental error of principle and law in holding that Originating Summons are but applications and do not form a substantive suit.

3. On its part, the Respondent filed two (2) applications seeking almost similar orders. These are the Notice of Motion application and a Notice of Preliminary Objection all dated 8th September, 2021. The motion sought for the chamber summons dated 29th July, 2021 to be struck out with costs to the Respondent. As for the Notice of Preliminary Objection, it was premised on the following grounds: -
 - a. That the Chamber Summons dated 29th July, 2021 was supported by an affidavit sworn by one Amos Cheruiyot whereby he had annexed three letters marked as annexure AC-1 which letters were not part of the proceedings before the Taxing Master. Accordingly, the attempt to introduce the said letters is grossly irregular.
 - b. That at any rate, the letters dated 15th May, 2003 and 25th June, 2003 were clearly issued on a without prejudice basis and therefore the said letters are not admissible.
4. The Respondent thus prayed for the Chamber Summons be struck out with costs to it.
5. The Applicant filed a supplementary affidavit dated 12th September, 2022. The Applicant averred that at paragraphs 4 and 5 of its supporting affidavit, it had made reference to the originating summons and supporting affidavit filed in Miscellaneous Civil Application HCCC No. 276 of 2003 [O.S] and the ruling of Mr. Justice Sergon delivered on 9th February, 2007. It was therefore its position that the said documents were before the Honourable Taxing Master at the time he was making his decision on the Applicant's Bill of Costs now subject of the present reference.
6. According to the Applicant, the said two documents were inadvertently not attached to its affidavit. It thus went ahead to attach the Originating Summons and supporting affidavit in Miscellaneous Civil Application HCCC No. 276 of 2003 [O.S] and Justice Sergon's decision delivered on 9th February, 2007. They were marked as exhibit "AC 1".
7. Directions were taken that the three applications be disposed off simultaneously by way of written submissions. Both parties duly complied by filing detailed submissions and cited various authorities in support of their rival positions. The Applicant's submissions are dated 12th September, 2022 and filed on 14th September, 2022 while those of the Respondent are dated 16th November, 2022 and filed on even date. The court is grateful to Counsel for their industry in complying with the directions. The submissions will go a long way in assisting the court arrive at a decision either way.

Analysis and Determination

8. I have considered the applications, the responses, the submissions together with the authorities relied upon by the parties as well as the law. Considering that a preliminary objection was raised, I propose to deal with it first as its outcome has a bearing on the application dated 29th July, 2021. If it can dispose off the application dated 29th July, 2021, then the court does not have to consider that application. Otherwise, if it does not, the court is obligated to make a determination on the application dated 29th July, 2021.
9. The preliminary objection is founded on the fact that the letters marked as annexure AC-1 were not part of the Proceedings before the Taxing Master thus an attempt to introduce them before this court is grossly irregular. On the second limb, the Respondent argued that the said letters were in any way exchanged on a without prejudice basis and thus inadmissible.



10. The parameters of consideration of a preliminary objection are now well settled. A preliminary objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969] EA 696. At page 700, Law, JA stated: -

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

At page 701, Sir Charles Newbold, P added: -

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”

11. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit or application.
12. As already stated, one of the preconditions for a valid preliminary objection is the assumption that the facts pleaded are correct and unopposed by the rival party. One of the grounds in support of the preliminary objection was that the letters marked AC-1 were neither part of the documents before the Taxing Master nor before the court at the primary level. This will require an inquiry as to what was before the Taxing Master and this court in Miscellaneous Civil Application HCCC No. 276 of 2003 [O.S]. An interrogation of what the courts considered would ensue. This clearly falls outside the ambit of a preliminary objection.
13. On the second limb, admissibility is a rule of evidence. In the present case, the Respondent contends that two of the letters sought to be introduced by the Applicant were authored on “without prejudice” basis. This will equally call for the court’s interrogation of the letters in issue, consider the contents and then make a verdict as to whether they should be admitted or not. This calls for a review of the evidence and thus not a pure point of law. Having come to this conclusion, I am persuaded that both the preliminary objection as well as the notice of motion dated 8th September, 2021 are not well founded.
14. The preliminary objection and the notice of motion all dated 8th September, 2021 having not disposed off the application, it behooves this court to now turn its attention to the application dated 29th July, 2021. However, before venturing into the merits of the said application, a review of the two documents pointed out by the Respondent is necessary. Are they admissible? I have looked at the two letters dated 15th May, 2003 and 25th June, 2003. They are clearly written on “without prejudice” basis.
15. There are several judicial pronouncements on communication on a without prejudice basis. In *Oceanbulk Shipping and Trading SA v TMT Asia Ltd and 3 Others* [2010] UKSC 44 cited with



approval in *Mumias Sugar Co. Ltd & Another v Beatrice Akinyi Omondi* [2016] eKLR, in a majority decision of the Supreme Court of United Kingdom, the Judges stated as follows: -

“...The approach to without prejudice negotiations and their effect has undergone significant development over the years. Thus the without prejudice principle, or, as it is commonly called, the without prejudice rule, initially focused on the case where negotiations between two parties were regarded as without prejudice to the position of each of the parties in the event that the negotiations failed. The essential purpose of the original rule was that, if the negotiations failed and the dispute proceeded, neither party should be able to rely upon admissions made by the other in the course of the negotiations. The underlying principle of the rule was that parties would be more likely to speak frankly if nothing they said could subsequently be relied upon and that, as a result, they would be more likely to settle their dispute...”

16. However, the without prejudice rule is not absolute as was observed by Lord Griffiths in *Rush and Tompkins Ltd v Greater London Council* [1989] AC 1280 where he noted as follows: -

“...The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence 'without prejudice' to make clear beyond doubt that in the event of negotiations being unsuccessful they are not to be referred to in at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase 'without prejudice' and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission. I cannot therefore agree with the Court of Appeal that the problem in the present case should be resolved by linguistic approach to the meaning of the phrase 'without prejudice'. I believe that the question has to be looked at more broadly and resolved by balancing two different public interests namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation. However, these cases show that the rule is not absolute and resort may be had to the 'without prejudice' material for a variety of reasons when the justice of the case requires it...”

17. Considering the contents of the two letters, it leaves no doubt that the parties were trying to impress upon their respective clients to have the matter settled at a certain consideration and as such, I do not think the parties intended that in the event of not agreeing or reaching a settlement, these letters were to be used in subsequent litigations. I thus find that the two letters dated 15th May, 2003 and 25th June, 2003 are inadmissible and they are hereby expunged from the affidavit of Amos Cheruiyot sworn on 29th July, 2021.
18. Now turning to the merits of the application, it is clear that the Applicant was dissatisfied by the award on instructions fee by the Taxing Master pertaining to its Bill of Costs dated 19th February, 2007. According to the Applicant, the award was manifestly low as to be highly unjust. From the Applicant's perspective, the value of the subject matter could be discerned from the Originating Summons and that figure was indicated to be Kshs. 6,900,000,000/=. The role of this court on a reference from taxation



by the Taxing Master is clearly delineated. In *Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR, the Court of Appeal held as follows: -

“...On reference to a Judge from the Taxation by the Taxing Officer, the Judge will not normally interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer erred in principle in assessing the costs...”

19. Did the Taxing Master erred in principle when he held that the value of the subject matter could not be discerned from the pleadings, settlement or judgement? In *Joreth Limited v Kigano & Associates* [2002] eKLR, the Court of Appeal held as follows: -

“...We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances...”

20. According to the Applicant, the value of the subject matter could be discerned from the supporting affidavit of Joseph Kennedy Kiliku. A review of the Originating Summons reveals that there were three prayers that were sought. These are: -

- a. A declaration that the Defendant has wrongfully and irregularly allowed the Staff Pension Scheme sponsored by the Defendant in favour of its employees of whom 80% are members of the Plaintiff to incur a huge deficit and that consequently such members’ rights have been prejudiced and are prejudiced in that they are unable to enjoy the full benefits of the Staff Pension Scheme.
- b. That the Defendant be ordered to pay to the Kenya Ports Authority Staff Pension Scheme all monies withheld and/or all monies causing the deficit.
- c. That the Defendant pays the costs of this suit.

21. Clearly without going into the affidavit, there was no prayer for any specified figure be it Kshs. 6,900,000,000/= or any other figure. The figures were introduced in the supporting affidavit sworn by Joseph Kennedy Kiliku and in particular, paragraphs 3 and 4. It is settled that the value of the subject matter can be discerned from the pleadings, judgement or settlement. Is an affidavit a pleading? This was answered by the Court of Appeal in the case of *Stephen Boro Githua v Family Finance Building Society & 3 Others* [2015] eKLR where it held as follows: -

“...As is trite law the contents of an affidavit constitute evidence on oath. An affidavit does not constitute a pleading. A pleading includes a summons, petition, a statement of claim or demand or a defence, a reply to a defence or counterclaim, all of which are subject to amendment, unlike an affidavit, which is evidence...”

22. This clearly settles the issue of Joseph Kennedy Kiliku’s averments in the affidavit in support of the Originating Summons. Did the ruling of Hon. Mr. Justice J.K. Serگون delivered on 9th February, 2007 indicate that the value was Kshs. 6,900,000,000/= ? I do not think so. At page 3 of the ruling, this is the only place the figure is mentioned and clearly, the court was commenting on Kiliku’s affidavit. Nowhere in the ruling did the court say the value was Kshs. 6,900,000,000/= There was neither



judgement nor settlement and I thus do not discern any error of principle by the Taxing Master. He exercised his discretion judiciously and was alive to his duty where the value of the subject matter cannot be ascertained from the pleadings, judgement or settlement.

23. Before I conclude, the Applicant pointed out that it was an error for the Taxing Master to hold that originating summons are but applications and do not form a substantive suit. I agree with the Applicant that indeed an originating summons is a suit as contemplated by section 2 of the *Civil Procedure Act*. To this extent, there was an error of principle on the part of the Taxing Master. However, despite this error, it is clear that the Taxing Master did not delve so much on this issue. Accordingly, this error did not affect the Taxing Master's assessment of instructions fees which as I have discussed above, he proceeded on the correct principles in taxing the Bill of Costs.
24. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to a party or not. This was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. In *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR the court noted as follows: -

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Costs follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

25. The Respondent opposed the application and since the application has failed, I see no reason to deny the Respondent costs and I do so award.
26. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
- a. The Application dated 29th July, 2021 is devoid of merit and the same is hereby dismissed;
 - b. Costs to the Respondent.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 7TH DAY OF FEBRUARY, 2024.

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F. WANGARI

JUDGE

In the presence of;

Mr. Khagram Advocate for the Applicant

Ms. Murage Advocate for the Respondent

Mr. Barille, Court Assistant

