



**Francis M.O. Kadima t/a Kadima & Company, Advocates v Kedong Ranch Limited (Miscellaneous Civil Application 195 of 2016) [2024] KEHC 3797 (KLR) (18 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3797 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS CIVIL APPLICATION 195 OF 2016**

**SM MOHOCHI, J**

**APRIL 18, 2024**

**IN THE MATTER OF THE ADVOCATES ACT CAP. 16 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: HIGH COURT CIVIL SUIT NO. 21 OF 2010**

**BETWEEN**

**GEORGE OLE SANGUL & 11 OTHERS**

**-VS-**

**KEDONG RANCH LIMITED**

**IN THE MATTER OF TAXATION OF ADVOCATE/CLIENT BILL OF COSTS**

**BETWEEN**

**FRANCIS M.O. KADIMA T/A KADIMA & COMPANY,  
ADVOCATES ..... APPLICANT**

**AND**

**KEDONG RANCH LIMITED ..... RESPONDENT**

**RULING**

1. There are two applications before me for determination. The first is a Notice of Motion dated 17<sup>th</sup> May, 2016 by the Applicant/Advocate (1<sup>st</sup> Application) filed by the Applicant and the second is a Notice of Motion dated 16<sup>th</sup> August, 2023 by the Respondent/Client (2<sup>nd</sup> application).
2. The 1<sup>st</sup> Application dated 17<sup>th</sup> May, 2016 filed pursuant to Rule 13 of Advocates Remuneration Rules (CAP 16) Laws of Kenya, Order 51 Rule 1 Civil Procedure Rules 2010 and Article 159 of [the Constitution](#) of Kenya 2010, seeks the following reliefs:



- a. Spent
  - b. The certificate of costs awarded /and/or costs certified be deemed to be a Decree of this Honourable Court and enforced forthwith.
  - c. Costs of this Application be added to the certificate of costs and executed as a Decree of this Honourable Court.
  - d. Any other remedy that the Honourable Court will deem fit to grant to meet the end of justice.
3. The 1<sup>st</sup> Application fortified by supporting affidavit of Francis M.O. Kadima and is premised on following grounds on the face of the Motion;
- i. Spent;
  - ii. That, Respondent instructed the firm of M/S Kadima & Co, Advocates to represent it and defend originating summons HCCC NO. 21 OF 2010 (OS) wherein judgement was delivered on 30<sup>th</sup> January, 2015;
  - iii. The legal fees due to the firm of M/S Kadima & Co, Advocates has not been taxed as required by law;
  - iv. The certificate of costs passed by the taxing master be deemed to be a Decree issued by this Honourable Court and summary judgement entered in terms and the same be executed/and/ or enforced by this Honourable Court;
  - v. The granted of the orders sought will serve the ends of justice.

## **The Advocate's Case**

### **1<sup>st</sup> Application**

4. The Applicant/Advocate was instructed to take over the primary matter from the firm of M/s Karanja Mbugua, Advocates to defend Originating Summons being ELHCC No. 21 OF 2010 (OS) between George Ole Sangui & Others -Vs- Kedong Ranch Ltd and took over the matter and conducted the hearing up to judgment on 30<sup>th</sup> January, 2015.
5. That, the legal fees between Applicant/Advocate and Respondent/Client were not agreed and therefore the bill of costs was filed in Court for taxation before the taxing master and he prays that the certificate issued by the Court be deemed to be a Decree of this Court and enforced as such the grant of the orders sought will meet the ends of justice.
6. That, the Respondent's Application asking this Honourable Court to set aside the Certificate of Taxation of 14<sup>th</sup> October, 2016 and strike out the Bill of Costs dated 17<sup>th</sup> May, 2016 is legally untenable and is grounded on misunderstanding of legal processes and is a complete abuse of Court process.
7. That, the Respondent's Application is not urgent. It is a frivolous and vexatious Application brought with the sole intention of denying the Applicant its rightfully earned legal fees on the basis of the taxed costs for services rendered by the Applicant for the Respondent in Nakuru High Court Civil Case No. 21 of 2010 (OS).
8. That, even when taken at its highest, the Respondent's Application is an afterthought brought solely in a dubious attempt to delay and circumvent a legal, valid and enforceable Certificate of Taxation dated 14<sup>th</sup> October, 2016.



9. That, the Respondent's Application impermissibly tries to litigate the issue of setting-aside the Certificate of Taxation dated 14<sup>th</sup> October, 2016 under prayer 2. The Application for such an order is unmerited as the Respondent as an aggrieved party failed to follow the procedure contemplated under Rules 11 and 12 of the Advocates Remuneration Order.
10. That, the Certificate of Costs dated 14<sup>th</sup> October, 2016 was never objected to in such a manner anticipated by the Advocates Remuneration Order and hence the Respondents Application dated 16<sup>th</sup> August, 2023 attempting to do so is time-barred and in any event the Certificate of Costs dated 14<sup>th</sup> October, 2016 is admitted by the Respondent.
11. That the validity and legality of the proceedings giving rise to the Applicant's Bill of Costs is not contested or impugned, the same was served upon the Respondent together with a Notice of Taxation as evidenced by an Affidavit of Service sworn on 13<sup>th</sup> September, 2016 and further ruled upon by the Deputy Registrar on 13<sup>th</sup> October, 2016.
12. That, the instructions to represent the Respondent are not denied and despite the Respondent being afforded an opportunity they never challenged the bill, it (the Respondent) is solely liable to pay the Applicant its full costs of Kshs. 450, 822, 161/= as per the Certificate of Costs dated 14<sup>th</sup> October, 2016.
13. That, the Respondent in its Supporting Affidavit, admits/acknowledges the validity of the Certificate of Taxation dated 14<sup>th</sup> October, 2016 through its own correspondences and to date has not challenged the same.
14. That, Kengen Limited was never a party to the main suit and proceedings in Nakuru High Court Civil Case No. 21 of 2010 (OS), George Ole Sangui & Others versus Kedong Ranch Limited.
15. That owing to the test set out under Order 2 Rule 15 of the Civil Procedure Rules on striking out pleadings and Rules 11 and 12 of the Advocates Remuneration Order on setting aside the Certificate of Taxation, the instant Respondent's Application falls short of the set thresholds and ought to be dismissed with costs.
16. The 2<sup>nd</sup> Application dated 16<sup>th</sup> August 2023 under Sections 1 to 3A, 34, 63 (e) and 89 of the Civil Procedure Act Cap 21 of the Laws of Kenya and Order 2, Rule 15 (1) (d), Order 10, Rule 11 and Order 51, Rule 1 of the Civil Procedure Rules, 2010 seeks the following reliefs;
  - i. Spent
  - ii. The Certificate of Taxation herein dated 14<sup>th</sup> October, 2016, be set-aside.
  - iii. The Bill of Costs dated 17<sup>th</sup> May, 2016, by the Advocate be and is hereby struck-out.
  - iv. The costs of this Application be provided for.
17. The 2<sup>nd</sup> Application fortified by supporting affidavit of Stanley Kinyanjui and is premised on following twelve (12) grounds on the face of the Motion;
  - i. The Advocate/Applicant was retained by the Client/Respondent in the defence of a claim for adverse possession in Nakuru High Court Civil Case No 21 of 2010 (OS), George Ole Sangui & Others v Kedong Ranch Limited;
  - ii. Nakuru High Court Civil Case No 21 of 2010 (OS) was determined in favour of the Client in a judgment delivered on 30<sup>th</sup> January, 2014.



- iii. There has never been a dispute over fees due to the Advocate in respect to services rendered in Nakuru High Court Civil Case No 21 of 2010 (OS).
- iv. On 26<sup>th</sup> June, 2023 the Advocate demanded from the Client, the payment of Kshs 450,822,161.00 on account of taxed costs for services rendered by the Advocate in Nakuru High Court Civil Case No 21 of 2010 (OS).
- v. The Advocate's demand is based upon a Bill of Costs dated 17<sup>th</sup> May, 2016 and a Certificate of Taxation for the same dated 14<sup>th</sup> October, 2016.
- vi. The Advocate had by a letter dated 5<sup>th</sup> February, 2020 acknowledged the payment in full of fees due to him from the Client for services rendered in Nakuru High Court Civil Case No 21 of 2010 (OS).
- vii. The Advocate has notwithstanding receipt of fees due to him and acknowledgement that the Client is not indebted to him sought to execute the Certificate of Taxation dated 14<sup>th</sup> October, 2016 against the Client through the proceedings herein.
- viii. The Bill of Costs dated 17<sup>th</sup> May, 2016 was filed and the Certificate of Taxation dated 14<sup>th</sup> October, 2016 obtained in abuse of the process of the Court.
- ix. The Certificate of Taxation dated 14<sup>th</sup> October, 2016 is a nullity and the same is sought to be fraudulently and unlawfully executed by the Advocate as against the Client.
- x. The High Court has inherent power to set aside the Certificate of Taxation dated 14<sup>th</sup> October, 2016 and strike out the Bill of Costs dated 17<sup>th</sup> May, 2016 to prevent the ends of justice from being defeated and its process from being abused.
- xi. It is just and lawful that the Certificate of Taxation dated 14<sup>th</sup> October, 2016 be set aside and the Bill of Costs dated 17<sup>th</sup> May, 2016 struck-out.

### **Respondent/Client's Case**

18. The Respondent/Client, deponed that the Applicant/Advocate was retained in the defence of a claim for adverse possession in Nakuru High Court Civil Case No 21 of 2010 (OS), George Ole Sangui & Others v Kedong Ranch Limited which was determined in its favor in a judgment delivered on 30<sup>th</sup> January, 2014.
19. There has never been a dispute over fees due to the Applicant/Advocate in respect to services rendered in Nakuru High Court Civil Case No 21 of 2010 (OS) and that, the Applicant/Advocate on 26<sup>th</sup> June, 2023 demanded from them the payment of Kshs 450,822,161.00 on account of taxed costs for services rendered by the Advocate in Nakuru High Court Civil Case No 21 of 2010 (OS).
20. That the demand by the Applicant/Advocate, was made immediately after the Respondent/Client, who is the Applicant/Advocate's landlord, sought to levy distress upon the Advocate for outstanding rent, and the Applicant /Advocate's communication of payment of the outstanding rent exhibited at page 29 of SK-1.
21. The Respondent/Client, commissioned an inquiry in their offices and also in the Court before which the Certificate of Taxation was stated to have been issued to ascertain the propriety of the demand from the Applicant/Advocate.



22. That they learnt that the Bill of Costs dated 17<sup>th</sup> May, 2016 had been subject of dealings between the Applicant/Advocate and the predecessor chairperson of the board of directors of the Respondent/Client, Mrs Christine Cronchey.
23. There is in the Respondent/Client's file in the offices, a letter dated 10<sup>th</sup> November, 2016 from the Applicant/Advocate to Mrs Christine Cronchey notifying the Client of the Bill of Costs and attaching a letter drafted by the Applicant/ Advocate for the signature of Mrs Christine Cronchey and addressed to the Applicant/ Advocate In the draft letter, the Respondent/Client, was to settle Kshs 15,000,000.00 and the balance was to be pursued from Kengen Limited.
24. That there is a further draft letter to Kengen Limited in which the Respondent/Client, was indicated as requesting the former to settle the amount over and above Kshs 15,000,000.00 exhibited at pages 69 to 73 of SK-1.
25. The Respondent/Client provided a copy of its letter dated 16<sup>th</sup> November, 2016 signed by Mrs Christine Cronchey to the Applicant/ Advocate acknowledging the Bill of Costs and notifying the Applicant/ Advocate that the Client would settle Kshs 15,000,000.00 of the sum in the Bill of Costs and that an invoice for the balance would be forwarded to Kengen Limited for its consideration, exhibited at page 74 of SK-1
26. The Respondent/Client's file provided a copy its letter dated 16<sup>th</sup> November, 2016 signed by Mrs Christine Cronchey addressed to Kengen Limited forwarding the Certificate of Taxation dated 14<sup>th</sup> October, 2016 to Kengen Limited for settlement exhibited at pages 75 to 78 of SK-1.
27. That the Respondent-Client 's file, did contain a copy of a letter dated 18<sup>th</sup> January, 2017 from the Respondent-Client and signed by Mrs Christine Cronchey addressed to Kengen Limited being a follow up on the earlier letter of 16<sup>th</sup> November, 2016 exhibited at pages 79 to 94 of SK-1.
28. In the Respondent-Client's file, there is a letter dated 20<sup>th</sup> June, 2017 from the Applicant/ Advocate to Respondent/Client, for the attention of Mrs Christine Cronchey forwarding several fees notes by the Advocate for services rendered in Nakuru High Court Civil Case No 21 of 2010 (OS) exhibited at pages 95 to 118 of SK-1 Respondent-Client's bundle.
29. Respondent-Client relied on a schedule of cheques paid to the Advocate for services rendered in Nakuru High Court Civil Case No 21 of 2010 (OS) in the total sum of Kshs 103,679,803.00. exhibited at pages 119 to 120 of SK-1. To demonstrate that they had been paying the Applicant/ Advocate.
30. Respondent-Client provided relied on the letter dated 5<sup>th</sup> February, 2020 from the Advocate to the Client for the attention of Mrs Christine Cronchey in which the Applicant/ Advocate acknowledges the payment of Kshs 14,000,000.0 in full and final of fees due from Respondent-Client to the Applicant/ Advocate for services rendered in Nakuru High Court Civil Case No 21 of 2010 exhibited at page 121 of SK-1.
31. That, it is in the interest of justice that the application herein by the applicant be struck-out and/or dismissed in its entirety.
32. Directions were issued on the 28<sup>th</sup> November 2023 'to wit';
  - a. A temporary Stay of Execution of taxed bill of costs is hereby issued pending determination of this Application.
  - b. The Applicant shall file a return of service.



- c. The Applicant shall Serve the Application dated 23<sup>rd</sup> November 2023, upon the Respondents, within three (3) days and not later than, Wednesday the 22<sup>nd</sup> November 2023.
- d. The Application, shall be mentioned inter-partes on the 5<sup>th</sup> of December 2023, for further directions

### **Analysis and Determination**

33. In the absence of a contest by way of reference by the Respondent/Client, I shall thus acknowledge the Bill of Costs dated 17<sup>th</sup> May, 2016 and Certificate of Costs dated 14<sup>th</sup> October 2016 to be valid until impeached.
34. The Court has considered the Application, the response thereto and the submissions on record and the issues for determination is:
  - i. Whether this Court should Set-Aside the certificate of costs?
  - ii. Whether this Court should strike-out the certificate of costs.
  - iii. Whether this Court should deem the Certificate of Costs dated 14<sup>th</sup> October 2016 to be a Decree?
35. This Court will consider the validity of the taxation before considering the 2<sup>nd</sup> Application on its merits. The principles of setting-aside the decisions of Taxing Master are well established in the cases of Premchand Raichand Limited & Another vs Quarry Services of East Africa Limited and Another [1972] E.A 162, First American Bank of Kenya vs Shah and Others (2002) EA 64 and Joreth Ltd vs Kigano and Associates (2002) 1 EA 92. These includes:
  - a. That there was an error of principle;
  - b. The fee awarded was manifestly excessive or is so high as to confine access to the Court to the wealthy;
  - c. That the successful litigant ought to be fairly reimbursed for the costs he has incurred;
  - d. That so far as practicable there should be consistency in the award.
36. The power of the trial Court to strike-out pleadings flow from Order 2 Rule 15(1) of the Civil Procedure Rules which provides as follows:
  - i. "At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that—
  - ii. it discloses no reasonable cause of action or defence in law; or
  - iii. it is scandalous, frivolous or vexatious; or
  - iv. it may prejudice, embarrass or delay the fair trial of the action; or
  - v. it is otherwise an abuse of the process of the Court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."
37. Striking-out of pleadings should be sparingly deployed as the same is now well regarded as draconian, this Court is unpersuaded that the Respondent/Client's 2<sup>nd</sup> Application has satisfied any of the conditions for grant of the prayer to strike out the Bill of Costs dated 17<sup>th</sup> May, 2016 that gave rise to the certificate of costs dated 14<sup>th</sup> October 2016.



38. The Respondent/Client, argued that, there was an agreement for fees between them and the Applicant/ Advocate and therefore, the same is baseless the matter did not fall under Section 45 of the Act. It was their case that there being agreement for fees, the taxing officer not in order to tax their advocate- client bill of costs.
39. Section 45 broadly provides:
- (1) Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may—
    - a. before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate’s remuneration in respect thereof;
    - b. before, after or in the course of any contentious business in a civil Court, make an agreement fixing the amount of the advocate’s instruction fee in respect thereof or his fees for appearing in Court or both;
    - c. before, after or in the course of any proceedings in a criminal Court or a Court martial, make an agreement fixing the amount of the advocate’s fee for the conduct thereof; and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf.
40. I have Considered the question as to whether there was an agreement as alleged by the Respondent/ Client, fortified with the fact that letter dated 5<sup>th</sup> February, 2020 from the Advocate to the Client for the attention of Mrs Christine Cronchey in which the Applicant/ Advocate acknowledges the payment of Kshs 14,000,000.0 in full and final of fees due from Respondent-Client to the Applicant/Advocate for services rendered in Nakuru High Court Civil Case No 21 of 2010. The Advocate/Applicant has not showcased how this payment would then not constitute the Agreement with Respondent.
41. An Agreement envisioned under Section 45 for fees must not only be in writing, it must be signed by the client or by his authorized agent, I would hasten to add that the converse is, a document from the Advocate speaking to the subject and directed at the client, if expressly stating instruction and fees would then constitute an agreement. In this instance.
42. Before me are two conflicting positions which in my mind firstly is a Respondent/Client, who never contested the taxation, has not impugned the validity of the Certificate of Costs but contends that there existed an agreement that negated the entire taxation and that the Court should strike out the bill of costs and Applicant/ Advocate seeking sanction to execute the certificate of costs.
43. I note that the taxation was never defended and the Respondent/Client alleges collusion by its previous chair Mrs Christine Cronchey and the Advocate, to get Kengen Ltd to pay the bill. Which to me smacks of corruption. No contractual formalities have been laid between Kedong Ranch Limited and Kengen Limited that would be the basis of such payment. It would be rational then to state that a rational mind would thus suspect that the payment hit a cropper for the same reason.
44. While the parties have alluded to their respective underlying reasons for the heightened escalation, that the Applicant /Advocate, attempts to execute the certificate owing to a tenancy dispute as the Respondent/Client is the Landlord in Kedong House Nairobi and that the Respondent/Client’s Application is a belated and reactionary attempt by the Respondent/Client to deny the Applicant / Advocate his fee.
45. I am of the view that the Advocate never sought to enforce the certificate of costs owing to the agreement that the certificate of costs shall be subject to negotiation with Kengen. In fact, the Advocate



clearly has ignored the letter dated 5<sup>th</sup> February, 2020 from the Advocate to the Client that explicitly admitted of there being no other claim, in fact with regard to the specific certificate of costs, that it shall be subject to negotiation.

46. Basis has been laid for the invocation Sections 3 and 3A of the *Civil Procedure Act* which provides me the special jurisdiction and inherent powers to remedy the situation. The Respondent/Client's action of accepting service of the certificate of costs and attempting to get a 3<sup>rd</sup> Party, Kengen Ltd to take it up and pay the Applicant /Advocate, does not in any way manifest any injustice, rather it demonstrates that Respondent/Client, had no contest over the bill of costs but rather had common understanding with the Applicant /Advocate that Kengen Ltd would pay-up and Applicant /Advocate was aware of the arrangement and concurs with the position in his own letter.
47. This then means that, the Respondent/Client deliberately never defended the taxation owing to the alleged collusion by its previous chair Mrs Christine Cronchey and the Advocate and I am persuaded that the Applicant/Advocate did unleash the certificate of costs in retaliation to their former clients levying distress for rent and whereas the Certificate might be valid, I have appreciated that the eight (8) year lull without executing would logically attributable to their position exhibited by the Advocate that the same was payable by Kengen Ltd subject to negotiations.
48. The Court is unable to adopt and sanction a certificate of costs that has more than meets the eye in that, the same was never contested by the client but rather an objection raised is that the Advocate was aware that the same was only payable by Kengen Ltd hence the reason why the Notice of Motion dated 17<sup>th</sup> May, 2016 was never prosecuted. The insistence of there being an agreement would thus constitute an objection envisioned under rule 11 (3) and as such the taxation and resultant certificate is impugned.
49. This Court contends that there being an agreement between the Applicant /Advocate and the Respondent/Client the Bill of costs ought not to have been subjected to a taxation and in order for the ends of justice and to prevent abuse of the process of the Court. I am constrained to set-aside the same.
50. The Mutual understanding between client and advocate to have a 3<sup>rd</sup> party pay a bill of costs reeks of mischief and abuse of the process of the Court.
51. Accordingly, the Court invokes its inherent jurisdiction and allows the 2<sup>nd</sup> Application dated 16<sup>th</sup> August 2023 and disallows 1<sup>st</sup> Application dated 17<sup>th</sup> May, 2016, in its entirety, on the following terms: -
  - i. The Certificate of Cost dated 14<sup>th</sup> October, 2016 is hereby set aside.
  - ii. The 1<sup>st</sup> Application dated 17<sup>th</sup> May, 2016 is hereby dismissed for want of merit.
  - iii. The Cost of the Application, is awarded to the Respondent.
  - iv. A forty-Five (45) Day stay of execution, is hereby granted to the Respondent.

It is so Ordered.

**SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 18<sup>TH</sup> DAY OF APRIL 2024.**

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**MOHOCHI S. M.**

**JUDGE**

