



**Aoko Atieno & Associates v Jumwa (Miscellaneous Application  
E058 of 2021) [2023] KEHC 3121 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 3121 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
MISCELLANEOUS APPLICATION E058 OF 2021  
SM GITHINJI, J  
MARCH 23, 2023**

**BETWEEN**

**AOKO ATIENO & ASSOCIATES ..... APPLICANT**

**AND**

**AISHA JUMWA ..... CLIENT**

**RULING**

1. The respondent herein filed a Chamber Summons dated 10th February 2022 seeking the following orders;
  - a. Spent.
  - b. That pending the hearing and determination of this Application, this honourable court be pleased to issue a stay of execution of the ruling delivered on 26<sup>th</sup> January 2022 in Misc. Application no. E058 of 2022.
  - c. That pending the hearing and determination of this application, this honourable court be pleased to order that the Taxation Reference filed herein does operate as stay of execution of the Ruling of the Taxing officer delivered on 26<sup>th</sup> January 2022 in Misc. Application No. E058 of 2022.
  - d. That this honourable court be pleased to set aside the ruling delivered on 26<sup>th</sup> January 2022 in Misc. Application No. E058 of 2022 and hence dismiss the Bill of costs dated 4<sup>th</sup> August 2021.
  - e. That costs of the application be provided for.
  - f. Any other order that this court may be pleased to grant in the circumstances.
2. The application is founded on the grounds on the face of it and on the supporting affidavit of Aisha Jumwa who deponed that on 26<sup>th</sup> January 2022 the Taxing officer delivered her ruling wherein the Bill



of Costs dated 4<sup>th</sup> August 2021 was taxed at Kshs. 4,469,571.80 and she filed through her advocate a notice of Objection in the form of a letter dated 3<sup>rd</sup> February 2022 in accordance with the Advocates Remuneration Order. In addition, her advocate requested for reasons for the Taxing officer's ruling delivered on 26<sup>th</sup> January 2022 through a letter dated 27<sup>th</sup> January 2022.

3. Ms. Aisha Jumwa stated that the decision by the taxing officer was manifestly excessive contrary to the principles of the Advocates Remuneration Order and the Applicant is likely to proceed with execution unless the orders sought are granted. Further, the amount charged on each item is not supported by production of the documents prepared, receipts, or any supporting documents; availing no records for time spent to justify the amount charged for each item and/or attendances.
4. The applicant filed a Notice of Preliminary Objection opposing the chamber summons on grounds that;
  - i. The entire Chamber Summons Application is incompetent and cannot lie before court as it is fatally defective since it is not brought under Rule 11 (1) of the Advocates Remuneration Order.
  - ii. That no reference has been filed at the High Court in respect of the ruling dated 26.01.2022 and in accordance with Rule 11 (1) of the Advocates Remuneration Order.
5. The respondent then filed a Notice of motion dated 5<sup>th</sup> May 2022 seeking the following orders;
  - a. Spent.
  - b. That the applicant/respondent's Notice of Preliminary Objection dated 11<sup>th</sup> April 2022 be struck out with costs.
  - c. That costs of the application be borne by the Applicant/Respondent.
  - d. That this honourable court be pleased to grant any other order/relief in the interest of justice.
6. The application is supported by the sworn affidavit of Aisha Jumwa who deponed that the P.O may delay the fair trial of the Reference dated 10<sup>th</sup> February 2022 and the said application is clearly brought out under the Advocates Remuneration Order.
7. The Applicant/Advocate filed a Notice of motion dated 9<sup>th</sup> September 2022 seeking the following orders;
  - a. That this honourable court be pleased to adopt the Taxation Ruling made on 26<sup>th</sup> January 2022 and enter as judgment of this honourable court the certified taxed sum of Kshs. 4,469,571 together with interests and costs.
  - b. That this honourable court be pleased to order interest and costs at 14 % per annum from the date of service of the fee note and/or Bill of Costs till payment in full.
  - c. That costs of the application be assessed and awarded to the advocate.
8. The application is premised on the sworn affidavit of Aoko Otieno advocate who deponed that the Client instructed her to act on her behalf in Election Petition Case No. 13 of 2017 in Malindi High court which she ably did to its conclusion. That she then prepared and forwarded a final fee note in respect of the professional fees and disbursements to the client for settlement which the client declined to pay necessitating the filing of the present Bill. The Bill of costs was then taxed on 6<sup>th</sup> January 2022 at the sum of Kshs. 4,469,571 and a certificate of costs was issued.



## Analysis and Determination

9. The applications and the P.O were canvassed by way of written submissions. I have considered the applications herein by the parties, the submissions as well as authorities relied upon. For determination therefore is;
  1. Whether the P.O is merited
  2. Whether the application was filed out of time
  3. Whether stay of execution should be granted
10. The purpose of a preliminary objection was broadly discussed in [\*Charles Onchari Ogoti v. Safaricom Ltd & Anor \[2020\]\*](#) eKLR as follows:

“(9) This court is aware of the leading decision on Preliminary Objections where the Court of Appeal for East Africa, then the highest court for purposes of this jurisdiction and the others in East Africa in *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd.* [1969] EA 696, where Law J.A. and Newbold P. (both with whom Duffus V-P agreed), respectively at 700 and 701, held as follows:

Law, J.A.:

“So far as I am aware, a Preliminary Objection consists of a pure 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 on 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.”

Newbold, P.:

“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 has 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 nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

- [10] The Supreme Court of Kenya, now the highest court in the land has broadly confirmed, and extended, the nature and scope of Preliminary Objections in cases discussed below, and its decision thereon is binding on this court and all courts below it by virtue of Article 163 (7) of [\*the Constitution\*](#) of Kenya 2010.
- [11] In case cited by the 1st Respondent, *David Nyekorach Matsanga & Another v. Philip Waki & 3 Others* [2017] eKLR, and the three-judge bench of the High Court (Lenaola, J. (as he then was), Odunga and Onguto, JJ. after considering various holdings of the Supreme Court of Kenya on question of Preliminary Objection held as follows:

“We quickly turn to the question whether we have before us a Preliminary Objection proper. Traditionally, the case of *Mukisa Biscuit Manufacturing Co*



Ltd v. West End Distributors Ltd [1969] EA 696 has been the watershed as to what constitutes Preliminary Objections. The Court of Appeal in Nitin Properties Ltd v. Singh Kalsi & another [1995] eKLR also captured the legal principle when it stated as follows:

“A Preliminary Objection 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 has to be ascertained or if what is sought is the exercise of judicial discretion.”

In Hassan Ali Joho & another v Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR the Supreme Court stated that:

“ 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”

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. Guided by these principles, in my view the P.O herein does not raise a pure point of law and the same cannot therefore hold. In addition, the P.O is founded on one of the grounds, that the Chamber summons has not been brought under Rule 11 (1) of the Advocates Remuneration Order. This couldn't be any further from the truth as it is clear from the face of the Chamber summons that the application was brought under Rule 11 of the Advocates Remuneration Order.
12. On whether the application was timeously made, the Applicant herein contests that the same was filed within the required time as per rule 11 of the Advocates Remuneration Order. Rule 11 of the Advocates Remuneration Order provides;

11. Objection to decision on taxation and appeal to Court of Appeal

- (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.
- (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
- (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.



13. The ruling in respect of the Bill of Costs was delivered on 26<sup>th</sup> January 2022. The Chamber Summons herein was filed on 10<sup>th</sup> February 2022. By simple calculation, this was 15 days after delivery of the ruling and a day late from the prescribed time. From the material placed before me, I do note that the Respondent’s advocate wrote to the taxing officer requesting for rationale of the ruling of 27<sup>th</sup> January 2022. Further, on 3<sup>rd</sup> February 2022, counsel for the respondent wrote another letter stating the intention to object. In my view, these were steps taken to challenge the ruling and a one-day delay cannot be said to be inordinate and likely to prejudice the applicant.
14. On whether the order for stay of execution can issue, Order 42 Rule 6(2) of the Civil Procedure Rules provides:
  - “(2) No order for stay of execution shall be made under subrule (1) unless—
    - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
    - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
15. In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 the court of Appeal gave guidance on how a court should exercise discretion in an application of stay of execution and held that:
  1. “The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
  2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
  3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
  5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
16. From the *Butt* case, it is clear that the court has discretion to grant stay of execution and also order for security for costs on its own motion. In exercising the said discretion, stay of execution be and is hereby granted on condition that the Respondent deposits in court half the amount taxed in the Bill of Costs within 30 days from the date hereof failure to which the Applicant be at liberty to execute.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALLINDI THIS 23RD DAY OF MARCH, 2023.**

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**S.M. GITHINJI**

**JUDGE**

**In the Presence of: -**

**1. Ms Aoko for the Applicant**

**2. Mr Dunson Omari for the Respondent, Miss Odongo is holding his brief.**

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**S.M. GITHINJI**

**JUDGE**

**23/3/2023**

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