



Muriu Mungai & Co Advocates v Attorney General for and on behalf of the Permanent Secretary Ministry of Co-operative Development; New Kenya Co-operative Creameries Ltd (Intended Interested Party) (Miscellaneous Application 533 of 2010) [2023] KEHC 18653 (KLR) (Civ) (8 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18653 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS APPLICATION 533 OF 2010**

**JN MULWA, J
JUNE 8, 2023**

BETWEEN

MURIU MUNGAI & CO ADVOCATES ADVOCATE

AND

**THE ATTORNEY GENERAL FOR AND ON BEHALF OF
THE PERMANENT SECRETARY MINISTRY OF CO-OPERATIVE
DEVELOPMENT RESPONDENT**

AND

**NEW KENYA CO-OPERATIVE CREAMERIES LTD INTENDED
INTERESTED PARTY**

RULING

1. There is on record for determination, an Application dated December 20, 2017 brought by Kenya Co-operative Creameries Ltd, seeking to be joined as an Interested Party in this cause. The application is grounded upon provisions of Order 1 Rule 10(2) of the *Civil Procedure Rules* (CPR).
2. The grounds for the application are stated at it's the face ;
 - a. That the Applicant in this suit is the Advocate/Applicant in HCMA No 799 of 2007 where a reconciliation of accounts on Bills of Costs is being done by Consent Order between the Applicant and the Intended Interest Party and is coming up for hearing on the January 16, 2018. (Now spent)



- b. That the Intended Interested Party was not a party in the taxation of the Bill of Costs dated 8/11/2020 and taxed at Kshs 1,218,619/= but the Applicant has included this taxation in the said HCMA 799 of 2007,
 - c. That the Intended Interested Party wishes to challenge the retainer and the certificate of costs aforesaid against it.
 - d. That the Applicant will not suffer any prejudice.
 - e. That it is only fair and just that the Intended Interested Party is joined to this taxation for the ends of justice to be met.
3. The application is further supported by an affidavit sworn on the December 20, 2017 by Peter Kennedy Ombati the Company Secretary and Chief Legal Manager of the Applicant; which affidavit deposes to matters stated at the grounds of the application stated above.
4. In opposing the application Peter Munge Advocate, a partner in the Advocates' law firm, the respondent in this application swore replying affidavits on the 2/03/2022 whereupon, from his knowledge depones to the events obtaining to the matters leading to the instant application and avers that in the first instance, the Applicant is guilty of inordinate delay as the Advocates Bill of Costs filed on November 12, 2010 was taxed on November 12, 2010, and that no explanation for the delay has been explained by the Applicant for a period of about (7) seven years since the taxation.
5. The Advocates further state that at the time the primary suit Misc Application No 990 of 2003 was filed and instructions given to the Advocates to represent the Respondent, the Intended Interested Party had not been incorporated and that the said suit was duly compromised by consent of the parties then Advocates and therefore, that the Applicant has no *locus standi* to bring the instant application to challenge the bill of costs and the taxed costs.
6. It is a further deposition by the Advocates that no objection to the taxation of the compromised consent on the primary suit was ever lodged, and therefore, the Taxing Officer's decision remains unchallenged.
7. The consent by the parties in Misc Civil Application No 990 of 2003 is annexed to the affidavit and marked as 'PM' as well as an order issued by the Court (Mabeya J) in one of the many matters in Misc Appln No 799 of 2007 on the April 17, 2013, and marked as 'PM-1' wherein several orders were issued by consent of the then parties Advocates.
8. The Company Secretary of the Applicant swore and filed a further affidavit on the March 16, 2018 in which he reiterated his depositions in his earlier affidavit, and specifically that the Applicant – the Intended Interested Party was not a party in the taxation of the Bill of Costs dated 8/11/2010, but that the respondent then was the A.G on behalf of the Permanent Secretary, Ministry of Co-Operative Development and therefore, he avers that the Applicant was not served with the Bill of Costs nor any other pleading, as admittedly, the Applicant as it was not in existence.
9. At time of preparation of this ruling, only the Advocates/Respondents have filed their submissions dated 9/11/2022 despite court directions to both parties to file on or before the 26/1/2023.

The court has considered the parties pleadings, the affidavits for and in opposition to the application as well as the submissions and cited authorities.



10. The issues that may be flagged for determination are threefold:
 1. Whether the applicant has laid a basis for the grant of the orders sought in the application
 2. Whether the application is merited in any event
 3. Costs.
11. As ably asserted by the advocates, and admitted by the Applicant in all its pleadings, the Intended Interested Party was not in existence at all the material times when the suits, and impugned taxations were filed heard and consent orders by the parties advocates then were recorded in the three suits in court, thus:
 - i. Hcc Misc Case No 722/2003
 - ii. Hcc Misc Case No 693/2003
 - iii. Hcc Misc Case No 990/2003
12. The consent order is dated 1/11/2004.

The applicant then falling under the Ministry of Co-Operative Development was duly represented by the Hon. The Attorney General and particularly in the HCC Misc No 990/2003.

I have seen the duly executed consent in the suit Hcc Misc No 990/2003. It is dated October 27, 2004 (annexture 'PM1' in the Advocates Replying Affidavit sworn on the 2/03/2018. It clearly shows that the Applicant/Intended Interested Party was properly and legally represented, and signed for on behalf of the AG for the GOK.
13. Further, by another consent recorded in Court on the April 17, 2013 it was ordered by consent of all parties lawyers that;
 1. That the parties herein do take internal reconciliation of all the taxation and matters between themselves within 30 days.
 2. That there be a stay of execution in this matter and other suits between the parties until then.
14. It is therefore clear in my mind that at all relevant material times, the Intended Interested Party was represented and is therefore bound by the various consents recorded between them in Court.

The Court has not been told that these consent orders have been set aside and therefore they remain in force.
15. In my considered opinion, when the Applicant by its further affidavit sworn on March 16, 2018 by Peter Kennedy Ombati, at par 5 deposes that the client denies retainer, it makes no legal or factual sense, to state the least because, had there been no retainer acknowledged by the Hon AG, then the issue could have been raised, and determined before execution of the consents.

Coming after 7 years to allege that the Ministry of Cooperatives did not employ competent counsel to take legal steps at this time in point is but a mockery of justice as also stating at para (5) (i) that the Applicant was indeed not the instructing client, the applicant's averment therein cannot be far from the truth; as it was not yet incorporated.



16. Joinder of parties to ongoing proceedings is always at the Court's discretion, but upon sound arguments.

Order 1 rule 10(2) of the Civil Procedure Rules provides that: -

‘The court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined..... and the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.’

17. The party so applying must offer sufficient grounds before the court and must demonstrate its interest clearly to be identifiable, and what prejudice it would suffer by a denial of such orders.
18. The Supreme Court pronounced itself on the matter of enjoinder in the case Francis Kariuki Muruatetu & another v R & 5 others [2016] eKLR.
19. In this case, there is no dispute that the taxation proceedings are long completed as well stated in the two consent orders executed by all the parties. The certificates of taxation were issued on the 7/03/2011, and no objections/ references were filed against the Taxing Officer's decisions. There are therefore no pending proceedings into which the Applicant can be enjoined, to state its alleged stake therein.
20. The only issue pending in these taxation proceedings as captured under the consent order dated April 17, 2013 is the reconciliation of the accounts. The Applicant is not barred from assisting the parties and taking part in that respect without being enjoined as a party in the proceedings.
21. In any other capacity, the Interested Party would be but a busy body, as it would have no locus standi in respect of Bills of Costs taxed long before it came into existence; and for that, none of the parties who were dealing with the issue, including the Hon. A.G is or has complained.
22. It has not been demonstrated that upon its incorporation, it took over the then existing proceedings against itself by way of substitution or otherwise. Had that been done, then may be, it could have acquired some locus standi; short of that, it is a busy body.
- The issue of 7 years' delay in bringing this application came up.
23. Whereas there is no measure as to what constitutes unreasonable delay, sufficient and plausible explanation must be offered by the party accused of inordinate delay in taking any legal action against another.
24. I disagree totally with the applicant's submission that the 7 years' delay does not count as it was not a party to the taxation of the bill of costs on 9/11/2011; but does not go ahead to deny that it was none existent at the time, nor that its predecessor was ably represented in court not only in the said taxation, but in all matters giving rise to the taxation. The arguments by the Applicant are lame and are not sufficient to persuade the court to exercise its discretion in its favor.
25. For the foregoing, this court finds and holds that the intended interested party's application dated December 20, 2017 lacks merit and is hereby dismissed with costs to the Advocates, Muriu Mungai & Company Advocates.
26. Orders accordingly

DELIVERED DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF JUNE, 2023.



JANET MULWA
JUDGE.

