



Local Authorities Pensions Trust [LAPTRUST] v Chairman, Retirement Benefits Appeals Tribunal; Mboroki & another (Interested Parties) (Judicial Review Application 403 of 2012) [2023] KEHC 23810 (KLR) (Judicial Review) (19 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23810 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION 403 OF 2012
JM CHIGITI, J
OCTOBER 19, 2023**

BETWEEN

LOCAL AUTHORITIES PENSIONS TRUST [LAPTRUST] APPLICANT

AND

**THE CHAIRMAN, RETIREMENT BENEFITS APPEALS
TRIBUNAL RESPONDENT**

AND

**STEPHEN MUTEITHYA MBOROKI INTERESTED PARTY
CHIEF EXECUTIVE OFFICER, RETIREMENT BENEFITS
AUTHORITY INTERESTED PARTY**

RULING

1. The matter before this court is a Notice of Motion dated 15th December, 2022 brought under Sections 1A, 1B, & 3A of the *Civil Procedure Act*, and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The Application is claimed to be for the 1st Interested Party, through the law firm of Nzaku & Nzaku Advocates. The Notice of Motion seeks for orders:
 1. That this Application be certified urgent and the same be heard ex-parte in the first instance.
 2. That this honourable court be pleased to issue orders compelling the Applicant herein (Local Authorities Pension Trust-LAPTRUST) to replace the cheque dated 29.11.2022 with another one of an equal amount to be drawn in favour of Nzaku and Nzaku Advocates.
 3. That costs be provided for.



2. The Application is accompanied by a Supporting Affidavit evenly dated, and a Further Supporting Affidavit dated 6th April, 2023 sworn by Steven Nzaku, an advocate of the High Court (in the law firm of Nzaku & Nzaku Advocates). The Application was based on the grounds on the face of it, and on the Affidavits.
3. In sum, the Steven Nzaku deponed that pursuant to the taxing master ruling of 27th October, 2022 which awarded Ksh. 663,591.33/= in favour of the herein Interested Party; a cheque was drawn, in favour of the Interested Party, and forwarded through his advocates (Nzaku & Nzaku Advocates).
4. He (Steven Nzaku) claims that since the cheque was not drawn in the name of the firm, the same was rejected and returned with a request that replacement cheque be drawn in the name of the firm; which request was declined. That as such, any payment/proceeds accruing to the Interested Party by virtue of the proceedings herein ought to be channelled to the said firm of Nzaku & Nzaku Advocates.
5. Further, that it is mischievous and in bad faith for the Applicant/Respondent to decline to issue a cheque in favour of the Interested Party's/Applicant's advocate, yet the advocate is legally authorized to receive such payments on behalf of the client.
6. Accordingly, he claims that it is needful for the Applicant/Respondent to be compelled to issue another cheque of equal amount in favour of the firm of Nzaku & Nzaku Advocates. In other words, that it is for the Applicant/Respondent's own good that the cheque dated 29.11.2022 be replaced with another one in the name of the firm of advocates herein in order to avert execution.
7. To the deponed, it is deducible and apparent from both Replying Affidavits [dated 20.01.2023 sworn on behalf of the Applicant/Respondent, and dated 24.03.2023 by the 1st Interested Party] that the 1st Interested Party is acting in collusion with the Applicant/Respondent to deny them (Nzaku & Nzaku Advocates) of their rightful remuneration despite having represented the 1st Interested Party satisfactorily in this matter, and others matters which were determined in favour of the 1st Interested Party.
8. The deponent, Steven Nzaku, beseeched this court that if at all it (court) finds that the 1st Interested Party is entitled to be paid directly by the Applicant/Respondent, then that the amount due be deposited in court as security to enable the firm to file and tax an Advocate-Client Bill of Costs. The reason, forwarded being that, the 1st Interested Party may not be in a position to pay any amount so taxed, if the money claimed herein is paid directly to him (the client/1st Interested Party).
9. The Application is opposed. The Applicant/Respondent (Local Authority Pension Trust) filed their Replying Affidavit dated 20th January, 2023 deponed by Kimutai Hosea Kili, a Trustee of the Local Authority Pension Trust (the judgment debtor herein).
10. The Applicant/Respondent depose that the instant Application is frivolous, vexatious, and an abuse of the process of court. That since the law expressly permits the judgment-debtor (Local Authority Pension Trust in this case), to settle the taxed party-and-party costs through direct payment as to the Decree-Holder (1st Interested Party/Stephen Muteithya Mboroki) in this case; it is common ground that the Judgment Debtor drew a cheque in favour of the Decree-Holder, in compliance with the Order 22, Rule 1 (b) of the Civil Procedure Rules, 2010. Further, that monies taxed in a party-and-party bill of costs belong to the successful client (in the instant case, the Decree-Holder). Reliance was placed on the case of Samuel Omondi Adera v Lore and Co Advocates [2022] eKLR, at paragraphs 12-13.
11. Consequently, that since the firm of Nzaku & Nzaku Advocates is not a decree- holder--within the meaning of section 2 of the [Civil Procedure Act](#) or for purposes of the taxed party-and-party costs--the



- law does not permit an advocate to destroy, reject, or overwrite the word on a cheque for purported rejected settlement of party-and-party costs, on the ground that such a cheque is drawn in the name of the advocate's client (who is the decree-holder) as in the instant case, instead of the name of the advocate.
12. Also that Nzaku & Nzaku Advocates were on a frolic of their own —rather than acting on their client's instructions—when they overwrote the word "rejected" on the cheque that the judgment-debtor issued in favour of the decree-holder.
 13. Notably, that the cheque leaf drawn in favour of the decree-holder remains in the decree-holder's advocates' possession to date, being Nzaku & Nzaku Advocates. The decree-holder's advocates have stubbornly refused to surrender the said cheque, while at the same time refusing to accept it in settlement of the taxed party-and-party costs: An attempt to eat their cake and have it too which cannot be. A printout of email correspondence between the judgment-debtor's advocates and the decree-holder's advocates dated 7th January, 2023 is stated to be annexed.
 14. According to the Applicant/Respondent the instructions create an agency relationship between an advocate and his client; and therefore, the rejection of the cheque by the decree-holder's advocates amounts to a rejection of payment on the part of the decree-holder. Thus, that the judgment-debtor is entitled to consider itself discharged of any obligations under the certificate of taxation, and any related decree(s). The case of Patrick Wamukota v John Tulula & 3 others [2015] eKLR is relied on.
 15. As per the Applicant/Respondent, the Application does not, ex-facie, disclose any or any reasonable ground for the grant of the reliefs sought, and thus this Honourable Court ought to dismiss the Application with costs.
 16. Further, in opposing the Application, the 1st Interested Party filed his Replying Affidavit dated 24th March, 2023 sworn by Stephen Mboroki Muteithia. It is averred that the firm of M/s Nzaku and Nzaku Advocates filed a Party and Party Bill of Costs on 9th June, 2022 alleging that the same was on behalf of the 1st Interested Party (Stephen Mboroki Muteithia), for costs awarded in Judicial Review Application No. 403 of 2012. That a ruling was delivered on 27th October, 2022 taxing the Bill of Costs at Kshs 663,591.33.
 17. The 1st Interested Party maintains that the firm of Nzaku Nzaku Advocates should not have filed that Bill of Costs, as they stopped representing him, and the current advocates having taken over handling the case. The handing over was by an application filed on 5th October, 2020 in Nai RBAT Civil Appeal No. 5 of 2010 that addressed the change of representation.
 18. As per the 1st Interested Party, the Application was concluded by an agreement, as reflected in the attached letter dated 11th May, 2021. The 1st Interested Party states that he fulfilled the terms of the change of representation, by paying Kshs. 150,000 as legal fees, to Nzaku & Nzaku Advocates. Therefore, that the cheque issued for costs should be remitted to him as he had already paid Nzaku & Nzaku Advocates the agreed fees for the work they had done at the time.
 19. In advancing their case, supporting the Application, the Applicant (Steven Nzaku of Nzaku & Nzaku Advocates) filed their written submissions dated 6th April, 2023. It contends that by virtue of him(Applicant) being an advocate of the 1st Interested Party, and by virtue of the law of agency, the cheques should be written in his firms' favour for having represented the 1st Interested Party in this case, thus is entitled to his remuneration. Also, that since parties had agreed that the advocate be allowed to keep the proceeds from the Party and Party taxation, the advocate is entitled to keep the proceeds not just as lien, but also as his entitlement via the arrangement.



20. The view held is that--as captured in the case of *Bill Baba Owour v National Bank of Kenya* [2022] eKLR, the court while dealing with a similar Application relied on the English decision in the case of *Gavin Edmonson Solicitors Ltd -V- Haven Insurance Co. Ltd* [2008] UKSC--in either case the equitable lien would entitle the solicitor not merely to hold on the money received, but to deduct his charges from it before accounting to his client for the balance. But equity would also enforce the security where the defendant (or his agent or insurer) paid the debt direct to the claimant, if the payer had either colluded with the claimant to cheat the solicitor out of his charges, or dealt with the debt inconsistently with the solicitor's equitable interest in it, after having notice of that interest. In an appropriate case the court would require the payer to pay the solicitor's charges again, direct to the solicitor, leaving the payer to such a remedy as he might have against the claimant.
21. Further, it was averred that the firm of *Gikera & Vadgama* did not comply with the mandatory provision of Order 9Rule 9 of the Civil Procedure Rules, prior to filing the Replying Affidavit sworn on 23.03.2023 hence rendering the same incurably defective and untenable; and be struck out with cost. In enforcing the mandatory nature of the Order 9Rule 9, the Applicant relied on the case of *James Ndonyu Njogu v Muriuki Macharia* [2020] eKLR.
22. In the end, the Applicant submitted that the court allow the Application dated 15th December, 2022 with cost being borne by the Applicant/Respondent (Local Authority Pension Trust).
23. Promoting its case, in opposing the Application, the 1st Interested Party filed his written submissions dated 3rd July, 2023. It is submitted that contrary to the assertions by the firm of *Nzaku & Nzaku Advocates*, the issue of change of representation and payment of legal fees by the Applicant was addressed by the Professional Undertaking, between the two firms. Thus, the firm (*Nzaku & Nzaku Advocates*) officially ceased to act on behalf of the 1st Interested Party; and by consent agreed to payment of Kshs, 150,000/ as full settlement of any claims the firm had against the 1st Interested Party as at the time of the undertaking.
24. Accordingly, the 1st Interested Party contends that having settled its legal fees with the firm, any costs awarded in the proceedings belongs to him. In this regard, the 1st Interested Party relies on the holding of the court in *Ataka Kimori & Okoth Advocates v Surestep Systems and Solutions Limited* [2020] eKLR, which authoritatively cited the decision in *Little Africa Kenya vs Andrew Mwiti Jason*, (2014) eKLR that observed that, the function of costs in a suit is to reimburse the successful litigant of the expenses incurred in prosecuting or defending a matter. Further, that it is settled law that costs awarded belong to the Client and not the Advocate, and that it is the Advocate on record to pursue execution of the awarded costs.
25. That the same position was endorsed by the court in *Samuel Omondi Adera v Lore and Co Advocates* [2022] eKLR thus; Monies taxed in a party to party bill of costs belong to the successful client, and the advocate is generally under an obligation to pay over the same to the successful client.
26. The 1st Interested Party further submits that Professional Undertakings are binding in nature, and the firm of *Nzaku & Nzaku Advocates* cannot ask the court to aid it in renegeing on the Professional Undertaking that addressed the issue of representation and legal fees. That in the case of *Waruhi K'owade & Ng'ang'a Advocates v Mutune Investment Limited* [2016] eKLR the Court of Appeal regarded the binding nature of Professional Undertakings.
27. In the end, the 1st Interested Party posits that the Application by the firm of *Nzaku & Nzaku Advocates* is devoid of merit and as such, the prayers sought under it should not be granted. That the entire Application should be dismissed with costs.



Analysis and Determination

28. I have considered the application, the responses, and the parties' submissions. The issue that crystalizes for determination is whether the Application is merited, in the circumstances.
29. From the record before this court, in the main, at the risk of delving into the merits of the case, it can be distilled that the law firm of Nzaku & Nzaku Advocates, by the averments of Steven Nzaku an advocate in the firm, is laying a claim of monies against their (then) client, Stephen Mboroki Muteithia, the 1st Interested Party.
30. As such, the aspect/protest of the cheque being drawn in favour of the 1st Interested Party may be held to be incidental to the claimed monies. Indeed, the Applicant in his 6th April, 2023 Supplementary Affidavit affirmed that he was being denied his rightful remuneration, as an advocate, despite having legally represented the 1st Interested Party, the client, in this and other matters. Further, he confirms that he (Advocate) is apprehensive that if the cheque/monies is directly released to the 1st Interested Party; the Applicant (advocate) may not receive his payment from the 1st Interested Party.
31. The Respondents mainly contended that the Application is frivolous, vexatious, and an abuse of the process of court; while the 1st Interested Party maintained that the Applicants, firm of Nzaku & Nzaku Advocates were not representing him, and had no claim against him as he had fully discharged his dues.
32. On abuse of the court process, the Court of Appeal in the case of Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 others Civil Appeal No. 25 of 2002 (2009) eKLR 229, stated as follows; -

“The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bonafides and frivolous, vexatious or oppressive’.
33. Further, on frivolous and vexatious, the court of Appeal in the case of Kivanga Estates Limited v National Bank of Kenya Limited [2017] eKLR, stated that

“A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action See Trust Bank Limited v Amin Company Ltd & Another (2000) KLR 164.”
34. Turning back to the instant matter, it is worth noting that the Applicant had asked this court to order the amount due be deposited in court, as security to enable him to file and tax an Advocate-Client Bill of Costs. To my mind, this is an acknowledgement by the Applicant of the proper avenue/forum to pursue his cause. There is no condition in law that for one to pursue their remuneration, by way of Bill of Cost, funds have to be deposited in court; the apprehension notwithstanding.
35. Therefore, it is clear that this Application as presented before this court is premature and speculative.



36. Samuel Muigai Ng'ang'a vs The Minister for Justice, National Cohesion and Constitutional Affairs and Another, Petition No 354 of 2012, Lenaola J expressed himself on the issue of justiciability as follows: "The Petitioner has crafted questions to which he seeks an answer but where is the dispute that I am supposed to resolve? Elsewhere above, I have merely set out the Law as applicable to the issues raised but what is justiciable about those issues? Black's Law Dictionary defines 'justiciable' as "proper to be examined in courts of justice". It further goes on to define a 'justiciable controversy' as "a controversy in which a claim or right is asserted against one who has an interest in contesting it." The other definition given of a justiciable controversy is "a question as may properly come before a tribunal for decision."
37. The orders as sought do not warrant issuing, as the application is devoid of proper ventilation in a proper forum at the initial instance. The Applicant is at liberty to file and tax an Advocate-Client Bill of Costs. The Advocate has an avenue through which he can recover his fees at his disposal.
38. The application is an abuse of the court process and lacks merit.

Order:

The Notice of Motion dated 15th December, 2022 is dismissed with cost.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF OCTOBER 2023.

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J.CHIGITI (SC)

JUDGE

