



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC. CASE NO. 548 OF 2017

KENYA ELECTRICITY TRANSMISSION CO. LTD.....RESPONDENT

VERSUS

HEMATIES INVESTMENTS LIMITED.....1ST DEFENDANT

MUKIN LIMITED.....2ND DEFENDANT

RULING

By a Notice of Motion Application dated the 22nd July, 2020 brought pursuant to Sections 14 and 19 of the Environment and Land Court Act; Order 51(1) of the Civil Procedure Rules including Sections 1A, 1B, 3A, 26, 27, 28, 38 and 63(e) of the Civil Procedure Act; the Applicant seeks the following orders:

1) That an order be and is hereby issued directing the Respondent to pay the Petitioner (through its advocates on record) the following amounts:

a) The sum of Kshs. 1,005,430 and;

b) Interest on (a) above at the rate of 12% per annum from 13th of April 2017 until payment in full.

2) That in default of making the payment set out in clause (1) above, execution do issue forthwith.

3) That the costs of this Application be borne by the Respondent.

The application is premised on the grounds on the face of it and the supporting affidavit of Jomo Nyaribo, its Advocate, where he explains that after the commencement of this suit, parties entered into negotiations to settle matter out of court, under the guidance of their respective counsels. Further, the out of court negotiations culminated in a Deed of Settlement dated 7th April 2017 which was adopted by the Court on 26th July, 2017. Under Clause 2 of the Deed of Settlement, the Respondent agreed to settle the legal fees incurred by the Applicant in Kajiado ELC 548 of 2017 (KETRACO vs. Mukin Limited & Another) on or before 13th April, 2017 as well as the costs of Mukin Limited in Kajiado ELC 548 of 2017 on or before 13th April, 2017. Further, that in default of making the payment, interest of 12% per annum from the 13th April, 2017 would accrue. The Applicant acknowledges that the Respondent has partially complied with the Deed of settlement and what remains unpaid is the legal fees. Further, that they had attempted to reach an amicable settlement with the Respondent but were unsuccessful, necessitating the filing of an Advocate-Client Bill of costs in court, for assessment with the same being taxed at Ksh.1,005,430.00 as per the certificate of taxation which they attached. The Applicant contended that since the Deed of Settlement has never been varied or vacated, it should be complied with in totality.

The Respondent in opposing the application filed a Replying Affidavit sworn by Alfred Ochieng who is its counsel in this matter. In the said affidavit, it confirmed the existence of the Deed of Settlement between itself and the Applicant. He further confirmed that the Applicant filed the Advocate-Client Bill of Costs for taxation. He alleges that the Respondent was not served with the said Advocate-Client Bill of Costs nor was it involved in the taxation proceedings since they were not parties thereof. He insisted that the Applicant had not demonstrated any Advocate-Client relationship as between the Respondent and the firm of Messrs Muthaura, Mugambi, Ayugi & Njonjo advocates. Further, that the Bill as taxed on 29th November 2018 was as between the Applicant and its client and the same could not be construed to apply to the Respondent. He contended that it had paid for the requisite legal fees by making two payment advises to the counsel for the Applicant for Ksh 1,252,632.20 and Kshs.346,376.00 respectively, which it attached to support these averment. It reiterated that the Application was ill conceived and ought to be dismissed with costs to it.

None of the parties filed their submissions to canvass the instant application. Be that as it may, this court will proceed to rely on the grounds as raised on the instant Notice of Motion and the supporting Affidavit thereof as well as the Replying Affidavit filed by the Respondent.

Analysis and Determination

Upon consideration of the instant Notice of Motion application including the respective affidavits, the issue for determination is whether the Applicant is entitled to the orders as sought.

Before I make a determination of the issues herein, I wish to provide a brief background of the dispute at hand. The suit (***Kajiado ELC No. 548 of 2017 (KETRACO vs. Mukin Limited & Another)***) was instituted by the Respondent (Plaintiff) against the Defendants (Applicants) on 17th March, 2017 seeking various orders *inter alia*:

- a) ***An assessment for just compensation payable to the Defendants;***
- b) ***Permanent injunction against the Defendants either by themselves, their agents, employees from interfering with the works of the Plaintiff and attacking the servants and agents of the Plaintiff on the suit properties.***
- c) ***In the alternative, Judgement against the Defendants for losses incurred by the Plaintiff due to the disruption of the construction of the power lines.***
- d) ***Costs of this suit.***

The suit was settled through the Deed of Settlement dated 7th April 2017 which was adopted by the Court on 26th July, 2017. In the said Deed of Settlement, the Respondent had agreed to settle the costs of the Applicant, which it did partially. Further, the Applicant filed an Advocate Client Bill of Costs which was taxed at Ksh.1,005,430.00. I note in the Deed of settlement dated 7th April 2017 the parties agreed on specific rights and obligations for each one. Further, the said Deed was adopted as an Order of the Court vide a Consent. Clauses 2 and 4 of the said Deed provides that:

2. KETRACO shall in addition settle legal fees incurred by Mukin Limited arising out of Kajiado ELC Petition No. 10 of 2017 (Mukin Limited vs KETRACO) and arising out of Kajiado ELC No. 548 of 2017 (KETRACO vs. Mukin Limited & Another) on or before 13th of April 2017.

4. KETRACO shall meet and settle the costs of both Kajiado ELC petition No. 10 of 2017 (Mukin Limited vs. KETRACO) and Kajiado ELC No. 548 of 2017 (KETRACO vs. MUKIN LIMITED & ANOTHER)

It is apparent that while Clause 2 referred to “*Legal fees*”, Clause 4 referred to “*costs*”. I opine that the intention and the spirit of the parties while entering into this Deed can only be known to them. Further, the wording of Clause 4 does not clearly distinguish which particular costs the Deed referred to. For instance, Clause 3 is clear on cost of valuation. Clause 4 does not state if the Respondent is to pay ‘party to party’ or ‘advocate to client’ costs. Since Clause 4 generally referred to costs, it can be deduced that the Respondent was to pay both the party and party costs as well as the advocate to client costs. The payment made by the Respondents on 26th July 2017 of Ksh.1,252,632.70 is clarified in the letter dated 12th July 2017 as ‘*legal fees*’. It is a fact that the taxed amount was pegged on the ‘*Advocate-Client*’ relationship. Whereas the Respondent was not a client to the Applicant’s advocates, however from a reading of the Deed of settlement particularly Clause 4, it is clear it had accepted to settle the said costs. I note the Respondent insists it was not a party to the taxation but has not informed court if it challenged the said costs by filing a Reference. The Advocates Remuneration Order makes provisions in respect to the procedure an aggrieved party can adhere to, in challenging a taxation. More specifically Paragraph 11 of the Advocates Remuneration Order provides that: “*A party who intends to challenge a ruling on taxation must first write to the taxing officer within 14 days from the date of ruling of taxation, giving a notice of objection specifying the items in the Bill of Costs in respect of which he is aggrieved of and requesting the taxing master/officer to give reasons for allowing them as shown in the ruling.*”

In the case of ***Twiga Motor Limited vs. Hon. Dalmas Otieno Anyango [2015] eKLR*** the court observed that: “*The time limits in Rule 11 of the Advocates Remuneration Order have been put there for a reason. Failure to adhere to the said time lines would mean that the application would be rendered incompetent in the first instance.*”

See also the case of ***Vishisht Talwar vs. Anthony Thuo Kanai t/a A. Thuo Kanai Advocates [2014] eKLR***.

In this instance, the costs pegged on ELC No.548 of 2017, were taxed at KES 1,005,430.00. Further, the certificate of costs dated 26th November 2018 emanating therefrom, has neither been contested nor varied, hence stands enforceable.

Based on the facts as presented while relying on the legal provisions cited above as well as associating myself with the quoted decisions, I find that the Respondent is liable to settle the aforementioned taxed amount as stated in the Deed of Settlement dated 7th April 2017. It is my considered view that the Respondent’s attempts to extricate itself from the terms of the said Deed is dishonest and cannot stand unless the same is first varied. To my mind Clause 2 of the said Deed as read together with Clause 4 are unambiguous.

It is against the foregoing that I find the Notice of Motion application dated the 22nd July, 2020 merited and will allow it. I will proceed to make the following final orders:

- a) ***That an order be and is hereby issued directing the Respondent to pay the Applicant (through its advocates on record) the following amounts;***

i. The sum of Kshs. 1,005,430 and;

ii. Interest on (a) above at the rate of 12% per annum from 13th of April 2017, until payment in full.

b. That in default of making the payment set out in clause (1) above, within sixty (60) days from the date hereof, execution do issue forthwith.

c. That the costs of this Application be borne by the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 10TH DAY OF NOVEMBER, 2021

CHRISTINE OCHIENG

JUDGE