



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC. PETITION NO. 10 OF 2017

MUKIN LIMITED.....PETITIONER

VERSUS

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

RULING

By a Notice of Motion Application dated, 22nd July, 2020, brought pursuant to Section 14 and 19 of Environment and Land Court Act, 2011, Order 51(1) Civil Procedure Rules including Sections 1A, 1B and 3A, 26, 27, 28, 38 and 63(e) Civil Procedure Act, the Applicant is seeking for 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.1,867,600.00; 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, the Petitioner's Advocate who deposes that the Petitioner herein filed a Petition against the Kenya Electricity Transmission Company Limited (*the Respondent*) in Kajiado ELC Petition No. 10 of 2017 following a dispute over compensation for wayleave over the Petitioner's property. He states that in the course of prosecuting the Petition, the Petitioner and Respondent entered into negotiations to settle the matter out of court under the guidance of their respective counsels on record. He avers that the out of court negotiations culminated in parties executing a Deed of Settlement dated 7th April, 2017 which was adopted as an order of the court on 26th July, 2017. He contends that under the Deed of Settlement, the Respondent agreed to compensate the Petitioner Legal fees and costs arising out of Kajiado ELC Petition No. 10 of 2017 on or before 13th April 2017 and in default of making payments referred to above, interest would accrue on those amounts at the rate of 12% per annum from the due date. He claims the Respondent had partially complied with the terms of the Deed of Settlement except for payment of legal fees incurred by the Petitioner as agreed under clause 2 of the deed; He explains that parties engaged with a view on resolving the amount of legal fees to be paid but the negotiations fell through thereby necessitating filing in court, of an Advocate - Client Bill of Costs for assessment of legal fees. He confirms that the Advocate - Client Bill of Costs dated 23rd January, 2018 was filed in court on 29th October, 2018 and taxed in the sum of Kshs.1,867,600.00. He reiterates that the Respondent was duly notified of the taxed amount and a demand for payment issued on 26th February, 2019 but the same had not been honoured to date. Further, that Certificate of Taxation had not been set aside or altered nor has a reference been filed to challenge the same within the stipulated timeline. He reaffirms that the consent order issued on 26th of July, 2017 had never been altered, set aside, reviewed or appealed against and it was in the interest of justice that this court does grant the orders as sought.

In response, the Respondent filed a Replying Affidavit sworn by Alfred Ochieng the Respondent's Advocate who deposed that he knew for a fact that the Petitioner herein was seeking payments amounting to Kshs. 1,867,600.00 and interest at the rate of 12% as from 13th April, 2017. He confirms that the Petitioner did file an Advocate - Client Bill of Costs but did not serve the Respondent, hence they did not participate in the taxation proceedings and were not a party to the said taxation. He explains that the Advocates Act and the Advocates Remuneration Order conferred on the taxing officer jurisdiction to tax Bill of Costs between advocate and their clients as well as party and party, so as to determine legal fees for services rendered. Further, that the Petitioner herein had not demonstrated any Advocate-Client relationship as between the Respondent and the firm of Messrs Muthaura, Mugambi, Ayugi & Njonjo Advocates to warrant the Bill as filed and taxed to apply to the Respondent. He insists the Bill as taxed on 29th November, 2018 was between the Petitioner and his client(s) and the said Bill could not be construed to apply to the Respondent who was not a party to the taxation. He contends that they made payments for requisite legal fees, being party and party costs of the suit in Petition No. 10 of 2017 and ELC 548 of 2017 to the Petitioner by making two

payment advices to the Counsel for the Petitioner for Kshs. 1,252,632.70 and Kshs. 346,376 respectively. Further, through such payment, the Respondent sought to be discharged from the professional undertaking and have the matter marked as settled. He reiterated that the application should be dismissed.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the instant Notice of Motion application including the respective affidavits and rivalling submissions, the issue for determination is whether the Petitioner/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. This suit was instituted by the Petitioner vide its Petition dated 28th March, 2017 wherein it sought for various orders including a permanent injunction to issue restraining the Respondent either by itself, its employees, agents or servants or any other person acting through them or in their name from trespassing on or otherwise interfering with all that property known as KAJIADO/OLCHORO-ONYORE/187 (*measuring approximately 9.2 Ha*). To compromise suit, the parties entered into a Deed of Settlement dated 7th April, 2017 which was later adopted as a Court Order on 26th July, 2017. The Respondent has stated that they were not party to Misc. Civil Application No. 6 of 2018 which gave rise to the Certificate of Taxation for Kshs. 1,867,600 as they were not served with the same. 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.”

While in the case of *Vishisht Talwar vs. Anthony Thuo Kanai t/a A. Thuo Kanai Advocates [2014] eKLR* the learned Judge favourably cited the Court of Appeal decision of *Machira & Co. Advocates vs. Arthur K. Magugu & Another CA 199/2002[2012] eKLR* where it stated that:

“Rule 11 thereof provides for ventilation of grievances from such decisions through references to a judge in chambers. The effect may be viewed as an appeal or a review but these being legal terms in respect of which different considerations apply, they should not be loosely used. Appeals require the typing of proceedings, compiling of records of appeal and hearing of the same in open court. Reviews, however, would require provisions akin to those in Section 80 of the Civil Procedure Act of discovery of new and important matters, errors on the face of the record and so on. In our view the Rules Committee intended to avoid all that and provide for a simple and expeditious mode of dealing with decisions on Advocate’s Bill of Costs through references under Rule 11 to a Judge in chambers.”

The Petitioner claims it duly notified the Respondent of the taxed amount on 26th February, 2019 and attached proof to that effect. I note from the proceedings herein that the Respondent has failed to pay the taxed amount and also never filed a reference in the ELC to challenge the taxed costs. It is my considered view that the Respondent is estopped from claiming they were not parties to the taxation proceedings hence unable to pay. I opine that, it ought to have challenged the said taxation proceedings in accordance with the law instead of acquiescing to the same and later refusing to pay. As per clause 2 of the Deed of Settlement dated 7th April, 2017 which was neither varied nor set aside, it stated 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 v KETRACO] arising out of Kajiado ELC No. 548 of 2017 [KETRACO v Mukin Limited & Anor] on or before the 13th of April, 2017.

I note the Respondent had filed an application dated 27th July, 2017 seeking to set aside the Orders granted by consent on 26th July, 2017 on grounds that it was recorded on misrepresentation of facts by the Petitioner’s Advocate, but later withdrew the said application on 21st September, 2017. From the conduct of the Respondent, it seems it seeks to extricate itself from a duly signed Deed of Settlement and I must say this won’t do.

It is against the foregoing while relying on the legal provisions cited above as well as associating myself with the quoted authorities that I find that the Respondent’s acts of declining to settle the taxed costs amounts to dishonesty. I further find that the Respondent has failed to provide plausible reasons why it has failed to comply with Clause 2 of the Deed of Settlement for a period of close to four (4) years.

In the circumstance, 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. 1,867,600/= 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