



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C MISC NO. 10 OF 2018

MUCHOKI KANGATA NJENGA &
COMPANY ADVOCATES.....APPLICANT

VS

BILHA NJERI KABIRU..... 1ST RESPONDENT

LOISE WAMBUI MUTUA.....2ND RESPONDENT

ADVOCATE/CLIENT BILL OF COSTS

ARISING FROM

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA

CAUSE NO 380 OF 2017

BILHA NJERI KABIRU..... 1ST PLAINTIFF

LOISE WAMBUI MUTUA.....2ND PLAINTIFF

VS

ONESMUS KARINA WAIMIRI

(Sued on his own behalf and as

Legal representative of the

Estate of WAIMIRI KARINA).....1ST DEFENDANT

PETER MAINGI MITHEKO.....2ND DEFENDANT

THE HON ATTORNEY GENERAL.....3RD DEFENDANT

THE LAND REGISTRAR, MURANGA..4TH DEFENDANT

RULING

1. These proceedings commenced by a bill of costs christened Advocate/Client bill of costs filed in Court on the 5/7/18. The Applicant seeks to recover from the 1st and 2nd Respondents Advocate and client costs arising from the conduct of ELC NO 380 of 2017. The bill of costs is

itemised and is on record.

2. The 1st and 2nd Respondents have opposed the bill of costs in two phases; through a Preliminary Objection and a replying affidavit sworn on the 27/8/18 by the Irungu Kangata Advocate. At para 3 of the said affidavit the Advocate states that while he was a partner in the firm of Musyoki Kangata Njenga and Company Advocates who are the Applicants herein he was instructed by the 1st and 2nd Respondents to personally take conduct of ELC 380 of 2011 formerly NYERI civil case of 35 of 2011 seeking an order of cancellation of registration of Peter Maingi Mitheko as the owner of the suit land named in the said case among other orders.

3. At paras 4 and 5 of the said affidavit, the Advocate depones that he resigned in February 2018 from the law firm of Musyoki Kangata Njenga & Co Advocates and commenced practice as Irungu Kangata and Company Advocates. As part of the agreement between the partners, the said Advocate states that he was permitted to leave the law firm with all the matters and cases that he personally was handling. Among those cases is the case of the 1st and 2nd Respondent described above. The said Advocate on 5/3/18 filed a notice of change of Advocates in the case.

4. It is not on record that the Applicant objected to the law firm of Irungu Kangata & Company Advocates taking over the conduct of Muranga ELC 380 of 2011.

5. In the Preliminary Objection filed on the 28/8/18 the 1st Respondent raised the following grounds of objection to the Advocate-client bill filled by the Applicant;

a. That the Advocate -Client Bill of costs is premature and a waste of judicial time for the reasons that the matter is not ripe for Advocate -Client taxation since the Advocate who had previous conduct of the matter is still the Advocate taking conduct of the same.

b. The Advocate -client bill of costs is bad in law and fatally defective in substance and form

c. The Advocate – Client bill of costs is otherwise frivolous vexatious ad an abuse of the Court process and ought to be dismissed in the first instance.

6. The Applicants have not filed an affidavit or other pleadings in any form to counter the affidavit of Irungu Kangata Advocate stated above. The said Irungu Kangata Advocates have on 23/1/19 filed written submissions in relation to the 1st Respondents Preliminary Objection filed on the 27/8/18. In the records, the Applicant did not file any submissions in the case.

7. The Court will therefore proceed to assess the Preliminary Objection as filed. This cause of action is undertaken because it is on the record that the Preliminary Objection and the affidavit of Irungu Kangata Advocate and the 1st Respondent's submissions have been duly served on the Applicant.

8. The definition of a Preliminary Objection is settled by the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, where the Court held;

"..... 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".

9. In **Oraro vs. Mbaja [2005] 1 KLR 141 Ojwang, J** (as he then was) expressed himself as follows; -

".....a "Preliminary Objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."

10. Taking the bill of costs as filed and fitting it in the meaning of the settled definition of a Preliminary Objection, the circumstances would be as follows;

a. In respect to a point of law; the 1st Respondent has stated that the matter before the Court is not necessary because it cannot fit in the circumstances prescribed by law as an Advocate /client bill of costs. Going by para 11 and 12 of the Advocates remuneration order the High Court assumes jurisdiction for taxation following a decision of the Deputy Registrar or by consent of the parties to make a reference to the Judge for determination. The High Court then does not assume direct jurisdiction of taxation for a bill of costs whether party or party costs or Advocate/Client costs. In such circumstances therefore the 1st Respondent's objection is merited.

b. A pleading by a party which is accepted or not controverted by the other party or arising out of the pleadings which when determined may dispose of the case; The 1st Respondent through the affidavit of Irungu Kangata Advocate has stated that the transfer from the Applicants of his case to the firm of Irungu Kangata & Company Advocates was a settlement among the partners of the Applicant. It was therefore not necessitated by the personal conduct of the Respondents. The Applicant has not controverted such information or deposition by the Respondents' Advocate. It is therefore safe to conclude that the statement on oath by Irungu

Kangata is faithful and truthful in all aspects of the preliminary objection. It is a well stated fact in the pleadings and not controverted by the Applicant.

c. It is a matter which does not require further enquiry or investigation by the Court; the matters set out in the affidavit of Irungu Kangata Advocate are clear and precise which have not been challenged or controverted by the Applicant. In this circumstance, therefore, there is nothing for the Court to inquire into or investigate.

d. It is a matter that requires discretion of the Court; discretion of the Court is applied in matters that necessitate conclusion of cases before the Courts as to achieve substantial justice. These may be matters pleaded whether there is no express provision of the law giving direction but require exercise of skill and knowledge of the Court so as to achieve justice of the case. The matter of the Advocate client bill of costs of the application and the objection taken by the 1st Respondent are clearly matters of law and precise facts which are not challenged and therefore do not require exercise of any discretion of the Court.

11. The Court has considered the Written Submissions of the Respondents. The Respondents have among others dealt with matters relating to proceedings filed which are considered to be scandalous, frivolous, vexatious largely dealing with the provisions of Order 2 rule 15 of the Civil Procedure Act. In view of the findings above relating to settled law on Preliminary Objection the Court does not consider it worthwhile to further consider the submissions relating to application of Order 2 rule 15 of the Civil Procedure Act.

12. In the upshot the Preliminary Objection is upheld. The Applicant's bill of costs is dismissed with costs to the Respondents.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 30TH DAY OF APRIL, 2019

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Applicant – Absent

Kamata HB for Irungu Kangata for the 1st and 2nd Respondents

Kuiyaki and Njeri, Court Assistants