



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CORAM: F. MUGAMBI, J
MISC APPLN NO. E195 OF 2024

BETWEEN

TITUS MAKHANU & ASSOCIATES ADVOCATES
APPLICANT

VERSUS

KENYA MEDICAL SUPPLIES AUTHORITY
RESPONDENT

RULING

Background and Introduction

1. This ruling determines the application dated 20th June 2024 brought under **sections 1A, 1B, 3A, 22 and 24 of the Civil Procedure Act, CAP 21 Laws of Kenya, Order 19 rules 2 and 19 of the Civil Procedure rules 2010** and all the other enabling provisions of the law.
2. The application seeks orders that the respondent be compelled to produce for inspection the

minutes of the meeting dated 19th March 2024, which was signed by the applicant on 21st March 2024, where the respondent allegedly agreed to pay the applicant KES 31.5 million in settlement of legal fees. It also seeks an order that the respondent be compelled to produce the minutes and/or resolutions of the respondent's board meetings, particularly those held on 15th March 2024, concerning the payment of legal fees. The application further seeks that the respondent be ordered to produce CCTV footage of occurrences in the office of the respondent's Chief Executive Officer on 19th March 2024 and 21st March 2024, between 7:00 a.m. and 1:00 p.m.

- 3.** In default of the above orders, the application seeks that the respondent's Corporation Secretary Mr. Fred Wanyonyi, Finance Officer Ms. Christine Mwangi, and CEO's Secretary Ms. Pamela Kaburu be summoned to attend court and be examined on oath as to the existence of the said minutes. The applicant also seeks that the Board Chairperson, Mr. Irungu Nyakera, Mr. Gichohi Mwaniki, the personal assistant to the Board Chairperson be summoned to attend court and be examined on

oath regarding the board minutes and the alleged involvement in negotiations and a demand for retention of KES 15 million from the settlement.

4. Finally, the applicant also seeks that Dr. Andrew Mulwa, the CEO, be summoned for cross-examination on his affidavit sworn on 11th June 2024, particularly on the existence of the meetings, board resolutions, and whether he was aware of the taxation proceedings and prior undertakings to pay the KES 31.5 million. The application is supported by the affidavit sworn by **Titus Makhanu** on even date.
5. The applicant states that prior to the filing of the Bill of Costs dated 5th March 2024, the parties engaged in negotiations which culminated in a mutual agreement to settle the applicant's legal fees at Kshs. 31.5 million, down from the initial figure of Kshs. 61,052,631.50. The said agreement, it is alleged, was entered into in good faith with a view to resolving the matter amicably.
6. That despite the agreement, the respondent subsequently reneged, prompting the applicant to

proceed with the taxation process. A meeting held on 19th March 2024, attended by the respondent's CEO, Corporation Secretary, and others, is said to have reaffirmed the settlement, and minutes were drawn up to that effect. The minutes were reportedly signed by the applicant's representative and other officials of the respondent, save for the respondent's CEO, who was to sign last and thereafter forward a copy to the applicant which was never fulfilled.

7. It is further stated that the respondent's CEO became evasive and ceased communication regarding the agreed payment. As a result, the applicant proceeded with the taxation process, which culminated in a ruling delivered on 29th April 2024, awarding the applicant Kshs. 149,977,677.22.
8. The applicant also avers that following the respondent's board meeting on 15th May 2024 where payment of the Kshs. 31.5 million was approved the respondent's CEO and chairperson, through a representative, demanded a retention of Kshs. 15 million as a precondition for disbursement

of the agreed amount. Attempts were allegedly made to have the applicant sign an agreement or standing order to secure this retention, which the applicant declined.

- 9.** The applicant contends that these demands were improper and that the respondent failed to disclose the existence of the settlement agreement in its application seeking to set aside the certificate of taxation. It is alleged that the respondent's CEO has deponed to matters that are riddled with contradictions, omissions, and misrepresentations, and that he has approached the court with unclean hands. It is the applicant's case that unless the orders sought are granted, it will suffer prejudice, particularly due to the continued concealment of the minutes of the meeting held on 19th March 2024 which is essential in the fair determination of the dispute.
- 10.** This application is opposed by the respondent in a replying affidavit sworn by **Dr. Waqo Ejesra** dated 26th February 2025. It is contended that the notice was legally flawed and amounted to an abuse of the court process. It is asserted that the notice

failed to meet the legal threshold under **Section 22 of the Civil Procedure Act** and **Section 69 of the Evidence Act**, as it did not demonstrate that the applicant was in possession of secondary evidence, nor that the respondent held the original documents sought.

11. The respondent further argues that the documents listed in the Notice to Produce were outside the scope of the issues properly before the court, which were limited to the respondent's application to set aside a certificate of taxation dated 29th April 2024, and the applicant's motion to adopt the same as a judgment under **Section 51(2) of the Advocates Act**. It is contended that the applicant has attempted to expand the remit of its application by introducing matters in the notice to produce which had not been pleaded in the main pleading.

12. The respondent's position is that the alleged meetings of 19th and 21st March 2024, in which a settlement for KES 31.5 million was purportedly agreed, were neither pleaded nor supported by documentary evidence such as notices, agendas,

or signed minutes. The respondent maintained that, as a statutory body, all its meetings followed formal procedures.

13. The application was canvassed by way of written submissions which I have duly considered.

Analysis and Determination

14. The main issue for determination is whether the applicant has met the threshold for an order of production of documents. **Section 22 of the Civil Procedure Act** provides that:

“Subject to such conditions and limitations as may be prescribed, the court may, at any time, either on its own motion or on the application by either party-

a) Make such orders as may be necessary or reasonable in all matters relating to the delivering and answering of interrogatories, the admission of documents and facts and the discovery and inspection, production,

impounding and return of documents or other material objects producible as evidence

b) The court has the power to summon any person to produce such documents or adduce evidence as the case may be.”

15. The application of these provisions was examined in **Rafiki Microfinance Bank Limited V Zenith Pharmaceuticals Limited, [2016] eKLR** where the Court drew guidance from *Halsbury’s Laws of England, Volume 13, paragraph 38*. The Court emphasized that it will not issue orders for the production of documents that lack relevance or significance to the dispute at hand. As Halsbury’s notes:

“Discovery will not be ordered in respect of an irrelevant allegation in the pleadings, which, even if substantiated, could not affect the result of the action nor in respect of an

allegation not made in the pleadings or particulars nor will discovery be allowed to enable a party to “fish” for witnesses or for a new case, that is to enable him frame a new case. Each case must be considered according to the issues raised; but where there are numerous documents of slight relevance and it would be oppressive to produce them all, some limitation may be imposed.”

16. Similarly, in **ABN Amro Bank N.V. V Kenya Pipeline Company Limited, [2019] eKLR** the Court of Appeal held that the court may order discovery of documents on application being made where those documents are related to the suit before it and the purpose of discovery is to ensure that all documents or information necessary for the just determination of the suit are made available to all parties as to the court.

17. The applicant seeks production of the minutes of a meeting allegedly held on 19th March 2024,

minutes and/or resolutions of a board meeting held on 15th March 2024 and CCTV footage from 19th and 21st March 2024. Its argument is that these documents are within the exclusive control of the respondent and are essential to the fair and just determination of the dispute, in confirming the existence of a settlement agreement for KES 31.5 million. In addition, the applicant seeks the summoning of the respondent's executives to confirm the existence of the minutes.

18. On the other hand, the respondent disputes the existence of the said meetings and documents, arguing that the request constitutes a fishing expedition. It asserts that the case before court is limited to the adoption of a certificate of taxation and a counter application seeking to set it aside. The production sought, in their view, pertains to issues that have not been pleaded.

19. The proceedings before me relate to a reference application filed by the respondent, challenging the certificate of taxation issued by the taxing master. There is no dispute that the applicant was awarded Kshs. 149,977,677.22 following the taxation of the

bill of costs dated 5th March 2024. Concurrently, the applicant has filed an application under **Section 51(2) of the Advocates Act** seeking the adoption of the said certificate as a judgment of the court.

20. At this stage, the Court's mandate is limited to determining whether the certificate of taxation should be upheld or set aside. Any prior agreement on fees ceased to be relevant once the advocate elected to pursue taxation of the bill. The Court is therefore concerned only with whether the taxing master erred in principle or exercised discretion improperly in assessing the costs.

21. Moreover, it is evident that the claim for legal fees is not anchored in any settlement agreement. The figure of Kshs. 31.5 million was introduced only in the applicant's response to the application seeking to set aside the certificate of taxation. That figure was neither part of the bill of costs nor considered in its determination. Guided by the established dicta in the decisions above, the Court must refrain from admitting documents that bear no relevance to the matter at hand.

22. In this context, the production of minutes cannot be regarded as essential to the fair resolution of the reference. The same reasoning applies to the CCTV footage and other documents extraneous to the taxation proceedings. Allowing the documents would mean that the court will be looking beyond the boundaries of the reference and scope under ***Paragraph 11 of the Advocates Remuneration Order.***

Disposition

23. Accordingly, the application dated 20th June 2024 is not merited and the same is dismissed with costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI
THIS 20TH DAY OF FEBRUARY 2026.**

**F. MUGAMBI
JUDGE**

Delivered in presence of:

Mr Makhanu for the advocate/ applicant

Mr Rotich for the respondent

Court Assistant: Lillian