



REPUBLIC OF KENYA



Ochieng & another v Mansa East Africa Limited (Miscellaneous Application E074 of 2023) [2024] KEELC 389 (KLR) (31 January 2024) (Judgment)

Neutral citation: [2024] KEELC 389 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS APPLICATION E074 OF 2023**

**JA MOGENI, J
JANUARY 31, 2024**

BETWEEN

ABDULRHAMAN OCHIENG 1ST APPLICANT

HABIL HAGAI OTIENO 2ND APPLICANT

AND

MANSA EAST AFRICA LIMITED RESPONDENT

JUDGMENT

1. By a Notice of Motion dated 15/09/2023 expressed to be brought under Order 51, Rule 1 of the [Civil Procedure Rules](#) and Section 51 (2) of the [Advocates Act](#) Cap 16 Laws of Kenya and all other enabling provisions of the Law, the applicant/advocate Abdiaziz & Co. Advocates seeks for orders:
 - a. That this Honorable Court be pleased to order the Certificate of Costs in respect of the taxation order made on 26th September 2022 for the sum of Kenya Shillings Three Million, Twenty-Six Thousand and Two Hundred and Ten Only (Kshs. 3,026,210=) be adopted as judgement and decree of this court and consequently, judgement be entered for the Applicants against the Respondent, for Kshs. 1,513,105/=.
 - b. Interest be granted on prayer (1) hereinabove at the rate of 14% per annum from the date of delivery of the Ruling on Costs on 26th September 2022 until payment in full.
 - c. Costs of this application be awarded to the Applicant and the same be assessed and included in the decree.
2. The application is predicated on grounds set out in the application and supporting affidavit of Hassan Sheikh Abdiaziz 15/09/2023.



3. According to the applicants they lodged an appeal in National Environment Tribunal (NET) Appeal No. 8 of 2019 against National Environment Management Authority (NEMA) and the Respondent herein.
4. In its judgment of 6/02/2020 NET entered a judgment in favour of the applicants'. The applicants thereafter filed their bill of costs dated 13/02/2020 and taxation of costs was awarded to them upon the bill being taxed on 26/09/2022 at Kshs. 3,026,210 which was to be paid jointly and severally. The applicants attached a copy of the ruling marked as "HAS-3".
5. The Certificate of costs was served upon the Respondents for settlement but the respondent herein has failed to honor the certificate of costs issued on 26/09/2022 and the applicants seek have it adopted as decree of the court for purposes of enforcement and payment by the respondent. The Certificate of Taxation has not been set aside or stayed by the court or appealed against.
6. On 4/10/2023 the applicant Hassan Sheikh Abdiaziz having personal conduct of this matter confirmed service and produced an affidavit of service to that effect.
7. The application is opposed. The respondent filed a replying affidavit sworn on 18/10/2023. The gist of the replying affidavit is that Section 130 (2) of *Environmental Management Coordination Act* 1999 that "no decision or order of the Tribunal shall be enforced until the time for lodging an appeal has expired or, where the appeal has been commenced until the appeal has been determined.
8. That the Respondent has filed an appeal against the ruling being ELCA E101 of 2022 and he annexed a copy marked as "VM1" dated 26/10/2022.
9. Therefore, the ruling cannot be enforced until the Appeal is heard and determined. The Application is therefore premature.
10. The parties argued the application by way of written submissions.

Analysis and Determination

11. I have carefully considered the application by the applicants. On 9/10/2023 when the matter came up under certificate of urgency, I directed the applicants' counsel to serve the respondent's counsel who had indicated that he had not been served on time. Upon service the applicant was granted 7 days to file a further affidavit upon being served by the respondent and further directions were issued on filing of submissions.
12. As already indicated the respondent filed a replying affidavit under protest sworn on 18/10/2023.
13. In the case of *L.N. Ngolya and Company Advocates vs Jackson Mithi Kilango* [2008] eKLR Lenaola J (as he then was) was faced with pertinent procedural question of whether, upon taxation of costs, an advocate can execute for the recovery of the taxed costs without filing a suit for judgment on the Certificate of Costs. In paragraph 6 of the judgment in the *L.N. Ngolya & Company Advocates* (ibid) the court held that once costs are taxed, then Section 48 and Section 49 of the Act became operational and the advocate should follow through on the steps provided to institute a suit for recovery of costs and obtain a judgment and decree capable of being executed.
14. The Certificate of Costs provides the basis for exercise of jurisdiction by the court to enter judgment for the taxed costs in accordance with Section 51(2) of the *Advocates Act* below:

"The certificate of a taxing officer by whom it has been taxed shall, unless it is set aside or altered by the court, be final as to the amount of the costs covered thereby, and the court may



make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”

15. Similar position was reiterated in the case of *Musyoka & Wambua Advocates v Rustam Hira Advocate* (2006) eKLR where it was held: -

“Section 51 of the Act makes general provisions as to taxation, as the marginal note indicates. One of those provisions is that the court has discretion to enter judgment on a Certificate of Taxation which has not been set aside or altered, where there is no dispute as to retainer. This in my view is a mode of recovery of taxed costs provided by law, in addition to filing of suit.....”
16. The procedure provided in section 51(2) of the *Advocates Act* aids expeditious disposal of cases relating to recovery of advocate-client costs as long as:
 - (1) the costs have been taxed by and certified under the hand of the taxing master by a Certificate of Costs;
 - (2) the Certificate of Costs has not been set aside or stayed or appealed against on a reference filed upon it; and
 - (3) there is no dispute on retainer. In such case, judgment is ordinarily entered in the sum in the Certificate of Costs upon application by the advocate. The application may be commenced by way of a Notice of Motion which in law is potent tool for originating a suit.
17. The National Environment Tribunal has jurisdiction to make an order for costs pursuant to Section 129 (3) (c) of *EMCA* and Rule 39 of the *National Environment Tribunal Procedure Rules*, 2003. The legal framework for assessment of costs before tribunals including the National Environment Tribunal is provided for under Schedule 11 of the *Advocates (Remuneration) (Amendment) Order*, 2014. Where the value of the subject matter can be ascertained from the pleadings filed, then Party and Party costs are computed as provided under Schedule 11 (8). Where the value of the subject matter cannot be ascertained, the scale is provided for under Schedule 11(9).
18. In the present case, the Tribunal made a finding in its judgment dated the 6/02/2020 wherein the Applicants’ Appeal was found to be successful and allowed it with costs. Subsequently the ruling on the issue of costs was delivered on 26/09/2022 with the respondents being asked to pay the costs jointly and severally totaling Kshs. 3,026,210 and a certificate of costs was issued.
19. The respondent argues that since they have filed an appeal then the application before the court cannot proceed until the appeal is heard and determined. I am not persuaded with his argument since the certificate of costs has not been set aside or altered. Further the respondent filed his appeal on 26/10/2023 well aware that there was this application before this court.
20. The logical thing that the respondent should have done should have been to ask the court to consolidate this application and the appeal, he did not. When he appeared in court on 9/10/2023 long before he filed the appeal he never mentioned that there was an appeal filed.
21. In fact, I have not been shown any reference against the decision of the taxing master herein. Accordingly, I find the application by the advocate/applicant merited. I hereby enter judgment for the advocate in terms of the Certificate of Costs dated 26/09/2022. As a legal consequence, a decree shall be drawn accordingly. Needless to state that, execution of the decree is in accordance with the provisions of the *Civil Procedure Act* and *Rules*. As the applicant sought, there will be no order as to costs.



It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF JANUARY 2024.

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MOGENI J

JUDGE

Ms. Anjiko holding brief for Mr. Aziz for the Applicant

Ms. Rutvi Shah for the Respondent with Mr. Mailu

Court Assistant: Sagina

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MOGENI J

JUDGE

