Obora v Rift Valley Railways (Civil Appeal 448 of 2019)
[2025] KECA 581 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KECA 581 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 448 OF 2019

DK MUSINGA, F TUIYOTT & GV ODUNGA, JJA

MARCH 28, 2025

BETWEEN

WILLIAM NEMBE OBORA & 73 OTHERS ..... APPELLANT

AND

RIFT VALLEY RAILWAYS ..... RESPONDENT

(Being an appeal from the ruling and order of the Employment and Labour Relations Court, Nairobi (M. Onyango, J). delivered on 10th August 2018 in ELRC Cause No. 499 of 2012)

JUDGMENT

1. This appeal has, as its genesis, the judgement delivered by Mbaru, J. on 18th June 2014 in Nairobi ELRC Cause No 499 of 2018. In that decision, the learned Judge entered judgement for the appellant against the respondent in the main claim and dismissed the counterclaim that had been filed by the respondent against the appellant. In so doing, the learned Judge declared that the summary dismissal of the appellants by the respondent was unfair and unlawful and awarded each of the appellants twelve months gross salary from 4th July 2011 to 26th March 2012 amounting to Kshs 20,871,664.00. Also awarded to each appellant was one month's gross pay in lieu of notice. Both amounts were directed to accrue interest from the date of dismissal till payment in full. Lastly, the learned Judge ordered that:

> "Costs of the suit awarded to the claimants."

2. It is the interpretation of this last order that eventually provoked this appeal. When the matter went for taxation of the appellants' costs, the taxing officer, by a decision made on 22nd June 2017, based the taxed amount only on the subject matter of the suit and not on the counterclaim, stating:

> " Given that the jurisdiction of the taxing master is based on the orders issued by the court, I find that Order (4) of the Judgement dated 18th June 2014 was only limited to an award for costs of the suit. In the premise, instructions fees would be based on Kshs 33,916,454/

= and thereby attracting fees of Kshs 535,955.68. Consequently, fees for getting up would be Kshs 178,651.89 being a third of the instructions fees."

3. Aggrieved by the said decision, the appellant moved the Judge of the Employment and Labour Relations Court, pursuant to, amongst other provisions, rule 11(2) of the Advocates (Remuneration) Order, 2015, seeking to have the decision of the taxing officer set aside on the grounds that the appellants' bill of costs was based on a subject matter of Kshs 33,916,545 instead of Kshs 42, 300, 000 which the appellants believed ought to have been the subject matter for the purposes of taxation if the counterclaim had been taken into account.

4. In the ruling the learned Judge, while referring to the cases cited before her, dismissed the application, stating that:

> " These cases are a clear demonstration that a suit is not the same as counterclaim and unless the court specifically awards costs for a counterclaim, none is payable. I therefore find that the Deputy Registrar was right in basing the taxed amount on the subject matter of the suit and not the counterclaim as no costs were awarded on the counterclaim in the judgment."

5. In this appeal, the appellants have taken issue with the said decision on the grounds that the learned Judge erred in law and fact: by misapplying well established principles applicable in dealing with applications under rule 11(2) and Schedule 6 of the Advocates (Remuneration) Order 2015 that quantum can only be determined from three grounds, the pleadings, judgement or settlement; by upholding the decision of the Deputy Registrar which solely based the instructions fees on the Kshs 33,916,454/- but failed to have regard to the dismissed counterclaim of Kshs 42,300,000; in finding that 'costs of the suit' as awarded in the judgement merely referred to costs on the appellants' claim and not the counterclaim; in finding that the counterclaim was not part of the suit; by improperly exercising her discretion; and in failing to appreciate the principles of taxation in rendering her decision.

6. We heard the appeal on 3rd February 2015 when learned counsel, Ms Khadijah, held brief for Mr Muchemi for the appellants, while learned counsel, Ms Winfred Mutinda, held brief for Mr Thuo for the respondent. Counsel relied on their written submissions which they briefly highlighted.

7. With due respect to counsel, the bulk of the submissions were directed to the exercise of discretion by the taxing master, yet the appeal is against the decision of the learned Judge dismissing the application for setting aside the taxation, not on the basis of the exercise of discretion, but on the basis that no costs were expressly awarded by Mbaru, J. in the judgement.

8. According to the appellants, the word 'suit' as employed in the judgement connotes both claim and counterclaim since section 2 of the *Civil Procedure Act*, defines 'suit' to mean all civil proceedings commenced in any manner prescribed; that based on the decision in William Koross v Hezekiah Kiptoo Komen & 4 Others [2015] eKLR, there cannot be two distinct judgements where a suit has an original claim and counterclaim; that Order 7 rule 3 of the Civil Procedure Rules contemplates a situation where a setoff or a counterclaim is raised in order to enable the court to pronounce a final judgement in the same suit; that the word 'suit' as envisioned in Order 7 rule 3 must be interpreted in line with the principles in Law Society of Kenya v Kenya Revenue Authority & Another [2017] eKLR; and that the learned Judge erred in law and in principle by upholding the ruling by the Deputy Registrar that failed to consider the value of the counterclaim in computation of the instructions fees.

9. On behalf of the respondent it was submitted: that this being a second appeal from the decision of the taxing officer, the appeal must be restricted to maters of law; that the jurisdiction of the taxing officer flows from the orders granted by the court; that the appellants ought to have either challenged

the finding of the trial Judge in so far as the costs were concerned or sought a review thereof; that the word 'suit' as used in the judgement could not reasonably be taken to mean both the main suit and the counterclaim; that based on the decision in Patrick O. Wabidonge v Kobil Petroleum Ltd [2010] eKLR, a counterclaim is a separate suit while on the authority in the case Kenya Commercial Bank Ltd v James Karanja [1981] eKLR a counterclaim is a fresh suit; that the award of costs on the main suit does not include costs on a counterclaim as orders as to costs are specific and consequently, where costs for a counterclaim are not awarded, none should be claimed; that based on the decision in Musoke v Dol [1963] EA 526, separate fees may be allowed for a claim and counterclaim; that courts are alive to the issue that they have discretion to award costs for both the claim and counterclaim or either suit.

10. We have considered the appeal, the submissions and the authorities cited. Before we deal with the crux of the matter at hand, it was contended by the respondents that this being a second appeal, this Court's jurisdiction is restricted to matters of the law. As we stated at the beginning of this judgement, the appeal arises from an objection to taxation (commonly referred to in litigation parlance as reference) to the Judge of the Employment and Land Court from a decision of the taxing officer. That objection was substantially made pursuant to paragraph 11(1), (2) and (3) of the Advocates (Remuneration) Order which provides that:

    1. Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

    2. The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

    3. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

11. It should be remembered that taxation of costs applies to matters filed in the High Court and Courts of equal status. The process of taxation of a party and party bill of costs is undertaken in the same file in which the costs were ordered to be paid. Accordingly, the process of taxation is not a fresh suit That is the reason objections from decisions of the taxing officers are by way of a chamber summons instead of an appeal. Therefore, it would be a misnomer to argue that the objection to the taxation is a first appeal. This comes out clearly from paragraph *11* above where it is expressly stated that a challenge to taxation is by way of an objection while a challenge to this Court from the decision arising from the objection is an appeal.

12. The crux of this appeal is whether for the purposes of taxation of costs, an order awarding costs of the suit includes the costs of the counterclaim. According to the appellants, the word 'suit' where here is a counterclaim includes the counterclaim for the purposes of an award of costs. That interpretation in our view is too broad. Order 7 rule 13 of the Civil Procedure Rules, for example, provides that:

    " If, in any case in which the defendant sets up a counterclaim the suit of the plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with."

13. That rule clearly creates a distinction between the counterclaim and the suit of the plaintiff. This Court, in *County Government of Kwale & 2 others v Rahimkhan & 5 others (Civil Appeal 75 of 2020)* [2023] KECA 308, dealt with the said rule and held that:

> "The rationale for this provision is that a counterclaim is separate claim and is only brought within the main claim for the purposes of convenience. A counterclaim is a case in its own right, completely different from the plaintiff's case and it will fall or succeed on its own merits; it is a form of cross suit in which the parties transpose roles, whereby the defendant becomes the plaintiff and the plaintiff the defendant hence a counterclaim is a suit distinct from the plaintiff's suit."

14. The principles guiding taxation of costs where there is a counterclaim were extensively dealt with by the predecessor of this Court in D'silva v Rahimtulla and Others [1968] EA 335. Sir Charles Newbold, P. rendered himself as follows:

> "If there is a counterclaim then the amount of costs to be given on that counterclaim, where an order is made for the defendant who has counterclaimed to get his costs on the counterclaim, is not to be determined as if it were a separate action but is to be determined on the basis that only the additional costs resulting from the counterclaim are to come within the order of the court allowing the defendant the costs of the counterclaim...The position of plaint and counterclaim is equated with that of appeal and cross-appeal and on a cross appeal only such additional costs as arose from the cross appeal are to be given to the cross-appellant. Therefore, on a counterclaim all the successful party, who has been ordered to get his costs on the counterclaim, can obtain are those costs which arose purely by reason of the counterclaim and he is not entitled to obtain his costs as if the counterclaim were a separate action...While normally the word "plaint" should be construed to include counterclaim, it would be wrong to do so in the particular circumstances of this case. The effect of doing so would be to grant to the defendant who counterclaimed his instruction fees on precisely the same basis as if the counterclaim were a separate action which would be running counter to the decisions in England and in Kenya. While, generally, it is accepted that the word "plaint" should include another type of proceedings which, though it is not a plaint is, for all practical purposes in other circumstances equated to a plaint, in the light of the particular provision in which the word comes and in these particular circumstances the courts should not enlarge the word "plaint" to include counterclaim." [Underlining ours].

15. On his part, Sir Clement De Lestang, VP. opined that:

> "Whereas our rules, as for that matter the English rules from which they are derived, attribute the same effect to a counterclaim as to a cross suit, this falls short of making a counterclaim a plaint. To come within paragraph (f) of item (1) of Schedule 6 of the Remuneration of Advocates Order, a counterclaim would have to be a proceeding commenced by plaint which it is not. A plaint has to conform with Order 7 of the Rules while a counterclaim is governed by Order 8. The inclusion of a counterclaim in clause (f) would prevent the application of the principle which is well-established for the taxation of a counterclaim, especially in the circumstances of this case."

16. Delivering his opinion, Spry, JA. (as he then was) stated:

> "Rule (f) of item (1) of paragraph 6 of the Advocates Remuneration Order relates to instruction fees "to sue or defend any other proceeding commenced by plaint" or originated

> in certain other manners. The reference to other proceedings follows certain specified actions which are not relevant to these proceedings. Paragraph (l) refers to instruction fees to sue or defend in any case not otherwise provided for…Whereas it is true that a counterclaim has many of the attributes and may in many ways be equated to a cross-action, it is not one. Indeed, the procedure is expressly set up so as to avoid the necessity of cross- actions."

17. From the above decision, what comes out is that the principles that apply in taxation of costs in counterclaims is not the same as those that apply to taxation of costs in the main claims. Further, although a counterclaim is a separate and fresh suit (see Kenya Commercial Bank Ltd v James Karanja (supra)), for the purposes of taxation, a counterclaim is not to be treated as a plaint. In addition, for one to be liable to pay costs on a counterclaim there ought to be an order to that effect.

18. In our view, the decision to whether to award costs of a counterclaim is an exercise of discretion of the trial Judge. Where there is no express order as to the costs of the counterclaim, the prudent thing to do is to seek clarification from the trial court on the same. Parties ought not assume that once the main claim succeeds and the counterclaim fails, the order awarding costs in the suit includes the costs of the counterclaim. If we were to hold otherwise, one would find it difficult to explain that principle in cases where both the main suit and the counterclaim are either dismissed or succeed. This therefore makes it necessary that the court determining a suit in which a counterclaim is filed expressly pronounces itself on the costs of the counterclaim and where there is no such express order, the omission can only be corrected by the trial Judge.

19. In this case, as there was no express order regarding the counterclaim, the learned taxing officer cannot be faulted for declining to purport to interpret the order of the trial Judge as regards the award of the costs of the counterclaim. The role of the taxing officer is restricted to taxation of costs and in the exercise of such powers the taxing officer cannot, under the guise of taxation, correct what parties may deem to be slips in the decision giving rise to the taxation. That is a power reserved for the trial Judge.

20. In the circumstances, we find no merit in this appeal, which we hereby dismiss, but since the failure to deal with the issue of the costs of the counterclaim was not of the making of any of the parties, we make no order as to the costs.

21. Those shall be our orders.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF MARCH, 2025.

D. K. MUSINGA (PRESIDENT)

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

F. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR