



**Mutyaene v Miriti & 4 others (Environment & Land Case
E002 of 2020) [2024] KEELC 3242 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 3242 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E002 OF 2020**

CK YANO, J

MARCH 7, 2024

BETWEEN

REUBEN KIOKO MUTYAENE PLAINTIFF

AND

HELLEN KIUNGA MIRITI 1ST RESPONDENT

NAHASHON KOOME 2ND RESPONDENT

LAND REGISTRAR, MERU CENTRAL 3RD RESPONDENT

THE LAND SURVEYOR, MERU COUNTY 4TH RESPONDENT

THE ATTORNEY GENERAL 5TH RESPONDENT

RULING

1. By a notice of motion application dated 15th June, 2022, the Plaintiff/applicant is seeking the following orders:-
 1. Spent
 2. That pending hearing and determination of the application inter parties, the court do stay execution of taxed Bill of costs as per the certificate of costs dated 26th May, 2022 and thereafter pending hearing and determination of pending appeal Nyeri COACA NO. E143 of 2021.
 3. That the applicant be granted leave to file a taxation reference to this honourable court against the ruling of the Taxing Officer delivered on 13th May, 2022 as per annexed application for reference.
 4. That the application for reference annexed hereto be deemed as duly filed and served upon payment of requisite fees.



5. That this Honourable court be pleased to set aside the ruling and taxation delivered on 13th May, 2022 and the consequently certificate of costs dated 26th May, 2022 and to further re-assess/re-tax the advocates Bill of costs dated 28th June, 2021.
 6. That there be such other or further orders as the court may deem fit and just to grant in the circumstances.
 7. That costs of this application be in the cause.
2. The application is premised on the grounds thereon and supported by the affidavit of Reuben Kioko Mutyaene, the applicant sworn on 15th June 2022 and the annexures thereto. The application is said to be brought under Rules 11, 13A and 16 of the *Advocates (Remuneration) Order*, Section 3, 13 and 19 of the *Environment and Land Court Act*, Rules 1 and 10 of the Practice Directions on Proceedings of the Environment and Land Courts, 1A, 1B, 3, 3A, 27, 80, 95 and 99 of the *Civil Procedure Act*, Order 22 rules 25, Order 42 rule 6, order 45, order 51 rule (1), (2) & 14(1) of the *Civil Procedure Rules*, Articles 22, 23, 35(2), 40, 43, 47, 50(1), 159(2), 258 and 259 of *the Constitution* of Kenya and all other enabling provisions of the law.
 3. By another Notice of Motion dated 6th June, 2023 said to be brought pursuant to Sections 3 and 19 of the *Environment and Land Court Act*, Rule 1 of the Practice Directions on proceedings of the Environment and Land Court, Section 1A, 1B, 3, 3A 22, 95 and 100 of the *Civil procedure Act*, Order 8 rules 3 and 5 of the *Civil Procedure Rules*, Articles 25(c), 27, 35, 46, 47, 48, 50(1) and 159(2) of *the Constitution* of Kenya and all other enabling provisions of the law, the applicant is seeking for orders:
 - a. That the Honourable Court be pleased to grant leave to the plaintiff/Applicant to amend the Notice of Motion Application and Chamber Summons (Taxation Reference-Annexure "RKM-8" dated 16th May 2022 as set out in the amended versions annexed hereto.
 - b. That the amended Notice of Motion Application and amended Chamber Summons (Taxation Reference) dated 06-06-2023 together with the ancillary annexures thereto marked "RKM-15" to "RKM-26" be deemed as duly filed.
 - c. That this Honourable Court be pleased to issue orders directing both the 1st and 2nd Respondents/Defendants to produce, file in court and serve certified copies of their National Identity Cards (IDs) for purpose of discovery, inspection and proper identification of the parties in this matter.
 - d. That there be such other or further orders as the Court may deem fit and just to grant in the circumstances.
 - e) That the cost of this application be in the cause
 4. The application is based on the grounds thereon and supported by the affidavit of REuben Kioko Mutyaene, the applicant, sworn on 6th June 2023. The applicant states that he has lately obtained vital material information from statutory bodies, Land Surveyors Board (LCB) and the Institution of Kenya Surveyors of Kenya (ISK) that puts to doubt the 2nd defendant's/respondent's identity and critically indict his professional qualifications as a surveyor and is put to strict proof that he is a surveyor recognized by law. That the said new information is core and goes into the substratum of the litigation hence the need for the court to allow the proposed amendments and the new annexures thereto and place paramount consideration of its import and effect in the matter.
 5. That while the 1st and 2nd defendants/respondents have prosecuted this matter and sworn affidavits and received certificate of costs in the names Helen Miriti Kiunga and Nahashon Koome respectively,



- different names appear in the numerous documents filed in court. That they have both not filed copies of their National Identity Cards as proof of identity. The applicant avers that it is absolutely necessary that the court is satisfied of the precise identity and citizenship registration details of the defendants/respondents as they exist in their material identity cards for correct naming of the parties and to ensure orders and ensuing reliefs are directed to the right persons/parties, and not granted in vain.
6. The applicant avers that a certificate of costs being culmination of taxed Bill of Costs is a legal instrument with monetary value and that the amount payable cannot be remunerated to person(s) whose identity is questionable or has not correctly been established. That it has become necessary to amend both the Notice of motion Application and Chamber Summons (Tax Reference) so that the New Information/documents are incorporated/captured to ensure fair and just determination of the application.
 7. It is the applicant's contention that the proposed amendments shall not in any way prejudice the defendants/respondents but will enable the court to determine with certainty the real question or issues raised by the applicant. That the reference application has not been heard by the court. The applicant urges the court to consider and unreservedly grant leave to amend as sought in the application herein, and for discovery and production of the vital identification documents in furtherance of the overriding objective of the Environment and Land Court Act and Civil Procedure Act, thus ensure fair hearing and serve justice appropriately in accordance with the law.
 8. In his supporting affidavit, the applicant has reiterated the above grounds and avers inter alia that he is the proprietor of all that parcel of land known as LR. No. NTIMA/NTAKIRA/3121 located in Mpuri Location Meru County. That on 16th June, 2022, he filed an application seeking leave to file a Taxation reference against the 1st and 2nd defendants/respondents, Bill of Costs ruling of the taxing officer delivered on 13th May, 2022. That the suit stems from alleged land re-surveying and land boundary adjustments occasioned by the 2nd respondent who purports to be a surveyor. That out of the, unlawful and unauthorized joint actions of the respondents, the applicant's land was adversely affected and its user diminished, hence the present dispute. The applicant has annexed copies of the 1st and 2nd defendant's replying affidavit dated 28/10/2020, letter to Land Surveyors Board dated 10/08/022 and the response dated 07/09/2022 and email, affidavit of service, consignment notes, chiefs' letter, annexure dated 08/10/2020, affidavits filed on 13/7/2022, certificate of costs and letter dated 21/09/2020.
 9. The applications are opposed by the 1st and 2nd defendants/respondents through a replying affidavit dated 22nd June, 2023 sworn by Hellen Kiunga Miriti. It is their contention that the applications are misguided, frivolous, vexatious an abuse of court process, fatally defective and a contemptuous waste of judicial time and resources. That it has become manifestly apparent that the applicant's intention is to defeat the cause of justice by creating delays through a myriad of voluminous applications which have the effect of denying the 1st and 2nd respondents the opportunity to enjoy the fruits of the court's judgment.
 10. Relying on advice, the 1st and 2nd respondents contend that the court is functus officio with regard to issues concerning merits of the case since the court already pronounced itself on the matter, and therefore the myriad of concerns raised in the applications regarding the merits of the applicant's case are not only misguided but also placed before the wrong forum. That the decision on whether or not to award costs is also not a decision of the Deputy Registrar, but of the trial court during the judgment. That the plaintiff's averments regarding the respondents National Identity Cards is a red herring with no basis in the taxation process and is only intended to divert the courts attention in order to defeat



the cause of justice and to deny the 1st and 2nd respondents the opportunity to enjoy the fruits of the courts judgment.

11. The 1st and 2nd respondents further state that it is not true that their Advocates only opposed an Interlocutory Application but they prosecuted a defence by way of supporting the 3rd to 5th Defendants Preliminary Objection which had the effect of dismissing the entire suit on a point of law and they also filed written submissions dated 8th January 2020 and a Replying Affidavit filed on 28th October 2020. They also denied that the Applicant was condemned unheard because he was served with the Notice of Taxation dated 7th January 2022 informing him that the Bill of Costs would be Taxed on the 17th March 2022. That the applicant then filed a Preliminary Objection dated the 10th March 2022 which was dismissed by the Court just before a Ruling on the Taxation was delivered on 13th May 2022.
12. The 1st and 2nd respondents state that the various Applications, the second Notice of Preliminary Objection, the Notice of Motion Applications and Chamber Summons Applications appear to be masking an Appeal or Review which clearly lack merit and is placed before the wrong forum. That the Application seeks to challenge the Court's Ruling which awarded costs of the suit to the defendants by sneaking in a Review through the back door albeit without sufficient grounds for Review.
13. The 1st and 2nd respondents aver that the Court has Jurisdiction and authority to determine whether or not to direct a matter to proceed by way of Written Submissions or Oral Submissions based on its inherent and unrestricted jurisdiction and in exercise of the same, the Court was justified to make a Ruling upon hearing the parties especially because there was no merit in the Applicant's Preliminary Objection and again because the Trial Court was not at any time bound to give directions to make Written submissions under any law.
14. The 1st and 2nd respondent aver that it is not true that the Applicant will suffer substantial loss because his claim merely challenges the Taxing Officer's alleged error in arriving at a figure of Ksh 153,148 while the Applicant believes he should have arrived at Ksh 152,788 which is a negligible difference of Ksh 360/=, and in that regard in order to bring the issue to an end they conceded to Applicant's proposal of Ksh 152,788/=.
15. The 1st and 2nd respondents further aver that instruction fees are payable as Party to Party Costs the moment a Notice of Appointment of Advocates or Memorandum of Appearance has been filed by an Advocate on behalf of a party therefore the Hon. Trial Court's award was justified in factoring instruction fees since they filed a Notice of Appointment dated 28th October 2020 through their respective Advocates on record. That the costs assessed were in no way inordinately excessive and that in any event, if there should be a review of the costs it should be upward to include the 3rd to 5th defendants who also participated in the final determination of the suit.
16. The 1st and 2nd respondents state that this was also a complex, contentious and litigious matter which was conflated by the voluminous, vague, wordy, bulky and ambiguous choice of words employed by the Applicant throughout the suit and the Court should take note of that if it is inclined to review the costs as assessed.
17. The 1st and 2nd respondents aver that fees for getting up at a trial are assessed not less than one-third of the instruction fee allowed on taxation and therefore the Taxing Officer made no error in her determination thus the Application is clearly unjustifiable.
18. The 1st and 2nd respondents further aver that t the Hon. Court is not bound under any law to Tax Costs in one event since Costs of Appeals are taxed separately from costs of the Trial Court and that, that is



the most convenient way to Tax costs where there is an Appeal because sometimes costs of an Appeal may be borne by a different person from the one who bears costs of the Trial Case.

19. The 1st and 2nd respondents state that there is no need to Stay the payment of Costs in this matter because even in the unlikely event that the Appeal is allowed and the order on Costs is reversed in the Applicant's favor he will still have the option to have his Certificate of costs executed.
20. The 1st and 2nd respondents aver that they are advised by their counsel that the applications are premised under very many sections of the law and some sections quoted therein do not exist under Kenyan Law while others have no significance to the current application. They state that there should be an end to litigation and the court should not allow the Applicant to deny them the fruits of its judgement on account of preposterous, frivolous and unfounded Applications engineered to defeat the course of justice. They prayed for the said applications to be dismissed with costs to the respondents.
21. The application was canvassed by way of written submissions. The applicant filed his submissions dated 18th September 2023 and further supplementary submissions dated 13th December 2023 in person while the 1st and 2nd respondents filed theirs dated 18th October, 2023 through the firm of Mithega & Kariuki & Co. advocates. I have read the said submissions and I need not respond to the same in this ruling.

Analysis And Determination

22. I have considered the applications, the response filed as well as the submissions made. The main issues for determination are:-
 - (i) Whether, the court should grant leave to the applicant to amend the Notice of Motion application and chamber summons dated 16th May 2022.
 - (ii) Whether the court should direct both the 1st and 2nd respondents to produce, file in court and serve copies of their National Identity cards.
 - (iii) Whether stay of execution of the taxed Bill of Costs should be granted pending hearing and determination of Nyeri COACA No. E143 of 2021.
 - (iv) Whether leave to file a Taxation reference against the ruling of the Taxing Officer should be granted.
 - (v) Whether the court should set aside the ruling and Taxation delivered on 13th May, 2022 and the consequential certificate of costs dated 26th May, 2022 and to further re-assess/re-tax the Advocates Bill of Costs dated 28th June 2021.
23. With regard to the first issue, the principles that guide amendments of pleadings were discussed in the case of *Joseph S. Wafula Versus Elena Chepkurgat Talam (Sued as the Legal Administrator of the estate of the late Kiptalam Arap Kogo)* (2019) eKLR where it was held that:-

“The overriding consideration in an application for leave for amendment ought to be whether the amendment sought are necessary for the determination of the suit and whether the delay in bringing the application for amendment is likely to prejudice the opposite party beyond compensation in costs”.



24. Further, the principle that guide the court in considering an application for amendment of pleadings were set out by the Court of Appeal in *Central Kenya Limited Versus Trust Bank Limited* (2000) 2EA 365 as follows:-

“A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side”.

25. In the case of *George Gikubu Mbutia Versus Consolidated Bank of Kenya Limited & Another* (2016) eKLR, the Court of Appeal expressed itself as follows:-

“As regards the law, the High Court readily accepted that the court has unfettered discretion to allow the amendment of pleading, which discretion must be exercised judiciously. It is accepted too as a general position that parties to a suit have the right to amend their pleadings at any stage of the proceedings before judgment and that court should liberally allow such amendments. However, he also noted situation which the court will refuse to exercise its discretion to allow amendments. Such cases include where a new or inconsistent cause of action is introduced, where vested interests or accrued legal rights will be adversely affected, where prejudice or injustice which cannot be properly compensated in costs is occasioned to the other”.

26. I have looked at the record. The application seeking leave to amend was filed on 8th June 2023 while the application sought to be amended was filed on 16th June 2022. Therefore, the application for amendment was made after a period of about one year. I have also perused the application dated 6th June 2022 and note that the applicant has not given any explanation for bringing the application for amendment after a period of about one year which is no doubt is clearly inordinate.

27. I have also looked at the proposed amendments and I note that the same are mainly on new issues on the grounds on which the original motion is premised and the averments in the affidavit in support of that application. In my view, an application for leave to put in a further or supplementary affidavit would have sufficed, and not an application for amendment as sought herein. It is my view that good practice dictates that a party who deems it necessary to introduce new evidence in an application should simply make an application for leave to file a further or supplementary affidavit. I am therefore not persuaded that I should exercise my discretion in favour of the applicant and grant leave to amend. The proposed amendments are more in the form of evidence and not the pleadings. Moreover, in the case of *Rubina Ahmed & 3 others Versus Guardian Bank Limited (sued in its capacity as a Successor in title to First National Finance Bank Limited)* [2019]eKLR the court of Appeal held inter alia, that an “amendment will not be allowed at a late stage of the trial if on the analysis of it is intended for the first time thereby to advance a new ground of defence”. This in my view is clearly what the applicant is trying to do in this case.

28. The next issue to consider is whether the court should order the 1st and 2nd respondents to produce copies of their National Identification cards. My understanding of this prayer is that the applicant is doubting the authenticity of the documents held by 1st and 2nd respondents herein. The applicant has cited Article 35 of *the Constitution* among others. Whereas the applicant has a right to access to information held by the state under Article 35 of *the Constitution*, the *access to Information Act* provides the legal framework for access of information by a public or private entity so far as the information is



required for the exercise of any right. In this case there is no indication that the applicant has invoked the said Act and requested the information and the Director of National Registration in the office of the State Department for Immigration and Registration of persons has denied him access to the information sought. Moreover Section 35(G) of the *National Police Service Act* allows the Director of Criminal Investigations to undertake forensic analysis while undertaking investigations where a complaint has been lodged as provided by law. From the material on record, there is no evidence that shows that a report was made to the police to carry out any investigations if it was suspected by the applicant that an offence or offences were committed. Section 24 of the National Police Act gives the Inspector General of Police (and Director of Criminal Investigations) the jurisdiction to investigate crimes. Therefore, if the applicant suspects that an offence has been committed by the 1st and 2nd respondents, he ought to have shared the same with the relevant investigative agencies for whatever investigations and forensic reports he may require. It does not require any court order for such investigations to be undertaken where it is suspected a crime has been committed. Directing the 1st and 2nd respondents to deposit their Identification documents in court would be asking the court to descend into the arena of conflict by looking for evidence for parties in respect of contested issues. The court must also exercise caution where the orders sought may end up being an intrusion of other individuals constitutionally guaranteed rights and freedoms. That may amount to a violation of an individual's right to bodily integrity and privacy. I am therefore not persuaded to grant this prayer.

29. The next issue is whether stay of execution should be granted pending the hearing and determination of the case before the court of Appeal. Order 42 rule 6 of the *Civil Procedure Rules* provides the Legal framework to guide the courts in exercising its discretion on whether or not to order stay pending appeal. For the applicant to move the court into exercising the said discretion in his favour, the applicant must satisfy the court that substantial loss may result to him unless stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for the due performance of the decree.
30. In the instant case, the stay sought is in respect of a certificate of costs dated 26th May, 2022 while the appeal in the Court of Appeal at Nyeri is COACA No. 143 of 2021. The order appealed against was for payment of costs. As rightly pointed out by the advocate for the 1st and 2nd respondents, a keen perusal of the applicant's application reveals that he acknowledges that the taxing officer should have arrived at a figure of Ksh. 152,788 instead of 153,148/= which is a difference of Ksh. 360/=. The 1st and 2nd respondent have stated that they are even willing to concede to the said amount to bring this issue to an end. The applicant has not indicated that the respondents are unable to pay him if the appeal is successful. Therefore, in my view the applicant will not suffer any irreparable or substantial loss if the stay is not granted. I am also not convinced that the appeal will be rendered nugatory if the order of stay is not granted.
31. On whether leave to file a reference against the ruling of the taxing officer should be granted, paragraph 11 of the *Advocates Remuneration Order* gives the Court power in its discretion by Order to enlarge the time for lodging a reference notwithstanding the expiry of the 14 days period prescribed for the reference from the taxing master's decision on costs. However, in exercising its discretion in this regard, the court should consider whether there has been no inexcusable delay in presenting the application. The ruling of the taxing officer was made on 13th May 2022 while the application for leave to file a reference outside the time prescribed was filed on 15th June, 2022. This was a delay of about two weeks after the decision was delivered. The applicant has stated that he was indisposed since April, 2022 with chronic eye ailment and was on treatment. Although the applicant has stated that he has annexed a copy of the medical practitioner's hospital chit Marked "RKM -5 ". I have perused the application and note that there is no such annexure in the supporting affidavit as alleged. To my mind therefore,



the Applicant is not being truthful and is out to mislead the court. In my view, such a party does not deserve the discretion of the court. It is trite law that he comes to equity must come with clean hands. The court cannot come to the aid of a party who deliberately and blatantly misleads the court and more so under oath. It is not allowable for a party to abuse the court process.

32. The other issue is whether the ruling and taxation delivered on 13th May 2022 and the consequent certificate of cost dated 26th May, 2022 should be set aside and re-assess/re-tax the Advocates Bill of Costs dated 28th June, 2021. These prayers portend a challenge to the decision of the Taxing Officer. These are matters that ought to be urged in a reference under paragraph 11 of the Advocates Remuneration Order.

33. In the case of *Machira & Co. Advocates Versus Magugu* (2002) 2EA 428, Ringera J (as he then was) stated:-

“As I understand the practice relating to taxation of bill of costs, any complaint about any decision of the taxing officer whether it relates to a point of law taken with regard taxation or to a grievance about the taxation of any item in the bill of costs is ventilated by way of a reference to a judge in accordance with paragraph 11 of the Advocates Remuneration Order”.

34. What is before me is not a reference from taxation but an application seeking to set aside the orders made by the taxing officer. The only recourse to the applicant if aggrieved by the decision of the taxing officer was to lodge a reference. It has been said time and again that where there is a specific procedure provided for addressing a grievance that procedure should be strictly complied with. From the above enunciation, I find that the prayer for setting aside is incurably incompetent and is dismissed.

35. The upshot is that the Notice of Motion dated 6th June, 2023 and the Notice of motion dated 15th June, 2022 are devoid of merit and the same are dismissed with costs to the 1st and 2nd respondents.

36. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF MARCH, 2024

Hon. C. Yano

ELC – Judge

In the presence of:-

Court Assistant: Tupet

Kirimi for 1st and 2nd defendants

Reuben Kioko plaintiff present in person

No appearance for Ag for 3rd - 5th defendants

