



**Republic v Export Processing Authority; London Distillers (K) Ltd
 (Exparte Applicant) (Environment and Land Miscellaneous Application
 48 of 2019) [2024] KEELC 3595 (KLR) (29 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3595 (KLR)

**REPUBLIC OF KENYA
 IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
 ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 48 OF 2019**

A NYUKURI, J

APRIL 29, 2024

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL
 REVIEW PROCEEDINGS AGAINST EXPORT PROCESSING ZONE AUTHORITY**

AND

**IN THE MATTER OF: AN APPLICATION FOR LEAVE
 TO INSTITUTE THE JUDICIAL REVIEW PROCEEDINGS**

AND

IN THE MATTER OF: ARTICLE 157 (4), (10) AND (11) THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE PENAL CODE CAP 63 LAWS OF KENYA

AND

**IN THE MATTER OF: THE ENVIRONMENT
 MANAGEMENT AND CO-ORDINATION ACT**

BETWEEN

REPUBLIC APPLICANT

AND

EXPORT PROCESSING AUTHORITY RESPONDENT

AND

LONDON DISTILLERS (K) LTD EXPARTE APPLICANT



RULING

Introduction

1. This matter came up before the taxing officer of this court on 17th February 2021, for the taxation of the respondent's party and party bill of costs dated 13th January 2020, when counsels on both sides applied to have the matter placed before the Judge for directions on whether a certificate for costs of Senior Counsel ought to be issued in view of the fact that the respondent had sought enhanced cost on the basis that they were represented by, among other counsel Mr. Paul Muite Senior Counsel. Acceding to the parties' prayer, the taxing officer placed this matter before me for directions on the certification for costs of Senior Counsel.
2. The history of this matter is that the *ex parte* applicant herein instituted this suit by way of a chamber summons application dated 9th October 2019 seeking leave to seek judicial review orders of *certiorari*, *mandamus* and prohibition against the respondent. The *ex parte* applicant challenged the respondent's decision to suspend their license to discharge effluent into the respondent's main trunk sewer line. The *ex parte* applicant sought for leave to have the respondent's decision in its letter of 20th September 2019 suspending the licence that allowed the applicant to discharge its pre-treated waste water into the EPZA main trunk sewer line, and the letter of 30th September 2019 returning three cheques to the applicants, quashed. They further sought for leave to obtain an order of *mandamus* to compel the respondent to allow the applicant to use their main trunk sewer line in terms of the contract agreed by the parties. In addition, leave was sought to apply for an order of prohibition to prohibit the respondent from interfering with the free flow of the applicants pre-treated waste water in its sewer line. Lastly, they sought that leave granted operates as stay.
3. The statutory statement attached to the application stated briefly that the respondent, a statutory body drawing its funding from the exchequer and having exclusive control and management of EPZA main trunk sewer line, entered into an agreement on 3rd March 2014 with the *ex parte* applicant allowing the latter to discharge its pre-treated effluent into the EPZA main trunk sewer line on some conditions. According to the *ex parte* applicant, the respondents served the *ex parte* applicant with a letter dated 20th September 2019 communicating its decision to suspend the applicant's permit to discharge its pre-treated effluent into the EPZA main trunk sewer line on the basis that tests done on the applicant's effluent showed that the same was hazardous and a danger to human and other living organisms. Therefore, the applicant's complaint was that that the respondent's decision was unreasonable, irrational and unprocedural as the respondent relied on fake test results to make a unilateral decision, thus maintaining that it discharges pre-treated non hazardous effluent into the EPZA main trunk sewer line.
4. On the same date of 9th October 2019, the court allowed the prayers sought in the chamber summons above thereby granting the *ex parte* applicant leave to apply for the judicial review orders as prayed, besides ordering that leave granted operates as stay as sought. It appears these orders jolted both parties into a frenzy, because there was a flurry of applications filed thereafter by both parties in a span of just about two weeks.
5. Five days after leave was granted, which was on 14th October 2019, the *ex parte* applicant filed an application under certificate of urgency dated 13th October 2019 for contempt against the respondent's acting CEO one George Mateteto and John Zeyung Yang, the alleged proprietor of Erdemann Property Limited for violation of the orders of stay granted on 9th October 2019. On the same date of 14th



- October 2019, the respondent also filed a motion under certificate of urgency dated even date, seeking orders that the court vacates the orders of stay made on 9th October 2019, on the basis that the National Environment Tribunal (NET) had granted orders for maintenance of status quo in NET Case Number 27 of 2019 and that therefore if they obeyed the stay orders granted by this court on 9th October 2019, they will be in violation of the orders of NET.
6. On 17th October 2019 and 23rd October 2019, the alleged contemnors respectively filed replying affidavits and grounds of opposition, opposing the application for contempt. On 18th October 2019 the *ex parte* applicant filed the substantive motion dated 17th October 2019 seeking orders of *certiorari*, *mandamus* and prohibition pursuant to leave granted on 9th October 2019.
 7. On 25th October 2019 the respondent filed a motion dated 24th October 2019 for contempt against the *ex parte* applicant's directors for allegedly disobeying the orders made on 18th October 2019 requiring them to allow experts from the respondent and other entities to enter its premises and take samples of the effluent discharged to EPZA main trunk sewer line. It is at this point, when none of their applications had been determined that the parties relented and decided to negotiate this matter. Subsequently on 6th November 2019, the parties filed the consent dated 4th November 2019 which was adopted by this court as an order of the court on 19th November 2019. The consent was to the effect that the *ex parte* applicant's substantive motion dated 17th October 2019 together with all pending interlocutory applications be marked as settled and that the *ex parte* applicant to pay the respondent costs to be taxed by the Deputy Registrar.
 8. It is pursuant to the above consent that the respondent filed their party and party bill of costs dated 13th January 2020, which included enhanced costs on the basis that the respondent was represented by among other counsel, Senior Counsel Paul Muite. Having noted that the fees was based on representation by Senior Counsel and there being no certification by the Judge for cost of Senior Counsel, parties sought for directions of the Judge on the question of issuance of Senior Counsel certificate.
 9. The court directed parties to file and exchange written submissions, and on record are the respondent's submissions supporting issuance of Senior Counsel certificate, filed on 27th February 2023 as well as the *ex parte* applicant's submissions opposing issuance of Senior Counsel certificate filed on 17th May 2023.

Respondent's Submissions

10. Counsel for the respondent submitted that the Senior Counsel appearing for the respondent in this matter Mr. Paul Muite led the firm of Munyao, Muthama and Kashindi Advocates because of the significance of this matter to the respondent and the effect it may have on similar decisions by the respondent relating to other entities which necessitated involvement of a Senior Counsel.
11. According to counsel for the respondent, before the consent was adopted, parties attended court on several occasions and Senior Counsel Paul Muite was involved in various processes including guiding the respondents counsel on responses to the various applications filed and attending court personally on 28th October 2019.
12. Counsel urged the court to be satisfied that Paul Muite Senior Counsel was involved in the matter and therefore the court ought to issue the Senior Counsel certificate while the rest of the matters will be handled by the taxing officer.
13. It was further submitted for the respondent that the proviso under Schedule 6 (1) of the [Advocates Remuneration Order 2014](#) provided for certificate of Senior Counsel and that the purpose of that



certificate is to confirm the involvement of Senior Counsel in the matter. Counsel argued that there is no law defining the extent to which a Senior Counsel must be involved for a certificate to be issued and the court only needs to be satisfied that Senior Counsel was instructed and participated in the matter. Counsel implored the court to find that in this case the Senior Counsel was closely and heavily involved in the matter working closely with the firm of Munyao, Muthama and Kashindi Advocates.

14. Counsel contended that Paul Muite Senior Counsel's involvement included holding various meetings with the respondent's representative under the respondent's advocates, reviewing and approving documents prepared for the respondent for filing in court, advising the defence strategy on various applications, preparing for court attendances and actual court attendances as well as research and coordinating case management which falls within the scope of an advocate's duty to the client. Counsel took the position that there is no requirement that a Senior Counsel leading a firm of advocates must attend court every time the matter comes up for hearing and that the role of Senior Counsel is not limited to court attendance. They argued that the fact that Mr. Paul Muite Senior Counsel may not have attended all court sessions is immaterial as schedule 6 of the [Advocate's Remuneration Order 2014](#) does not provide specific conditions that must be fulfilled to qualify to obtain Certificate for Senior Counsel from the Judge. Counsel observed that grant of certificate of Senior Counsel is the discretion of the Judge on being satisfied that a Senior Counsel was involved.
15. It was argued that seniority is one of the core pillars upon which the legal profession is built and that the court needs to take cognizance of the criteria for conferment for the rank of Senior Counsel under Rule 7 of the [Advocates \(Senior Counsel Conferment and Privileges\) Rules 2011](#) and therefore granting a certificate for Senior Counsel is underpinned on the need to accord due respect to the status of Senior Counsel.
16. Reliance was placed on the case of *Premchand Raichand Limited v Quarry Services of East Africa Limited* (No. 3) [1972] EA 162 for the proposition that Senior Counsel charged relatively higher fees for their services. Counsel also submitted that costs should not be allowed to rise to a level to confine access to justice to the wealthy; that successful litigants ought to be fairly reimbursed for costs incurred; that the general remuneration of advocates must be able to attract recruits to the profession and that there ought to be consistency in awarding costs.
17. Counsel asked the court to consider the complexity of this case, the nature and importance of judicial review application, the value of the subject matter of the dispute and other relevant considerations which justified appointment of a Senior Counsel. They maintained that this matter raised important issues of fact and law affecting interests of the respondents and therefore enhanced the responsibility placed on a Senior Counsel. They argued that issues raised in the suit concerned irrationality as the basis for seeking judicial review and called for the interpretation of the mandate of the respondent under Regulation 12 of the [Environmental Management and Coordination \(Water Quality\) Regulations 2006](#). It was further argued that the respondent's advocates also defended the applications for contempt filed against the respondent. Further, counsel asserted that the respondent was accused of conflict of interest, a matter which needed handling by a Senior Counsel. They submitted that their brief raised public policy issues calling for the expertise and guidance of Senior Counsel as the applicant had questioned the respondent's exercise of statutory powers and sought judicial review orders which are public law remedies. It was their position that this matter was of great importance to the public as it touched on questions of fundamental right to a clean and healthy environment.

Ex parte Applicant's Submissions

18. Counsel for the *ex parte* applicant relied on the case of [Kenya Commercial Bank Limited v John Benjamin Wanyama](#) [2007] eKLR for the proposition that in complex matters a Senior Counsel may



- be instructed to lead and it is for that reason that costs are sometimes enhanced and a certificate for two counsel given by court. On that basis, counsel argued that schedule 6 (1) (iii) of the *Advocates Remuneration Order* provides that where a Senior Counsel certificate is issued by a Judge, instruction fees shall be increased by half and other charges doubles where requisite and that therefore issuance of a Senior Counsel certificate significantly impacts the costs chargeable to a party. In that regard, it was contended for the *ex parte* applicant that the onus is on the party claiming complexity to prove the same and maintained that the mere fact that a matter is of importance to the parties does not necessarily make it complex.
19. On the respondent's submission that they anticipated that the decision in this matter would impact similar disputes relating to other entities necessitating involvement of Senior Counsel, counsel argued that no disclosure was made of the alleged entities and why it was decided by the respondent that it would take the lead in having its decision apply to other entities regarding infractions by its employees on similar subsisting agreements for discharge of effluent. Counsel implored the court not to be persuaded by the respondent's submission that the court was expected to sanitize clear cases of waste of public resources to assist the respondent which is a public institution.
 20. It was further contended for the *ex parte* applicant that the assertion that there is no law defining the extent of the involvement of Senior Counsel for a certificate to be issued, is misinterpretation of the law and an attempt to misguide the court. Reliance was placed on the case of *Republic v Minister for Agriculture & 2 others Ex Parte Samuel Muchiri W'Njuguna & 6 others* [2006] eKLR for the proposition that if there are complex elements in the proceedings they must be specified, including the nature of forensic responsibility placed on counsel and if there is novelty in the proceedings, it must be conscientiously identified, and where there was deployment of considerable inordinately time consuming industry the details of such circumstances must be clearly described. In that regard, counsel submitted that neither is there evidence of such complexity described in the body of the respondent's bill of costs or submissions and that there is no evidence that all the advocates in the law firm of Munyao, Muthama and Kashindi Advocates as stated in their letterhead had no ability to handle this suit.
 21. Counsel pointed out that the judicial review application was necessitated by the respondent's refusal to comply with a consent order made in ELC No. 4 of 2019 and therefore the same was purely for purposes of enforcement of those orders to allow use of the EPZA main trunk sewer line damaged under the supervision of the respondent's CEO despite existence of an agreement for discharge of effluent from the applicant to the respondent's main trunk sewer line. It was argued for the *ex parte* applicant that Senior Counsel only appeared in court once on 28th October 2019 when a consent was entered pursuant to the court on its own motion urging the parties to see how to balance interests of the parties in view of the fact that the *ex parte* applicant's operations had been shut down jeopardizing employment of hundreds of Kenyans.
 22. They further argued that the application for contempt and the substantive judicial review application were never heard but merely compromised by a consent filed in court in view of the multiplicity of proceedings that were existing then due to the closure of the *ex parte* applicant's distillery. Counsel took the position that the issues raised in the applications were neither novel nor were there large volumes of documents for perusal or needing to be simplified to need employment or instruction of a Senior Counsel. They contended that what is described by the respondent as the responsibility of an advocate is the ordinary responsibility placed on any advocate and calls for nothing more than diligence that any legal practitioner must exercise to prosecute their client's case. Further, counsel asserted that the applications were compromised by consent hence the legal expertise and experience of Senior Counsel



was never decided and therefore the court should examine the consent for its purport, interpretation and meaning.

23. Counsel submitted that the respondent has not given any clarification as to the nature of guidance that the respondents counsel was given in drawing very simple responses, the disability of the counsel's firm comprising of advocates of several years standing in practice and the single attendance in court by the Senior Counsel when a consent was entered into. They therefore maintained that there was no need for Senior Counsel to be instructed and the court should decline the invitation to issue a certificate for Senior Counsel.
24. While arguing that costs are meant to adequately and reasonably compensate parties for expenses incurred and not a scheme to milk parties dry of their finances, counsel referred the court to the case of *Republic vs Kenyatta University & another ex parte Wellington Kihato Wamburu* [2018] eKLR. Counsel submitted that in exercising its discretion of increasing instruction fees from the prescribed minimum, courts must be guided by factors including the difficulty and complexity of the issues, the length of the trial, the value of the subject matter, and other factors that affect fairness of an award of costs. They maintained that having demonstrated that this matter was neither complex nor novel, the length of the trial being fairly brief and the Senior Counsel attending only once, it is only fair that the *ex parte* applicant is not made to pay the respondents exorbitant costs through a Senior Counsel's brief that was unnecessary.

Analysis and determination

25. The court has carefully considered the issues raised in the submissions by counsel on both sides, the dispute that was before court which the parties settled by consent, and the entire court record. Therefore, the only issue that arises for determination is whether there is justification for this court at this stage to issue a certificate for costs of Senior Counsel.
26. Section 2 of the *Advocates Act* defines a "Senior Counsel" to mean

"an advocate upon whom the President has conferred the rank of Senior Counsel."
27. Section 17 of the *Advocates Act* describes Senior Counsel as follows;

The President may grant a letter of conferment to any person of irreproachable professional conduct who has rendered exemplary service to the legal and public service in Kenya conferring upon him the rank and dignity of Senior Counsel.
28. Therefore, a Senior Counsel is an advocate highly ranked and dignified in law, by virtue of being an advocate with impeccable professional conduct having rendered exemplary service to the legal and public service. The position of Senior Counsel gives them precedence as stated in section 20 of the *Advocates Act* as follows;

The Attorney-General, the Director of Public Prosecutions, the Solicitor General, Senior Counsel or Queen's Counsel according to the date of their appointment as such, the president and vice president (if not a Senior Counsel) of the Society shall, in that order, take precedence of advocates who, inter se, shall take precedence according to the date upon which they signed their names on the Roll.
29. Rule 19 of the of the *Advocates (Senior Counsel Conferment and Privileges) Rules*, provide for duties, powers and privileges of Senior Counsel as follows;

A person whom the rank of Senior Counsel is conferred shall enjoy the following privileges;



- a. Precedence in having his matters mentioned when appearing in court or in a Tribunal.
 - b. When appearing robed in court or in a Tribunal of wearing the gown and court sleeved waistcoat as worn by a judge of the Court of Appeal.
 - c. The exclusive right to sit within the bar in all courts in which there is a Bar separating the area for Senior Counsel from the general area of the court. In all other courts to sit on the front bench.
 - d. Such other privileges as the counsel may consider appropriate.
30. Paragraph 60 of the *Advocates Remuneration Order* provides for the matters to be taken into account by the Judge in certifying costs for Queen’s Counsel and Junior Counsel as follows;
1. In any case or matter where an order for costs is made in favour of a party whose case has been conducted or led by one of Her Majesty’s Counsel, additional costs provided in Schedule 6 shall be allowed if the judge at the trial or on delivery of judgment shall have certified under his hand that the employment of the Queen’s Counsel was reasonable and proper having regard in the case of a plaintiff, to the amount recovered or paid in settlement or the relief awarded or the nature, importance or difficulty of the case, and in the case of a defendant, having regard to the amount sued for or the relief claimed or the nature, importance or difficulty of the case.
 2. A certificate of Queen’s Counsel (With or without Junior Counsel) may be granted notwithstanding that he is a member of the firm of advocates by whom he was instructed.
 3. A certificate of Junior Counsel (with or without Queen’s Counsel) may be granted notwithstanding that he is a member or employee of the firm of advocates by whom he was instructed.
31. According to section 20 of the *Advocates Act*, a Senior Counsel and a Queens Counsel rank equally and therefore my view is that paragraph 60 of the *Advocates Remuneration Order 2014*, applies to Senior Counsel in so far as the factors for consideration by the Judge in considering whether a party seeking certification has demonstrated that it was reasonable and proper to employ Senior Counsel, are concerned.
32. The proviso in Schedule 6 (1) (iii) states as follows;
- In any case which a certificate for Senior Counsel has been given by the Judge, the instruction fee allowed on taxation as between party and party shall be increased by one half and other charges shall be doubled where requisite, the allowance for attendance of Senior Counsel in court conducting or leading the cause being on the higher side.
33. Therefore, the judicial function of considering whether or not to certify costs for Senior Counsel is a matter of the Judge’s discretion. In exercising this discretion, a Judge ought to judiciously consider among other matters, whether it was reasonable and proper for the party seeking such certification, to employ a Senior Counsel. The test of reasonability and propriety, would require the Judge to consider the amount recovered or paid in settlement, or relief claimed, the nature, importance, difficulty or complexity of the case and any other relevant matters. Although the respondent argued that where a Senior Counsel is involved, the judge ought to certify costs of Senior Counsel as a matter of course, it is clear that the powers and privileges of Senior Counsel do not include certification in every matter where a Senior Counsel is involved and that such certification can only be done where it is reasonable and proper to do so upon having regard to the amount recovered or paid, the nature, importance, difficulty or complexity of the case.



34. Paragraph 60 of the [Advocates Remuneration Order](#) is very clear on the stage in the proceedings when the judge give the certification. It provides that the judge's certification shall be done under his or her hand at the trial or on delivery of judgment. The same stance is taken in the proviso in Schedule 6 (1) (iii) of the [Advocates Remuneration Order](#), in that at the point of taxation, the taxing officer considers if a certificate for senior counsel has been given by the Judge. Therefore, by the time a matter is placed before the taxing officer for taxation of costs, in exercising their discretion, among the matters they are obligated to check and consider are inter alia if any certification for costs of Senior Counsel has been given by the judge either during trial or on delivery of judgment or where the matter was settled by the parties, any consent on certification of Senior Counsel's costs. I do not think that either the parties or the taxing officer are within the ambit of the law, to seek directions on certification for costs of Senior Counsel, where the judge has not made any directions on the same during trial or on delivery of judgment or where the parties' consent is silent on the matter, like in this matter. That would be moving the judge after the fact, which in my view could not have been the intention of the Paragraph 60 and Schedule 6 (1) (iii) of the [Advocates Remuneration Order 2014](#). In this matter, the parties have approached the court seeking for certification when the matter is already before the taxing officer for taxation of the respondent's bill of costs and when the Judge had not made certification at the trial, hence effectively out of the mandate of the Judge and within the jurisdiction of the taxing officer; which in my view ought not be entertained by this court. If the respondent needed such certification, they ought to have raised it when the matter was pending trial, or ensured it was included in the consent or raised it at the point when parties sought to adopt their consent herein. This was not done in this matter. It is therefore my finding that the question of certification of costs for Senior Counsel has been raised too late in the day and this court is *functus officio* regarding that question.
35. Were it not for the fact that this court is *functus officio* regarding the question of certifying the costs for Senior Counsel, then, looking at the dispute that was resolved by the parties herein by consent, which dispute has been summarized in paragraphs 2 to 5 above, the same being the *ex parte* applicant's challenge on the legality of the respondent's suspension of their permit to discharge effluent into the respondent's main trunk sewer line, and subsequent applications for contempt and setting aside of stay orders; it is my view that there is nothing complex, difficult or novel in the claim that was presented before this court that would reasonably and properly call for the involvement of Senior Counsel in this matter. The issues involved which were raised before court and which were settled by consent were matters that courts in our jurisdiction have been dealing with from time immemorial and any reasonable advocate worth their title would not find any difficulty in addressing them adequately. In addition, there is no aspect of the dispute or issues raised that the respondent specified to have presented any difficulty, novelty or complexity in any manner be it jurisprudential, conceptual or otherwise. Even the volume of the documents and pleadings involved in this matter are nothing out of the ordinary. The respondent attempted to argue that because the matter raised interpretation of Regulation 12 of the [Environmental Management and Coordination \(Water Quality\) Regulations 2006](#), then it was a complex matter necessitating involvement of Senior Counsel. I do not think that the mere interpretation and application of the said regulation (which requires legal compliance by entities operating sewage system regarding discharge of effluent into the environment), would require a Senior Counsel. It will suffice to state that the said [Regulations](#) have been in force for over a decade and a half and applied by this court and other courts and tribunals for a long time and therefore, there is no basis for asserting that there exists complexity in the interpretation thereof, and none has been demonstrated by the respondent.
36. I agree with the reasoning in the decision in [Republic vs Minister for Agriculture & 2 others ex Parte Samuel Muchiri](#) (*supra*) that where a party invokes complexity in the proceedings, they must, with



specificity, demonstrate the elements constituting complexity and how that complexity has constrained counsel in applying time-consuming industry in dealing with the matter.

37. While the respondent has a constitutional right to instruct advocates of their choice including Senior Counsel in any of their matters whether it is simple or complex, the burden of bearing the costs of instructing Senior Counsel would, in my view ordinarily borne be by the instructing party, who in this case is the respondent and cannot be placed on the opposing party who is the *ex parte* applicant in this matter, unless it is demonstrated that there was reasonable and proper justification to instruct Senior Counsel in view of the complexity, novelty, or difficulty of the matter requiring time consuming industry on the part of Senior Counsel. In the instant matter, it is my view that questions of judicial review which were brought under several Articles of the Constitution and Order 53 of the Civil Procedure Rules and questions of contempt and setting aside of stay orders are simple and ordinary proceedings that would not compel the respondent to instruct Senior Counsel to lead the law firm of Munyao, Muthama and Kashindi Advocates. In the premises, I am not persuaded that this is a matter that needed involvement of a Senior Counsel.
38. Ultimately, I find and hold that as the certificate of Senior Counsel having not been given by the Judge when the trial was pending or upon settlement of the dispute by consent or within the consent adopted by this court, and that matter having not been raised by the parties during the aforesaid stages of these proceedings, I find and hold that this court is *functus officio* on that question. In the premises, I decline to certify for costs of Senior Counsel. Each party shall bear its own costs of this determination.
39. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 29TH DAY OF APRIL 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Nduru holding brief for Mr. Tugee for Respondent

No appearance for *ex parte* Applicant

Court assistant – Abdisalam

