Kemboy Law Advocates v Narok County Government (Environment and Land Miscellaneous Application E017 of 2023) [2024] KEELC 3365 (KLR) (25 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3365 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E017 OF 2023

CG MBOGO, J

APRIL 25, 2024

BETWEEN

KEMBOY LAW ADVOCATES ..... ADVOCATE

AND

NAROK COUNTY GOVERNMENT ..... CLIENT

RULING

1. What is before this court for determination is the Notice of Motion Application dated 13th February, 2024 filed by the client/applicant. It is expressed to be brought under Articles 159 of *the Constitution* of Kenya, Sections 1A,1B, 3A of the *Civil Procedure Act* and Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders: -

    1. Spent

    2. That this honourable court be pleased to vacate the ruling date of the Advocate/Respondent's Bill of Costs scheduled for 21st February, 2024 pending the hearing and determination of this application.

    3. That the court be pleased to grant the applicant leave to file its response to Bill of Costs out of time.

    4. That the draft Response to Bill of Costs dated 13th February, 2024 annexed herein and the notice of preliminary objection dated 14th November, 2023 be deemed by this honourable court as duly filed by the applicant.

    5. That the cost of this application be in the cause.

2. The application is premised on the grounds inter alia that the advocate/respondent filed a Bill of Costs dated 4th October, 2023 against the applicant/ client seeking costs to the tune of Kshs. 37,050,580.30/- and that the said Bill of Costs was served upon the client/ applicant directly on the 26th October, 2023.

3. The application is supported by the affidavit of John Mayiani Tuya, the Acting County Secretary of the client/applicant sworn on even date. In his affidavit, the client/applicant deposed that they were served with the Bill of Costs dated 4th October, 2023 on 26th October, 2023. He went on to depose that the firm of Maina Ngaruiya & Co. Advocates received instructions on 12th February, 2024.

4. He deposed that there was delay in obtaining instructions from the client/ applicant due to prolonged procurement process in obtaining a firm of advocates, and that there was necessity of consultation and approvals involving various officers within the County Government.

5. The Acting County Secretary further deposed that as it stands, the client/applicant does not have any latitude to defend itself in the taxation process since the Deputy Registrar has already issued a date for ruling i.e. 21st February, 2024. He also deposed that if the court allows ruling on taxation to proceed, it will be prejudiced, as the County Government will be condemned unheard to pay Kshs. 37,050,580.30/- being the sum claimed in the Bill of Costs.

6. The Acting County Secretary further deposed that it is only fair that the client/applicant is afforded a right of reply and as such, the application has been made promptly and in good faith. It was also deposed that it will suffer prejudice as the matter involves public funds.

7. In conclusion, the Acting County Secretary deposed that the applicant/client has a bonafide response to the Bill of Costs with triable issues as per the draft copy attached to the application.

8. On 15th March, 2024, the advocate/ respondent filed a replying affidavit in opposition to the application. The replying affidavit was sworn by Julius K. Kemboy on 1st March, 2024. The advocate/ respondent deposed that on 21st February, 2024, the Taxing Officer directed that is in the interest of justice to delay the delivery of the ruling pending the hearing and determination of the instant application. That after the Taxing Officer's directions were issued, the client/applicant attempted to un-procedurally have the hearing of this application transferred from this court to the Deputy Registrar having realized that the orders issued by the Judge were irregular and unlawful as they were issued without jurisdiction.

9. The advocate/respondent deposed that the learned Justice Washe and this court lack jurisdiction to hear and determine the instant application. He relied on the cases of Otieno Ragot & Company Advocates versus Kenya Airports Authority [2015] eKLR, Sharma versus Uhuru Highway Development Limited [2001] 2 EA 531, C.B. Gor & Gor versus Oriental Commercial Bank Limited (formerly known as Delphis Bank Limited) [2018] eKLR, Hezekiah W. Gichohi versus Uhuru Highway Development & Others [2011] eKLR, Stanley Mwandoe Righa versus Braimoh Joseph Mburu [2014] eKLR, Lubullellah & Associates Advocates versus Nasser Ahmed T/A Airtime Business Solutions [2010] eKLR and Munikah & Company Advocates versus Heri Development Limited & 3 Others [2019] eKLR.

10. The advocate/respondent further deposed that the proceedings of 14th and 15th February, 2024 are a nullity as the ELC court in Kilgoris lacked the jurisdiction to entertain the instant application, for the reason that this matter is not a suit for recovery of costs as contemplated under Section 48 of the *Advocates Act*. It was also deposed that the Taxing Officer is still seized of this matter and he can only exercise jurisdiction over any issue until a ruling is delivered. The advocate/client deposed that the parties have not filed any consent to divest the jurisdiction of this court and there is no appeal or reference before this court pursuant to paragraphs 11 (1) and 12 of the Advocates Remuneration Order.

11. The advocate/respondent further deposed that this court having lacked jurisdiction, cannot transfer the hearing of the instant application to the Taxing Officer. He deposed that what the client/advocate would have done on 21st February, 2024 is to withdraw the instant application and thereafter file a new but similar application to deal with it. The advocate/respondent relied on the cases of Phoenix of E.A. Assurance Company Limited versus M. Thiga t/a Newspaper Service [2019] eKLR and Macfoy versus United Africa Company Limited [1961] 3 All ER 1169.

12. The advocate/respondent further deposed that the application is an afterthought intended to delay taxation, having been filed after an inexcusable period of more than 5 months after the receipt of the Bill of Costs. He deposed that the reasons advanced by the client/applicant for the delay in filing the instant applicant are lies, as he has represented the County Government in various legal matter for a period of about 20 years, and the firm of Maina Nyaruiya & Company Advocates has come on record not only in this matter but in other matters as well.

13. The advocate/respondent further deposed that the client/applicant has represented itself in Nairobi ELCL Miscellaneous Application No. E070 of 2023 and it is an unfounded ground that it failed to file a response in time due to the procurement processes in appointing a firm of advocates in these matters for more than 5 months. He deposed that the client/applicant was quick to enter appearance and therefore the delay in filing the instant applicant is inordinate and has been brought without clean hands. The advocate/respondent relied on the cases of Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR, and Njoroge versus Kimani (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling).

14. The advocate/respondent deposed that the delay in filing the notice of preliminary objection and the response to the Bill of Costs is not only intentional and contumelious, it is also inordinate and inexcusable as it was foreseeable and an issue entirely in the control of the client/applicant. He deposed that the instant application is an abuse of court process meant to defeat the wheels of justice. Reliance was placed in the cases of Ashmore versus Corp of Lloyd's [1992] All ER 486, Banque Financiere de la Cile SA versus Westgate Insurance Co. Ltd [1990] 2 All ER 947, at 959 and Hunter versus Chief Constable of the West Midlands Police & Others [1981] 3 All ER 727.

15. On the 13th March, 2024 the client/applicant filed its supplementary affidavit in response thereto sworn on 11th March, 2024. The client/applicant deposed that the instant application was dealt with on 15th February, 2024 wherein it was brought to the attention of the Taxing Officer on 21st February, 2024 who stayed the delivery of the ruling pending the hearing and determination of the instant application. It was further deposed that the jurisdiction of this court extends to handling applications arising from taxation proceedings. The client/applicant further deposed that it has properly approached the court and it is well within its rights to seek the orders in the application.

16. The application was canvassed by way of written submissions. On the 13th March, 2004 the client/applicant filed its written submissions dated 11th March, 2024 where it raised one issue for determination which is whether the applicant ought to be granted leave to file its response to the respondent's Bill of Costs out of time.

17. On this issue, the client/applicant submitted that it has a right to a fair hearing which is guaranteed by *the Constitution* under Article 50 and the same cannot be limited as espoused under Article 24. The client/applicant further submitted that the delay in filing the application is excusable and that it is keen on expeditiously defending the taxation matters before court. The client/applicant relied on the case of Harriet Otieno & 2 Others versus My Jobs Eye Kenya Limited [2017] eKLR.

18. The client/applicant further submitted that this court has unfettered jurisdiction to set or extend time for filing the response to the Bill of Costs. To buttress on this submission, the client/ applicant relied on the cases of Margaret Njoki Kamau versus Reuben Ndivo Mwangi [2021] eKLR and Landmark Freight Services Limited versus Zakhem International Limited [2021] eKLR.

19. The advocate/respondent filed their written submissions dated 16th April, 2024, where they raised three issues for determination as listed below: -

    a. Whether this honourable court has jurisdiction to hear and determine the present application.

    b. Whether the client/applicant ought to be granted leave to file and serve its response to the Bill of Costs out of time.

    c. What order should be as to costs.

20. On the first issue, the advocate/respondent submitted that this court lacks jurisdiction to hear and determine the instant application for the reason that as at the time of the application, the matter was pending taxation before the Deputy Registrar. The advocate/respondent relied on the cases of Otieno Ragot & Company Advocates versus Kenya Airports Authority [2015] eKLR, The Matter of Winding Up of Leisure Lodges Limited, Winding Up Cause No. 28 of 1996, Sharma versus Uhuru Highway Development Limited [2001] 2 EA 531, C.B. Gor & Gor versus Oriental Commercial Bank Limited (formerly known as Delphis Bank Limited) [2018] eKLR, Hezekiah W. Gichohi versus Uhuru Highway Development & Others [2011] eKLR, Stanley Mwendoe Righa versus Braimoh Joseph Mburu [2014] eKLR, Munikah & Company Advocates versus Heri Development Limited & 3 Others [2019] eKLR.

21. The advocate/respondent submitted that the orders issued by the ELC court in Kilgoris are illegal, null and void including the Taxing Officer's discretionary orders of 21st February, 2024 which are incurably bad. Reliance was placed in the cases of Macfoy versus United Africa Company Limited [1961] 3 All ER 1169, Albert Chaurembo Mumba & 7 Others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) versus Maurice Munyao & 148 Others (suing on their own behalf and on behalf of the plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) [[2019] eKLR and Pheonix of E.A Assurance Company Limited versus M. Thiga t/a Newspaper Service [2019] eKLR.

22. On the second issue, the advocate/respondent submitted that the delay in filing the instant applicant is inordinate and inexcusable since it is more than five months after the client/applicant was served with the Bill of Costs. The advocate/respondent went on to depose that the extension of time being an equitable right, it behooves the client to come to a court of equity with clean hands. The advocate/ respondent relied on the cases of Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR, Njoroge versus Kimani (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling), Ashmore versus Corp of Lloyd's [1992] All ER 486, Banque Financiere de la Cile SA versus Westgate Insurance Co. Limited [1990] 2 All ER 947, at 959 and Hunter versus Chief of Constable of the West Midlands Police & Others [1981] 3 All ER 727.

23. On the third issue, the advocate/respondent submitted that the instant application should be struck out with costs as it was held in the cases of James Ngara Mukiri & Another versus Josephine Wangari Mukiri [2013] eKLR and Paul Njage Njeru versus Karija K Mugambi [2021] eKLR.

24. I have carefully analysed and considered the application, the replies thereof, the written submissions as well as the authorities cited by both parties.

25. In my views, the issues for determination are as follows: -

    a. Whether this court has jurisdiction to hear and determine the instant application.

    b. Whether this court can or ought to grant the client/applicant leave to file its response to the Bill of Costs out of time.

26. It is the advocate's/respondent's contention that this court lacks the jurisdiction to entertain this matter since the jurisdiction to deal with matters taxation is a preserve of the Taxing Officer and not a judge.

27. The Court of Appeal in the Owners of the Motor Vessel "Lillian S" versus Caltex Oil (Kenya) Ltd [1989] eKLR stated as follows on the question of jurisdiction of a Court of law: -

> " Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

28. It is not in doubt that matters purely taxation fall within the jurisdiction of a Taxing Officer and not the judge. The Court of Appeal in Sharma v Uhuru Highway Development Limited [2001] 2 EA 530, held that the Judge;

> "....not being seized of the taxation itself, and there being no appeal or reference to him as provided for by paragraphs 11(1) and 12 of the Advocates (Remuneration) Order from a decision of the Taxing Officer who was dealing with the taxation, and the taxation not being a suit filed in the High Court for the recovery of costs, simply had no jurisdiction at all, to hear as he did, the Respondent's application to strike out. This by itself makes his hearing of and his ruling of 19th May, 2000, of the Respondent's application a nullity from the word go."

29. In Donholm Rahisi Stores versus East African Portland Cement Limited [2005] eKLR, Waweru, J said,

> " Taxation of costs, whether those costs be between party and party or between Advocate and Client, is a special jurisdiction reserved to the Taxing Officer by the Advocate (Remuneration) Order. The court will not be drawn into the arena of taxation except by way of reference (from a decision of taxation) made under Rule 11 of the Advocates (Remuneration) Order. The present application is not such reference. The application seeks an order that would have the effect of interfering with the special jurisdiction of the taxing officer does nothing beyond taxation of the bill of costs. The consequences of such taxation, for instance recovery of the taxed costs, will be a matter for the court, and the court can at that stage be asked to stay recovery of those costs pending whatever event, say, an appeal against the order granting the costs, or a reference under Rule 11 of the advocates (Remuneration) Order."

30. Also, in Kangethe & Mola Advocates versus Corporate Insurance Company Limited [2021] eKLR, it was held that:

> "In this case all I can only add is that the Courts in Kenya are hierarchical, the jurisdiction of taxation of costs is vested upon the taxing master who should evaluate the matters placed before him/her and should do so independently. The jurisdiction that is vested in the High Court on the other hand is to deal with a reference emanating from the decisions of the taxing master. The issues of the amount of work done or not done by the advocate which were so eloquently presented by Mr. Issa should be presented to the taxing master. In other words, when defending his client, Mr, Issa should be able to argue the proportionate costs that should be paid to the advocates for the work which was done and which was not done. The high court should not micro manage the taxing master....The Respondent's contention that this court lacks jurisdiction to grant the reliefs sought is well founded, given that the Taxing Master has not rendered itself to give this court jurisdiction to relook into any grievances by any aggrieved party"

31. From the above cited authorities, it is clear peradventure argument that in matters taxation, the Taxing Officer is the one properly clothed with jurisdiction to deal with issues arising during taxation proceedings, and unless and until the taxation is complete, the court has no business entering the arena of taxation. The powers of this court kick in after the decision on taxation has been made.

32. In this case, the advocate/respondent filed its Bill of Costs dated 4th October, 2023 and served the same upon the client/applicant on 26th October, 2023. On 15th November, 2023, the advocate/respondent prayed for a ruling date of the Bill of Costs having served the same upon the client/applicant. The Taxing Officer, upon being satisfied with the affidavit of service, and there being no response to the application, reserved the matter for ruling on 21st February, 2024.

33. The client/applicant sought to arrest the ruling of the said taxation for the reason that there was delay in obtaining instructions to respond and it was therefore out of time. It is obvious that the ruling was not delivered on the said 21st February, 2024 as the client/applicant filed the instant application before this court for intervention to file its response to the Bill of Costs.

34. In my view, this is an issue that does concern taxation, and the taxing officer has the competence to deal with the same. Unless a reference has been filed or otherwise, this court cannot interfere with the matter that is before the Taxing Officer.

35. I totally agree with the advocate/respondent that this court lacks jurisdiction to hear the instant application. That being said, I will not proceed to deal with the second issue as that would embarrass this court.

36. For this reason, the Notice of Motion Application dated 13th February, 2024 is hereby struck out with costs to the advocate/respondent

    Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL this 25TH day of APRIL, 2024.

HON. MBOGO C.G.

JUDGE

25/04/2024.

In the presence of: -

Mr. Meyoki Pere – C.A