**Kitur v National Land Commission & another (Environment & Land Case 4 of 2019) [2024] KEELC 3805 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3805 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**ENVIRONMENT & LAND CASE 4 OF 2019**

**MC OUNDO, J**

**APRIL 25, 2024**

**BETWEEN**

**SYLVIA CHEPKORIR KITUR ..... PLAINTIFF**

**AND**

**NATIONAL LAND COMMISSION ..... 1ST DEFENDANT**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... 2ND DEFENDANT**

**RULING**

1. Pursuant to the 2nd Defendant's communication to the Plaintiff and the 1st Defendant herein that it no longer required the Plaintiff's portion of land that was to be compulsorily acquired subject to the 1st Defendant de-gazettment of the said property known as Kericho Municipality block 2/2 (the suit land) which had earlier been marked for compulsory acquisition through Gazette Notice No. 1921 of 18/3/2016 and Gazette Notice No. 20229 of 2/3/2018, the Plaintiff withdrew the instant suit and the same was marked as withdrawn on 30th May, 2023. Since the parties had not agreed on costs, it had been directed that the Plaintiff tax its Bill of Costs.

2. The 2nd Defendant/Applicant has now filed an application by way of Chamber Summons dated 25th April, 2023, brought pursuant to the provisions of Rule 11(1) and (2) of the Advocates Remuneration Order and Order 42 Rule 6 (1) and (2) of the Civil procedure rules and Sections 1A, 1B, 3, 3A of the *Civil Procedure Act*, Chapter 21, Laws of Kenya and all other enabling provisions of law wherein it seeks that a determination be made as to who, between the 1st and 2nd Defendants, ought to bear the Plaintiff's costs of the suit within the context of the court's orders of 30th May, 2022, and in addition, who between the Plaintiff and the 1st Defendant, should bear the costs of the 2nd Defendant.

3. The 2nd Defendant/Applicant has also sought that the ruling of the Taxing Officer delivered on 12th April 2023 on all items of the Plaintiff's Bill of Costs dated 12th September, 2022, be set aside, except for the Taxing officer's findings on items 7,8,10,11, 14-19 and 25 of the said Bill of Costs. That thereafter,

the said Bill of Costs be ordered to be taxed before a different Taxing Officer, with appropriate directions on principles of such taxation by way of guidelines. It also sought that the costs of the instant application be provided for.

4. The Application was supported by the grounds on its face and the Supporting Affidavit of equal date sworn by the Defendant/Applicant's Counsel to the effect that pursuant to communication by the 2nd Defendant to the 1st Defendant that it no longer required the Plaintiff's portion of land which it had sought to compulsorily acquire, the matter had been withdrawn with costs to the Plaintiff wherein the court's order did not specify which of the two Defendants was liable to settle the costs. That further the court had been silent on the issue of the 2nd Defendant's costs.

5. The Applicant had then proceeded to fault the Taxing Master's taxed Bill of costs to the effect that the learned Taxing Officer had erred in law and in fact, in failing to appreciate that the suit having been settled and/or withdrawn in a summary manner before commencement of the trial, hence instruction fees ought to have been reduced to only 75% of the sum computed.

6. That further, the Taxing Officer had erred in law and in fact in failing to appreciate that the Plaintiff had charged her claim for costs on the higher scale, on other services rendered.

7. That the learned Taxing Master had also erred in law and in fact in awarding costs of the alleged grant of Letters of Administration which had not been the subject of the instant suit.

8. That the taxing officer had awarded the disbursements without the benefit of any proof of expenditure by way of receipts issued or shown to him, contrary to the express and mandatory provisions of Rule 74A of the Advocates Renumeration Order.

9. That it was thus in the interest of justice that the reliefs sought be granted since the 2nd Defendant had complied with the requirements of law relating to the pursuit of the reliefs sought.

10. The Application was opposed by the Plaintiff/Respondent's Replying Affidavit dated 26th October, 2023 who deponed that the 1st Defendant had been sued on account of its quest to compulsorily acquire the suit property at the behest of the 2nd Defendant. That for the 1st Defendant to undertake compulsory acquisition, it ought to have received a request from the concerned entity which in the instant matter had been the 2nd Defendant, a fact that the said 2nd Defendant had admitted in its Pleadings. That therefore it could not be gainsaid that the Defendants were acting in concert and as such one could not be divorced from the other hence both the 1st and 2nd Defendants were jointly and severally liable for their actions.

11. That the 2nd Defendant had not disclosed in their Statement of Defence that they had immediately requested the 1st Defendant to degazette the Plaintiff's property upon reaching a decision that they no longer required the suit property.

12. That it was trite that costs follow the event, and in the instant case, the Plaintiff had been entitled to costs as had been assessed by the court, thus the Plaintiff could not be said to be liable for the 2nd Defendant's legal fees. Further, that the court's ruling on costs having mentioned the Defendants without specifying as to which Defendant would bear costs, the same could only be interpreted to mean that the Defendants were jointly and severally liable to cater for the Plaintiff's legal fees.

13. She deponed that the Taxing Officer in his ruling had given sufficient reasons for adopting the value of property as Kshs. 31,385,085/= as opposed to a value of Kshs. 18,643,375/=.

14. That the Taxing Officer exercised his discretion judiciously and on the right principles in taxing bill of costs, which had been drawn to scale hence it was untrue that the same had been taxed on the higher

scale as had been alleged by the 2nd Defendant. She thus deponed that the instant application was frivolous, designed to deny the Plaintiff the costs hence it ought to be dismissed with costs.

15. Despite directions having been given that the instant Application be canvassed by way of written submissions, only the Plaintiff/Respondent complied and filed her submissions dated 22nd November, 2023 which I shall herein summarize as follows:

**Plaintiff/ Respondent's Submissions.**

16. The Plaintiff/Respondent framed her issues for determination as follows: -

    i. Which party between the 1st and 2nd Defendants ought to bear the Plaintiff's costs.

    ii. Whether the Learned Taxing Master applied the right principles in taxing the Plaintiff's bill of costs dated 25th April, 2023.

17. On the first issue for determination as to whether the 1st and 2nd Defendants ought to bear the Plaintiff's costs, the Plaintiff reiterated the contents of her Replying Affidavit and then submitted that in view of the fact that the 1st Defendant had been sued on account of its quest to compulsorily acquire the suit property at the behest of the 2nd Defendant, the said 2nd Defendant could not be absolved from the consequences ensuing from the determination of the instant matter, costs inclusive. Further, that it had not been open for the 2nd Defendant to claim that it should not bear the costs of the instant suit solely on the alleged communication to degazette the suit property nor for it to claim that the parties herein had not submitted on costs since it had been upon parties' lengthy submissions on costs that the court had directed that the Plaintiff tax its Bill of Costs.

18. It was the Plaintiff's submission that being that costs follow event, once it had been directed that the Plaintiff was entitled to costs, such a finding could only be interpreted to mean that the Defendants were jointly and severally liable to cater for the Plaintiff's legal fees. She thus urged the court to dismiss the 2nd Defendant's vain attempt to split hairs on who should bear the said costs.

19. As to whether the learned Taxing Master had applied the right principles in taxing the Plaintiff's bill of costs dated 25th April, 2023, the Plaintiff submitted that the Applicant had not faulted the learned Taxing Masters findings per the Ruling dated 12th April, 2023. That whereas the Applicant had contended that the Learned Taxing Master had erred in adopting the value of the suit property of Kshs. 31,386,085/= that had been submitted by the Plaintiff, the contrary value of Kshs. 18,643,575/= that had been submitted by the 2nd Defendant had not been supported by a Valuation Report or backed by any justification. That conversely, the Plaintiff's value had been backed by a Valuation Report dated 28th August, 2018 that had been attached to the Plaintiff's list of documents that had been filed alongside the Plaint on 1st February, 2019.

20. The Plaintiff thus urged the court to dismiss the 2nd Defendant's contestations on the issue as the learned Taxing Master could not be faulted for relying on a Valuation Report whose contents had never been controverted by any court report. Reliance was placed in the decided case of Masore Nyangau & Co Advocates v Kensalt Ltd, ELC Nakuru Mis App 196 of 2015 (sic) which had cited with approval the case of Tom Ojienda & Associates Advocate v County Government of Narok (Miscellaneous Application E608 of 2019) [2021] KEHC 452 (KLR) (Commercial and Tax) (16 June 2021) (Ruling).

21. That further, the Applicant's contestation that the learned Taxing Master had erred in failing to assess the instruction fee at 75% as the mater had not proceeded to full hearing could not lie since the court had indeed appreciated the said principle in duly taxing off the instruction fee that had been submitted and awarding a sum of Kshs. 600,000/= as instruction fee while noting that the matter had

not proceeded for hearing. Her submission was that the attendances were duly assessed in terms of paragraph 7 (d) of Schedule 6 of the Advocates Remuneration Order.

22. That whereas the Applicant had duly applied for reasons for the Taxing Master's determination as required by law, it had neither submitted the response thereto, nor made a pleading as to whether the reasons requested for were ever given as anticipated under Rule 11 of the Advocates Remuneration Order. She thus submitted that the Applicant had denied the court an opportunity to consider the learned Master's further reasons in support of his determination. That the Taxing Master had indeed applied the correct principles in taxing the bill at hand hence the instant inference ought to be dismissed.

**Determination.**

23. I have considered the Applicant's application herein, the Respondent's replying affidavit as well as the Respondent's written submissions. In its application dated 25th April 2023, the Applicant herein sought that the court interprets its orders, upon the withdrawal of the suit by the Plaintiff, as to who amongst the Defendants would bear the costs to the Plaintiff. That secondly, the court had been silent on the 2nd Defendant's costs.

24. The Applicant had then proceeded to fault the Taxing Master's taxed Bill of costs to the effect that the learned Taxing Officer had erred in law and in fact, in failing to appreciate that the suit had been settled and/or withdrawn before trial.

25. In response, the Respondent had opposed the application, arguing that the 1st Defendant had been sued on account of its quest to compulsorily acquire the Plaintiff's suit property at the behest of the 2nd Defendant. That for the 1st Defendant to undertake compulsory acquisition, it ought to have received a request from the concerned entity which in the instant matter had been the 2nd Defendant, a fact that the said 2nd Defendant had admitted in its Pleadings. That therefore it could not be gainsaid that the Defendants were acting in concert and as such one could not be divorced from the other hence both the 1st and 2nd Defendants were jointly and severally liable for their actions. I agree.

26. On the issue as to whether or not the Taxing Master had applied the right principles in taxing the Plaintiff's Bill of Costs dated 25th April, 2023, the Respondent had argued that Rule 11 of the Advocates Remuneration Order stipulated for an dissatisfied party to seek reasons of the contested items from the Taxing Master's determination through issuance of a notice and only then would a reference be made to court. That in this case it is not clear whether the Applicant had received reasons after giving notice to the Taxing Officer, as required by law, for it had neither submitted the response thereto, nor made a pleading as to whether the reasons requested for were ever given as anticipated under Rule 11 of the Advocates Remuneration Order. That the Applicant had therefore denied the court an opportunity to consider the learned Master's further reasons in support of his determination.

27. On the 24th October 2023, by consent parties took directions to dispose of the application dated the 25th October 2023 through the filing of written submissions wherein by the 23rd November 2023, the Defendant/Applicant had not complied. On the 19th December 2023, the court extended leave for compliance but as I write this ruling, there still has been no compliance by the Applicant. Only the Respondent herein complied.

28. It is now a settled practice under the new constitutional dispensation that filing of written submissions is the norm as written submissions serve the purpose of expedience and amounts to addressing the court on the evaluation of the evidence of each party and analysis of the law. It is therefore trite that an Applicant who fails to file his submissions on an application as ordered by the court is deemed as

a party who has failed to prosecute his application and therefor that application is liable for dismissal. The filing of submissions having been ordered by consent, the failure by the Applicant to exercise the leave granted to her to file written submissions clearly demonstrated inertia and inordinate delay, lack of interest and/or seriousness on her part in the prosecution of the matter.

29. The Court of Appeal in Rowlands Ndegwa and 4 Others vs. County Government of Nyeri and 3 Others; Agriculture, Fisheries and Food Authority & Another (Interested Parties) [2020] eKLR, citing with approval the decision of the High Court in, Winnie Wanjiku Mwai vs. Attorney General & 3 Others [2016] eKLR, observed as follows:

> " With regard to dismissal for want of prosecution, there are indeed no hard and fast rules as to the manner in which the inherent power and discretion to dismiss an action for want of prosecution is to be exercised. It is however generally accepted that dismissal will be invited if there should be a delay in the prosecution of the action and the Respondent is prejudiced by the delay with attention also being paid to the reasons for the inactivity...."

30. The mode of hearing of the Application dated the 25th April 2023 having been chosen by consent wherein the same was adopted by the court, and there having been no compliance by the Applicant to prosecute their matter, I am persuaded to dismiss the application, which I now do, with costs to the Respondent.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 25TH DAY OF APRIL 2024.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**