



REPUBLIC OF KENYA



**Kariuki & 16 others v Kenya Agricultural Research Institute (Petition
2 of 2013) [2023] KEELRC 110 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 110 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
PETITION 2 OF 2013
HS WASILWA, J
JANUARY 26, 2023**

**BETWEEN
PETER WAMBUGU KARIUKI & 16 OTHERS CLAIMANT
AND
KENYA AGRICULTURAL RESEARCH INSTITUTE RESPONDENT**

RULING

1. This ruling is in respect of respondent’s preliminary objection dated September 26, 2022, which came out as follows; -
 - a. The bill of costs is filed not in the original court file where the proceedings were conducted.
 - b. This court in a ruling delivered on January 23, 2020, did dismiss the petitioner’s application that had sought that taxation be conducted in a different court file as opposed to the original court file.
 - c. The said court ruling has not been set aside to date.
 - d. The bill of costs herein as long as it is filed not in the original court file is contemptuous of the court orders of January 23, 2020 so as to direct this honourable court sitting as a taxing officer of the jurisdiction to preside over and or determine such proceedings.
2. The preliminary objection is opposed by the petitioner who filed a replying affidavit sworn on October 17, 2022 by Wilfred Nyaundi Konosi, the advocate for the petitioner. In the affidavit, the deponent avers that the bill of costs was filed in a reconstructed file in line with the ruling delivered by the court on January 23, 2020 in Nakuru ELRC Miscellaneous Application no 17 of 2019 because the original file could not be traced.
3. He stated that the orders in the application of October 9, 2019 sought for the reconstruction of the file and for it to be merged with the skeleton file and stored in a strong room.



4. It was his averments that the application of October 9, 2019 was not dismissed but rather was termed premature because the issues raised were to be undertaken by the Registrar and the Deputy Registrar.
5. It was his case that the Deputy Registrar of this court tried tracing the original file to no avail informing her decision to open a skeleton file and for the construction of the file. Therefore, that there is nothing in the orders of January 23, 2020 that needs to be set aside.
6. The affiant states that this matter was concluded way back in 2013 and the attempt by the applicant to overturn the decision of the court and review the decision of the appellate court was thwarted. Thus the application herein is an attempt by the applicant to further delay the finalization of the case herein.
7. He stated also that the preliminary objection does not raise any points of law and therefore should be dismissed to pave way for the finalization of the taxation of the petitioner's costs.
8. The preliminary objection was disposed of by way of written submissions, with the applicant filing on the December 5, 2022 and the respondent on the December 15, 2022.

Respondent/Applicant's Submissions.

9. The applicant submitted by giving the definition of preliminary objection as stated in the case of *George Orieno Gache & Another v Judith Akinyi Bonyo & 5 others* [2019] eKLR where the court held that;

“The starting point is to restate what constitutes a preliminary point of law that can be urged by way of preliminary objection. In *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696, the defunct Court of Appeal of East Africa defined a preliminary objection as follows: “A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

In the present case, the facts relied upon by the learned judge in arriving at his decision are contested facts. The validity of the letter of allotment issued in 1991, the alleged fraud as pleaded and particularized in the plaint and the legal capacity of the 1st and 2nd respondents to file the suit are all contested and disputed facts. It would require trial to determine the veracity and probative value of the evidence adduced towards proof of these contested facts.”

10. On that basis the applicant submitted that the facts as laid out are not controverted because the bill of costs is not filed in the original file. It was argued that the petitioner's application seeking to open a skeleton file was dismissed in the ruling of January 23, 2020, which orders have not been set aside or reviewed. It was argued that, the fact that the bill of costs was filed in a skeleton file before the court gave green light to open a skeleton file, rendered the bill of costs null and void. It was further argued that the filing of the bill of costs in the skeleton file before following due process stated by the court was an illegality and in violation of the direction given by the court in its ruling. In this they relied on the case of *Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution and Planning and 3 others* [2017] eKLR where the court held that;

“An order passed by a competent court, whether interim or final has to be obeyed without any reservation. The Constitutional Court of South Africa, in *Burchell v Burchell* underlined the importance to the rule of law, of compliance with court orders in the following terms:-
... Failure to enforce court orders effectively has the potential to undermine confidence in



recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”

According to *Black's Law Dictionary*;

“ Contempt is a disregard of, disobedience to, the rules, or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.”

In *Halsbury's Laws of England* it is stated:-

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such an order would as a general rule result in the person disobeying it being in contempt and punishable by committal or attachmentan application to court by him not being entertained until he had purged his contempt”

In book *The Law of Contempt*, learned authors Nigel Lowe & Brenda Sufrin state as follows:-“Coercive orders made by the courts should be obeyed and undertakings formally given to the courts should be honoured unless and until they are set aside. Furthermore it is generally no answer to an action for contempt that the order disobeyed or the undertaking broken should not have been made or accepted in the first place. The proper course if it is sought to challenge the order or undertaking is to apply to have it set aside.”

11. Also in *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another*, Ibrahim J (as he then was) stated as follows: -

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against or in respect of whom, an order is made by court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.”

Rule of law makes it incumbent for all persons, without exception to respect court orders at all times. The whole purpose of litigation as a process of judicial administration is lost if court orders are not complied with. A party who knows of an order whether null or valid, regular or irregular cannot be permitted to disobey it.[12] It would be most dangerous to hold that suitors or their solicitors could themselves judge whether an order was null or valid; whether it was regular or irregular.[13] There is need to emphasize that the principle of law is that the whole essence of litigation as a process of judicial administration is lost if orders issued by court through the set judicial process in the normal functioning of courts are not complied with in full by those targeted and / or called upon to give due compliance / effect.

12. Similarly, that the bill of costs was filed on November 7, 2019, which was before the ruling of the court was rendered, therefore that the bill of costs was irregular and should be declared null and void. It was argued further that to allow the bill of costs to lie would be condoning an illegality. The Applicant



hence urged this court to find the filling of the bill of costs to be contemptuous of the ruling and orders of the court and strike out with costs.

Petitioner/ Respondent's Submissions.

13. The petitioner submitted from the onset that judgement in this matter was delivered on May 3, 2013 in favour of the petitioners who were also awarded costs of the petition. Upon the award the respondent/ applicant herein filed Nakuru Civil appeal no 315 of 2015, together with an application which stayed execution till the appeal was heard and determined. When the appeal and subsequently review was determined the petitioners sought to tax their bill of costs but the original court file would not be traced, prompting the petitioners to file Miscellaneous Application no 17 of 2019 seeking an order for the opening of a skeleton file and also sought leave to reconstruct the court file. The court ruled on January 23, 2020 and laid down the steps to be taken before opening a skeleton file and directed the Deputy Registrar to attend to those steps within 21 days. It was argued that the aforementioned steps were followed but the file could not be traced, therefore that the petitioner only filed its Bill of costs on the skeleton file because the original file could not be traced.
14. It was submitted that the application herein is used as a delay tactics in total violation of the expectation provided for under section 3 of the *Employment Act*, which enjoins this court to expeditiously deal with matter.
15. It was also argued that the preliminary objection does not raise pure points of law as was expressly stated in *Mukisa Biscuits Manufacturing Co Ltd West End Distributors Ltd* (1969) EA 696 in the following terms:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

Further Sir Charles New Newbold, JA stated that:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does not nothing but unnecessarily increase costs and, on occasions confuse the issue. The improper practice should stop”.

16. Accordingly, that there is no law which requires that a bill of costs be taxed in the original file. If a file cannot be traced, it is permissible to tax the bill of costs in a skeleton file. Therefore, that the preliminary objection is not merited and should be dismissed.
17. I have examined the averments of the parties herein. The applicants herein filed a preliminary objection on the taxation currently before the taxing master seeking that the taxation be halted as the application for taxation was filed in a miscellaneous application file as opposed to the main file where the cause was heard and determined.
18. The applicants aver that this court ordered taxation to be filed on the original file by its order of January 23, 2020 in Misc 17/2019.



19. The applicants have not exhibited any order as alleged before this court.
20. There is also no law that provides that taxation must be filed in the cause's original file. In my view, the application by the applicant is based on a technicality as it were meant to derail the conclusion of this matter.
21. The preliminary objection is found to be without merit and is therefore dismissed.
22. Costs to the respondents.

RULING DELIVERED VIRTUALLY THIS 26TH DAY OF JANUARY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Ngethe holding brief for Milimo for respondents - present

Ekesa holding brief for Konosi for petitioners – present

Court Assistant – Fred

