M Dalmar Trading Co Ltd v Gakibe & 2 others (Environment & Land Case E001 of 2023) [2024] KEELC 7510 (KLR) (14 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7510 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E001 OF 2023

JO MBOYA, J

NOVEMBER 14, 2024

BETWEEN

M DALMAR TRADING CO LTD ..... PLAINTIFF

AND

MARY WAMBUI GAKIBE ..... 1ST DEFENDANT

SAMUEL KIBE NDUNGU ..... 2ND DEFENDANT

RAAS RESIDENCE LIMITED ..... 3RD DEFENDANT

RULING

Introduction and Background

1. The Plaintiff/Applicant herein has approached the honourable court vide Notice of Motion Application dated the 7th October 2024, brought pursuant to the provisions of Order 10 Rule 11 and Order 22 Rule 22 (1), Order 51 Rule 1 of the *Civil Procedure Rules* and Section 3A of the *Civil Procedure Act*, Chapter 21, Laws of Kenya; and in respect of which same has sought for the following reliefs;

    i. That this Application be certified urgent and fit to be heard Ex-parte in the first instance.

    ii. That this Honourable Court be pleased to review set aside and/or vacate the taxation order issued by the Honourable Court on 7th November 2023, and grant the 3rd Defendant unconditional leave to defend the bill of costs dated 16/3/2023.

    iii. That an interim stay of execution order do issue to restrain the 3rd Defendant, its agents and/or servants from proceeding to execute the Certificate of Taxation pending the inter-partes hearing and determination of the application herein.

    iv. That costs of this application be awarded to the Defendant.

2. The subject application is premised/anchored on various grounds which have been enumerated at the foot thereof. Furthermore, the application is supported by the affidavit of Mustaf Abdulahi Omar [Deponent] sworn on the 7th October 2024 and a supplementary affidavit sworn on the 8th November 2024, respectively.

3. Upon being served with the subject application, the 3rd Defendant/Respondent filed a replying affidavit sworn by one Abdi Wahab Mohamed Hussein. Instructively, the replying affidavit is sworn on the 23rd October 2024.

4. The instant application came up for hearing on the 11th November 2024; wherein the advocates for the respective parties covenanted to canvass the application by way of oral submissions. In this regard, the court allowed the advocates to proceed and canvass/ ventilate the application in the manner proposed.

Parties Submission

a. Applicant's Submissions:

5. The Applicant herein adopted and reiterated the grounds contained at the foot of the application. Furthermore, the Applicant also reiterated the averments contained in the supporting affidavit sworn on the 7th October 2024; as well as the supplementary affidavit sworn on the 8th November 2024. In addition, the Applicant thereafter raised and canvassed three [3] salient issues for consideration by the court.

6. Firstly, learned counsel for the Applicant has submitted that the Applicant herein was hitherto represented by the firm of M/s Hassan Lakicha & Company Advocates. However, the said firm failed to protect the interests of the Applicant during the taxation. In this regard, the Applicant thereafter sought to change her advocates culminating into the appointment of the law firm of M/s Kyalo Mbobu & Company Advocates.

7. To this end, learned counsel for the Applicant has submitted that the previous/outgoing counsel for the Applicant thereafter wrote a letter intimating that same [outgoing advocate] has no objection to the current firm of advocates taking over the conduct of the instant matter on behalf of the Applicant.

8. Arising from the foregoing, learned counsel for the Applicant has therefore invited the court to find and hold that the firm of M/s Kyalo Mbombo & Associates are properly on record for and on behalf of the Applicant. In any event, learned counsel for the Applicant has thereafter referenced the contents of paragraphs 5, 6 and 7 of the supplementary affidavits sworn on the 8th November 2024.

9. Secondly, learned counsel for the Applicant has submitted that though the 3rd Respondent herein filed and served the bill of costs upon the Applicant's previous advocates, the previous advocate failed to attend court and to participate in the taxation of the impugned bill of costs.

10. Owing to the foregoing, it has been contended that as a result of the failure and/or neglect by the previous advocates, the impugned bill of costs was taxed albeit without the participation and/or involvement of the Applicant.

11. Flowing from the foregoing, learned counsel for the Applicant has therefore submitted that the taxation of the impugned bill and the consequential ruling rendered on the 7th November 2023, violated the rights of the Applicant to fair hearing. In this regard, learned counsel for the Applicant has cited and referenced the provisions of Article 50[1] of the *Constitution* 2010.

12. Thirdly, learned counsel for the Applicant has submitted that the Applicant's previous advocates, namely, M/s Hassan Lakicha & Company Advocates failed to notify and inform the Applicant of the

progress of the matter before the court. Furthermore, it was contended that the previous counsel also did not advise the Applicant of the filing of the bill of costs and the scheduled date for taxation.

13. Further and at any rate, it has been contended that the Applicant herein only realized and/or discovered that the bill of costs had been filed and thereafter taxed when same [Applicant] was served with a notice to show cause.

14. In the circumstances, learned counsel for the Applicant has contended that the failure to update and/or advice the Applicant of the status of the proceedings before the court was a mistake and/or failure of the advocates. In this regard, learned counsel for the Applicant has invited the court to find and hold that the mistake of counsel ought not to be visited upon the client.

15. Finally, learned counsel for the Applicant has submitted that the honourable court is seized and possessed of the requisite jurisdiction to entertain and adjudicate upon the instant application. In any event, it has been contended that the Application herein is not prohibited by the provisions of Rule 11 of the *Advocate Remuneration Order* or at all.

16. Additionally, it has been submitted that the provisions of Rule 11 of the *Advocates Remuneration Order* relate to a scenario where the aggrieved party was knowledgeable of and indeed participated in the taxation. It is in such a situation that the parties are obligated to issue and serve a notice of objection to taxation.

17. However, in respect of the instant matter, it was submitted that the Applicant herein was neither knowledgeable of nor privy to the taxation proceedings. Furthermore, it was contended that the Applicant only got to know of the impugned proceedings long after the taxation had been carried out and undertaken.

18. In the premises, learned counsel for the Applicant has therefore submitted that the application beforehand is meritorious. In this regard, the Applicant has implored the court to allow the application and thereafter avail unto the Applicant an opportunity to participate in the taxation, in accordance with the provisions of Article 50[1] of *Constitution*,2010.

b.3rd Defendant's/respondent'submissions:

19. The 3rd Respondent herein adopted and relied on the contents of the replying affidavit sworn on the 23rd October 2024. Thereafter, the 3rd Defendant/Respondent raised and canvassed four [4] salient issues for consideration by the court.

20. First and foremost, learned counsel for the 3rd Defendant/Respondent has submitted that the Applicant herein was previously represented by the firm of M/s Hassan Lakicha & Co Advocates. It was further contended that the said firm of advocate participated in the proceedings up to and including the delivery of the judgment.

21. To the extent that the Applicant herein was previously represented by the firm of M/s Hassan Lakicha & Co Advocates, it was contended that if the Applicant was desirous to effect change of advocate, then it behoved the Applicant to comply with Order 9 Rule 9 of the *Civil procedure Rules, 2010*. In particular, it was contended that the incoming advocate ought to have sought for and obtained leave of the court before filing a notice of change of advocate.

22. Nevertheless, learned counsel contended that the current advocates have neither sought for nor obtained leave to come on record. Furthermore, it has been submitted that the purported consent annexed to the supplementary affidavit has neither been filed nor adopted by the court.

23. In the circumstances, learned counsel for the 3rd Defendant has submitted that the current advocate is not properly on record. In this regard, the court has been invited to find and hold that the impugned application has been filed by a person without the requisite locus standi.

24. Secondly, learned counsel for the 3rd Defendant/Respondent has submitted that the Applicant herein through her previous advocates on record was duly served with the bill of costs and the taxation notice. In addition, it was contended that the Applicant's erstwhile advocate was equally knowledgeable of the directions of the court pertaining to the filing and exchange of written submissions on the bill of costs.

25. Despite being privy to and knowledgeable of the filing of the bill of costs and the scheduled date for taxation, it was contended that the Applicants previous advocates ignored and/or disregarded the taxation proceedings.

26. To the extent that the Applicant and her erstwhile advocate were duly served with the bill of costs and the attendant taxation notice, it was submitted that the Applicant herein cannot now be heard to contend that her rights to fair hearing have been breached, violated and/or infringed upon.

27. In any event, it was contended that the obligation of the court touches on and concern the issuance of reasonable notice to the parties, including the Applicant. However, it was contended that whether the party assumes/ appropriates the opportunity granted by the Court and participates in the proceedings, is a different issue and/or question.

28. Finally, it was submitted that the instant application is not only premature and misconceived but same is legally untenable. In particular, it was submitted that any person, the Applicant not excepted, who is aggrieved by the taxation proceedings and certificate of taxation is obligated to challenge same in accordance with the provisions of Rule 11 of the Advocates Remuneration Order.

29. Furthermore, it was submitted that insofar as the current application does not accord with and/or abide by the provisions of Rule 11 of the Advocates Remuneration Order, the entire application is therefore fatally deficient and legally untannable. At any rate, it was contended that the honourable court can only entertain and handle the application if same [application] was filed in accordance with the law.

30. Arising from the foregoing, learned counsel for the 3rd Respondent has therefore implored the court to find and hold that the honourable court is devoid and divested of the requisite jurisdiction to entertain the subject matter.

31. In view of the foregoing, learned counsel for the 3rd Respondent has submitted that the application beforehand therefore does not meet the requisite threshold to warrant the granting of the orders sought. Simply put, learned counsel for the 3rd Respondent has invited the court to strike out the application or in the alternative, to dismiss same for lack of merits.

Issues For Determination:

32. Having reviewed the application beforehand and the response thereto and upon taking into account the oral submissions rendered on behalf of the parties, the following issues do emerge [crystalise] and are thus worthy of determination;

    i. Whether the instant application has been filed by a law firm which is properly on record or otherwise.

    ii. Whether the court is seized of the requisite jurisdiction to entertain the application.

iii. Whether the Applicant herein was [sic] condemned without a hearing and in contravention of Article 50 of *Constitution* 2010, or otherwise.

Analysis And Determination:

Issue Number 1 Whether the instant application has been filed by a law firm which is properly on record or otherwise.

33. It is common ground that the instant suit was filed by the Plaintiff/Applicant albeit through the firm of M/s Hassan Lakicha & Co Advocates. Furthermore, it is imperative to underscore that the firm of M/s Hassan Lakicha & Co Advocates participated in the hearing of the suit up to and including its determination.

34. Subsequently, the 3rd Defendant [who is the decree holder] proceeded to and filed a bill of costs for purposes of taxation. In any event, the impugned bill of costs was thereafter subjected to taxation culminating into the ruling rendered on the 7th November 2023.

35. To the extent that the Applicant herein was previously represented by the firm of M/s Hassan Lakicha & Co Advocates, it is apposite to state and underscore that if the Applicant was desirous to effect change of advocate, such change could only be effected by compliance with the provisions of Order 9 Rule 9 of the *Civil Procedure Rules 2010*.

36. Suffice it to posit that where an incoming advocate seeks to come on record in place of an erstwhile advocate and more particularly, where judgment has been rendered, then the incoming advocate is obligated to file the requisite application.

37. On the other hand, the incoming advocate is also at liberty to engage with the outgoing advocate and thereafter procure a consent duly executed. Upon procuring the consent, the incoming advocate would be obliged to thereafter file the consent together with the requisite notice of change for purposes of adoption and endorsement by the court.

38. It is instructive to underscore that a consent if any, can only become an order of the court upon its filing and thereafter endorsement. Pertinently, it is the endorsement of the consent by the court that makes the consent lawful and binding as a court order.

39. To this end, it suffices to take cognizance of the holding of the Supreme Court of Kenya in the case of *Asanyo & 3 others v Attorney-General* (Petition 7 of 2019) [2020] KESC 62 (KLR) (10 January 2020) (Judgment), where the court stated and observed as hereunder;

> 40. Adoption of a consent by a Court is a process, in the course of which a Court discharges the duty of evaluating the clarity of the consent placed before it by parties, and giving directions on the manner of adoption. This circumvents the risk of an unlawful Order, and validates the mode of adoption and compliance. Thus, a consent by parties becomes an Order of the Court only once it has been formally adopted by the Court. It is only from that stage, that the Court becomes functus officio. this court having ruled that the Judgment of the Court of Appeal (dated 13 November 2015) was a nullity; and that Court having not formally adopted the consent by parties, was not yet functus officio.

40. In respect of the instant matter, learned counsel for the Applicant has referenced a letter which was written by M/s Hassan Lakicha & Co Advocates. The letter however is not a consent. At any rate, there is no gainsaying that the purported letter was neither filed nor adopted by the court in the usual manner.

41. Other than the foregoing, the advocates for the Applicant has also referenced a notice of change which has been annexed to the supplementary affidavit. Notably, the said notice of change of advocates has also not been filed nor served in accordance with the Law. [See the provisions of Order 9 Rules 5 and 6 of the *Civil Procedure Rules, 2010*]

42. To my mind, learned counsel for the Applicant seems to be content with annexing the letter which is [sic] purported to be a consent and the notice of change.

43. Be that as it may, it is instructive to underscore that the consent if any, and the notice of change of advocate could only be effectual if same were duly filed and endorsed by the court. Insofar as same have neither filed nor endorsed, there is no gainsaying that the current advocates are not properly on record.

44. Back to the provisions of Order 9 Rule 9 of the *Civil Procedure Rules 2010*. It is explicit and crystal clear that the incoming advocate is obligated to comply with the stipulated provisions of the law.

45. For ease of appreciation, it suffices to reproduce the provisions of Order 9 Rule 9. Same are reproduced as hereunder;

> [Order 9, rule 9.]
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> Change to be effected by order of court or consent of parties.
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> 9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court —
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> (a) upon an application with notice to all the parties; or
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> (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

46. Having failed to comply with and/or abide by the provisions of Order 9 rule 9 of the *Civil Procedure Rules, 2010*, there is no gainsaying that the Applicant's current advocates are not properly on record. In this regard, it thus follows that the court processes filed by and on behalf of the current advocates, including the current application, have been filed by a stranger.

47. Before departing from the issue herein, learned counsel for the Applicant submitted that the failure to comply with the provisions of Order 9 rule 9 of the *Civil Procedure Rules*, does not by itself deprive the counsel of *locus standi*. Furthermore, it was also contended that the failure in question relates to non-compliance with a procedural rule and hence same ought not to defeat substantive justice.

48. Nevertheless, it is worth stating the rules of procedure were crafted and promulgated to provide an even playing field for the litigants. In any event, where a litigant is not able to comply with the prescribed rules, it behoves the litigant to demonstrate the difficulty attendant to compliance with the rules of procedure. However, it cannot be said that a litigant and/or its counsel can choose when to comply with the rules of procedure and when to disregard same.

49. To my mind, the approach deployed by learned counsel for the Applicant is perfunctory and Cavalier in nature. Such nature of flagrant/ utter of disregard of the rules of procedure must not be countenanced/ sanctioned by the Court.

50. To buttress the foregoing exposition of the Law, it is instructive to adopt and reiterate the succinct position in the case of *Kakuta Maimai Hamisi v Peris Pesi Tobiko, Independent Electoral And Boundary Commission (IEBC) & Returning Officer Kajiado East Constituency* (Civil Appeal 154 of 2013) [2013] KECA 279 (KLR) (Civ) (8 August 2013) (Judgment), where the court held as hereunder;

> A five-judge bench of this Court expressed itself very succinctly but a few days ago on this precise point is the case of *Mumo Matemu v. Trusted Society Of Human Rights Alliance & 5 Others* Civil Appeal No. 290 of 2012 as follows;
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> > "In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of *Constitution* and the overriding objective principle under Section 1A and 1B of the *Civil Procedure Act* (Cap 21) and Section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases."

51. The importance of compliance with the rules of procedure and more particularly, the ones that are intertwined with the substance of the matter was also highlighted by the Supreme Court in the case of *Patricia Cherotich Sawe v Independent Electoral & Boundaries Commission (IEBC), United Republican Party(URP), Rose Kisama, Naum Chelagat & Cheruiyot Maritim* (Petition 8 of 2014) [2015] KESC 7 (KLR) (Civ) (22 July 2015) (Ruling), where the court stated and observed as hereunder;

> (31) Although the appellant involves the principal of the prevalence of substance over form, this Court did signal in *Law Society of Kenya v. The Centre for Human Rights & Democracy & 12 Others*, Petition No. 14 of 2013, that "Article 159(2) (d) of *Constitution* is not a panacea for all procedural shortfalls." Not all procedural deficiencies can be remedied by Article 159; and such is clearly the case, where the procedural step in question is a jurisdictional prerequisite.

52. Flowing from the foregoing exposition, it is my finding and holding that the firm of M/s Kyalo Mbobu & Co Advocates are not properly on record. In this regard, the court processes filed and lodged by the said firm, including the currrent application, have been lodged by a firm without the requisite locus standi.

53. In the circumstances, the impugned court processes and in particular, the application beforehand therefore courts striking out.

Issue Number 2 Whether the court is seized of the requisite jurisdiction to entertain the application.

54. The crux/gravamen of the Applicant's complaint touches on and concerns the taxation proceedings and the consequential certificate of taxation arising therefrom.

55. Suffice it to recall that the Applicant has contended that the impugned bill of costs was subjected to taxation albeit without her participation and/or involvement. In this regard, the Applicant is beseeching the court to set aside and vacate the certificate of taxation and thereafter allow the Applicant to participate in the taxation.

56. To my mind, the Applicant herein is stating that same [Applicant] was/is aggrieved by the certificate of taxation. Consequently, the Applicant seeks to impugn and/or impeach the certificate of taxation.

57. It is instructive to state and underscore that where a litigant, the Applicant not excepted, is aggrieved by the taxation proceedings and in particular a certificate of taxation, it is incumbent upon the Applicant to comply with and/or adhere to the provisions of Rule 11 of the *Advocates Remuneration Order.*

58. Suffice it to underscore that the importance of the provisions of Rule 11 of the *Advocates remuneration Order* has been highlighted and elaborated upon in the case of *Machira & Co. Advocates v Arthur K. Magugu & another* (Civil Appeal 199 of 2002) [2012] KECA 245 (KLR) (2 March 2012) (Judgment).

59. For coherence, the Court of Appeal stated thus;

> 12. Sub-rule (1) requires the party objecting to give notice in writing within 14 days "of the items of taxation to which he objects." As the trial judge correctly found, the Respondents notice of 1st August 2001 did not comply with that provision. It did not specify the items objected to so that the taxing officer could give his reasons on them.
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> 13. As we have pointed out the intendment of the Rules Committee in providing for objections to bills of costs to be dealt with by references and not appeals or reviews was expedition. If vague notices are given taxing officers might be forced to give their reasons for their taxation of each item including even those not objected to. That would of course defeat the purpose of that expeditious procedure. Having not specified the items objected to and sought reasons for their taxation, the Respondents notice of 1st August 2001 was fatally defective. It follows that the Respondents reference based on it was incompetent and we agree with counsel for the Appellant that it should have been struck out.

60. There is no gainsaying that the Applicant herein is simply inviting this court to engage with the certificate of taxation and to impeach same. Quite clearly, the Applicant was obligated to comply with the set and prescribed mechanism for invalidating a certificate of taxation.

61. I am aware that learned counsel for the Applicant contended that the Applicant herein was not involved in the taxation proceedings. To this end, learned counsel for the Applicant contended that the Applicant was thus not bound by the provisions of Rule 11 of the *Advocates Remuneration Order*.

62. I am least persuaded by the arguments rendered by learned counsel for the Applicant. For good measure, my reading of Rule 11 of the *Advocates Remuneration Order* drives me to the conclusion that anyone, the Applicant not excepted who wishes to object to the certificate of taxation must comply with Rule 11 of the *Advocates remuneration Order*.

63. Finally, it is imperative to underscore that where the law outlines and prescribes a mechanism for addressing a particular situation, it behoves all and sundry, to comply with the set mechanism. At any rate, where there is a failure to comply with the set mechanism, such a failure invalidates the proceedings and ousts the jurisdiction of the court.

64. To this end, I beg to adopt and reiterate the holding in the case of *Speaker of the National Assembly v Karume* (Civil Application 92 of 1992) [1992] KECA 42 (KLR) (29 May 1992) (Ruling), where the court stated and observed as hereunder;

> 15. In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *Constitution* or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.

65. Likewise, the same position [*supra*] was elaborated upon by the Supreme Court in the case of *Outa & another v Okello & 5 others* (Petition 10 of 2014) [2014] KESC 20 (KLR) (3 July 2014) (Judgment)

> 65. For the proper conduct of administration of justice, the statutory form is generally employed to confer jurisdiction, prescribe form, substance, process and procedure, governing the

administration and dispensation of claims. A statute in this category may prescribe how to formulate a right of action – for instance, by petition, plaint, notice, or originating motion. On procedural aspects, the statute or the rules (as the case may be), may regulate timelines, and other facets of case- management. It may also regulate the confines within which a Court may exercise its adjudicatory powers, by prescribing the category of jurisdictional issues; or questions upon which a Court may make a determination of the case before it. This is the context in which the conduct of proceedings before our Courts is governed by the *Civil Procedure Act*, the Criminal Procedure Code, the *Appellate Jurisdiction Act*, the *Supreme Court Act*, 2011 and the Rules made pursuant thereto, and by many other Acts of special character.

66. Arising from the foregoing, my answer to issue number two [2] is twofold. Firstly, the Applicant herein was obligated to comply with and/or abide by with the prescription of the law as pertains to the manner of impeaching a certificate of taxation. [See Rule 11 of the *Advocate Remuneration Order*].

67. Secondly, the failure to comply with and or abide by the provisions of Rule 11 of the *Advocate Remuneration Order* divests this court of the requisite jurisdiction to entertain and adjudicate upon the subject dispute.

Issue Number 3 Whether the Applicant herein was [sic] condemned without a hearing and in contravention of Article 50 of *Constitution* 2010, or otherwise.

68. Learned counsel for the Applicant has contended that the taxation proceedings were carried out and undertaken albeit without the involvement and participation of the Applicant. In this regard, it has been contended that the lack of participation by the Applicant in the taxation proceedings therefore constitutes a breach and/or violation of the Applicant's right to fair hearing.

69. Furthermore, learned counsel for the Applicant has submitted that even though the Applicant had instructed and engaged the firm of M/s Hassan Lakicha & Co Advocates, the said firm failed to protect the rights and interests of the Applicant. In this regard, it has been contended that the Applicant has therefore been condemned unheard.

70. What I hear the Applicant to be contending is to the effect that his rights to fair hearing has been breached and/or violated. In this regard, the Applicant is therefore beseeching the court to vacate the ruling rendered on the 7th November 2023 and thereafter afford it an opportunity to be heard.

71. However, it is important to underscore that the right to fair hearing does denote that a party must be heard. To the contrary, the right to fair hearing underpins the entitlement of a party to due notice and unreasonable opportunity to be heard. As to whether the party appropriates the right to be heard, is another thing all together.

72. Put differently, the right to fair hearing does not envisage that a court handling a particular matter must go for the Applicant and force same [Applicant] to come to court to be heard. Pertinently, the court is only called upon to discern whether a particular party has been availed due notice and reasonable opportunity. However, if the party fails to partake of fair hearing, then such a party can only blame him/herself

73. To this end, I can do no better than to cite and reference the decision of the Court of Appeal in the case of *Union Insurance Co. of Kenya Ltd vs Ramzan Abdul Dhanji* Civil Application No.179 of 1998 [Unreported], where the Court stated thus:

> " The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not

utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it".

74. In respect of the instant matter, evidence abound that the Applicant through her previous counsel was afforded due notice and opportunity to be heard. In any event, the court even gave directions for the filing and exchange of written submissions of the bill of costs.

75. Nevertheless, the Applicant and her advocates on record failed to appropriate the opportunity granted. The court thereafter proceeded to and taxed the bill of costs. In this regard, can the Applicant really be heard to complain that same was condemned unheard.

76. In my humble view, the Applicant through her erstwhile counsel was given due notice and reasonable opportunity. Same [Applicant] failed to appropriate the opportunity. Having failed to appropriate the opportunity, the Applicant can only blame itself and not otherwise.

77. As pertains to the import and tenor of what constitutes due process and the right to fair hearing, I beg to adopt and reiterate the holding of the Court of Appeal in the case of *County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others* [2015] eKLR, where the court held as hereunder;

> 72. The primary meaning of the rule of law as anybody who has anything to do with the law knows, "is that everything must be done according to law." In relation to governmental power, this means that every government authority must justify its action, which deprives an individual of his right or infringes his liberty, as authorized by law. This "is the principle of legality." But the rule of law demands more than just the principle of legality. It demands, and this is the second meaning of the rule of law, "that government should be conducted within a framework of recognized rules and principles which restrict discretionary power." This is the principle of due process.
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> 73. Due process is a fundamental aspect of the rule of law. Due process is the right to a fair hearing. The right to a fair hearing encapsulated in the audit alteram partem rule (no person should be condemned unheard) and founded on the well-established principles of natural justice, is not a privilege to be graciously accorded by courts or any quasi-judicial body to parties before them. As is clear from Articles 47 and 50 of our Constitution, it is a constitutional imperative.
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> 74. Whereas the right to a fair hearing varies from one case to another depending on the subject of the matter in issue, its irreducible minimum is now well settled. In granting that right, the court or the administrative body or person concerned should not make it a charade by taking perfunctory actions for the sake of running through the motions to be seen to have complied with it.
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> The person charged is entitled to what, in legal parlance is referred to as the right to "notice and hearing." That means he must be given written notice which must contain substantial information with sufficient details to enable him ascertain the nature of the allegations against him. The notice must also allow sufficient time to interrogate the allegations and seek legal counsel where necessary. In the epigram of the indomitable Lord Denning in *Kanda v. Government of Malaya*
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> > "If the right to be heard is to be a real right which is worthy anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made

affecting him: and then he must be given a fair opportunity to correct or contradict them."

78. Before departing from this issue, it is also worth recalling that the Applicant has also contended that her previous advocate neither informed nor notified same of the filing of the bill of costs and the taxation of the same. In any event, the Applicant contended that same only came to know of the taxation of the impugned bill of costs after same was served with a notice to show cause.

79. Without belabouring the point, there is no gainsaying that the instant suit belongs to the Applicant. The Applicant was therefore obligated to keep track of the proceedings and continually to appraise itself of the status of the proceedings. The Applicant herein cannot be heard to lay a blanket blame on her previous counsel. At any rate, such kind of blame games do not cut ice with this court.

80. To amplify the exposition of the law, it suffices to take cognizance of the ratio decidendi in the case of *Habo Agencies Limited v Wilfred Odhiambo Musingo* (Civil Appeal (Application) 124 of 2004) [2015] KECA 987 (KLR) (Civ) (16 January 2015) (Ruling), where the court stated and held thus;

> It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel. It is true as submitted by Mr. Wambola that mistakes of counsel may be excusable.

81. My answer to issue number three[3] is therefore twofold. Firstly, the Applicant herein had due notice and reasonable opportunity to participate in the taxation of the impugned bill of costs. However, same [Applicant] failed to appropriate the opportunity granted and/or availed.

82. Secondly, the Applicant herein was never condemned unheard. On the contrary, the taxation proceedings and the resultant certificate of taxation were lawful and procedural. Instructively, the contention that the Applicant was condemned unheard flies on the face of the evidence on record.

Final Disposition:

83. Flowing from the discussion [details highlighted in the body of the ruling], it must have become crystal clear that the instant application is not only premature and misconceived, but same is also legally untenable.

84. In a nutshell, the application dated 7th October 2024 be and is hereby dismissed with costs to the 3rd Defendant/Respondent. Furthermore, the costs of the application be and are hereby assessed and certified in the sum of kes.25, 000/= only.

85. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14 TH DAY OF NOVEMBER 2024.

OGUTTU MBOYA,

JUDGE.

In the Presence of;

Benson Court Assistant

Ms Linnet Chania h/b for Mr. Kyalo Mbobu for the Plaintiff/Applicant.

Mr. Peter Muchoki for the 3rd Defendant/Respondent.

Mr. Duncan Muge for the 1st and 2nd Defendants/Respondents.