



**Ndungu v National Social Security Fund Board of Trustees (Environment & Land Case 558 of 2016) [2024] KEELC 13368 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13368 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 558 OF 2016  
AA OMOLLO, J  
NOVEMBER 14, 2024**

**BETWEEN**

**STEPHEN NJOROGE NDUNGU ..... PLAINTIFF**

**AND**

**NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES . DEFENDANT**

**RULING**

1. Before the Court for determination is a Reference by way of Chamber Summons dated 12<sup>th</sup> April 2024 and brought under Order 50 Rule 6 of the Civil Procedure Rules and Paragraph 11(1) and (2) of the Advocates Remuneration Order. The Defendant (hereinafter ‘Applicant’) is seeking orders that:
  - a. Spent.
  - b. Spent.
  - c. The court be pleased to allow a Reference against the Certificate of Taxation dated 19<sup>th</sup> January 2024 and, in its place, dismiss the Respondent’s bill of costs dated 24<sup>th</sup> August 2023.
  - d. In the alternative to prayer (c) above, the Court be pleased to order the re-taxation of the Respondent’s bill of costs dated 24<sup>th</sup> August 2023 by a taxing officer other than Hon. T. Marienga, Deputy Registrar.
  - e. Costs of this Reference be provided for.
2. The application is based on several grounds and supported by an affidavit sworn by Moses Onyango, an advocate at the firm of Kiptinness and Odhiambo Associates. The deponent averred that the Respondent’s bill of costs dated 24<sup>th</sup> August 2023 was taxed at Kshs. 2,815,627.20 on 14<sup>th</sup> December 2023. It was stated that the Applicant’s former advocates objected to the taxation vide a letter dated 15<sup>th</sup> December 2023. The deponent stated that due to the change in advocates the firm that is now on



record had difficulty in accessing the taxation ruling and was only able to access the same on 12<sup>th</sup> April 2024 hence the delay in filing the instant reference.

3. It was averred that the taxation was excessive and erroneous and specifically that the Taxing Officer erred in: failing to appreciate the Applicant's submissions; taxing the bill as drawn; failing to consider that the value of subject matter was not computed in the judgement; considering the value of the subject matter as Kshs. 81,332,158.05; taxing the bill of costs excessively yet the reliefs allowed in the judgement were non-monetary; erroneously assessing the get up fees; allowing Kshs. 197,400 as cost for making copies when the same was not proven; allowing items 5 and 19 as separate items; allowing items 22,27,29,36,37,38,40,44,48,50,51,57,60,61 and 62 yet they were routine attendances; taxing items 4, 5, 19, 20, 21, 26, 30, 32, 34, 42, 58, 59, 64 and 68 excessively; taxing item 26 at Kshs. 21,600 yet there are less than 200 folios; taxing item 68 at Kshs. 5,300 yet the bill was 8 folios; allowing item 69 at Kshs. 73,000 without proof; and, allowing VAT at Kshs. 338,362.37 yet that is not applicable in party and party bill of costs.
4. The Respondent filed a replying affidavit dated 30<sup>th</sup> April 2024. He stated that the Applicant should not be given audience by the Court as it has not complied with the decree of the Court dated 11<sup>th</sup> May 2023 which required it to give statements of account and transfer the suit properties to the Respondent. It was further averred that the instant application is aimed at delaying the execution process.
5. The deponent averred that apart from a letter dated 15<sup>th</sup> December 2023 in which the Applicant's former advocates were seeking a copy of the ruling, there was no further communication from the Applicant. Additionally, the deponent stated that the letter was not filed in Court nor served on the Respondent. The deponent further noted that the Reference is defective as it was filed out of time. He also noted that the change of advocates should not be used as an excuse for that as the statutory filing period had lapsed by the time there was a change in advocates.

### **Submissions**

6. The Respondent filed submissions on 13<sup>th</sup> June 2024. It was submitted that the Applicant who was represented by an advocate during the taxation did not file an objection to the taxation within 14 days as required by Paragraph 11(1) of the Advocates Remuneration Order. It was further submitted that the affidavit that was eventually sworn was sworn by the advocate not the Applicant. This in the Respondent's view amounts to the advocate trying to be a witness. The cases of *Simon Isaac Ngugi v Overseas Courier Services (K) Ltd [1998] KEHC 240 (KLR)* and *David Kinyanjui & 2 Others v Meshack Omari Monyori [1998] KECA 104 (KLR)* were relied upon.
7. The Applicant submitted that the prayers sought cannot be granted by the Court as firstly, there is no competent reference before the Court as the Applicant has not been granted extended time within which to file the reference; and secondly, the Applicant is seeking to have the bill of costs dated 24<sup>th</sup> August 2023 struck out yet it has been taxed and only the taxation can be objected to.
8. In conclusion, the Respondent submitted that the Applicant is in contempt of the decree issued by the Court on 11<sup>th</sup> May 2023. It was stated that the Applicant has been engaging in delaying tactics since then and was only jolted by the decree holder's notice of motion dated 29<sup>th</sup> February 2024. A notice of change of advocates was consequently filed on 8<sup>th</sup> March 2024 but it was not until 12<sup>th</sup> April 2024 that the instant application was filed.
9. The Applicant filed submissions on 10<sup>th</sup> September 2024 and relied on the cases of *Regina Waithira Mwangi Gitau v Boniface Nthenge [2015] KEHC 2475 (KLR)*, *First Community Bank Limited v Talib Omar Said [2020] KEHC 2951 (KLR)* and *Hakika Transporters Services Ltd v Albert Chulah*



Wamimitaire [2016] KECA 255 (KLR). The Applicant submitted that there is no express prohibition against an advocate swearing an affidavit relating to matters within his knowledge.

10. On the question of time, it was submitted that the advocates filed the reference as soon as they received instructions to act. It was further submitted that the power to admit a reference out of time is discretionary and that such discretion should be exercised in light of the oxygen principle to allow a reference filed out of time even though an application for enlargement of time has not been made nor Order 50 Rule 6 relied upon. The cases of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission, Wilfred Rottich Lesan, Robert Siolei Returning Officer Bomet County, Kennedy Ochayo, Wilfred Wainaina, Patrick Wanyama, Mark Manzo & Abdikadir Sheikh [2014] KECA 782 (KLR), Muturi Mwangi & Associates v Mwangi [2024] KEELC 1604 (KLR) and Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi [1999] 2E A 231 were relied upon.
11. Relying on the cases of Premchand Raichand Limited & another v Quarry Services of East Africa Limited and another [1972] E. A 162, First American Bank of Kenya v Shah and others [2002] EA 64 and Joreth limited v Muturi Kigano and Associates [2002] 1EA 92. The Applicant submitted that the decision of a taxing master should be set aside where there is an error in principle. It was further submitted that in the instant suit there was an error in computing the value of the subject matter. It was stated that using the consideration of the suit properties as the value of the subject matter (and as a basis for the instruction fees) was erroneous as the matter before the Court was the sums excessively paid by the Respondent.
12. The Applicant submitted that the result of this error was an inordinately high instruction fee. Relying on the case of Kamunyori & Company Advocates v Development Bank Of Kenya Limited [2015] KECA 595 (KLR) the Applicant submitted that failure to correctly identify the subject matter was an error in principle that warrants a setting aside of the entire Certificate of Costs.

### **Determination**

13. Based on the foregoing the following issues arise for determination: Whether the Affidavit Sworn by the Applicant's Advocate is rightfully on record Whether the Reference is properly before the Court
14. The Respondent averred that the affidavit sworn by the Applicant's advocate amounted to the advocate crossing over from the role of counsel to that of a witness. The Applicant argued that there are circumstances where an advocate can lawfully swear an affidavit.
15. In the case of Kwacha Communications Limited & Hampshire Court Limited v Pindoria Holdings Limited & Kwacha Group of Companies [2022] KEHC 734 (KLR) the Court stated as follows:

It is not always improper when an Advocate depones on matters confined to the facts that the deponent may prove from his own knowledge. As a result, not all affidavits sworn by Advocates are automatically defective. In my opinion, an affidavit sworn by an Advocate that is limited to facts which he/she is capable of proving on his own knowledge and does not disclose any issue necessitating his/her cross-examination is not flawed.
16. Having perused the affidavit sworn by the Applicant's advocate Moses Onyango, I am of the view that the same relates to matters within the advocate's knowledge. Additionally, the affidavit relates to formal matters including but not limited to errors in taxation. I consequently find that the affidavit is not defective and is rightfully on record.
17. On the second issue, the Respondent has argued that the reference is not rightfully before the Court as it was filed out of time and without leave extending time. The Applicant admits the Reference is filed



out of time but argued that the power to admit a reference out of time is discretionary and that such discretion should be exercised in light of the oxygen principle.

18. The time lines for filing an objection to a taxation are set out as follows at Paragraph 11 of the Advocate's Remuneration Order:

1. Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

19. Paragraph 11(4) of the Advocates Remuneration Order provides:

The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

20. As per the foregoing section of law, the correct procedure for filing a reference out of time starts with the filing of an application where the Applicant seeks orders of the Court allowing the filing of the reference out of time. The Applicant in the instant case has not done that. The Applicant filed a reference out of time without the permission of the Court to do so and is now asking the Court to accept it based on the oxygen principle.

21. The oxygen principle is stated as follows at Section 1A of the *Civil Procedure Act*:

The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

22. The Court of Appeal in the case of *Safaricom Limited v Ocean View Beach Hotel Limited, Salim Sultan Moloo & Alsai (K) Limited* [2010] KECA 346 (KLR) stated as follows concerning the application of the oxygen principle:

“This Court has, of course, embraced the new sections positively and will continue to apply them for the attainment of the goals envisaged by Parliament. The Court has, however, sounded a timely caution in all its decisions so far that the new provisions are not a panacea for all ills in civil litigation. Other cautions have been couched in different forms, for example, in *City Chemist (NBI) & Another vs. Oriental Commercial Bank Ltd*, Civil Appl. No. Nai. 302/2008 (UR) where, after appreciating the gravity of the requirements of the new provisions and the court's duty to give them operational effect, the court stated:

“That however, is not to say that the new thinking totally uproots well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application.”



23. The import of the foregoing is that the oxygen principle is neither a panacea of all ills nor a ticket to bypass clearly set out procedures of law. In the instant application, there is a clear procedure for filing a reference out of time. That procedure forms the basis for the exercise of the Court's discretion. The Applicant has failed to follow that procedure and the principle does not operate to replace applicable law with discretion and especially not in a case like this where the Applicant has not given any satisfactory explanation as to the reasons for the delay.
24. In view of the foregoing, I find that the reference is not rightfully before the Court. It is consequently struck out with costs to the Respondent.

**RULING DATED, SIGNED & DELIVERED AT NAIROBI THIS 14<sup>TH</sup> NOVEMBER, 2024.**

**A. OMOLLO**

**JUDGE**

