



Akenga Kimutai & Associates v National Land Commission (Environment and Land Miscellaneous Application E004 of 2023) [2024] KEELC 7553 (KLR) (12 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7553 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E004 OF 2023
JM ONYANGO, J
NOVEMBER 12, 2024

BETWEEN

AKENGA KIMUTAI & ASSOCIATES APPLICANT

AND

NATIONAL LAND COMMISSION RESPONDENT

RULING

1. By a Notice of Motion dated 31st January, 2023 and filed under Certificate of Urgency, the Applicant sought the following orders that; -
 - a. The Honourable Court be pleased to enter judgment for the applicant against the respondent for the sum of Kenya Shillings Twenty-Seven Million, Nine Hundred and ten Thousand, Three Hundred and Fifty (27,910,350/=) as it appears in the certificate of costs dated 20th December, 2021 with interest from the date of filing this Application until payment in full.
 - b. The Applicant be allowed to execute the judgment herein against the respondent, national land commission.
 - c. Costs of the Application be provided for.
2. The Application is premised on the 10 grounds thereon and on the Supporting Affidavit sworn by Francis Karanja, an Advocate of the High Court having conduct of the matter; on even date and a Further Affidavit sworn by Anthony Awando Ogutu, an Advocate of the High Court of Kenya, having conduct of the matter.
3. It is his contention that on 18th June, 2021 they filed a Party and Party Bill of Costs in Misc. Application No. 24 of 2017; on 14th October, 2021 a taxation notice was drawn and served upon the respondent's legal counsel via email. However, the respondent did not file any response to the said Bill of Costs and the same thus proceeded without the respondent's input and attendance.



4. Consequently, the Bill of Costs was assessed by the Deputy Registrar at Kshs.27,910,350 and a Certificate of Costs dated 20/12/2021 issued to that effect.
5. He maintained that the respondent was aware of the facts of the case regarding the estimate value of the suit land. Further, the respondent was represented in the suit Misc. Application No. 24 of 2017 at all times and therefore the taxation process cannot be an exemption.
6. In the Further Affidavit; he reiterated that the Application was brought pursuant to the provisions of Section 51(2) of the Advocates Act and that the respondent was duly served with the Bill of Costs dated and the Taxation Notice dated 18th June, 2021, on the 13th October, 2021 via their last used and recognized email address. He thus dismissed the allegations by the respondents that the Bill of Costs and the Taxation Notice thereof were served upon the firm of Mbuthia & Co. Advocates as false and misleading.
7. He further stated that the taxation of the costs proceeded ex-parte since the respondent despite being served with the said bill of costs and the taxation notice chose not to respond to the same. On who was to bear the costs of the suit; he contended that the costs in Eldoret ELC Misc. Application No. 24 of 2017, were awarded to the applicant and the same was to be borne by the 1st respondent in the said matter, who is the respondent herein.
8. In response to the allegations raised on the valuation report raised by the respondent; he averred that even though the respondent is disputing the said valuation report relied on in the taxation of costs, he has not provided a contrary valuation report despite having an opportunity to do so.
9. He further dismissed the claims by the respondent of seeking review and/or setting aside of the ruling on taxation as being a delaying tactic aimed at derailing the applicant from enjoying the fruits of their judgment. Instead, it was his assertion that the applicant stands to suffer substantial loss as they shall be delayed from proceeding with the execution of the taxed costs. He urged the court to allow the application.
10. The Application was opposed; the Respondent filed a Replying Affidavit sworn by Brian Ikol, an Advocate of the High Court and the Director Legal Affairs & Regulatory Services of the Respondents, on the 2nd September, 2024. He gave a brief background outlining the genesis of the matter; that the respondent filed a reference in court *vide* Eldoret ELC No. 112 of 2016 NLC vs Estate of Sisiwa Arap Malakwen & AG, seeking a determination on the issue of compensation. The same was heard and judgment delivered on 23rd October, 2017.
11. Subsequently, on 30th November, 2017; Rural Housing Estate filed an Application seeking to have the said judgment reviewed and set aside *vide* Misc. Application No. 24 of 2017. The Application was heard and allowed with costs. Rural Housing thereafter filed a Bill of Costs dated 18th June, 2021.
12. It is however his contention that the respondent was neither served with the Bill of Costs nor Taxation Notice. He dismissed the taxation notice served through the firm of Mbuthia & Company Advocates as being frivolous as they had never contracted the said firm to represent them.
13. Notwithstanding; taxation proceeded ex-parte and that the respondent only learnt of the Bill of Costs when he was served with the instant Application. He thus argues that the respondent was never accorded an opportunity to challenge the said Bill of Costs and was condemned unheard.
14. He further alleged that the even though costs were awarded to the then Respondent, there was no direction sought from the court as to who should meet the awarded costs. In addition, no proof was tendered to show the effort made in settling the assessed amounts against the respondent.



15. He contended that the valuation report relied upon in drawing the Bill of Costs had been challenged by the parties during the main trial and consequently, if the orders sought are granted it will occasion the respondent grave injustice who will also be at a risk of suffering irreparable harm.
16. In conclusion, he argued that it is in the interest of justice that the matter be referred back to the taxing master and the Bill of Costs be determined on merit, he maintained that no prejudice will be occasioned to the applicant and thus urged the court to dismiss the application.
17. The Application was canvassed by way of written submissions; the Applicant filed his written submissions dated 1st December, 2023 together with authorities while the Respondents filed their submissions dated 9th April, 2024 together with authorities, which I have read and taken into account in arriving at my determination as hereunder.

Analysis and Determination

18. Having critically read and considered the pleadings herein, the annexures attached thereto and the rival submissions; I am of the considered view that the sole issue arising for determination is whether the applicant has met the required threshold to warrant the grant of the orders sought;
19. I have taken into account the rival position by the parties herein. While the applicant seeks to have the certificate of costs awarded as the judgment of the court, the respondent seeks to set aside/ vacate/ review the said certificate of costs for the reason that he was not served and that the valuation report relied upon was erroneous.
20. On a perusal of the annexures by the Applicant in their Further Affidavit, I have noted that from the annexure marked AAO – 1, service was duly effected via email on 13th October, 2021 to nlc.legal@landcommission.go.ke. The attachments thereon were Bill of Costs in respect to ELC Case No. 24 of 2017 and 112 of 2016. On 31st March, 2022 there was an email from the respondent through the same email nlc.legal@landcommission.go.ke stating “we acknowledge receipt. The respondent did not dispute knowledge of the said email address nor comment on the same. I therefore find that the allegations by the respondent that they were never served with the bill of costs are false and misleading.
21. The respondent’s main ground for setting aside the certificate of costs was that they were never served with the Bill of Costs and the Taxation Notice and further that the valuation report relied upon by the application was disputed.
22. The orders sought of setting aside/reviewing the decision of the taxing master are discretionary in nature. This court is reminded of its duty to exercise such discretion judiciously, taking into account the circumstances of the case. As mentioned hereinabove, service was properly effected and the respondent was fully aware of the bill of costs and the resultant taxation proceedings but he chose not to attend nor file a response thereto.
23. Further, the respondent had an opportunity to challenge the valuation report relied upon by the applicant but he did not file any contrary valuation report; either at the taxation proceedings or in his replying affidavit, to challenge the disputed value of the property. The rules of evidence are clear in this regard; he who alleges must prove.
24. I must however state that counsel for the respondent in their Supplementary Submissions decided to circumvent the rules of procedure and evidence by annexing a copy of a valuation report in their submissions. The rules are clear; evidence can only be adduced either orally through the testimonies in court or through a duly sworn Affidavit. I will therefore disregard the said copy of valuation report as annexed in the submissions, the same has no probative and/or evidentiary value.



25. Consequently, it is the finding of this court that the respondent has not tendered any reasonable explanation and/or basis to warrant the exercise of discretion in its favor. As a result, this court is not persuaded to set aside the certificate of costs as sought.
26. Having established that there was proper service of the Bill of Costs and the certificate of costs has not been set aside, the question that therefore follows is whether said the certificate of costs can be adopted as a judgment of the court and execution thereof to issue.
27. The instant Application has been brought pursuant to the provisions of Section 51 (2) of the *Advocates Act* which provides as follows: -

“The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”

28. It is clear from the facts of the case that the certificate of costs issued in favor of the Applicants has neither been set aside, varied and/or reviewed. The Respondent has not filed any Reference seeking to challenge the said decision of the taxing master.
29. The provisions of section 51 (2) above mandates and gives this court the jurisdiction to issue an order that judgment be entered for the sum outlined in the certificate of costs. To this end, I find that the said prayer is merited.
30. The Applicant further seeks to be allowed to execute the said judgment against the respondent. The respondent herein is a government institution and execution thereof is governed by the provisions of Section 21 of the *Government Proceedings Act*. It is the respondent’s contention that the provisions under the said section requires strict compliance.
31. In *Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security* (2012) eKLR J. Githua held as follows:

“In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the *Government Proceedings Act*. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the *Government Proceedings Act* (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the



court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, Section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon.”

32. Guided by the above case law and the provisions of section 21 of the *Government Proceedings Act*, it is my finding that the said order of execution as sought in prayer (b) is premature and the same is therefore untenable at this point. The Applicant is directed to strictly comply with the legal provisions on execution against a government body/ agency.

Conclusion

33. In view of the foregoing, I find that the Notice of Motion Application dated 31st January, 2023 is partially merited and the same is hereby in terms of prayer (a) together with interest thereon at fourteen (14%) per cent per annum from the date of filing this application.
34. However, execution thereof to strictly comply with the provisions of Section 21 of the *Government Proceedings Act*.
35. Costs of the Application to be borne by the Respondent.

It is so ordered!

DATED, SIGNED AND DELIVERED AT ELDORET THIS 12TH DAY OF NOVEMBER, 2024.

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J. M. ONYANGO

JUDGE

In the presence of;

1. No appearance for the Applicant
2. Miss Obino for Miss Akello for the Respondent

Court Assistant: Kuto

