Swanya t/a Swanya & Co Advocates v Nairobi City County (Commercial Case E521 of 2024) [2025] KEHC 830 (KLR) (Commercial and Tax) (31 January 2025) (Ruling)

Neutral citation: [2025] KEHC 830 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E521 OF 2024

BM MUSYOKI, J

JANUARY 31, 2025

BETWEEN

VICTOR OGETO SWANYA T/A SWANYA & CO ADVOCATES ..... PLAINTIFF

AND

NAIROBI CITY COUNTY ..... DEFENDANT

RULING

1. The plaintiff, a firm of advocates has brought a notice of motion dated 12th September 2024 which seeks two orders viz:
    1. The court be pleased to enter summary judgment against the defendant as prayed on the plaint.
    2. The defendant do bear the costs of both the suit and the application.
2. The grounds upon which the application is based are on the face of the same which are basically and in summary that the defendant retained the plaintiff to offer legal services in Nairobi Environment and Land case number 08 of 2022 at legal fees of Kshs 325,310,200.00 out of which the defendant paid a sum of Kshs 14,009,160.00 leaving a balance of Kshs 311,301,040.00 which is the amount claimed in the plaint.
3. The facts of the case are that the defendant engaged the plaintiff to represent it in Nairobi ELC number 08 of 2021 which instructions the plaintiff accepted and executed to finality with a judgment being rendered in favour of the defendant. The plaintiff had raised a feed note of a sum of Kshs 1,178,408,748.28 but upon negotiations, it revised it to Kshs 325,310,200.00. The defendant agreed to pay the legal fees as per the revised fee note. Based on this understanding, the defendant sought to settle the fees and initiated payment of part of it being Kshs 85,000,000.00 for which they sought approval of the Controller of Budget which approval was granted. The defendant did not pay this sum despite

receiving approval for the Controller of Budget. Instead, it paid the aforesaid Kshs 14,009,160.00 which according to it, was the amount payable as per the Advocates Remuneration Order.

4. Upon entry of appearance by the defendant and before the defence was filed, the plaintiff filed the notice of motion which is supported by affidavit of Victor Swanya Ogeto sworn on 12th September 2024. The plaintiff depones that upon accepting the defendant's instructions, it in good faith proceeded to defend it in the ELC case. The letter of instructions dated 3-03-2022 has been exhibited as annexure VSO-1. The plaintiff has annexed a letter to the Controller of Budget dated 30-06-2023 in which the defendant sought approval for payment to the plaintiff of Kshs 85,000,000.00 among others. The Controller of Budget approved the payment vide her letter dated 30-06-2023 but the defendant did not pay the approved sum.

5. When the plaintiff followed up the matter which included complaint to the Controller of Budget, the defendant claimed through its letter dated 24-05-2023 that the payment had been processed but it was time barred by the closure of the system as the financial year had come to an end. In proof of this, the plaintiff has exhibited letter dated 22-05-2024 from the Controller of Budget to the defendant and the defendant's letter dated 24-05-2023 to the Controller of Budget. The defendant also went ahead and promised the Controller of Budget that the Kshs 85,000,000.00 will be paid within seven days after its supplementary budget was uploaded. By a letter dated 26-04-2023, the defendant sought to revise the agreed fees to Kshs 14,009,160.00 which the plaintiff rejected. Nevertheless, the defendant went ahead and paid the said Kshs 14,009,160.00. On this background, the plaintiff avers that the defendant does not have a plausible defence and seeks entry of judgement as prayed in its plaint.

6. The defendant opposed the application through a replying affidavit sworn by Wasonga S. Ogola on 30-09-2024. Mr. Ogola depones that the defendant has a water tight case against the plaintiff's claim. He adds that entering summary judgement at this stage would amount to condemning the defendant unheard and avoiding just and fair trial of the matter and that the plaintiff is employing short cuts in litigation. Lastly, the defendant avers that the application is incompetent and bad in law since there cannot be summary judgment against the government.

7. The application was argued by way of written submissions. The plaintiff filed submissions dated 9th October 2024 while the defendant filed its submissions dated 5th November 2024. The plaintiff in addition filed supplementary submissions dated 6th November 2024. I have read through the submissions, affidavits of the parties and annexures thereto. It is my considered opinion that the following are the issue for determination in this application;

    a. Whether there was a valid contract between the parties.

    b. Whether there can be a summary judgment against the defendant.

    c. Whether the amount claimed is due and truly owing to the plaintiff.

8. The defendant has not said much about the existence of the contract save that the legal fees agreement was made by an unauthorised person hence null and void and that the plaintiff should have gone for taxation instead of filing the suit. I have looked at the correspondence exchanged between the parties and I do hold that there was a consensus on the amount to be paid to the plaintiff although there was no formal agreement drawn and signed. The conduct of the parties especially the act by the defendant of initiating the process of paying part of the legal fees by seeking approval from the Controller of Budget is a clear testament that there was a meeting of the minds on the issue.

9. Section 45 of the *Advocates Act* allows an advocate and his client to agree on the fees payable outside the scale provided in the Advocates Remuneration Order. Where such scenarios obtain, the advocate does

not need to file an application for taxation and can bring a suit based on the contract between him and the client. In this case, it was not necessary or mandatory for the plaintiff to file a bill of costs as there was an agreement between the parties. Taxation comes in only where there is no agreement entered or where the same is a nullity or illegal. No material has been placed before me, which would convince me that there was anything illegal or unlawful about the agreement. The fact that the defendant unilaterally decided to renege on the agreement by stating that the fees was excessive does not make the agreement illegal.

10. The *Advocates Remuneration Order* is meant to make provisions for guidance on the minimum fees chargeable for various services. There is nothing that stops parties from making an agreement providing for payment of legal fees above the minimum provided in the *Advocates Remuneration Order*. To the contrary, it is illegal for an advocate to charge fees below the minimum provided in the *Advocates Remuneration Order*. In view of the above, it is my finding that there was a valid contract between the plaintiff and the defendant for provision of legal services at Kshs 325,310,200.00.

11. The second issue is whether summary judgement can be entered against the defendant. There is no dispute that the defendant is a County Government established under Article 176 of the *Constitution* as read together with Article 6(1) and the First Schedule to the Constitution. Order 36 Rule 3(2) provides that 'no application under Rule 1 shall be made against the Government.' The application referred to in this Rule is application for summary judgement just as in the application herein.

12. The defendant has submitted that it is a government and as such, it is protected from orders of summary judgment by the aforesaid Rule. The plaintiff submitted that the government referred to in the Rule is the national government and not a county government. According to the plaintiff, the Rule was passed before the county governments were established and in the circumstances, the Rule could not have been making any reference to the county governments.

13. Section 3 of the *Interpretation and General Provisions Act* defines the government to mean 'the Government of Kenya'. In that case, are the county governments part of the Government of Kenya. The county governments are established under the Constitution as devolved units of government. They are part of the system of governance in the country which is meant to decentralise resources, power and functions for better management and service delivery to the people and to give the people of Kenya more avenues, say and right to participate in the exercise of powers of the state. That is the purport of Article 174 of the *Constitution* specifically Sub-Article (c). In my view, with that, there is no way the county governments can be removed or separated from the system and definition of the government of Kenya. They are part of the government of Kenya and as such they are covered under Order 36 Rule 3(2) of the *Civil Procedure Rules*.

14. The Rule does not differentiate between a county and national government. The intricacies of running a government and management of government affairs calls for collaborative efforts from all the levels of government. The argument by the applicant that the Rule could not be referring to county governments because it was legislated before the county governments were established does not hold water. The *Civil Procedure Rules* have undergone several amendments since the coming into force of the current Constitution. If the Rules Committee intended to remove the county governments from the cover of the Rule, it would have expressly indicated so through amendments.

15. The special protection given to the government in various litigation processes may appear to be unfair to litigants but that is the law and this court being a court of law has no alternative but to follow the dictates of the law. The applicant has argued that the Rule is an archaic relic which should not be in our law books today and has cited *Absa Bank Kenya PLC vs Kenya Deposit Insurance Corporation* (High Court Commercial case number E411 of 2022); *Kenya Bus Service Limited vs Minister for Transport*

& 2 Others (2012) eKLR and *Bob Thomson Dickes Ngobi vs Kenya Ports Authority* (2017) eKLR. All these authorities discussed the effect, constitutionality and rationality of various sections of legislation that give special protection and treatment to the government in matters litigation and execution of court orders and decrees. Whereas I agree with the sentiments expressed by the judges in these cited authorities, the best I can do in this matter is to add my voice and state that the laws must be relooked with a discussion to make intentional amendments and adjustments to reflect the modern democratic realities.

16. I have given due consideration to the cited authorities and noted that none of them declared Order 36 Rule 3(2) of the *Civil Procedure Rules* unconstitutional or inoperative. Until the law is either repealed or declared unconstitutional, it remains the law and has to be followed. The plaintiff in this matter has not invited this court to declare Order 36(3)(2) of the *Civil Procedure Rules* unconstitutional or inoperative and even if it had done so, I would have been reluctant in making a finding to that effect in these proceedings. In my considered view, for the court to declare a law unconstitutional, the relevant government and legislative bodies and offices must be involved in the discussion and the same must be done in the right forum and not a private suit like this one. For the court to reach an informed decision on constitutionality of a legislation, the court must receive presentations from the parties and any interested party including the bodies responsible for legislating the instrument in question. There could be a historical or operational justification for such enactment and the court would be called upon to interrogate the rationality or otherwise of the provisions. In *Council of Governors vs Attorney General & Independent Electoral and Boundaries Commission* (2017) KEHC 6395 (KLR) Justice Chacha Mwita and Justice (as he then was) John Mativo stated as follows;

> 'A law which violates the constitution is void. In such cases, the Court has to examine as to what factors the court should weigh while determining the constitutionality of a statute. The court should examine the provisions of the statute in light of the provisions of the Constitution. When the constitutionality of a law is challenged on grounds that it infringes the constitution, what the court has to consider is the "direct and inevitable effect" of such law. Further, in order to examine the constitutionality or otherwise of statute or any of its provisions, one of the most relevant consideration is the object and reasons as well as legislative history of the statute. This would help the court in arriving at a more objective and justifiable approach.
>
> Thus, the history behind the enactment in question should be borne in mind. Thus any interpretation of these provisions should bear in mind the history, the desires and aspirations of the Kenyans on whom the Constitution vests the sovereign power, bearing in mind that sovereign power is only delegated to the institutions which exercise it and that the said institutions which include Parliament, the national executive and executive structures in the county governments, and the judiciary must exercise this power only in accordance with the Constitution.'

17. The plaintiff has also submitted that the Rule is in violation to and limits the right of access to justice as enshrined in Article 48 of the Constitution. As much as there is some limit to litigants in form of forcing parties to follow a longer and inconveniencing route while litigating with the government, the litigants are not left without a remedy. Article 25 of the *Constitution* provides for rights which cannot be limited and the right to access justice is not among the four listed. This of course not to say that any person should be denied access to justice. The plaintiff is rightly before a court of law and its door to litigation and fair hearing has not been locked by the mere fact that the law prohibits summary judgement against the government.

18. The third issue is whether the money is due and truly owing to the plaintiff. Answering this issue will amount to discussing the merits or lack of it of the defendant's defence and may result to the court giving orders for summary judgment which will obviously go against my earlier holding that the defendant is covered from summary judgment under Order 36 Rule 3(2) of the *Civil Procedure Rules*.

19. In the end I find that the application dated 12th September 2024 is incompetent pursuant to Order 36 Rule 3(2) of the *Civil Procedure Rules* and I hereby dismiss it with no orders as to costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Ruling delivered in presence of Mr. Ojiambo for the plaintiff and Mr. Waweru for the defendant.