



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kabogo v Gitau (Environment & Land Case 820 of 2017)  
[2023] KEELC 4 (KLR) (12 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 4 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 820 OF 2017**

**JG KEMEI, J**

**JANUARY 12, 2023**

**BETWEEN**

**KIMANI KABOGO ..... PLAINTIFF**

**AND**

**WILLIAM KABOGO GITAU ..... DEFENDANT**

**RULING**

1. The Plaintiff / Judgement - Debtor filed the instant Preliminary Objection dated 28/3/2022 on grounds That;
  - a. This Court is *functus officio*.
  - b. The continuous proceedings attaching from this file be it taxation of costs and or reference are an illegality and incurable and should suffer the same cause as our Preliminary Objection dated March 11, 2019 for the simple reason that this Court already submitted having Jurisdiction to hear it and hearing it is a mockery to the Justice system.
  - c. The Application cannot be filed in the same taxation file. It's in the nature of an appeal from the decision of the taxing officer.
  - d. The Respondent has filed an appeal in Nairobi CA No 82 of 2019; *Kimani Kabogo vs William Gitau Kabogo* which should be heard and determined before further steps are taken herein.
  - e. The Application itself be dismissed with costs or stayed until the Court of appeal pronounces itself.
2. Further the Plaintiff filed Grounds of Opposition on even date opposing the Defendant/Decree-holder's Chamber Summons dated 23/4/2021 on grounds that;



- a) The Court is functus officio having rendered its final judgment on December 10, 2018 where the same Court admitted that it doesn't have jurisdiction to hear and entertain any proceedings emanating from this case.
  - b) The Court in its final disposition on December 10, 2018 stated that all 'pleadings' be struck out entirely and thus the Applicant cannot then be still relying on said expunged documents unless they are reinstated via a Court of appeal order.
  - c) The Applicant has introduced new evidence in terms of annexures from page '53-89' that were not provided when the bill of costs was filed and thus the same should be struck out.
  - d) The Applicant continues to develop the suit property which is subject of Nairobi CA No 82 of 2019 and the continued development in LR 12825/27, 33 & 34 renders the appeal nugatory.
  - e) The Chamber Summons dated April 23, 2021 be dismissed and/or stayed until the Court of Appeal renders its final decision.
3. The Preliminary Objection was canvassed by way of written submissions by the parties which I have read and considered.
  4. Supporting the Preliminary Objection, the Plaintiff through the firm of Njeru Nyaga & Co Advocates filed submissions dated 2/6/2022. He submitted that this Court having found that it lacked jurisdiction to hear the dispute, ought not entertain the Defendant's further proceedings especially where introduction of new evidence by way of annexures that were not part of the Bill of Costs has been made. That the Defendant continues to develop LR 12825/27, 33 & 34 (the suit properties) which are the subject of Nbi CA No 82 of 2019. That entertaining the Defendant's further proceedings portray a likelihood of bias on the part of the Court in light of the dismissals issued against the Plaintiff for instance his Preliminary Objection dated 11/3/2019. Lastly that the Defendant's reference dated 23/4/2021 can only be filed as an appeal since the Bill of Costs was already taxed by the Taxing Officer of the Court.
  5. On the other hand, the firm of Issa & Co. Advocates filed the Defendant's submissions dated 16/6/2022. The Defendant enumerated the background of the matter and ensuing taxing officer's award of Kshs 234,666.00 on 8//4/2021 pursuant to the Party and Party Bill of Costs dated 17/1/2019. Dissatisfied with the award, the Defendant opted for a Reference to this Court *vide* the Chamber Summons dated 23/4/2021 that prompted the instant Preliminary Objection. That the singular issue for determination is whether this Court has jurisdiction to determine the Defendant's Reference.
  6. The Defendant maintained that jurisdiction flows from either the Constitution or legislation or both. That the taxing officer's jurisdiction to that end is donated by para. 10 [Advocates Remuneration Order \(ARO\), 2014](#) which states;

“The taxing officer for the taxation of bills under this Order shall be the Registrar or a district or deputy registrar of the High Court or, in the absence of a registrar, such other qualified officer as the Chief Justice may in writing appoint; except that in respect of bills under Schedule 4 to the order the taxing officer shall be the registrar of trade marks or any deputy or assistant registrar of trade marks.”



7. Further that if a party is dissatisfied with a taxing officer's decision, Para. 11 ARO stipulates the appropriate remedy that;
- “ 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.
  2. The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
  3. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
  4. 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.
8. Reliance was placed on the Court of Appeal decision in CB Gor & Gor Vs Oriental Commercial Bank Limited (formerly known as Delphis Bank Ltd) [2018] eKLR in relation to the provision of para. 11 of ARO above. That this Court's power to hear the Reference before it is distinct from the jurisdiction to hear the dispute in the main suit that resulted in the impugned award of costs and thus the Court is not functus officio as submitted. To that end the case of Muriu Mungai & Co Advocates Vs China Civil Engineering Construction Corporation (K) Ltd [2018] eKLR was cited on the Court's power to entertain a Reference.
9. On the issue of stay of taxation proceedings, the Defendant was emphatic that the prayer is *res judicata* having been previously determined *vide* this Court's Ruling delivered on November 25, 2021. The Defendant urged the Court to dismiss the Preliminary Objection with costs.
10. The germane issue for determination is whether the Preliminary Objection is merited.
11. The parameters of consideration of a Preliminary Objection are now well settled. A Preliminary Objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696. At page 700 Law JA stated:
- “ 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.”



12. At page 701 Sir Charles Newbold, P added:

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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...”

13. For a Preliminary Objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid Preliminary Objection should, if successful, dispose of the suit.

14. The Preliminary Objection assails this Court’s Jurisdiction to entertain the Reference filed herein *vide* the Chamber Summons dated 23/4/2021 in view of this Court’s Ruling delivered on 10//12/2018. In the said Ruling, this Court (differently constituted – Gacheru J) upheld the Defendant’s Preliminary Objection against the Plaintiff’s suit for want of jurisdiction. The Court struck out the suit with costs to the Defendant. Pursuant to that finding, the Defendant filed its Party and Party Bill of Costs dated 17/1/2019 and later taxed it on 8/4/2019 at Kshs 234,666.00. It is this award that the Defendant feels is too low and has led to the filing of the Refence to this Court which ultimately provoked the instant Preliminary Objection.

15. The Plaintiff contends that this Court is functus officio and should not entertain any further proceedings including the said Reference.

16. It is trite that the Court’s power to award costs flows from Section 27 of the *Civil Procedure Act* that gives both the subordinate Court and the High Court discretion and the jurisdiction to not only award costs but determine the extent at which those costs are to be paid and by which party. Paragraph 49 of the *Advocates Remuneration Order* clearly defines a “Court” to mean both the High Court or any judge thereof or a Resident Magistrate’s Court or a Magistrate sitting in a Magistrate’s Court. A Court in Part III of the *Advocates Remuneration Order* is given the mandate to determine costs in contentious matters as between Advocate and client and between party and party. Paragraph 11 of the *ARO* *inter alia* provides as follows on the Court’s power in an award for costs;

“ 11. Objection to decision on taxation and appeal to Court of Appeal

- (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.
- (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.”

17. Accordingly, flowing from the above, the power exercised by this Court at this juncture are appellate powers by way of Reference and not original power to hear the case. As rightly submitted by the Defendant ground 4 of the Preliminary Objection on stay of proceedings is *res judicata* having been aptly determined *vide* this Court’s Ruling delivered on 7/5/2020 and further by the Ruling dated November 25, 2021.



18. The Plaintiff maintains that he has filed his appeal in Nbi CA No 82 of 2019 whose subject is the suit properties that he accused the Defendant of developing. Nothing stops the Plaintiff from seeking the necessary orders from the appellate Court to protect his interests in the suit properties as appropriately desired.
19. In the upshot, I find that the Preliminary Objection is unmerited and the same be dismissed with costs in favour of the Defendant.
20. It is so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 12TH DAY OF JANUARY, 2023 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

**Njeru for Plaintiff**

**Ms. Munyogu for Defendant**

**Court Assistant – Phyllis / Kevin**

