



**Wabuke & another v Munialo (Miscellaneous Civil Application  
35 of 2022) [2024] KEHC 301 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 301 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
MISCELLANEOUS CIVIL APPLICATION 35 OF 2022  
AC MRIMA, J  
JANUARY 25, 2024**

**BETWEEN**

**KENNEDY WABUKE ..... 1<sup>ST</sup> APPLICANT**

**ISAAC GIRAGWA ISAGI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**KELVIN MUNIALO ..... RESPONDENT**

**RULING**

**Introduction:**

1. The instant ruling relates to a Notice of Preliminary Objection dated 9<sup>th</sup> November 2022 filed by the Respondent herein.
2. The objection was in respect to an application by way of Chamber Summons dated 21<sup>st</sup> October 2022 which was filed by the Applicants.
3. The application sought orders in respect of a ruling rendered on the taxation of a Party to Party Bill of Costs. The Bill was dated 7<sup>th</sup> June 2021 and related to Kitale High Court Civil Appeal No. E004 of 2022. The ruling on the taxation was delivered on 21<sup>st</sup> September 2021.
4. The objection was vehemently opposed.

**The Objection:**

5. The Notice of Preliminary Objection was tailored as follows: -
  1. That the honourable court lacks jurisdiction to entertain this matter as presented.
  2. That application is incompetent, misconceived and misplaced, bad in law and an abuse of the court's process.



3. That the application is incurably defective, should not be entertained as it is a nullity in law and should be struck out with costs to the respondent.
  4. That applicant's chamber summons application offends paragraphs 11(2) of the [Advocates Remuneration Order \(2014\)](#) as the reference has been filed after a year from the date the Taxing Officer delivered her Ruling on the 21<sup>st</sup> of September, 2021.
  5. That application for re-taxation before another Taxing Officer is filed out of time without leave of the court hence it cannot be entertained.
  6. That applicant's application seeking review has been brought under the wrong provisions of the law and should have been brought under its specific provisions, to wit, Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, 2010 (Chapter 21, Laws of Kenya) therefore the Orders sought cannot be granted.
  7. That Order 63 cited on the face of the application relates to supplemental proceedings and has nothing to do with either review of decree or orders and also does not apply to a reference on costs as such it does not apply to this application.
6. The objection related to the Chamber Summons dated 21<sup>st</sup> October 2022 which sought the following orders: -
1. That the costs allowed by the Deputy Registrar on taxation of the said party to party bill of costs dated 7/6/2021 be reviewed and/or struck out and/or remitted with appropriate directions to another Taxing Officer as the court may deem fit for consideration.
  2. That the costs of the application be in the course.
  7. On the directions of this Court, each party filed written submissions to the objection.

**Analysis:**

8. Given the nature of the issue at hand, this Court will not reproduce the submissions verbatim in this ruling. However, the Court will, no doubt, consider the parties' positions, arguments and decisions referred to in the discussion herein.
9. From the objection and submissions, two issues arise for determination. They are: -
  - i. Whether the Preliminary objection is sustainable in law.
  - ii. If the answer to (i) is in the affirmative, whether the objection be allowed.
10. The Court will deal with the issues in seriatim.

**Whether the objection is sustainable in law:**

11. The validity of a preliminary objection is considered on the basis that it conforms with the long-standing legal principle that it is raised on a platform of agreed set of facts, it raises pure points of law and is capable of wholly determining the matter.



12. To that end, the locus classicus decision in *Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd* (1969) E.A 696 at page 700, comes to the fore. In that case, the Court defined a preliminary objection and discussed its operation in the following eloquent manner: -

...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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.

...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued 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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

13. The Supreme Court weighed in on the issue in *Aviation & Allied Workers Union Kenya -vs- Kenya Airways Ltd & 3 Others* [2015] eKLR and stated thus: -

.... Thus, a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.

14. Ojwang J, as he then was, emphasized the finding in *Mukisa Biscuit -vs- West End Distributors case* (supra) in Civil Suit No. 85 of 1992, *Oraro -vs- Mbaja* [2005] 1 KLR 141 when he observed as follows: -

..... I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed....

15. In *John Musakali -vs- Speaker County of Bungoma & 4 others* (2015) eKLR the validity of a preliminary objection was considered in the following manner: -

.... The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law....

16. Finally, in *Omondi -vs- National Bank of Kenya Ltd & Others* {2001} KLR 579; [2001] 1 EA 177, guidance was given on what Courts ought to consider in determining the validity of preliminary objections. It was observed: -

... In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise



of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion....

17. The Court will now consider if the objection has been properly raised within the above confines of the law.
18. The Objection in this matter challenged the Chamber Summons mainly on two grounds. The first ground was that the Summons was filed out of time and without the leave of this Court. The second ground was that the application was brought under wrong provisions of the law.
19. The Chamber Summons is in essence a Reference under Rule 11 of the [Advocates Remuneration Order](#). The said provision is on objections to taxations. It states as follows: -
  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.
    - (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.
20. The Applicants contention in this matter was that upon the delivery of the ruling on the taxation on 21<sup>st</sup> September 2021, they filed an objection thereto and formally sought for the reasons for the ruling from the Taxing officer. The objection was dated 8<sup>th</sup> October 2021 and was filed on the even date.
21. They alleged that the Taxing officer did not render any reasons and did not communicate over the matter. After waiting for almost a year in vain, the Applicants then decided to file the impugned Chamber Summons notwithstanding that the reasons were yet to be supplied.
22. On its part, the Respondent contended that the reasons were contained in the ruling by the Taxing officer.
23. This Court has duly considered the ruling by the taxing officer.



24. Whereas the temptation on this Court to pronounce itself on whether the ruling contained the reasons or otherwise is quite high, the Court remains vigilant in that the issue at hand is a factual one. Further, the parties are not in agreement on whether the reasons were rendered in one way or the other. That fact is, hence, disputed and calls for settlement.
25. The issue as to whether the reasons were given and, if so, when, remains cardinal to the objection. That is because, under Rule 11(2) of the *Advocates Remuneration Order*, the Applicants could only file the Chamber Summons within 14 days of being favoured with the reasons by the Taxing officer. Since this Court cannot determine the factual issue in this forum, being a consideration of a preliminary objection, the objection becomes a non-starter.
26. The objection is certainly blurred with factual details which are liable to be contested and proved through the processes of evidence. The objection, hence, suffers a false start and is unsustainable.
27. With such a finding, there is no basis of considering the second issue herein and the matter ought to come to an end.
28. Consequently, the following orders do hereby issue: -
  - a. The Notice of Preliminary Objection dated 9<sup>th</sup> November 2022 is hereby dismissed with costs.
  - b. This Respondent shall file and serve a response to the Chamber Summons dated 21<sup>st</sup> October 2022 within 14 days of this ruling.
  - c. Once served, the Applicants will file a supplementary response, if need be, together with written submissions within 14 days of that service.
  - d. The Respondent will be at liberty to file and serve written submissions within 14 days of service.
  - e. This matter will be fixed for highlighting of the submissions on a date to issue.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 25<sup>TH</sup> DAY OF JANUARY, 2024.**

**A. C. MRIMA**

**JUDGE**

Ruling No. 2 virtually delivered in the presence of:

Miss. Mukamo, Learned Counsel for the Applicants.

Mr. Wanyonyi, Learned Counsel for the Respondent.

Chemosop/Duke – Court Assistants.

