



**Gituma Otieno & Co Advocates v Inoet Systems Limited & another (Miscellaneous Application E726 of 2022) [2024] KEHC 1643 (KLR) (Commercial and Tax) (23 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1643 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E726 OF 2022  
FG MUGAMBI, J  
FEBRUARY 23, 2024**

**BETWEEN**

**GITUMA OTIENO & CO ADVOCATES ..... APPLICANT**

**AND**

**INOET SYSTEMS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**SAFEZONE PROTECT LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling is with respect to two applications filed by the respondents and a notice of preliminary objection filed by the applicant. The first application is a Notice of Motion dated 9<sup>th</sup> August 2023 filed pursuant to the provisions of Sections 1A, 3A & 63 (e) of the [Civil Procedure Act](#) Cap 21, Order 9 Rule 9 and Order 51 Rule 1 of the [Civil Procedure Rules 2010](#). to the application of this nature.
2. The respondents seek inter alia to set aside the Certificate of Taxation and decree herein as well as an extension of time to file a Reference to this court from the Ruling of Hon. Tanui (DR) delivered on the 23<sup>rd</sup> April, 2023 disposing off this matter.
3. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Zedekiah Okumu, a director and founder of the respondent companies. In opposition thereto, the applicant filed a replying affidavit sworn on 17<sup>th</sup> August 2023.
4. The 2<sup>nd</sup> application is a Notice of Motion dated 21<sup>st</sup> August 2023 filed under the provisions of Sections 1A, 3A & 63 (e) of the [Civil Procedure Act](#) Cap 21, Order 9 Rule 9 & Order 51 Rule 1 of the [Civil Procedure Rules](#) 2010. I am of the view that the prayers sought therein are already spent, as the Court granted interim stay of execution as prayed therein.



5. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Zedekiah Okumu, a Director and Founder of the respondent companies. In opposition thereto, the applicant filed a replying affidavit on 28<sup>th</sup> August 2023 and a Notice of Preliminary Objection dated 24<sup>th</sup> August 2023 raising the following grounds of objection:
  - i. That the court lacks jurisdiction to entertain the respondents' Notice of Motion applications and
  - ii. That the respondents' Notice of Motion application dated 21<sup>st</sup> August. 2023 contravene Order 45 rule 6 of the Civil Procedure Rules, 2010.
6. The respondents' case is that they met the applicant in 2020, while looking to partner with a law firm for on-demand legal services. Following their initial meeting, they invited the applicant for a discussion to outline their needs. In a gesture of good faith, they asked the applicant to submit a brief outlining their approach to the respondents' potential assignments, as a means to showcase their capabilities and credibility for consideration. Three months after the meeting, the applicant emailed them a brief summarizing the discussed topics, demonstrating their potential and capability to undertake such work.
7. Thereafter, the respondents reverted via email indicating their satisfaction, and stating that they were not sure of any business due to the onset of Covid-19 but they wished to contact them again in future. As far as the respondents were concerned, that was the end of their interactions with the applicant's firm, until 2022 when the applicant filed an Advocate-Client Bill of Costs against them for costs allegedly for rendering a legal opinion and/or advisory to the respondents.
8. It was stated by the respondents that in light of the above, it is clear that the applicant has never represented them, has never been retained by them and has never rendered any services to the and/or on their behalf.
9. The respondents argued that they were unaware of the proceedings regarding the applicant's Bill of Costs scheduled for January 2023 because the notification emails were mistakenly directed to their spam folder. The matter came up again in February 2023, during which a representative of the respondents attended the virtual court session and then exited the session. Subsequently, the applicant's Advocate-Client Bill of Costs was determined on 23<sup>rd</sup> April 2023. The Taxing Officer ruled in favor of the applicant, taxing the bill as submitted on the ground that it was unopposed.
10. In June 2022, the respondents were informed via email about an urgent application and a forthcoming hearing date. In response, they hired Mr. Oregu as their Counsel, who filed a Notice of Appointment of Advocates and attempted to defend the said application seeking to enforce the Certificate of Taxation following the previous ruling. Despite these efforts, the court's subsequent orders directed at Mr. Oregu were not complied with.
11. The respondents further allege that their advocates ceased to provide updates on the case and ultimately abandoned it. As a result, the application to enforce the Certificate of Taxation proceeded without opposition, leading to the issuance of a decree on 1<sup>st</sup> August 2023. A draft decree was shared with the respondents for their review or approval giving rise to the present application. They aver that their current application was filed promptly, just eight days after the decree was issued, indicating their intention to address the situation without delay.
12. The applicant argued that the court lacks jurisdiction to entertain the current applications due to the final judgment issued on 31<sup>st</sup> July 2023. They highlighted that no appeal or review against this judgment has been filed, making the court functus officio. The applicant pointed out that the requests



to set aside the judgment or decree should be based on specific provisions of the *Civil Procedure Act* and Rules, which the respondents' applications do not adhere to.

13. Furthermore, the applicant stated that the respondents improperly sought to rely on the court's inherent powers, which should only be used in the absence of applicable procedural rules or to prevent injustice, neither of which applies in this case. They blamed the respondents for their predicament, attributing it to non-compliance with court orders. They also argued that the jurisdiction was not correctly invoked as per the required legal provisions and labeled the respondents' application as speculative and not based on solid facts.
14. The applicant criticized the applications filed by the respondents as invalid because they were submitted by an advocate who was not properly on record. Additionally, the applicant stated that the leave sought in the application dated 9<sup>th</sup> August 2023 as prayer No. 2 had not yet been granted by this Honourable Court and in any case the same could not issue since the Court's jurisdiction has not properly been invoked as provided for under Rule 11 of the Advocates Remuneration Order.

### **Analysis**

15. The applications were canvassed by way of written submissions. I have carefully considered the applications, cases cited and written submissions. In my view, three issues arise for determination in this case and these are:
  - i. Whether the respondent's Counsel is properly on record;
  - ii. Whether this Court is functus officio; and
  - iii. Whether the orders sought in the application dated 9<sup>th</sup> August 2023 are merited.

### **Is the respondent's Counsel properly on record?**

16. The applicant contends that all the applications filed by the respondents are a nullity for having been filed by an Advocate who had not obtained leave of Court to come on record. Furthermore, the leave sought in prayer No. 2 of the application dated 9<sup>th</sup> August 2023 has not yet been granted by this Honourable Court hence there are no competent pleadings before this Court for determination.
17. Upon perusal of the record, it is evident that when this matter was before the Deputy Registrar for taxation on 13<sup>th</sup> March 2023, she indicated that the respondents' Counsel had not filed a Notice of Appointment for him to be properly on record. It is further noteworthy that all through the proceedings before this Court, Counsel who purported to be on record for the respondents did not regularize his pleadings by filing a proper Notice of Appointment of Advocates within the timelines set by Court, despite being given several opportunities to do so.
18. Consequently, this Court by an order made on 31<sup>st</sup> July 2023, expunged the Notice of Appointment filed by the respondents' Counsel for being filed out of time. This technically means that the respondents did not have an Advocate on record in the proceedings before the Deputy Registrar, and in the proceedings before this Court, which were finalized on 31<sup>st</sup> July 2023 when this Court allowed the applicant's application dated 30<sup>th</sup> May 2022 adopting the Certificate of Costs issued on 29<sup>th</sup> May 2023 as a judgment of this Court.



19. Order 9 Rule 9 of the *Civil Procedure Rules* 2010 requires that:
- “When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after Judgment has been passed, such change or intention to act in person shall not be effected by order of the court-
- a. upon an application with notice to all the parties; or
  - b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
20. In my view, the provisions of Order 9 rule 9 are not applicable in this case because as I have stated, the respondents were not represented before judgment was passed. As a result, the respondents’ current advocates on record did not need to seek leave of Court or seek consent from the respondents’ advocate before filing a Notice of Appointment of Advocates to come on record for the respondents. Accordingly, this Court finds that the respondents’ advocates are properly on record.

**Is this Court functus officio?**

21. It is not disputed that on 31<sup>st</sup> July 2023 this Court allowed the applicant’s application dated 30<sup>th</sup> May 2023 thereby adopting the Certificate of Costs issued on 29<sup>th</sup> May 2023 as a judgment and decree of this Court. The applications herein seek to set aside the said Certificate of Taxation. The applicant submits that the Court is functus officio, as of 31<sup>st</sup> July 2023 as the judgment of the Court had not been appealed against neither had an application for review been filed against it.
22. The respondents on the other hand contended that this Court is not functus officio since the prayers sought in the applications herein are substantive prayers that it can either grant or deny based on its own discretion.
23. In my view, the court has several mechanisms through which it can set aside its own judgments, primarily guided by the provisions of the *Civil Procedure Act* and Rules. These powers are designed to avoid injustice and to correct errors arising out of accidents, inadvertence or excusable mistakes and are exercised with caution and restraint. The question is whether there is any good reason in this case for the Court to exercise this discretion.
24. The record shows that the applicant’s application dated 30<sup>th</sup> May 2023 came up on 21<sup>st</sup> June 2023 for mention for directions but Counsel for the respondents was not present in Court. It was rescheduled for mention on 22<sup>nd</sup> June 2023. On 22<sup>nd</sup> June 2023 after listening to both parties, the Court directed the respondents’ Counsel to regularize their representation by close of business 22<sup>nd</sup> June 2023.
25. The Court equally made it clear that time was of the essence as the advocates had been blatantly violating the practice rules. As such, the specific orders of the Court were that in the event the regularization was not done within the time specified, the Notice of Appointment would be deemed as expunged from the record. The matter was then scheduled for mention on 27<sup>th</sup> July 2023.
26. On this day, again, the applicant raised issues with the status of representation of the respondents’ Counsel and in particular their practicing certificate. This Court directed Counsel to file an affidavit and set the record straight. The matter was again scheduled for mention on 31<sup>st</sup> July 2023. On 31<sup>st</sup> July 2023, this Court upon perusing the respective affidavits filed by Counsel for parties indicated that the respondents’ Counsel filed his Notice of Appointment of Advocates on 26<sup>th</sup> June 2023, a week after the timelines granted by this Court.



27. The Court reminded Counsel that disobedience of Court orders must come with certain responsibilities and then proceeded to expunge the Notice of Appointment in line with the directions of 22<sup>nd</sup> June 2023. Consequently, the application dated 30<sup>th</sup> May 2023 was deemed unopposed and granted as prayed.
28. It is clear from the record that the respondents were given multiple chances to oppose the application made on 30<sup>th</sup> May 2023 and to regularize their legal representation but failed to take action. The respondents blame their situation on their previous advocates' negligence. A client who instructs counsel does not become a bystander in their own cause and so such blame alone does not justify invoking this Court's inherent jurisdiction. The respondents were aware of all the troubles that their advocates had put them through but took no action until judgment had been entered against them. Only then did they jolt into action.
29. A reading of the affidavits filed in support of these applications do not reveal any substantial reasons and/or new information to warrant this Court to invoke its inherent jurisdiction and set aside the decree dated 1<sup>st</sup> August 2023. In view of this, I agree with Counsel for the applicant that this Court has no jurisdiction to grant any further orders in this matter since it is functus officio as of 31<sup>st</sup> July 2023.

#### **Determination**

30. The upshot of this is that the application dated 21<sup>st</sup> August 2023 is spent. The application dated 9<sup>th</sup> August 2023 is devoid of merit. Consequently, it dismissed with costs to the applicant.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY 2024.**

**F. MUGAMBI**

**JUDGE**

