



Shah and Parekh v Kenindia Assurance Company Limited (Miscellaneous Civil Application 492 of 2018) [2024] KEHC 4441 (KLR) (Civ) (26 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4441 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION 492 OF 2018**

CW MEOLI, J

APRIL 26, 2024

BETWEEN

SHAH AND PAREKH APPLICANT

AND

KENINDIA ASSURANCE COMPANY LIMITED RESPONDENT

RULING

1. For determination is the motion dated 28.08.2023 by Shah and Parekh (hereafter the Applicant), expressed to be brought under the provisions of Section 1A, 1B, 3A and 26 of the Civil Procedure Act (CPA), Section 51 (1) & (2) of the Advocates Act, Paragraph 7 of the Advocates Remuneration Order and Order 51 Rule 14 of the Civil Procedure Rules (CPR) among others. The motion seeks inter alia that the court be pleased to enter judgment in the sum of Kshs. 2,254,819/- and a further sum of Kshs. 327,700/- as respectively awarded, pursuant to two certificates of taxation, against the Kenindia Assurance Co. Ltd (hereafter the Respondent). With interest at 14% p.a on the sum of Kshs. 2,254,819/- calculated up to and including 15.07.2023 and thereafter at 14% p.a until payment in full; and on the sum of Kshs. 327,000/- at 14% p.a, calculated from 06.12.2021 to 15.07.2023 and thereafter at 14% p.a until payment in full; and costs of the application.
2. The affidavit in support of the motion is sworn by Hasmukrai Manilal Parekh, who asserts being counsel and partner with the Applicant thus competent to depose. The gist thereof is that the Applicant filed a Bill of Costs dated 25.09.2018 against the Respondent which was taxed in the sum of Kshs. 2,254,819 on 31.05.2019. That a Certificate of Taxation issued on 18.06.2019 in respect of the fore-stated taxed costs has neither been set aside nor altered and is pursuant to Section 51(2) of the Advocates Act, final and the Respondent has no defence. He goes on to depose that by a letter dated 31.10.2022, the Applicant notified the Respondent of the provisions of Paragraph 7 of the Advocates



- Remuneration Order and that despite service of the said letter upon the Respondent, it has failed, neglected and or refused pay the taxed costs and accumulated interest or any part thereof.
3. He further asserts that upon taxation, the Respondent filed a motion seeking leave to file a reference in respect of the decision of the taxing officer which was allowed. However, they failed to file the reference, hence the Applicant filed a motion seeking a declaration that that Respondent having failed to file their reference, ought to be deemed to have abandoned it's right to challenge the decision of the taxing officer and the Applicant allowed to proceed to recover their taxed costs. He avows that the Court allowed the Applicant's motion with costs, prompting the filing of second Bill of Costs dated 05.12.2022 which was taxed on 27.06.2023 in the sum of Kshs. 327,700/- and a Certificate of Taxation dated 10.08.2023 issuing thereafter. He maintains that the second Certificate of Taxation has neither been set aside nor altered, thus by dint of Section 51(2) of the *Advocates Act*, is final and the Respondent has no defence.
 4. He deposes that the second Bill of Costs arises out of the Advocate and Client Bill of Costs and that by a letter dated 10.07.2022, the Applicant demanded from the Respondent Kshs. 3,672,327.95/- being the taxed costs and cumulative interest calculated up to 15.07.2023 for the first Bill of Costs and Kshs. 327,700/- for the second Bill of Costs including interest at the rate of 14% p.a. He reiterates that despite demand being made to the Respondent, it has failed, neglected or refused to pay the amounts claimed or any part thereof. That this Court has jurisdiction and discretion to award interest at the rate of 14% per annum for any period before the institution of the suit as is found equitable and reasonable while taking all circumstances into consideration. In conclusion, he asserts that the motion ought to be allowed as prayed, urging the Court to equally assess the costs of the instant motion in lieu of a further Bill of Costs, which procedure is time consuming and costly.
 5. In response to the motion the Respondent opted to file a Preliminary Objection dated 06.11.2023 premised on the grounds that;- (1) the application is bad in law and an abuse of the process of law; (2) that the application is premised on a provision of the law which is not applicable; (3) that upon the Court delivering its ruling on 18.06.2019 and 10.08.2023 it became functus officio in the matter; and (4) that the matter before Court is for taxation of Advocate-Client Bill of Costs and no judgment can be entered after taxation.
 6. Directions were taken on filing of brief submissions in respect of the motion and Preliminary Objection. The parties filed lengthy submissions that can be summarized as follows.
 7. The Applicant's counsel in addressing the Respondent's Preliminary Objection cited Order 51 Rule 14 of the CPR, to contend that there is no jurisdiction given to this Court to grant leave and/or extend time to the Respondent to file documents in response, where such documents are not filed within the time prescribed in sub-rule 14(2) of Order 51. Pointing out that the Preliminary Objection was served on the evening before directions were taken on 07.12.2023 and therefore is illegally before the Court, and ought to be rejected in toto. It was further asserted that the Preliminary Objection is intended to delay the matter in clear contravention of the provisions of Order 51 Rule 14 of the CPR and must be rejected for want of compliance with rules of procedure.
 8. Counsel argued that the Respondent's objection does not state which provision of law is contravened by the motion and how it is an abuse of the process of the court. Regarding the ground that the application was brought on a provision of the law not applicable to the circumstance, it was submitted that the motion was presented pursuant to the appropriate provisions of law as such there is no merit to the objection. Counsel similarly dismissed as lacking merit the ground that the Court is functus officio and that no judgment can be entered in the matter.
 9. Submitting on the Applicant's motion, counsel anchored his submissions on the decision in *Cleaver-Hume Ltd v British Tutorial College (Africa) Ltd* (1975) 1 EA 323 (HCK), and asserted that the



Applicant's claim is for taxed costs and interest thereon, being a liquidated sum; that the Respondent having failed to oppose the motion is deemed to have admitted the claim; and therefore, the Court ought to enter judgment as prayed. He cited Section 26(1) of the CPA and reiterated the contents of his affidavit to summarily argue that the Applicant is entitled to judgment as sought in the motion. In conclusion, it was submitted that the total judgment amount is approximately Kshs. 4,024,663/-. And that costs on an undefended scale under Schedule 6 Paragraph 1A are capped at Kshs. 120,370/-, which the court may award, or any sum the Court may consider appropriate taking all the circumstances into consideration.

10. The Respondent's counsel's submissions were rivetted on the Preliminary Objection. He cited the provisions of Order 51 Rule 14(1) of the CPR and relied on the of-cited decisions in *Mukisa Buscuits Manufacturing Ltd* (1969) EA 696 and *Oraro v Mbaja* (2005) KLR 141 to contend that the motion is premised on the wrong provision of statute ; that the Applicant was served with the Preliminary Objection more than three (3) days before the motion came up for hearing; and that pursuant to Section 51 of the *Advocates Act*, upon the issuance of the Certificate of Taxation, the Applicant ought to have instituted a fresh suit for recovery of costs to obtain a judgment and decree capable of execution instead of the procedure adopted herein. Citing the Supreme Court decision in *Raila Odinga & Others v IEBC & Others* [2013] eKLR in support of the proposition. He asserted that the court became functus officio upon the taxing officer delivering her ruling and issuing a Certificate of Costs on 18.06.2019. Counsel therefore urged the court to strike out the motion with costs.
11. The Court has considered the material and submissions canvassed in respect of the motion and Preliminary Objection (PO). The Court proposes to first deal with the preliminary issues raised by the respective parties and by extension the Respondent's PO dated 06.11.2023. At the outset the Applicant has challenged whether the Respondent PO is properly on record in light of the provisions of Order 51 Rule 14(2) of the CPR. Order 51 Rule 14 of the CPR Rules provides that; -

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- “(1) Any respondent who wishes to oppose any application may file any one or a combination of the following documents —
 - (a) a notice preliminary objection; and/or;
 - (b) replying affidavit; and/or
 - (c) a statement of grounds of opposition;
- (2) the said documents in subrule (1) and a list of authorities, if any shall be filed and served on the applicant not less than three clear days before the date of hearing.
- (3) Any applicant upon whom a replying affidavit or statement of grounds of opposition has been served under sub rule (1) may, with the leave of the court, file a supplementary affidavit.
- (4) If a respondent fails to file to comply with subrule (1) and (2), the application may be heard ex parte.



12. A review of the record reveals that the Applicant’s motion was filed on 28.08.2023 and fixed for hearing on 07.11.2023. The Respondent filed its PO on 06.11.2023. When parties appeared before this court 07.11.2023, the Court directed as follows; -

“Motion dated 28.08.2023 and PO raised against it to heard on 07.12.2023. Skeletal submissions of 2 pages font 12 may be filed within 21 days simultaneously for highlighting on 07.12.2023” (sic)

13. On 07.12.2023, it was confirmed that both parties’ submissions had been filed and a ruling date issued. Evidently, the Respondent’s PO was served upon the Applicant within time, a matter equally acknowledged in the Applicant’s submissions before this Court. Further, sub-Rule (1)(a) above provides that a PO is one of the options open to a Respondent intending to oppose an application. Therefore, the Applicant’s arguments concerning the PO do not hold water.

14. As to merits of the PO, the Court draws from the dicta of Ojwang, J. (as he then was) in *Oraro v Mbaja* (2005) KLR 141 to the effect that; -

“A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, 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.

Where a court needs to investigate facts; a matter cannot be raised as a preliminary point.... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

See also;- *Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors* (1969) EA 696 and *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR.

15. Of the four (4) grounds canvassed in the Respondent’s PO only ground No. (3) raising the functus officio plea meets the test above. As concerns ground No. 2, under Article 159(2)(d) of the *Constitution* as applied in a plethora of decisions, the failure to cite the appropriate provisions of statute in an application is not fatal as it is the duty of the Court to look into the substance and not form of the matter before it.

16. Is the Court functus officio in respect of the motion? In *Raila Odinga & Others* (*supra*), the Supreme Court cited with approval an excerpt from an article by Daniel Malan Pretorius, in “The Origins of the functus officio doctrine, with Specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832:

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”



17. The Court also relied on the holding in the case of *Jersey Evening Post Limited v Al Thani* [2002] JLR 542 at 550 to the effect that;

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.”

18. The thrust of the Respondent’s argument on the issue is that instead of filing the motion seeking entry of judgment in respect of a Certificate of Taxation dated 18.06.2019, the Applicant to have filed a fresh suit for recovery of the costs. That upon issuance of the Certificate, the Court became functus officio. As observed in *Jersey Evening Post Limited* (supra), a Court is only functus officio once it has perfected its order or judgment. In that regard, *Black’s Law, Dictionary* 9th Ed. Pg. 1251 defines “Perfect” as follows:- “To take all legal steps needed to complete, secure, or record (a claim, right, or interest)”

19. The taxation proceedings before the taxing officer resulted in the issuance of two (2) separate Certificate of Taxations (Annexure “HMP 1” & “HMP 2”), and not a judgment or decree, as Court proceedings would ordinarily yield. However, Section 51(2) of the *Advocates Act* provides that

“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.”

20. Therefore, the Applicant was cloaked was at liberty to approach the Court seeking that the its Certified Costs be converted into a judgment of the Court in order to perfect the decision of the taxing officer. Additionally, a judgment entered in respect of the certified costs, can further be perfected by way of execution proceedings, if necessary). The totality of the foregoing is that the Respondent’s PO dated 06.11.2023 is rejected in its entirety.

21. Regarding the substance of the motion, as earlier noted, two (2) Certificate of Taxation dated 18.06.2019 and 10.08.2023 have already issued in favour of the Applicant. No reference or other challenge to the respective Certificates has been mounted by the Respondent as provided under Rule 11 of the Advocates Remuneration Order. Section 51(2) of the *Advocates Act*, is express as to the finality of a Certificate of Taxation and whether judgment can be entered in respect of the Certified Costs.

22. The Respondent’s argument was that the Applicant ought to have availed itself of the provisions of Section 48 of the *Advocates Act* upon issuance of the Certificate of Taxation and not Section 51 of the Act. It is settled that an advocate is entitled to fees and compensation for work done. Section 48 of the *Advocates Act* provides that; -

- (1) Subject to this Act, no suit shall be brought for the recovery of any costs due to an advocate or his firm until the expiry of one month after a bill for such costs, which may be in summarized form, signed by the advocate or a partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause to be verified by affidavit filed with the plaint, for believing that the party chargeable therewith is about to quit Kenya or abscond from the



local limits of the Court’s jurisdiction, in which event action may be commenced before expiry of the period of one month.

- (2) Subject to subsection (1), a suit may be brought for the recovery of costs due to an advocate in any court of competent jurisdiction.
 - (3) Notwithstanding any other provisions of this Act, a bill of costs between an advocate and a client may be taxed notwithstanding that no suit for recovery of costs has been filed.
23. Therefore, in pursuit of costs due to an advocate, he can avail himself of either the provisions of Section 48 or 51 of the *Advocates Act*. It is pertinent to add here that proceedings brought under the provisions of Section 51 of the Act and Order 51 of the CPR enhance expediency in the resolution of claims arising from advocate-client taxed costs. In *Otieno, Ragot & Company Advocates v Kenya Airports Authority* [2021] eKLR, Murgor JA, the court cited with approval the decision in *Lubulellah & Associates Advocates V N.K. Brothers Limited* [2014] eKLR where it was held that:-
- “The law is very clear that once a taxing master has taxed the costs, issued a Certificate of costs and there is no reference against his ruling or there has been a ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter judgment. An applicant is not required to file suit for the recovery of costs.”
24. Thus, the Respondent’s opposition and submissions to the motion appear to fly in the face of the provisions of Section 51(2) of the *Advocates Act*. Further, an advocate is entitled to judgment on Certified costs and interest pursuant to Paragraph 7 of the *Advocates Remuneration Order* (ARO) which provides that:
- “An advocate may charge interest at 14 per cent per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, provided that such claim for interest is raised before the amount of the bill shall have been paid or tendered in full”
25. The motion before the court relates to two (2) Certificates of Taxation. The Certificates originate from two (2) Bills of Costs filed by the Applicant in the instant matter. The initial Advocate-Client Bill of Costs in the matter dated 25.09.2018 was served upon the Respondent on 19.12.2018 (Annexure HMP-2) and taxed on 31.05.2019 with a Certificate of Taxation for Kshs. 2,254,819/- issuing on 18.06.2019 (Annexure HMP-1). Pursuant to Paragraph 7 of the ARO the Applicant is entitled to levy 14% interest after the expiry of one month from the date of delivery of his bill. Therefore, interest on the first Certified costs for Kshs. 2,254,819/- accrues as from 19.01.2019 until payment in full.
26. The Second Bill of Costs dated 05.12.2022 is said to be “premised on various orders as to costs by this Court in respect of proceedings post-taxation on 31.05.2019 “, and was served on 11.01.2023 (Annexure HMP-6). It was taxed on 27.06.2023 and a Certificate of Taxation for Kshs. 327,700/- issued on 10.08.2023 (Annexure HMP-5). Similarly, under Paragraph 7 of the ARO interest the second Certified costs for Kshs. 327,700/-, attracts interest at 14% from 11.02.2023 until payment in full. There is no evidence of part-payment of any portion of the respective certified costs. Consequently, the Applicant’s motion is merited and the Applicant is entitled to judgment.
27. The Applicant’s motion dated 28.08.2023 is therefore allowed and judgment entered in the following sums; -
- a. Kshs. 2,254,819/- with interest at 14% per annum from 19.01.2019 until payment in full.



- b. Kshs. Kshs. 327,700/- with interest at 14% per annum from 11.02.2023 until payment in full.
28. The costs of the motion assessed at Kshs. 5000/- are awarded to the Applicant.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 26TH DAY OF APRIL 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Mr. Shah

For the Respondent: Mr. Nyamwaya

C/A: Erick

