



Mohamed & Samnakay v Hudani (Environment and Land Miscellaneous Application E028 of 2021) [2023] KEELC 16724 (KLR) (30 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16724 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E028 OF 2021
AA OMOLLO, J
MARCH 30, 2023

BETWEEN

MOHAMED & SAMNAKAY APPLICANT

AND

NIZARALI DHANJI MOHAMED HUDANI RESPONDENT

RULING

Corrigenda to this Ruling

1. On the March 23, 2023, this honourable court delivered a ruling, believing that the said ruling was in respect of the current matter whose details are ELC Misc application No E028 of 2021. However, the court has since established that the impugned ruling related to a separate and distinct case which was not scheduled for ruling.
2. Owing to the foregoing, the ruling in question in ELC Misc E028 of 2022 was made in error. In correcting the error, I am guided by the Supreme Court decision in *William Musembi v Moi Educational Centre Ltd and 2 others* (2021) eKLR. In the premises, the named ruling be and is hereby rescinded and the correct ruling is hereby rendered.
3. The applicant filed chamber summons dated July 8, 2022 brought pursuant to the provisions of paragraph 11(2) of the *Advocates (Remuneration) Order*, sections 1A, IB and 3A of the *Civil Procedure Act*, articles 10 and 159 of the *Constitution* and all enabling provisions of the law. He seeks the following reliefs;
 - i. That this honourable court be pleased to set aside the taxing officer's decision dated the March 24, 2022 in relation to the applicant's bill of costs dated the February 19, 2021 as filed in the above stated Miscellaneous cause.



- ii. That this honourable court be pleased to reinstate the said bill of costs dated the February 19, 2021.
 - iii. That in the alternative this honourable court be pleased to give directions on the venue where the said Bill of Costs should be filed.
 - iv. That the costs of this application be provided for.
4. The application is supported by the Affidavit sworn by Zul Mohamed of even date. He deponed that on the September 13, 2018, they filed their Bill of Costs dated September 12, 2018 in the Civil Division of the High Court as HC Misc Cause No 475 of 2018; that the same arose from the work done in HCCC No 639 of 2007 which had initially been filed in the Chief Magistrates Court Nairobi as CMCC No 10913 of 2005 but was subsequently transferred to the High Court, Civil Division.
 5. The Applicant stated that they came on record in the year 2012 and after filing the bill in the Civil Division on January 28, 2021 it was set for directions, on February 16, 2021. On that date, the Hon Deputy Registrar Mumassabba directed that the Bill of cost be withdrawn and a fresh Bill be filed in the Environment and Land Court. The Applicant stated that he proceeded to file a fresh Bill of Costs dated February 19, 2021 in the Environment and Land Court.
 6. The Applicant further stated that when the latter Bill of costs came for taxation before Honourable Deputy Registrar Diana Orago, she suggested that physical copies be filed as the documents were bulky and was thus difficult to read online. Upon the submission of the hard copies of all supporting documents, the taxing master made an order striking out the Bill stating that the same had been filed in the wrong court.
 7. The Applicant stated that they electronically submitted a Notice of Objection to Taxation dated March 24, 2022 addressed to the Deputy Registrar on the March 25, 2022 and served the same on the Respondent's Advocates on the same day. However, the reasons requested in the said Notice of Objection were not received. But the ruling issued on July 6, 2022 which contained the DR's reason for striking out the bill of costs.
 8. The applicant contended that the subject matter of the suit related to a dispute arising from a lease and under the provisions of articles 162(2)(b) and 165(5) (b) of the *Constitution of Kenya*, and section 13(2) of *Environment and Land Court Act*, matters relating to land including leases should be filed in the Environment & Land Court. That the Deputy Registrar proceeded to strike out the said bill of costs without giving him an opportunity to be heard, failing to observe rules of natural justice and contravening the "overriding objective" principle enunciated by section 1A, 1B and 3A of the *Civil Procedure Act* and articles 10 and 159 of the *Constitution*. The applicant prayed that the Bill of Costs should be reinstated and/or directions be issued as to the venue where it should be filed.
 9. In response, the Respondent filed a Replying Affidavit dated the December 6, 2022 stating there was no error on principle committed by the Taxing Master and the Applicant did not plead the ground of an error on the principle. That in the Civil Division Bill of the High Court, Hon LA Mumassabba (DR) noted that the parties in the main suit and those in the Bill of Costs were different and directed the Applicant to file the Bill of Costs in the proper court, with proper parties.
 10. The Respondent contended that the Taxing Officer in arriving at her ruling had exercised her discretion judiciously in that the Bill of Costs had been filed in bad faith as the subject matter thereof concerned different parties not parties in the Bill of Costs. He averred that it was wrong to tax the Bills drawn on a party/party basis when there was no bill due and on a non-existent cause of action because the suit was closed on July 5, 2013. It is stated when the matter came up for pre-trial, the Plaintiff's Advocate



in HCCC No 639 of 2007 informed the Court that the Plaintiff had ceased from operating as the Company was officially dissolved and proceeded to cease from acting for the Plaintiff.

11. Mr Hudam contended that the Bills of Costs as filed were full of misrepresentations because the case was considered to have been closed on July 5, 2013 at the pre-trial stage when the Plaintiff dissolved and by then they had paid their Advocate Kshs 50,000 which amount was sufficient for costs incurred.

Submissions

12. The applicant filed submissions dated October 28, 2022 and supplementary submissions dated December 13, 2022 in support of their application which submissions replicated the matters contained in the application and the grounds relied on. He sought the intervention of the court to either reinstate the bill of costs or give directions as to the appropriate venue to file the Bill.
13. The Applicant also submitted that it is a fundamental duty of any judicial officer to give parties an opportunity to expound on any issue that may be raised by Court on its own motion. That the taxing master in this case proceeded to strike out the Bill of Costs without any enquiry or question at all, and in so doing failed to observe rules of natural justice and the 'overriding objective' principle.
14. The Applicant submitted that they are not aware of any mistake in recording names of the parties in the Bill of Costs and the burden is on the Respondent to give particulars of his allegation by concrete evidence noting that the affidavit by Zul Mohamed advocate dated July 8, 2022 in support of the application as filed, the parties' names are correctly stated.
15. The Respondent filed his submissions dated December 6, 2022 and submitted that there was no error in principle that should warrant the interference by this court in setting aside the Taxing Master's ruling. The Respondent cited the principles warranting setting aside decisions of Taxing Master as established in the cases of *Premchand Raichand Limited & another v Quarry Services of East Africa Limited and another* [1972] EA 162, *First American Bank of Kenya v Shah and others* (2002) EA 64 and *Joreth Ltd v Kigano and Associates* (2002) 1 EA 92 as follows;
 - a. That there was an error of principle
 - b. The fee awarded was manifestly excessive or is so high as to confine access to the court to the wealthy
 - c. That the successful litigant ought to be fairly reimbursed for the costs he has incurred
 - d. That so far as practicable there should be consistency in the award.
16. The respondent submitted that they cannot keep jumping from one court to another because the Applicant must be paid their costs stating that the amount of money paid to them was sufficient.

Analysis & Determination

17. I have read the pleadings and considered the submissions filed by both sides. From the pleadings, it is apparent that the applicants bill of costs was struck out after the Taxing Master on her own motion held that the bill was filed in a court without jurisdiction. The dispute herein is whether the taxing master erred in determining the Bill in this manner without according the Applicant an opportunity to give reasons as to why the Bill was filed in the Environment and Land Court.
18. The respondent in submitting that there was no error, introduced new issues such as the Applicant putting names in the Bill that were not parties to the suit. The Respondent does not give the names of these strangers that were added to the Bill of costs. Further, the Respondent does not deny that they



had appeared before the Deputy Registrar, High Court Civil Division who directed the Applicant to withdraw and file the Bill in the appropriate Court. Thus, the Applicant did not just wake up and file their Bill of Costs before the ELC.

19. In principle, a judicial officer is allowed to raise questions of jurisdiction on its own motion. The question here is whether the Taxing Master having been concerned with the issue of jurisdiction acted in error by striking out the bill of costs without affording the Applicant an opportunity to defend himself. *Halsbury's Laws of England*, 5th Edition, Vol 61, page 545 at para 640 states;

“The *audi alteram partem* rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted and of the charge or the case they will be called to meet...”

20. Further, in the case of *Onyango Oloo v AG* (1983-1989) EA 456 it was held that;

“A decision in breach of the rules of natural justice is not cured by holding that the decision would have otherwise been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at...”

21. The Applicant has explained the reasons why he brought the Bill to the Environment and Land Court. Given the history of the case, had the Taxing Master given opportunity for the question of jurisdiction to be argued, she would have probably reached a different conclusion. The violation of the Applicant's right to be heard on the grounds upon which his Bill of Costs was struck out resulted in his being sent away from the seat of justice. The Applicant has been put in a position of not knowing where to go having previously appeared before the High Court, Civil Division. It is demonstrated that the Taxing Master acted in error in striking out the Bill without hearing the Applicant's story thus breaching the rules of natural justice. The breach was fundamental and warrants this Court to interfere with the findings of the Taxing Master.

22. In the circumstances, what orders should this Court grant? The Applicant has explained that his Bill of Costs arose from representing the Respondent in HCC Case No 639 of 2007. The Respondent submitted that the case was closed on the July 5, 2013 at the pre-trial stage. The file was thus closed before the matter was transferred to the Environment and Land Court. Although the cause of action may have been on a subject matter within the mandate of this Court, the file was finalized before a transfer to the ELC. Consequently, the bill of costs should have been dealt with in the Court where the matter was concluded which is the High Court Civil Division.

23. In conclusion, I hold that the reference as brought under the Chamber summons application dated July 8, 2022 is merited. The same is allowed and the following orders issued;

- i. That an order be and is hereby issued setting aside the Taxing Officer's decision dated the March 24, 2022 in relation to the applicant's bill of costs dated the February 19, 2021 as filed in the above stated Miscellaneous cause.
- ii. That this court does reinstate the said bill of costs dated the February 19, 2021 for taxation.
- iii. Directions is hereby given that the said bill of costs is hereby transferred to the Nairobi High Court, Civil Division to be taxed by the Deputy Registrar of that Court.
- iv. The matter be placed before the DR High Court Civil Division on April 27, 2023 for further orders



- v. Each party to meet their costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH MARCH, 2023

A OMOLLO

JUDGE

