



REPUBLIC OF KENYA



KENYA LAW
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Ednah Mutinda C/O Mbooni Kenya National Union of Teachers Branch v Mutisya & 13 others (Civil Appeal 63 of 2019) [2022] KEHC 14791 (KLR) (28 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14791 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL 63 OF 2019
GMA DULU, J
OCTOBER 28, 2022**

BETWEEN

**EDNAH MUTINDA C/O MBOONI KENYA NATIONAL UNION OF
TEACHERS BRANCH APPELLANT**

AND

**MICHAEL MUENDO MUTISYA 1ST RESPONDENT
WAMBUA MUTISO 2ND RESPONDENT
PETER M. NDIWA 3RD RESPONDENT
THOMAS MUTUA 4TH RESPONDENT
PHILIP MBITHUKA 5TH RESPONDENT
SAMMY MUTUA JONES 6TH RESPONDENT
MUKITA MUTIE 7TH RESPONDENT
PATRICK ISEVA 8TH RESPONDENT
JOEL MUOKI 9TH RESPONDENT
MUTUKU KITUNGI 10TH RESPONDENT
ABRAHAM MBITA 11TH RESPONDENT
RUTH MULEKYO WAITA 12TH RESPONDENT
JACKSON KIMWELI 13TH RESPONDENT
CRATER VIEW AUCTIONEERS 14TH RESPONDENT**

*(Being an appeal from the ruling delivered by Hon. L.K
Mwendwa (R.M) sitting at Tawa Law Courts on 30/07/2019)*



JUDGMENT

1. This is an appeal from a ruling made by the magistrate court at Tawa LK Mwendwa (RM) relating to two applications one dated July 5, 2019 and another application dated July 22, 2019, wherein the learned magistrate Hon LK Mwendwa RM on July 30, 2019 dismissed both applications on a finding upholding a preliminary objection that the magistrate did not have jurisdiction to hear and determine the two applications, as the court was *functus officio*.
2. Dissatisfied with the decision of the magistrate in dismissing the two applications, the appellant Ednah Mutinda has now come to this court on appeal through counsel M/s Mulu & Company advocates on the following grounds:-
 1. That the learned trial magistrate erred in law and in fact in finding that he had no jurisdiction to give reasons for the taxation upon filing a Notice Of Objection to taxation against the respondent's costs as assessed.
 2. That the learned trial magistrate erred in law and facts by finding that it had no jurisdiction to hear the appellant's application dated July 5, 2019 and July 22, 2019 respectively and proceeding to dismiss the same when the said applications were seeking orders for stay of execution, setting aside of decree and release of a motor vehicle and when he was properly seized with the appropriate jurisdiction.
 3. That the learned trial magistrate erred in law and in fact in failing to appreciate the law governing proceedings in taxation of costs and thereby arriving at an erroneous finding that he had no jurisdiction to adjudicate over the matter.
3. In the petition of appeal dated August 26, 2019, the appellant has asked this court to make several substantive orders, many of which have nothing to do with the issue of the finding on jurisdiction or otherwise, of the trial court to hear and determine the two applications.
4. The appeal was canvassed through filing of written submissions. In this regard, I have perused and considered the written submissions filed by Mulu & Company advocates for the appellant as well as the submissions filed by Kamende & Company for the respondents.
5. I note that both sides herein, agree to the sequence of events leading to the dismissal of the two applications by the trial court on the ground that the magistrate's court was *functus officio* and did not have jurisdiction to hear and determine the two applications, in that the substantive suit or suits had been determined, or struck out. It is also agreed that costs were determined and the proceedings were now at execution stage for recovery of costs.
6. It is of note that the appellant had already requested the taxing officer who had taxed the costs, to give the reasons for taxing the costs at the figure indicated, but had not been given the said reasons, and in the meantime the appellant's vehicle was in the process of being disposed of in satisfaction of the said costs.
7. The appellant thus filed the two applications in an attempt to save the vehicle from being sold, and the respondent filed a preliminary objection that the appellant's new counsel were not properly on record, and secondly that the court did not have jurisdiction to entertain the application, as the initial suit had been struck, and the court was thus *functus officio*. The court in the ruling found that the new advocate was properly on record, but dismissed the two applications on the ground that the court did not have jurisdiction to entertain the two applications.



8. In my view, the learned magistrate erred in finding that the court had no jurisdiction to entertain the two applications, because even if the suit had been struck out, the issue of costs and execution arising from the costs of the struck out suit were still alive in the same court, and orders had to be made by the court in the taxation and execution for costs accordingly. Otherwise if the court had no jurisdiction to entertain any application consequent upon the striking out of suit, even the respondents herein would not be able to go to the same court to pursue payment of costs, and execution for the costs.
9. Secondly, the taxing officer, as per the *Advocates Act* and Rules, was required to give the aggrieved party (the appellant), the reasons for the assessment of the taxed costs before a reference can be made in the High Court. It is not denied herein, that the reasons for taxation which were requested have to date not been given to the appellant herein.
10. I thus find that the magistrate was in error in finding that he did not have jurisdiction to hear and determine the two applications, as they both related to costs and execution of costs in the same court.
11. What orders can this court give in the present appeal? I note that the appellant has asked for several substantive and far reaching orders, some of which have nothing to do with the costs and taxation of the said costs, or the dismissal of the two applications on a preliminary objection. In my view, the only orders that this court can grant in this appeal, is with respect to the dismissal of the two applications on technical grounds. In my view any other issues arising can be pursued after the substantive decision on the two applications, because a lot of time has passed already.
12. I thus find merits in the appeal and allow the same and order as follows –
 1. I find that the magistrate had jurisdiction to hear and determine the two applications and make substantive determination of the same.
 2. I set aside the magistrate’s decision dismissing the two applications on a technicality of lack of jurisdiction.
 3. I order that the two applications be heard and determined substantively on merits by another magistrate with competent jurisdiction (other than LK Mwendwa) at Tawa or Makueni on priority basis.
 4. Any alleged wrongful acts by any party, can only arise and be pursued after the two applications are determined substantively.
 5. Parties will bear their respective costs of this appeal.
 6. The subordinate court at Tawa will mention the matter on November 3, 2022 for directions with a view to hearing the two applications.

DELIVERED, SIGNED & DATED THIS 28TH DAY OF OCTOBER, 2022, VIRTUALLY AT MAKUENI.

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GEORGE DULU

JUDGE

