REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

JUDICIAL REVIEW DIVISION

JR. MISC. APPL. NO. 5 OF 2017

GEOFFREY CHEGE KIRUNDI.....APPLICANT

VERSUS

THE DISPUTE RESOLUTION COMMITTEE OF

KENYA TEA DEVELOPMENT AGENCY

HOLDINGS LIMITED.....1ST RESPONDENT

KENYA TEA DEVELOPMENT AGENCY

HOLDINGS LIMITED.....2ND RESPONDENT

RULING

Before me is the applicant's chamber summons dated 27 November 2019. Prior its hearing inter partes the applicant had sought in the interim period for the suspension of the decision of Hon. P.Mutua, the deputy registrar of this Honourable Court, the learned taxing master who was also taxing master in the taxation of the 1st and the 2nd respondents party and party bills of costs dated 5 February 2018 and which bills were taxed at Kshs. 1,090,510/= and Kshs. 1,092,090/= respectively. He also sought for a stay of any further proceedings including such proceedings as may be necessary for enforcement of payment of the taxed costs.

These prayers are spent and the applicant's main concern when his application came up for hearing inter partes were the rest of the prayers which seek this Honourable Court's intervention and make orders setting aside:

(a) the proceedings held before the Deputy Registrar on 13 July 2018;

(b) the decision of the deputy registrar taxing the 1st and 2nd respondents' party and party bills of costs at Kshs. 1,090,510/= and Kshs. 1,092,090/= respectively; and,

(c) the certificates of costs and decree issued pursuant to the decision of the deputy registrar taxing the 1st and 2nd respondents' party and party bills of costs dated 5 February 2018 at Kshs. 1,090,510/= and Kshs. 1,092,090/= respectively.

The applicant also sought to have the 1st and 2nd respondents' party and party bills of costs dated 5 February 2018 remitted for taxation before the taxing master.

The basis of the applicant's application is that on 13 July 2018 the respondents' bills of costs proceeded for taxation before the taxing master in the absence of the applicant's counsel. According to the affidavit he has sworn in support of the application, his counsel's absence from court on the material date was due an inadvertent error of misdiarising the taxation date as 13 August 2018 instead of 13 July 2018.

Even then, the respondents are said to have filed written submissions on the date of the taxation and relied on these submissions without having served the upon the applicant's counsel and who, for that reason, did not have any chance to respond to the submissions. Yet the learned magistrate relied on these submissions in making his decision.

That notwithstanding, an earlier application made by the applicant to set aside the same taxation proceedings was dismissed by this honourable court (Matheka, J.) on 21 January 2019. According to the applicant, the application was dismissed for the reason that it ought to have been made before the deputy registrar.

The applicant went back to the deputy registrar but in a decision rendered on 13 November 2019, the deputy registrar declined to entertain the applicant's application because, in her opinion, she lacked the requisite jurisdiction the moment the certificates of costs were issued.

Against this background, the applicant swore, inter alia, that:

> ***"5...all I seek before this Honourable Court in the present Application is:***
>
> > ***a) to be granted my undoubted right to be heard on the bills of costs filed by the respondents against me.***
> >
> > ***b) to be protected from unjust execution proceedings even before I have had a chance to put my case on the matter of the Bills of Costs by the Respondents against me."***
>
> ***Despite these depositions, the applicant still swore as follows with respect to his present application:***
>
> ***"14. That I have therefore moved with haste to this honourable court as I object to the decision of the learned taxing master of 13th November 2019. (See a copy at in (sic) the Court record)."***

He then proceeded to challenge the taxation on the grounds that the costs awarded were premised on an interlocutory application that, in his view, attracts only nominal costs; that the subject matter of the dispute was in fact a matter of public interest; and, the 1st respondent had, in any event, bee adjudged by this honourable court a non-existent, non-legal entity and which, therefore, would not be entitled to costs.

The respondents opposed the applicant's application and to that end filed a replying affidavit. The genesis of the current dispute, as far as they are concerned, is the judgment delivered by this Honourable Court on 15 November 2017 dismissing the applicant's suit for judicial review orders and, in particular, the order awarding them costs upon the dismissal. It is based on the basis of this order that they filed their respective bills of costs.

When the bills came for taxation for the first time on 23 April 2018, the applicant did not attend court but the taxation could not proceed because the court was on leave. It is then that the taxation was rescheduled to 13 July 2018. This date was fixed ex parte but was served upon the applicant's counsel. Between the dates of 23 July 2018 and 28 July 2018 the applicant's and the respondents' respective counsel held a conversation in which the applicant's counsel was informed of the outcome of the proceedings of 13 July 2018.

The applicant then proceeded to file an application dated 10 August 2018 before the deputy registrar seeking, among other things, that the proceedings of 13 July 2018 together with the respective certificates of costs dated 25 July 2018 and 2 August 2018 be set aside. He also sought for afresh taxation of the respondents' bill of costs. The application was dismissed on 13 November 2019.

But even before this application was heard, the applicant filed another application dated 19 September 2018; in this application the applicant sought to have the court vacate and set aside the decree issued on 2 August 2018 and that any further proceedings in the matter be stayed pending the hearing and determination of an appeal apparently filed in the Court of Appeal at Nyeri. Once again this application was dismissed more particularly on 21 January 2019.

It is against this background that the present was filed, so the respondents swore. It was their case that as much as the application is disguised as a reference, the prayer sought have been determined in the previous decisions on the applicant's several applications.

In their submissions the respondents urged that going by the applicant's previous application and the rulings made in those applications, the present application is res judicata to the extent that it raises issues that have been adjudicated upon. To this end, the respondents invoked section 7 of the Civil Procedure Act, cap. 21 and cited the decisions in **Njue Ngai vs. Ephantus Njiru Ngai & another [20161eKLR and Ukay Estate Ltd & another vs Shah Hirii Manek Ltd & 2 Others eKLR** that the doctrine of res judicata is designed to achieve the twin goals of finality to litigation and protection of individuals from double vexation of the same cause.

Besides the argument that the applicant is caught up by the doctrine of res judicata the respondents also urged that the applicant's application does not comply with paragraph 11(1) and (2) of the Advocates Remuneration Order, 2009. They cited the cases of **Randolph Tindika t/a Tindika & Co. Advocates v Luka Mwambaga Msagha [2017] eKLR** and **N. W Arnolo T/a Amolo Kibanya & Co. Advocates vs Samson Keengu Nyamweya [2016] eKLR** where this paragraph was applied. In the latter decision, it was held that a reference filed outside the fourteen day is incurably and fatally incompetent.

It was also urged on behalf of the respondents that Constitutional provisions cannot be employed to override statutory provision as far as complying with paragraphs 11(1) and (2) of the Advocates Remuneration Order is concerned. And in this regard counsel cited the decisions in **Lilian Gogo v Joseph Mboya Nyamuthe & 4 others 120171 eKLR** in which the case of **Kimani Wanyoike vs. Electoral Commission & Another (1995) eKLR** was cited with approval and where it was held that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

Finally, the respondents counsel urged that the applicant cannot argue that he was never given a chance to be heard; the applicant, according to them, knew of the taxation date but chose not to attend court.

Having considered the applicant's application, the affidavits respectively filed in support of and in opposition to the application together with the submissions of both counsel for the applicant and the respondents I am persuaded that the application is, misconceived, incompetent and an abuse of the process of the court. I have come to this conclusion for various reasons.

In the first place, I find the contention by the applicant that he proceeded to the deputy registrar with an application to set aside the proceedings of 13 July 2018 only after a similar application had been dismissed by this court is misleading. There were in fact two applications pending simultaneously before the judge and the deputy registrar respectively. As a matter of fact, this was one of the points of contention before the judge; that the applicant could not be making an application before the judge similar to the one he had made before the deputy registrar. And certainly, it is because of this contention that in her ruling delivered on 21 January 2019, the learned judge said inter alia, that:

> ***"The ancillary proceedings to which the applicant makes reference are before the Deputy Registrar vide the applicant's own application seeking to set them aside. There is a procedure in law through which the proceedings before the Deputy Registrar can become proceedings before me. To the extent that there is an application before the DR seeking orders whose effect would be exactly the same as the orders sought before me in this application, the application is sub judice."***

The court went even further and held as follows:

> ***"It is not correct to argue that the applicant is left without recourse. The applicant has an application pending before the Deputy Registrar seeking similar orders. Those proceedings are properly before the Deputy Registrar and the applicant should first deal with the application to its final determination instead of seeking similar orders from this court as well."***

In addressing the question of costs, which again features prominently in the present application, the court noted as follows:

> ***"The applicant cannot be heard to say that the issue of costs arose 10 months after the delivery of my ruling. The order of costs was made at the same time as the striking order. At the time the applicant filed his appeal and the application in the Court of Appeal, the order for costs was in place. It is an issue the applicant ought to have raised before the court of appeal as it was inevitable that the proceedings related to the order of costs would follow the event."***

With these findings, what has been presented as the factual basis of the applicant's application is contrary to the established facts. The truth of the matter is that there was not only an application pending before the deputy registrar at the time the applicant prosecuted his application before the learned judge, but the judge made some remarks in her ruling which I, as judge having coordinate jurisdiction, cannot question.

And even if it was to be assumed that the applicant proceeded before the Deputy Registrar after his bid failed before the judge, he certainly cannot come back before this honourable court in a fresh application similar to the one that was dismissed by the deputy registrar.

A decision of the deputy registrar can either be appealed against, if it is made on an application under any of the rules specified in Order 49 Rule 7(1), or objected to under paragraph 11 of the Advocates (Remuneration) Order. The latter option appears to be to have been the most viable option available to the applicant the moment against the decision of the of the taxing officer rendered on 13 July 2018. If anything, the applicant has himself sworn in clear and unambiguous terms, in paragraph 14 of his affidavit, that he is

I should think this is the kind of decision that paragraph 11 is talking about and it is also the decision by which, for all intents and purposes, the applicant has been aggrieved all along. This being the case, all that the applicant was required to do was to give a notice in writing to the taxing officer of the items on the bills of costs to which he objected and this ought to have been done within 14 days from 13 July 2018 when the decision was made.

According to paragraph 11 (2) the taxing officer would have then recorded and forwarded to the applicant the reasons for his decision on those items. It is then that applicant may have within fourteen days from date of the receipt of the reasons applied to a judge by chamber summons setting out the grounds of his objection.

As much as the applicant invoked paragraph 11 of the Advocates Remuneration Order, there is no evidence and neither has the applicant suggested that he attempted to comply with this particular paragraph. A reference to the judge in chambers in terms prescribed by paragraph 11 would, no doubt achieve, at least in part, the same purpose, that is intended to be achieved in the present application; a dispute on the scale of fees charged on any item would properly be determined in such a reference.

Paragraph 13 A of the Remuneration Order which the applicant also invoked neither provides for the setting aside of the taxation proceedings nor of any order consequent upon such proceedings. That paragraph reads as follows:

> ***13A. Powers of taxing officer***
>
> ***For the purpose of any proceeding before him, the taxing officer shall have power and authority to summon and examine witnesses, to administer oaths, to direct the production of books, paper and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him.***

It is clear here that in any proceedings before the taxing officer his powers can only go as far as summoning and examination of witnesses, administering of oaths and giving such directions as to production of books, paper and documents. He may also direct and adopt any proceedings that necessary for determination of the question at hand.

The learned counsel for the applicant cited the decision in **Masika Koross Advocates versus Njama Limited (2015) eKLR** where the court, Kamau, J interpreted paragraph 76 of the Advocates Remuneration Order to imply that since the taxing master could proceed ex parte and tax a bill of costs, he had the power also to set aside his order if it turns out that the taxation notice was not duly served. Paragraph 76 reads as follows:

> 76. ***Taxing officer may proceed ex parte and extend or limit time or adjourn***
>
> ***The taxing officer shall have power to proceed to taxation ex parte in default of appearance of either or both parties or their advocates, and to limit or extend the time for any proceeding before him, and for proper cause to adjourn the hearing of any taxation from time to time.***

My understanding of this paragraph is inconsistent with the suggestion that a bill of costs can only be taxed in the presence of all the parties; as I understand it, a taxation in default of appearance of any or either party is not necessarily out of step.

I suppose the rationale is, if the taxation is in accordance with the remuneration order, there would no need for setting it aside merely for the reason that any or all the parties did not participate in the taxation proceedings. Of course, if the bill of costs is taxed contrary the remuneration order or to scale fees chargeable on any particular item in dispute any of the aggrieved party would be entitled to object and file the appropriate reference before the judge for determination rather struggle to setting aside the taxation proceedings or any consequent order made after such proceedings.

As far as the question of whether costs are payable to both or any of the respondents is concerned, all I can say is that the same question was addressed by learned sister Matheka, J in her ruling of 21 January 2019. As far as I gather from this ruling, it is question or one of the questions that are the subject of the appeal filed against the learned judge's decision of 15 November 2017 dismissing the applicant's suit against the respondents; the less I talk about it here the better.

For the foregoing reasons, I am inclined to dismiss the applicant’s application; it is hereby dismissed with costs.

Signed, dated and delivered on 22 January 2021

Ngaah Jairus

JUDGE