



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

PETITION NO. 1 OF 2017

MOHAMED DADO HATU.....PETITIONER

VERSUS

DHADO GODDAE GODHANA.....1ST RESPONDENT

THE RETURNING OFFICER

TANA RIVER COUNTY.....2ND RESPONDENT

THE INDEPENDENCE ELECTORAL

AND BOUNDARIES COMMISSION.....3RD RESPONDENT

RULING

R. Nyakundi, Judge

Ashioya Mogire & Nkatha Advocate for the Plaintiff

Chenge Busiku & Co Advocates for the 1st Respondent

The Notice of the Motion expressed to be brought under Section 1, 1A, 1B, 3A and part III of the Civil Procedure Act read Order 22 of the Civil Procedure Rules emanates from the decree of the court dated 5.1.2018.

In his bold arguments, the applicant has invited the court to find that he was never given an opportunity to interrogate the Bill of Costs. The applicant is therefore challenging the tax certificate of taxation and subsequent decree upon entry of judgment in which the 1st respondent is entitled to a sum of Ksh 1,836,033. In disposing the combined issues in the application Counsel has made reference to the following authority **Donhom Rahisi Spares Vs EA Portland Ltd (2005) Eklr**. On the new part of the 1st respondent Counsel the issue under scrutiny is whether the Honorable court has the requisite jurisdiction to determine the application. In a bid to persuade the court on this line of submissions counsel cited the principles in **Tuneya Dado vs IEBC and 2 others (Election Petition No. 1 of 2017)**. **Machira & Co Advocates vs Arther K Magugu (2012) ELL KL**. Further to the respondent it submissions is obvious that the firm of Ashioya Mogire Nkatha Advocates is in breach of order 9 of Rule of the Civil Procedure Rules on post judgment legal representation.

Determination.

I have given due regard to the rival submissions by both counsels with regard to the issues stated in the notice of Motion. This is simply not a reference to interfere with the discretion of the Taxing master as envisaged under Rule 11 of the Advocates Remuneration order. It has been suggested that no bill of costs was filed and served upon the applicant. Further, that election court did not tax costs but proceeded on the basis of capping, costs in its judgment.

There is no other question, approach this problem except in the way the court express itself in the case of **Moses Mwicigi & 14 others v independent Electoral and Boundaries Commission & 5 Others (2016) ECLR** where the court stated thus:

“This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case that it benefits not the attribute of mere technicality. The conventional wisdom, indeed is that procedure is the hand maiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the court would not hesitate to declare the attendant pleadings incompetent.

Yet procedure, in general terms, is not an end in itself. In certain cases, insistence of Article 159 (2) (d) of the constitution, which proclaims that, “..... courts and tribunals shall be guided by..(the principle that justice shall be administered without undue regard to procedural technicalities”. This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves the courts”.

Applying the tests which I have above indicated to the present case, I think that the words in the case of **Machira & Co Advocate Versus Arthur K. Magugu & Another (2012) EKL.R.** are in the circumstances contingent to the issues raised by Counsel for the 1st Respondent in which the court held as follows:

“The appellate Jurisdiction of any court is a creature of statute and has to be exercised in accordance with the provisions of the statute creating it. With regard to Advocates Bill of Costs, we agree with the decision of Ringera, J, (as he then was) in Machira v Magugu, Nairobi Civil Appeal No. 199 of 2002 that the Advocates Remuneration Order is a complete code which does not provide for appeals from Taxing Master’s decision. rule 11 therefore provides for ventilation of grievances from such decision through references to a judge in chambers...”

At the core of the Applicants’ case is a fundamental challenge to the decree arising out of the judgement of the Election court. It seems plain that the applicant led no evidence to show the invalidity of the judgment or the decree for that matter. Basically, the decision may only be challenged on Appeal, review or a reference. I think the expression of stay of execution is untenable to the facts of this case.

It goes without saying from the record in a judgment of the court delivered on 5.1.2018 costs were capped as Ksh. 2 million. That being the case, subsequent decree filed in court on 4.7.2020 ascertained the costs to a sum of Ksh. 1,836,033 as against the applicant herein. I therefore pose the question whether the applicant has shown sufficient reason for this court to interfere with the judgment delivered on 5.1.2018 and the decree of 1,836,033. In my conceded view, the answer is in the negative.

I find the submissions by the 1st respondent valid in Law, that the inherent jurisdiction as a residual power of the court or on review is not available as provisions in support of the application on account of the decree filed on 4.7.2020. The issue, therefore, is one of procedural jurisdiction and not discretion.

All in all, the notice of motion dated 4.7.2019 lacks merit. The same is accordingly dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF JANUARY, 2021

.....

R. NYAKUNDI

JUDGE

This Ruling has been dispatched electronically to the respective emails of the advocates in the matter.

(benard@cbadvocates.co.ke and ashioyamogireadv@gmail.com)