REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL CASE NO. 2 OF 2017

NYAMIRA COUNTY GOVERNMENT.....PLAINTIFF/RESPONDENT

=VRS=

LOCAL AUTHORITIES PROVIDENT FUND.....DEFENDANT/APPLICANT

RULING

By the Notice of Motion dated 16th January 2020 brought under Section 51 (2) of the Advocates Act, Paragraph 11 of the Advocates Remuneration Order, Order 22 Rule 22 of the Civil Procedure Rules and Article 5 of the Constitution, the defendant/applicant seeks the following orders: -

> **"1. THAT for purposes of URGENCY service of this Application be dispensed with in the first instance and the same be heard Ex-parte.**
>
> **2. THAT the Decree emanating from the Ruling of the Deputy Registrar on the 17/10/2019 and all consequential Orders be stayed and/or set aside Ex Debito Justitiae.**
>
> **3. THAT ALTERNATIVELY the Certificate of Taxation arising from the said Ruling and all Consequential Orders be stayed and/or be set aside Ex Debito Justitiae. AND**
>
> **4. THAT this Honourable Court be pleased to grant leave to the Applicant to file a Reference OUT OF TIME.**
>
> **5. THAT this Honourable Court do Review it's Order allowing for the conversion of a Certificate of costs to a Judgement due to NON-SERVICE.**
>
> **6. THAT costs of this Application do follow the event."**

The gist of the application is that whereas it was agreed that the plaintiff/respondent's Bill of Costs on the defendant/applicant's counterclaim would be canvassed by way of written submissions and the defendant/applicant's submissions were duly filed, the defendant/applicant was never served with the plaintiff/respondent's submissions and was subsequently never notified of the date of the taxing officer's ruling; that the defendant/applicant only learnt about the ruling on 20th December 2019 when a proclamation and Notice of Attachment, were served upon her; that the failure to notify the applicant has led to grave prejudice and has denied the defendant/applicant the right to challenge the ruling as provided in Paragraph 11 of the Advocates Remuneration Order and it is therefore imperative that the ruling be set aside and leave be granted to the defendant/applicant to file a reference. Further, that the resultant decree ought to be set aside because the application to convert the certificate of costs arising from the taxation was made ex-parte without notice to the defendant/applicant hence denying them audience and moreover a ruling on a Bill of Costs or a Certificate of Costs is incapable of execution as it must first be converted into a judgement upon an application duly served on the other side.

In opposition to the application, Counsel for the plaintiff/respondent filed a replying affidavit sworn by himself and deposed inter alia that the plaintiff/respondent filed its bill of costs on 22nd February 2019 and served it upon the advocates on record for the defendant/applicant; that when the same was listed for taxation on 13th March 2019 the court directed the defendant/applicant to file its submissions within seven days and fixed a mention on 26th March 2019 to confirm filing of submissions; that whereas the plaintiff/respondent filed submissions on 26th March 2019 the defendant/applicant filed hers on 27th March 2019; that on 15th March 2019 he (Counsel for the plaintiff/respondent) duly sent a notice of the mention set for 26th March 2019 to the advocate for the defendant/applicant via registered post; that on 26th March 2019 the court reserved its ruling to 30th April 2019 but the same was not ready; that he inquired as to when the ruling would be delivered and was informed it would be delivered on 17th October 2019 and that when he subsequently learnt the ruling had been delivered on 17th October 2019 he wrote a letter dated 29th October 2019 to the advocate for the defendant/applicant to advise their client to settle the costs and when the stay granted to the defendant/applicant by the court expired he instructed Heageons Auctioneers to commence the process of

execution. Counsel deposes therefore that this application has not been brought in good faith and has concealed material facts notably that the applicant has not explained why her advocate did not respond to the notice that costs had been taxed; that the said advocate had written a letter to the auctioneer after the proclamation and further has not given any explanation for bringing this application late.

This court heard the oral arguments of the Advocates on 22nd January 2020. Mr. Madara, Learned Counsel for the defendant/applicant submitted that he had not seen a decree in this matter and that due process was not followed because once the Deputy Registrar made a decision then the certificate of costs should have been converted into a judgement. He reiterated that the decision of the taxing officer was rendered in their absence and without notice which in itself denied his client a right to file a reference. He submitted that the alleged notice served upon his office in regard to the mention on 26th does not have his stamp and contended that the original ought to have been tendered. He further argued that the Bill of costs was in any event incompetent as the counter claim was dismissed leaving the main suit which the plaintiff then withdrew on the floor of this court. He contended that as such no suit existed and the bill should not have been brought as it was. He submitted that the replying affidavit filed in response to the application did not address the issues raised in the application more so whether the process of obtaining the decree was correct. He pointed out **"errors"** in the application for execution and further reiterated that a certificate of costs which has not been converted into a judgement then into a decree is incapable of being executed. He also reiterated that his client was not notified of the date of the ruling. He urged this court to grant the prayers sought.

On his part, Mr. Nyachiro for the plaintiff/respondent submitted that Mr. Madara once he discovered his client's goods had been proclaimed should have filed a notice under Paragraph 11 (1) of the Advocates Remuneration Order but that 30 days had since expired without such notice. He also urged this court to dismiss this application on the ground that it was brought by way of motion instead of Chamber Summons as provided in paragraph 11 (1) of the Advocates Remuneration Order. Mr. Nyachiro contended he personally served Counsel for the defendant/applicant with a notice of the date for the ruling and that he had filed an affidavit of service to that effect. He submitted that in any event Counsel for the defendant/applicant was represented by Mr. Nyamwange Advocate on 26th March 2019 when the ruling date of 30th April was given. Mr. Nyachiro submitted that since the ruling was not delivered as scheduled either party was obligated to inquire the next date given. He contended that the defendant/applicant had not demonstrated that any such inquiry was made. He reiterated his deposition that when he discovered the ruling had been delivered he duly notified the advocate for the defendant/applicant that there was a thirty days stay of execution. He contended that paragraph 51 of the Advocates Remuneration Order does not apply to this bill as it is a party and party bill but not an Advocate/client bill. He pointed out that the bill arose from the defendant's/applicant's counterclaim which was struck out with costs. He contended that Counsel for the plaintiff/respondent had filed a defence to the counterclaim as evidenced by the defendant/applicant's abandonment of their application for judgement upon noticing the defence on the record. Mr. Nyachiro urged this court to find that the defendant/applicant had not demonstrated sufficient reasons to warrant being granted leave to file a reference out of time and pointed out that Counsel for the defendant/applicant had instead of writing to the Deputy Registrar written to the auctioneer. He urged this court to dismiss the application with costs.

In reply, Mr. Madara reiterated his submissions and urged this court to allow the application.

I have carefully considered the rival submissions and all the material placed before me and before I determine the application on the merits, let me give a brief background of the case. The suit herein was filed via a plaint filed in Kisii High Court on 30th March 2011. The defendant's statement of defence was also filed in Kisii on 14th July 2011. There were many intervening interlocutory applications but more importantly the record shows that on 9th November 2016 the defendant/applicant filed what was referred to as **Defence of the Defendant and Counterclaim**. Subsequently on 7th March 2017 the suit was transferred to this court upon the application of the defendant/applicant. On 25th October 2018 this court heard a preliminary objection dated 23rd August 2017 in which the plaintiff/respondent urged this court to strike out the afore-stated **defence and counterclaim** on the ground that it had been filed without leave. Subsequently by a ruling delivered on 8th November 2018 this court upheld the preliminary objection and struck out the pleading with costs to the plaintiff/respondent. Thereafter on 22nd October 2018 Counsel for the plaintiff/respondent made an oral application to withdraw the suit and the suit was then marked as withdrawn with costs to the defendant. In essence therefore while the defendant/applicant was awarded the costs of the suit the plaintiff/respondent was awarded the costs of the counterclaim and the preliminary objection. Mr. Madara has contended that the plaintiff/respondent did not file a defence to the counterclaim but the record shows that a Reply to the Defence and Defence to Counterclaim was received by the court on 24th November 2016.

Having set the record straight it is my finding that whereas this court has discretion to extend the time limited for filing a reference and to stay execution of decrees, the defendant/applicant is not deserving of the orders sought. From the record it is evident that the decision of the taxing officer was rendered on 17th October 2019 and that none of the parties were notified. Upon delivering the ruling the taxing officer/Deputy Registrar granted a stay of execution for thirty days. On record is a letter dated 14th October 2019 from Tengo Madara & Co., Advocates to the Deputy Registrar of this court which states: -

> **"Your Ref: T.B.A 14th October, 2019**
>
> **Our Ref: TWM/LPF/01/1**
>
> **The Deputy Registrar,**
>
> **High Court of Kenya,**
>
> **Civil Division,**
>
> **NYAMIRA.**
>
> **Dear Sir/Madam,**

RE: NYAMIRA HCCC NO. 2 OF 2017

PARTY & PARTY BILL OF COSTS

NYAMIRA COUNTY GOVERNMENT –VS- LAPFUND

We act for Lapfund and were in the conduct of HCCC NO. 2 of 2017 a suit filed by the County Government of Nyamira against our Client. The suit was withdrawn by the County Government on the date of hearing.

We intend to file a Bill of Costs for thrown away Costs. However Nyachiro, the Advocate for the County Government filed a Party & Party Bill of Costs on 22/2/2019 of even date in which they sought Kshs. 12,675,849 as Costs.

Naturally, we have opposed the same. Submissions were agreed to be made. We filed ours and we were advised to await a date for Taxation which we do not have to date.

Kindly advice on the position of the Bill filed as HCCC NO. 2 of 2017 (Party & Party Bill of Costs).

Your quick attention would be greatly appreciated.

Yours faithfully

Tengo Madara

Cc: Client"

The letter which was marked urgent was received by this court on 4th November 2013 and on 19th November 2019 the Deputy Registrar replied as follows: -

"19th November 2019

Tengo Madara & Co. Adv,

Standard Street,

7th Floor, Standard Building,

P. O. Box 24999 – 00100,

Nairobi.

RE: NYAMIRA HCCC NO. 2 OF 2017

TOWN CLERK NYAMIRA TOWN COUNCIL & ANOTHER

VERSUS

THE EXECUTIVE OFFICER LAPFUND

Your letter dated 14th October 2019 refers.

This is to inform you that the party to party bill of costs filed by Nyachiro & Co. Advocates was taxed on 17th October 2019 at Kshs. 8,525,092.79/=.

Deputy Registrar

Nyamira High Court

Cc: Nyachiro, Nyagaka & Co. Advocates

Sakong House, 4th Floor

Kenyatta Street

P. O. Box 138 – 30100

Eldoret"

It cannot therefore be true that Counsel for the defendant/applicant got to hear of the decision of the taxing officer only after his client's goods were proclaimed as that process did not begin until 17th December 2019. Mr. Madara having been notified by no other than the court that the decision had been rendered and the costs taxed ought to have moved this court as provided in paragraph 11 of the Advocates Remuneration Order. He did not do so until 17th January 2020. It is my finding that his explanation for that delay which in my view is inordinate, flies in the face of the record as he was made aware of the decision of the taxing officer by the Deputy Registrar way before he claims it came to his notice.

As for his argument that the certificate of costs was not converted into a judgement, it is my finding that the bill of costs being one for party & party need not have been so converted in order to be executed. **Section 51 of the Advocates Remuneration Act** upon which Mr. Madara puts his reliance states: -

> **"(1) Every application for an order for the taxation of an advocate's bill or for the delivery of such a bill and the delivering up of any deeds, documents and papers by an advocate shall be made in the matter of that advocate.**
>
> **(2) 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."**

That section which from a reading of subsection one refers to advocate/client costs emphatically states that the certificate of costs is final as to the sum of costs unless set aside by the court. The section also bestows upon the court discretion to make such order in relation thereto including an order that the judgement be entered for the sum certified to be due with costs save where the retainer is disputed. In my view the section does not make entry of judgement a condition precedent in matters of party and party costs. The objections raised by Mr. Madara to the certificate of costs therefore have no basis just as his application to set aside the bill of costs or to extend time for filing a reference on the ground that he was not aware of the decision of the taxing officer.

In regard to execution the position previously was that a certificate of costs was not executable and that a decree had to be extracted first. That was the ruling of Ibrahim J, as he then was, in the case of **Rubo Kimngetich Arap Cheruiyot v Peter Kiprop Rotich [2006] eKLR where he stated: -**

> ***"In this case, there was no decree under which the certificate of costs could be underpinned. The certificate of costs is only for the payable costs, it is not the decree.***
>
> ***It is my view that a decree duly approved and signed had to be on record for any execution to take place, whether for eviction, costs or otherwise. As far as the parties in a suit are concerned, a certificate of costs is not an executable legal instrument. A certificate of costs is not capable of being "executed".***
>
> ***Warrants of attachment and sale cannot in law be issued on the basis of a certificate of costs. There must be a decree first. It is true that the Decree may not necessarily or always contain the ascertained costs. Costs can be determined before a decree is issued or subsequently after the decree has been drawn. However, for one to recover costs, there must be a decree. Any money awarded by the court including costs is only payable under a decree…."***

My reading of **Order 21 Rule 9 (1) & (2) of the Civil Procedure Rules** however seems to suggest that a certificate of costs can stand alone and be executed as such. **Rule (9) (1)** and **(2)** provide: -

> **"1. Where the amount of costs has been—**
>
> **(a) ……**
>
> **(b) ……**
>
> **(c) Certified by the registrar under Section 68 A of the Advocates (Remuneration) Order; or**
>
> **(d) ……**
>
> **the amount of costs may be stated in the decree or order.**
>
> **2. In all other cases, and where the costs have not in fact been stated in the decree or order in accordance with subrule (1), after the amount of the costs has been taxed or otherwise ascertained, it shall be stated in a separate certificate to be signed by the taxing officer, or, in a subordinate court, by the magistrate." (Emphasis mine)**

This in my view confirms that a certificate of costs is as good as a decree for purposes of execution. If a decree means the formal expression

of an adjudication, then the certificate of costs is the formal expression of the ruling of the court on certified costs and same can be enforced. ***(See Francis Kimani Kiige v National Hospital Insurance Fund [2017] eKLR).*** Indeed, in the **Court of Appeal Rule 108** of the **Court of Appeal Rules** now stipulates: -

> **"(2) For the purpose of execution in respect of costs, the decision of the court directing taxation and the certificate of the taxing officer as to the result of such taxation shall together be deemed to be a decree."**

I do not agree therefore that the process of execution herein should be halted simply because of the absence of a decree. In the premises I find no merit in the Notice of Motion and the same is dismissed in its entirety and the costs thereof awarded to the plaintiff/respondent. It is so ordered.

Signed, dated and delivered in open court this 20th day of February 2020.

E. N. MAINA

JUDGE