



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

HIGH MISC.APPL.NO.249 OF 2018

ELIZABETH WANGARE & CO.ADVOCATES.....APPLICANT

-VERSUS-

WILLY GITAU.....RESPONDENT

RULING

1. This is a ruling on **application** dated **13th March 2019**. It seeks to vary or set aside orders issued on 5th March 2019 in respect to **prayer 2 of Notice of Motion** dated 4th March 2019. Applicant sought to be allowed to deposit his logbook and that of his wife in place of deposit of kshs.4,491,377.50 as security.

2. Grounds on the face of the application are that applicant is unable to raise kshs 4,491,377.50 as ordered on 5th March 2019 as he is a retired teacher and has no pay slip or viable income; that the applicant is yet to receive his entitlement from the estate of the deceased's estate in succession cause No.336 of 2007 the *substrata* of the instant suit owing to stay orders issued on 30th January 2019 staying signing confirmation of grant.

3. That applicant avers that prayer sought in application dated 4th March 2019 will be rendered nugatory if orders sought in this application are not allowed and he stand to suffer prejudice.

4. The application is supported by affidavit sworn by the applicant on 13th March 2019. He restated grounds on the face of the application already captured above. He averred that he is ready to furnish the court with any other reasonable security, which include his logbook, his wife's logbook and pay slip. He attached two logbooks to the affidavit.

5. In response, the respondent filed replying affidavit dated 2nd April 2019.

She averred that, on 22nd February 2019 court issued decree requiring the applicant to pay kshs 8,020,815 to the respondent and upon proclamation by **Nasioki Auctioneers**, the defendant filed application dated 4th March to prevent attachment of his property.

6. She averred that, the court upon hearing both parties gave an order for stay on condition that the applicant deposit half decretal amount; that 2 days to the lapse of the above condition, the applicant filed application dated 13th March 2019 but served the respondent on 20th March 2019.

7. Respondent averred that the applicant's and his wife's logbooks are not sufficient and adequate security; that the vehicles whose logbooks the applicant proposes to deposit are susceptible to accident and may be written off; further they can be stolen; that the pay slip he proposes to deposit belong to a party who is not subject to this suit and the said security may not crystalize.

8. The respondent further averred that the applicant has other immovable properties and other sources of income, which he has not disclosed; further that there is no evidence attached to demonstrate nexus between **Isabel Jeptum Biwott** and the applicant.

9. Further, the condition granted by court effectively meant kshs 4,010,407.50 ought to have been deposited in court on or before 15th March 2019.

10. She averred that the applicant though retired is a teacher and/or administrator at **Baptist Academy**; that he is very economical with the truth and has not approached the court with clean hands hence not deserving any equitable reliefs from the court.

11. Respondent further averred that services rendered to the defendant were not subject to any occurrence of any event and thus grounds (b) and (c) of the notice of motion do not suffice.
12. She averred that it is evident that the applicant is on cherry picking spree, picking part of the court orders he deem comfortable with and bring application upon application to either set aside and/ or vary parts that the deem uncomfortable.
13. She stated that this is a monetary decree which can be repaid should there be a need hence the conditional stay by the court. She urged court to dismiss the application.
14. The respondent also filed preliminary objection dated 1st April 2019 in response to initial application dated 4th March 2019. Grounds of preliminary objection are that the application dated 4th March 2019 is improperly before court and grossly offends provisions of **Rule 11 of the Advocates Remuneration Order** and two, the firm of **H & K Law Advocates** is improperly on record by dint of the express provisions of Order 9 Rules 9 and 10 of the Civil Procedure Rules.
15. I gave direction for hearing of application dated 13th March 2013 and preliminary objection. Parties filed written submissions and proceeded to highlight submissions on 24th February 2020.
16. **Mr. Kiplagat** for the applicant restated grounds on the face of the application and averments by the applicant. He submitted that the court is empowered to require security upon judgment as it deems fit and pursuant to **order 45 of CPR** the court has jurisdiction to review its orders. He submitted that as averred in the supporting affidavit the applicant is unable to meet conditions of stay, as he is yet to receive his entitlement from estate of his late father **Bethwel Gitau Karuma**.
17. He further submitted that he is diabetic who is constantly admitted in hospital and it is not true he teaches or is administrator at **Baptist Academy** as alleged in replying affidavit. He submitted that financial status of the applicant is important evidence within the meaning of **order 45 (1)** which could not be produced at the time the orders were granted on 5th March 2019; that it is a ground of review. He stated that had the financial status been availed to court, the court would not have imposed the alternative conditions.
18. Counsel referred to the case of **Butt Vs Rent restriction tribunal [1982] eKLR 417**. He submitted that the logbooks they have offered are sufficient for performance of certificate of taxation in this case. He stated that the applicant's household goods proclaimed were worth kshs 300,000 but the applicant has instead offered security is over and above. He urged court to allow the application having the interest of justice in mind
19. In response counsel for the applicant relied on averments in the replying affidavit already captured above and submissions filed on 7th May 2019. She urged court to consider averments in the replying affidavit and annexures and arrive at a fair finding.
20. She submitted that she has raised 4 grounds in opposition to the application. First being the application has been filed by an Advocate who is not properly on record; that the prayer to come on record should have been dealt with first. Second ground is that the orders were express and unambiguous and were to lapse on 15th March 2019 and given that the time has lapsed; there is nothing capable of being stayed. She cited the case of **Simba Coach Limited Vs Kiriiyu Merchants Auctioneers[2019] eKLR** where the court held that the applicant is seeking review of orders which have been spent and that the orders cannot be granted as they were conditional and have since lapsed; she urged the court to be positively guided by that decision. She submitted that filing this application after filing the application dated 4th March 2019 amount to abuse of court process and court should guard itself against such litigants.
21. That upon being ordered to comply and failing to do so, the applicant should not have come to court seeking other prayers. She cited the case of **Hunker Trading Co. Ltd Vs ELF Oil Kenya Limited {2010} eKLR** where the Court of Appeal held that it was an abuse of the court process for a party to repeat an application for stay of execution in the Court of Appeal having failed to obey an order of the High Court on the previous application for stay of execution. She submitted that orders sought in this application are for stay similar to orders sought in the application dated 4th March 2019; it is repetitive and an abuse of the court process.
22. Lastly, she submitted that this application was filed 2 days to lapse of orders issued and if the applicant was dissatisfied with the orders, he should have moved to court.
23. On whether security is satisfactory, she submitted that there is no evidence to demonstrate that the 3rd party is a wife to the applicant and documents by 3rd party are not sufficient in this case; that there is no valuation to confirm value of the vehicles; she submitted that deposit of logbooks are not sufficient substitutes in this case; she said this a monetary claim and the question is, will the logbook be sufficient, she cited the case of **Esri Star Ltd & Another Vs Siloweswani [2018] eKLR** where the court held that motor vehicle security is worse form of security when it comes to monetary decree. She submitted that there are uncertainties that come with motor vehicles as they remain with the applicant and can be sold.
24. On allegation that the applicant is sickly, she stated that she emphasizes but the respondents is entitled to judgment and the court is entitled to right of balancing the rights. That no sufficient ground have been tabled before court to interfere with orders granted and exercise of discretion depend on circumstances of each case.
25. On preliminary objection, counsel for the respondent submitted that the application dated 4th March 2019 should not see light of day reason being that it was brought under wrong provisions of the law. She submitted that this court lacks the requisite jurisdiction to entertain the application dated 4th March 2019. She referred to **rule 11 of Advocates Remuneration Order (ARO)** which sets out the process and procedure a litigant ought to follow if displeased with orders of taxing master.

26. She submitted that jurisdiction is everything and court has to put down its tools in application brought under Civil Procedure Rules; her rule 11 provide procedure that the applicant ought to come to court. She submitted that the jurisdiction of this court has not been properly invoked. She cited **Lilian's Case** on jurisdiction and the case of **Odero Obal & Co. Advocates [2015] eKLR** where the court held that the only way the High Court can be moved where taxation is concerned is through a reference.

27. The other ground of the preliminary objection is that the Advocate is not properly on record. She submitted that proper procedure of invoking jurisdiction was not followed. She urged the court to dismiss the application.

28. In a rejoinder, counsel for the applicant submitted that they were properly on record. On the present application, he said the stay orders were to lapse on 15th March 2019 and they were still in time to come to court 2 days before the lapse.

29. On sufficiency of the logbooks as security, he submitted that it is not mandatory that security be monetary and it could be other conditions as guided by **Section 1 (b) & 3 (b) of CPA**. On omission of relevant provisions of the law, he submitted that that is a technicality curable under **Article 159 of the constitution**. He urged court to consider **Article 48 of the constitution** on applicant's right to justice and to ensure that the application before court is not rendered nugatory.

30. On preliminary objection, he submitted that the contention is that the applicant was not served with bill of costs and taxation proceeded exparte; he added that service is a matter of fact and the burden is on the person alleging to have served. He stated that they acknowledge **rule 11 of Advocates Remuneration Order** but the provisions do not exclude provisions of **Civil Procedure Act** especially **order 10 rule 11** and **section 3A** which provide inherent jurisdiction of the court on the decision as to whether decision of taxing master can be reviewed. Counsel submitted that setting aside of taxing master's decision was settled by the Court of Appeal in the case of **E.A power Management Ltd VS Stephen Kithi** trading as **Steve Kithi & Co. Advocates [2012] eKLR page 4** where the Court of Appeal stated that they agreed with counsel that the **Advocates Remuneration Order** provides its own procedure and there is no reference to the **Civil Procedure Rules**. However, they found that the case was different because the appellant was not aware of the taxation and the appellant could not have followed the procedure provided under the remuneration order.

31. He submitted that the taxing master proceeded exparte and there is no item they could object, as they never participated in the taxation. He also cite the case of **A S W (A minor suing through next friend HRS) vs. Jiangxi Zhongmei Engineering Construction Company Limited [2019] eKLR** where the High Court in Marsabit dismissed the preliminary objection which sought to have the application seeking to set aside exparte taxation. The court stated as follows:-

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My view on the dispute relating to assessment of costs is that parties should be accorded opportunity to raise any objection on any item on the bill of costs. It cannot be held that the assessment of costs by the taxing master is guided by divine intervention. The end result is that a party will be called upon to settle the costs. Such a party should not be made to pay costs without even knowing the basis of assessment...”

32. He further submitted that he has looked at the affidavit of service where it is indicated that the applicant refused to acknowledge service and directed that his Advocate be served and stated that service having been denied, the burden is on the respondent to prove service by calling process server. He submitted that **H & K Law** had filed notice of change of Advocate in **Succession No. 336 of 2007**, which was served on 15th August 2018.

33. He stated that the bill of costs arose from that succession cause but service was not effected and taxation proceeded exparte. He submitted that the right of every party to object to contents of bill of costs go to the core of right to fair hearing under **Article 50 of the constitution**. He submitted that this court has powers to set aside certificate of costs and refer to taxing master.

34. Counsel further submitted that application dated 4th March 2019 is not a reference in the meaning of **order 11 of Advocates Remuneration Order**; that on the contrary it is an application to set aside exparte taxation within the meaning of **Civil Procedure Rules**.

35. On whether the firm of **H & K** are properly on record, he submitted that the objection on that aspect is a misapprehension on **Civil Procedure Rules**. He submitted that the provision apply where a person has engaged an Advocate and wants to change; he argued that the rule was meant to protect Advocates from being shortchanged and in this case, the applicant did not have an Advocate in the taxation and he was not also acting in person so as to activate provisions of **Civil Procedure Rules**.

36. He submitted that as part of prayers, their firm sought to formally come on record and if the prayer had been canvassed the applicant would not have had an objection as a party has a right to appoint an Advocate of choice and prayer having been made the court can ratify as it may. He submitted that objection under **order 9 rule 9** cannot stand.

37. On rejoinder in respect to preliminary objection, counsel for the respondent submitted that service was made in respect to bill of costs and that they have exhibited that it was done. She distinguished the authority of **E.A Power Management Vs Stephen Kithi[2012] eKLR para 1 page 2** and **last para page 3** in that, evidence of service was not availed but in this case, she submitted that they have availed. She urged court to distinguish this case from the Court of Appeal decision and find that the two have different sets of facts.

38. She further submitted that in the applicants second case the respondent was not served. She further submitted that the jurisdiction of the court under **Section 1A and 1B** could only be invoked if the procedure is silent. She submitted that in respect to this case, the procedure is provided under **para 11 of Advocates Remuneration Order**.

39. On appearance, counsel submitted that the applicant's counsel has said he was on record in succession matter but has not said they filed appearance in the taxation matter; she submitted that there was no material placed before the taxing master to show that the respondent appointed any Advocate. She urged the court to read keenly the case of **Philip Muchiri Mugo Vs Mugo Kithakwa & Another [2017] eKLR**. She submitted that provisions of **para 11 of Advocates Remuneration Order** were followed.

40. She argued that in respect to **order 9 rule, 9** the applicant's counsel made prayer to be on record and the question is, why make the prayer if the law is irrelevant. She urged court to find that the firm of **H & K** are not properly on record.

ANALYSIS AND DETERMINATION

41. I will begin by making a determination on the preliminary objection. The following are in issue:-

1. Whether the firm of H& K are properly on record

2. Whether the applicant has rightfully invoked the jurisdiction of this court.

3. Whether the applicant has given sufficient reason to warrant varying of court order of 5th March 2019 to allow deposit of logbooks instead of half the decretal amount.

i. Whether the firm of H& K are properly on record

42. Under **Order 9 Rule 9** an Advocate who wish to come on record for a party may make a prayer for leave to come on record together with the other prayers in the initial application. The firm of **H& K Law Advocates** have included the application for leave to come on record in the prayers made in application dated 4th March 2020. That would have been dealt with if the application had been heard first. From the foregoing preliminary objection on that ground cannot therefore stand.

ii. Whether the applicant has rightfully invoked the jurisdiction of this court.

43. On the second ground of preliminary objection, whether the jurisdiction of this court has been properly invoked, counsel for the applicant argued that the applicant was not involved in taxation process and could not therefore object to the taxation as required under **paragraph 11 of Advocates Remuneration Order**; he argued that the option available for the applicant was to seek setting aside of the certificate of costs and for the bill of costs be placed before another taxing master for taxation.

44. Counsel for the respondent's argument is that this case is distinguishable from the Court of Appeal decision which allowed setting aside of taxation as in this case, the applicant was served with bill of costs but in the case cited the applicant had not been served and for that reason the Court of Appeal was moved to set aside taxation.

45. The issue as to whether the applicant was served will however be the subject for determination in the application dated 4th March 2020. I will not deal with the issue at this stage as that was not for argument or for determination in this application.

46. In the application dated 4th March 2020, the applicant is alleging that he was not served with bill of costs and is seeking to set aside taxation, an issue which is to be determined upon hearing arguments of each party. No objection has been raised in respect to assessment of any item in the bill of costs. In view of the fact that he is not raising objection to the taxation but is seeking to set aside the whole process of taxation, I find that the jurisdiction of this court has been properly invoked and it would be appropriate to hear the application on prayers sought in the application.

iii. Whether the applicant has demonstrated sufficient reasons to warrant varying of stay conditions granted on 5th March 2020.

47. The applicant has indicated that he is not a person of means, he is sickly and is yet to get his share from the estate of his late father. He has offered two logbooks for his vehicle and his wife's vehicle. I do agree with counsel for the respondent that the said logbooks may not be sufficient as the vehicles will be in custody of the applicant and his wife. There is no certainty that they will sufficient to satisfy the decree as no valuation has been done and in view of the fact that they will be in the hands of the applicant, there is no certainty that they will be dealt in a way that will not defeat its realization as security in the event that they will be recalled.

48. I will however give the applicant a benefit of doubt in his ability to raise the half-decretal amount and allow deposit of quarter of the decretal amount in 30 days plus deposit of one log book registered in his name as a condition for stay pending hearing and determination of application dated 4th March 2020.

49.FINAL ORDERS

1. Preliminary objection is dismissed.

2. Conditions for stay varied as follows.

i. Applicant allowed to deposit quarter of decretal amount, Auctioneer fee and his logbook for logbook.

ii. Deposits of funds within 30 days from the date of this ruling & logbook already deposited to remain in court as part of security.

iii. Applicant is restrained from disposing the said vehicle pending hearing and determination of application dated 4th March 2020.

3 . Costs of this application in the cause.

Ruling dated, signed and delivered via email at Nakuru This 30th day of April 2020

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RACHEL NGETICH JUDGE

TO:

Elizabeth Wangare Advocates for Applicant

H.K. Law Advocates Counsel Respondent