



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 4434 OF 1992

TOBIAS ONGANYI AUMA1ST PLAINTIFF

AARON MUISYO MWAILU.....2ND PLAINTIFF

JOHN OTIENO OWILL.....3RD PLAINTIFF

WALTER OJWANG AWICHI.....4TH PLAINTIFF

FIDELIS NTHUNTHI.....5TH PLAINTIFF

HENRY MUNENE KARUBIU.....6TH PLAINTIFF

VERSUS

KENYA AIRWAYS CORPORATION LTD.....DEFENDANT

RULING

1. On 23rd February, 2001, the High Court entered judgment in favour of the Plaintiffs who had been declared redundant by the Defendant. The judgment was, however, overturned by the Court of Appeal on 23rd November, 2007 and the Plaintiffs suit dismissed with costs. The Bill of costs in the Court of Appeal was taxed at Ksh.753,154.50. The Party and Party Bill of Costs in the High Court was taxed at Ksh.9,705,267/=.

2. The taxed costs were not paid by the Plaintiffs herein and the Defendant commenced the process of execution. A Notice to Show Cause dated 8th March, 2017 was subsequently heard by Deputy Registrar and the Plaintiffs were ordered to pay the decretal sum herein within 30 days. In default warrants of arrest were to issue for their committal to civil jail. That is what triggered the filing of the application dated 20th December, 2017.

3. The application dated 20th December, 2017 seeks orders that the ruling dated 14th September, 2017 be set aside. It is stated that the grounds in the body of the application and the affidavit in support that the taxation of the Bill of Costs herein was time barred and therefore ought not to have been entertained. That the taxation was not carried out in a miscellaneous file and therefore the application for execution was in breach of the law.

4. The application is opposed. The Defendant/Respondent filed the grounds of opposition dated 5th February, 2018 which state as follows:

“1.The Limitation of Actions Act is not applicable to taxation of bills of costs. See Abincha & Co. Advocates v Trident Insurance Co. Ltd [2013] eKLR where Waweru, J held that:

“That the Limitation of Action Act is not applicable to taxation of bills of costs. Further the issue of limitation is irrelevant as there was no suit for recovery of costs after taxation, what was before the court was an application for assessment of costs.”

2. Being a party and party bill of costs, the bill could only have been filed in the present case, and not through a

miscellaneous cause as alleged.

3. The Plaintiffs having failed to settle the costs within the time allowed by the Deputy Registrar, the Defendant was at liberty to apply for warrants of arrest to issue against the Plaintiffs.

4. The application is misconceived, lacks merit and is an abuse of the court process. It ought to be dismissed with cost.”

5. The Respondent also filed a replying affidavit in opposition to the application. The Defendant gave a background of the matter, decried the multiplicity of applications herein and termed the application at hand as an abuse of the court process.

6. The Applicants’ side filed a supplementary affidavit. It is contended that there was unreasonable delay from the date of the taxation herein to the dated of the execution proceedings. It is further averred that the warrants of arrest are only against six individuals while the suit herein was a representative suit and involved 960 former employees of the Defendant. It is further stated that the Plaintiffs/Applicants are senior citizens aged between 65-70 years who cannot be able to carry the burden for the whole group.

7. The application was canvassed by way of written submissions. Supplementary submissions were also filed by both parties. I have considered the application, the response to the same and the submissions filed.

8. The Bill of costs herein was taxed on 30th October, 2012. The same still stands and has not been set aside. It is therefore rather late in the day for the Applicants to raise issues herein that the Bill of costs was time barred. Whether the taxation was carried out in this file or in a miscellaneous file is also a matter of technicality that does not aid the Applicants case.

9. The taxation herein was carried out on 30th October, 2012. The Notice to Show Cause that is the subject matter of the instant application was issued on 8th March, 2017. That is a period of about five years. The Respondents are at liberty under the law to carry out execution proceedings within 12 years.

“An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

10. The issue of a representative suit was brought in through the supplementary affidavit. A supplementary affidavit ought to be a response to the replying affidavit or to buttress and clarify the averments in the replying affidavit (See for example **Astute Africa Investments & Holding v Spire Bank Kenya Ltd & another [2018] eKLR**). However, no objections were raised when it was filed nor an opportunity sought to respond to the same. This court will therefore take the said supplementary affidavit into consideration.

11. Although the suit was filed in representative capacity, the Court of Appeal in it’s judgment observed that there were several Plaintiffs whose names were not known. The court of Appeal also held that the six named Plaintiffs were entitled to sue on behalf of all the employees who had been declared redundant. This court’s view is that the Applicants are liable for the costs herein. In arriving at this position I am fortified by **Mulla The Code of Civil Procedure 18th Edition 1502** which was relied on by both parties that those represented in a representative suit are not liable for costs.

12. With the foregoing, I find no merits in the application and dismiss the same with costs.

Dated, signed and delivered in Nairobi this 30th day of April, 2020

B. THURANIRA JADEN

JUDGE