



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KABARNET**

**ELECTION PETITION NO. 1 OF 2017**

**MUSA SIRMA.....PETITIONER**

**VERSUS**

**THE INDEPENDENT ELECTORAL**

**AND. BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE ELDAMA RAVINE CONSTITUENCY RETURNING**

**OFFICER (NDIRANGU PETER KURIA) .....2<sup>ND</sup> RESPONDENT**

**MOSES LESSONET.....3<sup>RD</sup> RESPONDENT**

**AND**

**GILLETTE AUCTIONEERS.....INTERESTED PARTY**

**RULING**

1. By an application dated 19<sup>th</sup> September 2019, the Petitioner sought orders as follows:

**“1. THAT This Honourable Court be pleased to certify this application as urgent and heard on priority basis and service of the same be dispensed with at the first instance.**

**2. THAT The Honourable court be pleased to grant stay of execution and/or of further proceedings herein pending the hearing and determination of this Application.**

**3. THAT costs of this application be provided for.”**

2. The application was expressed to be based on grounds set out therein as follows:

*“a) THAT This Honourable Court delivered Judgment in this suit on 4<sup>th</sup> March 2018 awarding costs whereof to the Respondents and whose outcome is partly settled, vide a consent order.*

*b) THAT Applicant herein has since been proclaimed illegally and devoid of jurisdiction by the interested party, for a sum of Ksh.300, 423.80/= being costs of proclamation.*

*c) THAT the applicant herein is apprehensive that he shall be grossly prejudiced should the illegal proclamation and or execution whereof take place as presently intended by the interested party.*

*d) THAT the interested party has not exhibited an extracted a decree in this matter which decree is illegally due for execution any time from now if any exists.*

*e. THAT on the other hand interested parties claim and purported proclamation was and still is entirely illegal for both want of*

form and for gross undervaluation of the Applicants property and even third party property, like Motor Vehicle Registration No. KCC 1HE PRADO land cruiser, some even unknown, as documented.

f. THAT despite knowing and having the address and or contacts of the Applicant and or his advocate on record, the interested party, has resorted to clear illegality, in seeking to extort the Applicant.

g. THAT any execution herein, based on the proclamation Notice and in the sums stated, amounts to an illegal Appeal if not an extortion.

h. THAT the Interested party, Gillette Auctioneers proclaimed illegally and have not served procedurally, breaching the mandatory due process of services.

i. THAT this application herein be allowed as prayed.

AND ANY SUCH other ground to be adduced at the hearing hereof.”

3. The parties have had running disagreement as to the recovery of costs awarded by the court upon the determination of the election petition herein which the petitioner as the unsuccessful party was ordered in the Judgment of 4<sup>th</sup> March 2018 to pay to the respondents at Ksh.2,000,000/- for each respondent.

4. The 3<sup>rd</sup> respondent has filed a Replying Affidavit in which his primary objection to the application for stay of execution with regard to amount of Ksh.300,438.83 subject of the application of 19<sup>th</sup> September 2019 which is before the court is set out in paragraphs 24- 31 as follows:

“24. THAT the Petitioner has not made any effort to clear the balance from 28th August, 2019 despite having sought for two weeks on the 7th August, 2019 which prompted my advocates to write to Gillette Auctioneers on the 14th October, 2019 and the 1<sup>st</sup> November, 2019 seeking to recover the balance of Kshs.750,000/=.The letter of 14<sup>th</sup> October, 2019 also sought extension or reissuance of warrants of attachment and sale. (See letter annexed and marked ML-9).

25. THAT as regards the allegations in the Petitioner's further affidavit, there is no ingle evidence to support the allegations and even unreasonable for consideration given that all the allegations in the further affidavit relates to the Auctioneers' Bill of Costs which are different causes all together. They are not art of the petition herein and should be considered separately in their respective causes.

26. THAT auctioneers upon instructions are entitled to their fees and in this case, the auctioneer drew his bills and filed them. The award of Kshs.300,423/= was given by the court and remain valid for realization by the auctioneers having been led pursuant to the Auctioneers Rules.

**27. THAT if indeed the Petitioner was dissatisfied with the award to the auctioneers, then the Petitioner should have filed a reference which he has not one and in any case the balance of the award that is due to me is not in dispute the Petitioner cannot attempt to tie the same to the auctioneers' award.**

28. THAT the original award capping costs at Kshs.4,000,000/= do not apply to the auctioneers who were not parties to the suit. They prepare their bills based on the Auctioneers Rules.

29. THAT the Petitioner has not even produced to court evidence of the Proclamation notice which he says was in an envelope as per paragraph 'h' of the supporting affidavit and the Notice to Show Cause. The Petitioner's application the further affidavit are full of allegations without a shred of evidence.

30. THAT in any case, as I am advised by my advocates on record, the court is ex officio as a final award had already been rendered. If the Court were to even consider granting the prayers in the application, then what next as there is no pending appeal?

31. THAT the Petitioner is a restless and vexatious litigant with a string of losses all the way to the Supreme Court and this court should not entertain his gymnastics any further.”

5. Counsel for the parties made submissions both in writing and orally before the court on their respective contentions, and ruling was reserved for the 1<sup>st</sup> April 2020 but interrupted by the covid-19 management imperatives.

### **Determination**

6. The court has not become *functus officio* with regard to the issue of taxation of the auctioneer's Bill of costs as there has not been a final decision on the matter previously. What the court has previously decision is the substantive election petition in which the costs payable have been set at Ksh.2,000,000/- for each party in the petition against the unsuccessful party, the petitioner herein; and application dated 19<sup>th</sup> March 2019 for stay of execution. This court has considered the issue of *functus officio* in the context of a dispute on costs in an election petition – KBT Election Petition No. 2 of 2017, ruling dated 19<sup>th</sup> February 2019 - and held as follows:

**“(b) Whether the Court has jurisdiction to consider the matter raised in the Notice of Motion dated 28/11/18 or it is functus officio.**

6. "**Functus officio** ", Latin for "having performed his or her office" is defined in Black's Law Dictionary as follows:

"(of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished."

The answer to the point of Preliminary Objection thereon depends on the duties, functions and jurisdiction of the Election Court.

7. The Election Court has a general jurisdiction to "award the costs of and incidental to a petition and such costs shall follow the cause." See section 84 of the Elections Act No. 24 of 2011. **However, the execution of orders as to costs is governed by Rules 30 and 31 of "the Elections (Parliamentary and County Elections) Petitions Rules, 2017 as follows;**

#### **COSTS AND DEPOSITS**

##### **Costs.**

30. (1) The Court shall, at the conclusion of a petition, make an order specifying-

(a) The total amount of costs payable; and

(b) The persons by and to whom the costs shall be paid.

(2) When making an order under sub rule (1), the court may -

(a) Disallow any costs which may, in the opinion of the court, have been caused by vexatious conduct, unfounded allegations or unfounded

(b) Impose the burden of payment on the party who has caused an objections, on the part of either the petitioner or the respondent; and unnecessary expense, whether such party is successful or not, in order to discourage any such expense.

(3) The abatement of a petition shall not affect the liability of the petitioner or of any other person to the payment of costs previously incurred.

##### **Taxation and recovery of costs.**

31. (1) **The Registrar shall tax costs of a petition upon the order of the Court in the same manner as costs are taxed in civil proceedings and in accordance with the Civil Procedure Act.**

(2) **An order of the Registrar under sub-rule (1) shall be confirmed in the relevant Court.**

(3) **An election Court may direct that the whole or any part of any money deposited by way of security shall be applied in the payment of taxed costs.**

8. At first glance, it would appear that upon exercising the jurisdiction to award costs under Rule 30 of the Election Petition Rules, the jurisdiction of the Election Court is defined in the Elections Act and Rules over costs is exhausted save for the limited provision for confirmation of taxed cost and directions as to the disposal of the security - deposit for payment of taxed costs under Rule 31 (2) and (3) of the Rules.

9. The recovery of the costs of execution proceedings therefor must, accordingly, follow the usual procedure of "the Civil Proceedings in accordance with the Advocates Act (Cap 16)."

10. As regards Party and Party costs, that execution procedure of Order 22 of the Civil Procedure Rules would apply. As for Advocate-client costs, as the case here, the statutory provisions of section 48 of the Advocates Act apply as follows:

#### **48. Action for recovery of costs**

(1) Subject to this Act, no suit shall be brought for the recovery of any costs due to an advocate or his firm until the expiry of one month after a bill for such costs, which may be in summarized form, signed by the advocate or a partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause to be verified by affidavit filed with the plaint, for believing that the party chargeable therewith is about to quit Kenya or abscond from the local limits of the Court's jurisdiction, in which event action may be commenced before expiry of the period of one month.

(2) Subject to subsection (1), a suit may be brought (or the recovery of costs an advocate and a client may be taxed notwithstanding that no suit for due to an advocate in any court of competent jurisdiction.

(3) Notwithstanding any other provisions of this Act, a bill of costs between recovery of costs has been filed.

11. Because such a suit for recovery of costs may be brought "in any Court of competent jurisdiction" and section 11 of the Civil Procedure Act provides for filing of suits in "the Court of the lowest grade competent to try it", the recovery of the costs herein pegged to a ceiling of Ksh. 2,000,000/= could have been filed before a Magistrate's Court of Resident Magistrate's class with a pecuniary jurisdiction of 5,000,000/=. See Magistrate's Court's Act, 2015.

12. Section 48 of the Advocate's Act, however, appears to be only a permissive provision for the filing of a suit before a competent COURT for recovery of costs due to an Advocate. There exists an additional avenue under section 52 of the Act for the enforcement of payment of costs to an Advocate by the COURT "in which an Advocate has been employed" - in this case the Election Court, as follows:

#### 52. Charging orders

Any court in which an advocate has been employed to prosecute or defend any suit or matter may at any time declare the advocate entitled to a charge on the property recovered or preserved through his instrumentality [or his taxed costs in reference to that suit or matter, and may make orders for the taxation of the costs and for raising money to pay or [or paying the costs out of the property so charged as it thinks fit, and all conveyances and acts done to defeat, or operating to defeat, that charge shall, except in the case of a conveyance to a bonafide purchaser for value without notice, be void as against the advocate: Provided that no order shall be made if the right to recover the costs is barred by limitation.

Moreover, the residuary jurisdiction of Election Court could extend to issuing a Notice to Show Cause as to disposal of security for costs deposited into Court.

13. Could the Election Court be held, in these circumstances, to be "functus officio" as regards costs in view of section 52 of the Advocates Act? I think not. Although, the Election Court has exercised its jurisdiction in awarding costs under section 84 of the Elections Act and the Deputy Registrar of the Court has taxed costs in accordance with Rule 31 of the Election Petition Rules 2017, and notwithstanding the provision for the filing of a recovery suit under section 48 (2) of the Advocates Act, there remains the declaratory jurisdiction to make charging orders in enforcement no doubt of a charging lien under section 52 of the Advocates Act.

I would, therefore, find that the Election Court has jurisdiction to deal with the application of 28/11/18."

7. It is not dispute that the petitioner did not pay at one go the sums of costs awarded by the court in the Election Petition. Had he done so, here would have been no occasion for the levying of execution proceedings. As a result of the execution proceedings involving attachment of the petitioner's asset, execution costs arise. The claim by an auctioneer for such costs cannot be said to be retrained by an order of court fixing the recoverable costs in an election petition in accordance with the Election Petition Rules. The costs sought to be recovered by the auctioneer in those circumstances are not costs of the election petition but costs for the execution in recovery of the costs awarded by the Election Court. Should the judgment debtor pay the costs awarded by the election court with need to resort to execution proceedings not further costs over and above what is awarded for the election petition may be recovered; the further costs only arise where by the default of the judgment debtor to pay the costs awarded by the election court resort is had to the execution process for recovery thereof.

8. The application for stay of execution of 19<sup>th</sup> March 2019 was settled by consent of the parties upon terms as follows:

#### **"ORDER**

(In Open court before Hon. E.M. Muriithi J.)

UPON this matter coming up for hearing of the Notice of Motion dated 19/3/2019 b, in presence of the counsel for the Petitioner and counsel for the 3rd respondent:

#### **IT IS HEREBY ORDERED BY CONSENT:**

1. THAT following the payment of Ksh.250,000/= to the said Respondent as agreed, the Petitioner to pay the balance of Ksh. 1,750,000/= to the 3rd Respondent within 4 months that is to say before the 26/7/19 and in default execution to issue forthwith.

**2. THAT the Auctioneers fees to be agreed and in default of agreement to be taxed by the taxing officer of the Court.**

3. THAT the Notice of Motion dated 19/3/19 is disposed on the terms of this order.

GIVEN under my hand and the seal of this Honourable Court this 26<sup>th</sup> day of March, 2019.

JUDGE"

9. It is trite law that a consent order may only be varied upon principles for the variation of a contract, and I respectfully agree with the court in *Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited [2015] eKLR* on the law on variation of a consent judgment as follows:

*“The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts.*

*Hancox JA (as he then was) in the case of Flora Wasike v. Destimo Wamboko (1982 -1988)1 KAR 625, said in his judgment at page 626 -*

*“It is now settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.” See the decision of this Court in J.M. Mwakio v. Kenya Commercial Bank Ltd Civ. Apps 28 of 1982 and 69 of 1983,*

*This Court in the case of Brooke Bond Liebig v. Mallya 1975 E.A. 266 held:-*

*“A consent judgment may only be set aside for fraud collusion, or for any reason which would enable the court to set aside an agreement.”*

10. The Auctioneer was, therefore, within his right to seek the determination by taxation of his Bill of Costs in the event that no agreement thereon was reached between the parties. The Auctioneer’s Bill of Costs should, however, not have been filed as a separate cause but within this election petition in which the consent was made and where the amount of costs awarded and the balances of payment for which the recovery execution is said to have been done would be established.

11. The Deputy Registrar’s taxation as taxing master of the court of the Auctioneer’s Bill of Costs herein to a sum of Ksh.300,423.80 which is the subject of the application for stay of execution is to be challenged before the judge in accordance with the Auctioneers’ Rules. The petitioner has intimated that he has requested for the Reasons for the Decision of the Taxation for purposes of such reference in paragraph 11 of the Further Affidavit sworn on 10<sup>th</sup> December 2019 as follows:

*“11. That being heavily aggrieved by the decision of the taxing master we have objected to her decision and have already written to the taxing master requesting for reasons for the taxation of items number in all the items set under the interested parties bill of costs.” (sic.)*

### **Conclusion**

12. This court considers that the dispute between the parties will be effectively resolved by the determination of the reference of the taxing master’s taxation of costs at which the basis for the taxation, the amount and any legality issue arising, shall be considered upon hearing the Interested Party as the applicant in the Bill of Costs.

13. The Court must, in the meantime, hold the situation on the ground pending the determination of the petitioner’s Objection to the Taxing Master’s award of taxed costs, as to allow the process of execution to proceed while the objection proceedings have been initiated would be prejudicial to the petitioner.

14. However, to ensure efficient prosecution of the reference from the Deputy Registrar’s taxation of auctioneer’s costs, the court shall make that the order of stay granted herein shall lapse and be of no effect if the reference from the Taxing officer’s taxation is not prosecuted within a reasonable time hereof. In view of the current covid-19 management protocols which has hampered court operations and which therefore leads to delays in court hearings the court grants to the petitioner a period of 60 days from the date hereof to file and secure the hearing of the reference to the High Court of the taxation by Deputy Registrar the Taxing Master of Court.

### **Orders**

15. There shall, therefore, be an order for status quo to be maintained pending the hearing and determination of the reference from the Taxing Master’s taxation of the Bill of Costs. For this purpose, the stay of execution herein granted although not sought to last until the hearing of any appeal or application, shall therefore remain in force for sixty (60) days hereof, or until further orders of the court.

16. Liberty to apply, should the petitioner fail to comply with the directions herein made, is given to the Respondent and the Interested Party.

17. Costs in the cause.

*Order accordingly.*

**DATED AND DELIVERED THIS 29<sup>TH</sup> DAY OF MAY, 2020.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

M/S Prof. Ojienda & Associates for the Petitioner.

M/S Mirugi Kariuki & Co. Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

M/S Gordon Ogola, Kipkoech & Co. Advocates for the 3<sup>rd</sup> Respondent.