



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

MISC. APPLICATION NO. 38 OF 2016

P. MBOGO KARANJA.....1ST APPLICANT

SIMON N. KIRUGURA.....2ND APPLICANT

NASALIA NJURA NJERU.....3RD APPLICANT

VERSUS

JOSEPH KARIUKI NJOKA T/A JOFOCO CONTRACTORS.....RESPONDENT

R U L I N G

A. Introduction

1. This is a ruling on a preliminary objection on a point of law by the respondent dated 10/10/2018 against the hearing of the application dated 10/1/2018 seeking orders that this court appoints another Deputy Registrar re-tax afresh the bill of costs dated 1/03/2017. It also seeks for orders that the notice of appeal by the judgment debtor against the said taxation be deemed to have been withdrawn.

B. Respondent's Submissions

2. It is the applicants' submission that the applicant filed the current suit as a miscellaneous application and failed to cite the provision of the law upon which the application was premised.

3. It is the respondent's submission that this was excusable if one were to cite the provisions of Article 159 of the Constitution but that there was no provision in law providing for re-taxation of a bill of cost.

4. It was further submitted that **Rule 11 of the Advocate Remuneration Order** provided for law on taxation of bill of costs and in instances where one was aggrieved the remedy therein was that one was to give a notice of objection to the taxing officer within 14 days of the ruling, seeking reasons for the taxation and if not satisfied then one could file a reference to the high court. The applicants submitted that this was not the case.

5. The respondents relied on the case of **Ufundi Co-operative Savings and Credit Society vs Njeri Onyango & Company Advocates Nairobi Misc. Application No. 100 of 2013** where the court held that it would be stretching the principle too far if the court ignored the statutory mandatory provisions of **Rule 1 of the Advocates Remuneration Order**.

6. The respondents further relied on the case of **Kenya Airports Authority v Quiree Insurance Agency Nairobi HCCC No. 1430 of 2000** where the court proceeded to dismiss an application for setting aside the decision by the taxing master after finding that the applicant had not exhausted the mandatory provisions of **Rule 1 of the Advocates Remuneration Order**.

C. Applicant's Submissions

7. The applicant submitted that the respondents had filed their preliminary objection nearly one (1) month after raising the same in court in direct contravention of the directions given by the court and the same ought to be struck out by the court for not being properly before the court.

8. The respondent further quoted several cases that emphasised the need for courts to ensure substantive justice is done. These included the **Supreme Court in Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others [2014] eKLR** where the court expressed the need for courts to render justice without undue regard to technicalities. This was the same holding in the case of **James Mangeli Musoo v Ezeetec Limited [2014] eKLR** as well as in the case of **Martha Wangari Karua & Another v Independent Electoral & Boundaries Commission**

& 3 Others [2017] eKLR where the court held that courts should render justice without undue regard to technicalities where the matters of procedure do not go to the jurisdiction.

D. Analysis & Determination

9. The applicant raises the issue of this preliminary objection after the expiry of the time granted by the court.

10. **Article 159 (2) (d) of the Constitution** provides: -

“Justice shall be administered without undue regard to procedural technicalities.”

11. It was held by Marete J. in the case of **James Mangeli Musoo v Ezeetec Limited [2014] eKLR** that: -

“A technicality, to me is a provision of law or procedure that inhibits or limits the direction of pleadings, proceedings and even decisions on court matters. Undue regard to technicalities therefore means that the court should deal and direct itself without undue consideration of any laws, rules and procedures that are technical and or procedural in nature. It does not, from the onset or in any way, oust technicalities. It only emphasizes a situation where undue regard to these should not be had. This is more so where undue regard to technicalities would inhibit a just hearing, determination or conclusion of the issues in dispute.”

12. It is trite law that the late filing may be used by the court to penalize the party concerned in way of costs but it does not render the document filed invalid.

13. I therefore decline to strike out the preliminary objection on the said ground. It is in my considered opinion properly before the court.

14. A valid preliminary objection must be on a pure point of law. In **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, the *locus classicus* on preliminary objections in this region, Law JA stated:

“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

15. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.

16. The applicants through their counsel argue that the respondent’s application dated 22nd August 2018 ought to be dismissed as it seeks to review the ruling of a taxation master in a manner other than that set out in Rule 11 of the Advocate Remuneration Act. In view of that background, how should the client have challenged that taxation? That answer, is found in the Advocate Remuneration Order. Paragraph 2 of that order provides in part:

“this order shall apply to the Remuneration of an advocate of the High Court by his client in contentious and non-contentious matters, the taxation thereof.....”

17. Paragraph 11 of the Advocates (Remuneration) Order provides a detailed process of objection to taxation as seen below:

“11. Objection to decision on taxation and appeal to Court of Appeal.

(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(4) The High court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”

18. Thus the procedure for challenging a ruling on taxation is captured under *Paragraph 11* of the Advocates (Remuneration) Order and more specifically, *Rule 2* which stipulates that any party aggrieved with the decision of a taxing master is at liberty to file a reference to the High Court. From the above, it is evident that the procedure on taxation proceedings is unique in every sense of the word.

19. The Supreme Court in a case pertinent to what is before court had an occasion to consider the importance of adherence to the laid down procedure in approaching a court of law. This was in an appeal of an election petition that is the case of Moses Mwicigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others [2016] eKLR 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 befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden 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 on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence 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 to the courts.”

20. The importance of following procedure of paragraph 11 of the order, was underscored by Justice R. E Aburili in the case Vishisht Talwar v Anthony Thuo Kanai T/a A. Thuo Kanai Advocates [2014] eKLR where the learned judge stated:

“The learned judge referring to a decision in the Court of Appeal in Machira & Co. Advocates – vs- Arthur K. Magugu & Another CA 199/2002 [2012] eKLR stated that:

“Rule 11 thereof provides for ventilation of grievances from such decisions through references to a judge in chambers. The effect may be viewed as an appeal or a review but these being legal terms in respect of which different considerations apply, they should not be loosely used. Appeals require the typing of proceedings, compiling of records of appeal and hearing of the same in open court. Reviews, however, would require provisions akin to those in Section 80 of the Civil Procedure Act of discovery of new and important matters, errors on the face of the record and so on. In our view the Rules Committee intended to avoid all that and provide for a simple and expeditious mode of dealing with decisions on Advocate’s bill of costs through references under Rule 11 to a Judge in chambers.”

21. The learned Judge found fault with a reference of taxed costs that was filed as an appeal rather than a reference and proceeded to state further:

“I have no doubt in my mind that the above cited decisions set out good law regarding the procedure to be adopted in challenging taxed bill of costs whether it is between party and party or advocate and client.”

22. Further to the above, judicial precedents are in agreement that where there exists a clear-cut procedure for doing something, the same ought to be followed to the latter. This reasoning was held by the Court of Appeal in the case of Speaker of the National Assembly v Karume (2008) 1 KLR 425 as follows:

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

23. In light of the above, there exists a clear procedure for challenging a taxing master’s decision which was not followed in this matter. The respondent had no other avenue of challenging the taxing master’s decision save by way of reference upon compliance with **Rule 11 of the Advocates Remuneration Order**. The application dated 22/08/2018 is incompetent.

24. I reach a finding that the preliminary objection is merited and is hereby upheld.

25. Further to the preliminary objection, I have perused this court file No. HC Misc. No. 38 of 2016 used by the applicant to file this application. I note that it relates to an application dated 16/03/2016 filed by the respondents seeking review of the orders of Hon. S.K. Mutai made on 1/03/2016.

26. The application was heard and determined by this court in its ruling delivered on 8/02/2017. On determination of the application, the purpose for which this court file was opened was spent. The applicant has filed this totally new application in this file which is unprocedural. I find that this application is not properly before the court.

27. For the foregoing reasons, the preliminary objection dated 8/11/2018 is hereby upheld.

28. As I mentioned earlier the respondents are not entitled to costs due to the late filing of the preliminary objection.

29. The application dated 22/08/2017 is hereby struck out with no orders as to costs.

30. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF MAY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

1st and 2nd Applicants

Respondent present