



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISC. CIVIL APPLICATION NO. 56 OF 2019

(AS CONSOLIDATED WITH MISC. CIVIL APPLICATION NO. 57 OF 2019)

WEST KENYA SUGAR CO. LIMITED.....APPLICANT

VERSUS

MUSA MESHACK 1ST RESPONDENT

BARASA WANGILA2ND RESPONDENT

RULING

1. The applicant herein had filed an application dated 21st May, 2019 in which they were seeking several orders. However the only remaining issue now after the other issues were compromised by the parties, is as to who between the applicant and the 1st respondent should pay the charges owing to the auctioneer.
2. The background to the application is that the 1st respondent had sued the applicant in the subordinate court at Kakamega and obtained judgment against the applicant. Costs were taxed at the subordinate court and the 1st respondent proceeded to instruct an auctioneer, Jakacha Auctioneers, to attach the applicant's property. Thereafter the advocates for the parties compromised the issue of costs which were paid. They however could not agree on who was to pay the auctioneer's charges.
3. The applicant contends that the taxation of the 1st respondent's bill of costs at the subordinate court was done by an Executive Officer of the court and that the said officer did so without notice to them. That the Executive Officer never notified the applicant that the 1st respondent's bill of costs had been taxed. That the applicant only became aware of the taxation when the auctioneer proclaimed its property in satisfaction of the decree.
4. The applicant urges that the Court's Executive Officer has no power and or authority to tax costs or to adjudicate on matters that are before court. That in taxing the bill without notice to the applicant denied the applicant the inherent right to be heard. Therefore that the ensuing execution proceedings arising from the illegal actions of the Court's Executive Officer is a nullity. That the 1st respondent all along knew or ought to have known that it was proceeding on an irregularity. That in the premises it is the 1st respondent who should bear the auctioneer's costs as it instructed the auctioneer based on an illegality and an irregularly obtained certificate of costs.
5. The application was urged in court by Mr. Olendo acting for the applicant while the respondents were represented by Mr. Abok. Mr. Olendo stressed that neither the Magistrates Court Act nor the Advocates Remuneration Order (2014) gives the Court's Executive Officer power to tax a bill of costs. He submitted that the Advocates Remuneration Order (2014) donates the said power to the Deputy Registrar. Therefore that the warrants issued were based on an illegality and that they cannot stand. The 1st respondent should therefore be condemned to pay the auctioneer's charges. The advocate cited the case of **Nyamogo & Nyamogo Advocates –Vs- Pan Africa Insurance Company Limited & Another (2016) eKLR** where Aburili J. held that:-

“I must also state that the respondent's contention that the subordinate court party to party costs can only be assessed by the Executive Officer of that court is not pegged on any law and is in that regard a misconception. There is no power given to the Executive Officer as a taxing officer of that court to assess or tax costs between party to party. The successful parties before a subordinate court are not expected to draw an elaborate itemized bill of costs. They are expected to write a letter to that court seeking for an assessment of costs as proposed or as drawn, upon which the sitting magistrate or Deputy Registrar of the subordinate court may assess/approve the costs as drawn or invite both parties to the bill to submit on the bill before a certificate of costs is given. Any party aggrieved by the decision thereof may file a reference before a Judge in Chambers under paragraph 11 of the Advocates Remuneration Order.”

6. He further cited the case of **Mobil Oil Kenya Limited –Vs- Weldwell Limited (2008) eKLR** where Okwengu J. (as she then was) found

that the decree in issue was a nullity and incurably defective as a result of which she held that the warrants of attachment and sale that were based on the defective decree could not stand and accordingly lifted them.

7. Mr. Abok on his part submitted that there is no certificate of costs attached to the application dated 21/5/2019. That in the applicant's annexure marked "AA 5" the applicant indicates that they were served with the bill of costs but failed to attend the taxation. That the warrants of attachment marked "JA1" are indicated to be signed by a judicial officer. That the applicant has not given reason why they failed to challenge the taxation in time and had to wait when served with warrants of attachment.

8. Mr. Abok submitted that the applicant has not annexed any evidence that the taxation was done by an Executive Officer. Further that costs have been paid. That the application is an academic exercise. That the auctioneers costs have been taxed and execution done. That litigation has to come to an end. That since counsel for the applicant was served with the notice of taxation and did not respond the negligent conduct of Counsel does not constitute reason for review of the Court's orders. To that end he referred to the case of **In re Estate of Karori Kihagi (Deceased) (2018) eKLR**.

9. Mr. Olendo responded that there was no replying affidavit to rebutt the issues contained in the application. That it was not rebutted that the taxation was done by an Executive Officer. That a compromise was reached that reduced the costs. That what is remaining is the auctioneer's charges. That there is no evidence of execution.

10. The application dated 21st May, 2019 was supported by the affidavit of the applicant's Human Resource Manager one Japheth Alande in which he depones that the notice of the taxation of the bill of costs was served on their advocates on 9/4/19. That the notice indicated that the taxation was fixed for hearing on the following day, i.e. 10/4/19. That the notice was received by their advocates under protest as shown by the served bill of costs marked 'JA-5'. Therefore that the time of the notice was very short.

11. The deponent further states that the bill of costs was taxed on the following day 10/4/19 by the in-charge of the lower court's registry one Mr. Chivoli in the absence of their advocates.

12. The 1st respondent did not file an affidavit in response to what is averred by Japheth Alande.

13. The issues for determination are –

- (1) Whether the Executive Officer has power to tax bill of costs.
- (2) Whether the taxation was done by the Court's Executive Officer.
- (3) Whether the petitioner deserves the orders sought.

Whether Executive Officer has powers of taxation –

14. The subject matter was before a magistrate's court. Part III of the Advocates Remuneration Order, 2009 deals with taxation of costs. Rule 49 (2) of the Order provides that:-

"In this part "the court" means the High Court or any Judge thereof or a resident magistrate's court or any magistrate sitting as a member of a resident magistrate's court."

15. This section therefore gives a magistrate of the rank of Resident Magistrate and above power to tax/assess costs. The section does not give any power to an Executive Officer to tax bill of costs. The advocate for the applicant cited the judgment of Aburili J. (Supra) where she held that an Executive Officer has no power to tax costs. Limo J. was also of a similar view in **Bernard Gichobi Njira –Vs- Kanini Njira Kathendu & Another (2015) eKLR** where he held that:-

"Now turning to the law, a look at the provisions of Section 27 of the Civil Procedure Act gives both the subordinate court and the High Court discretion and the jurisdiction to not only award costs but determine the extent at which those costs are to be paid and by which party. Paragraph 49 of the Advocates Remuneration Order clearly defines a "court" to mean both the High Court or any Judge thereof or a Resident Magistrate's Court or a magistrate sitting in a magistrate's court. A court in Part III of the Advocates Remuneration Order is given the mandate to determine costs in contentious matters as between advocate and client and between party and party. It is therefore clear and indisputable that a magistrate's court has jurisdiction to assess costs and as a matter of law, paragraph 51 of the Advocates Remuneration Order clearly gives the applicable scale to be used in the subordinate courts as Schedule VII.

The Applicant's contention that an Executive Officer can assess or tax costs in his administrative capacity is not hinged on law and in that regard a misconception. An Executive Officer certainly cannot be a taxing officer for purposes of Advocates Remuneration Order.

.....The subordinate court has a discretion either to assess costs ex parte and notify the parties or invite the parties and tax the same inter partes that is if the parties are not in agreement on a specific item which usually relate to instructions fees. In my view there is nothing wrong for magistrates to proceed in either way and are perfectly in order to proceed either way to tax or assess costs payable in a case before them. The practice of inviting parties for assessment of costs for me though not mandatory is desirable to give the other parties a chance to be heard in order to avoid unnecessary complaints or references for one reason or

the other.”

I am in total agreement with the two authorities that the Executive Officer has no power to tax a bill of costs.

Whether the taxation in this case was done by Executive Officer –

16. Mr. Japheth Alande states in his affidavit that the taxation was done by an Executive Officer called Mr. Chivoli. He annexed a copy of the taxed bill of costs that he purported was taxed by Mr. Chivoli. Mr. Abok for the 1st respondent submitted that there was no evidence that the notice was taxed by an Executive Officer. However the 1st respondent did not respond by way of affidavit to challenge the averments by Mr. Alande that the bill was taxed by an Executive Officer. Does it then mean that since there was no affidavit by the 1st respondent in response to the averments by the applicant that the issue of taxation by an Executive Officer was proved? What is the effect where assertions in an affidavit are not challenged? In *re Estate of Job Ndunda Muthika (Deceased) (2018) eKLR* Odunga J. considered such an issue and held that:-

“I must however state that where the allegations made even in an affidavit fall short of the legal threshold expected in a matter the Court may still decline to grant the orders sought and this must be so even in cases where the application is not opposed. This was the Court of Appeal’s position in Central Bank of Kenya –Vs- Uhuru Highway Development Ltd. & 3 Others Civil Appeal No. 75 of 1998 where it was held that it is an error for the Court to hold that a failure to file grounds of opposition automatically entitles the applicant to orders ex parte as the applicant is not relieved of the onus on him of justifying his application. This is my understanding the holding of Rajah, JA in Britestone Pte Ltd –Vs- Smith & Associates Far East Ltd (2007) 4 SLR @ 855 at 59 that:

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him.”

17. In this case the applicant did not lay evidence how he knew that the taxation was done by the Executive Officer. There is no signature or name of the Executive Officer on the taxed bill. A mere look at the taxed bill cannot tell as to who taxed it. The applicant did not obtain an affidavit from Mr. Chivoli admitting that he is the one who taxed the bill. The fact that the 1st respondent did not respond by way of affidavit to the averments by Mr. Alande did not absolve the applicant the duty of proving that the taxation was done by an Executive Officer. He who alleges has the burden of proving. The applicant did not discharge this burden. There is then no proof that the taxation was done by an Executive Officer.

Whether the petitioner deserves the orders sought –

18. The applicant contends that the taxation notice that was issued on them was short. They are thereby not denying that they were served with the notice of taxation. They failed to attend the taxation. A tax or assessment officer can tax a bill in the absence of the parties where as in this case notice of taxation was served. The applicant’s annexure “JA-4” shows that the applicant was informed by a letter dated 30/4/19 that the bill had been taxed at Ksh. 70,602/=. Execution did not commence until the 16th May, 2019. The applicant was thus informed of the taxation before execution started. The ensuing execution was therefore procedural. The court finds no evidence that the execution was illegal and unprocedural as contended by the applicant. It is thus the applicant who should meet the costs of the auctioneer.

19. The upshot is that the applicant has not proved that the taxation was done by an Executive Officer. The execution against the applicant’s property was procedural. It is the applicant who should meet the costs of the auctioneer and it is so ordered.

Delivered, dated and signed in open court at Kakamega this 26th day of September, 2019.

J. NJAGI

JUDGE

In the presence of:

Mr. Mulama for applicant

No appearance for respondents

Parties: Applicant - absent

Respondents - absent

Court Assistant - George

30 days right of appeal.