



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

ELECTION PETITION NO. 2 OF 2008

JANE NJERI WANJIRU KIHARA.....PETITIONER

VERSUS

CHRISTOHER L. AJELE (Returning Officer Naivasha Constituency)...1ST RESPONDENT

ELECTORAL COMMISSION OF KENYA.....2ND RESPONDENT

JOHN MICHAEL NJENGA MUTUTHO.....3RD RESPONDENT

RULING

1. After the 2008 General elections, the 3rd Respondent, John Michael Njenga Mututho, was declared the duly elected Member of Parliament for Naivasha Constituency. The Petitioner was aggrieved by the declaration by the Electoral Commission of Kenya and filed a Petition challenging the election of the 3rd Respondent.
2. Through his advocates on record, the 3rd Respondent filed an application to strike out the Petition. The High Court declined to strike out the Petition. The 3rd Petition moved to the Court of Appeal. He was successful. His appeal was upheld and the Petition was ordered struck out with costs.
3. The parties, then, moved back to the High Court to resolve the issue of costs. By that time, the 3rd Respondent had changed advocates two times. The original advocates in the cause was Kilonzo & Company Advocates. By the time the matter went back to the High Court for taxation, Gordon Ogolla & Company Associates had filed a Notice of Change of Advocates. Thereafter, the firm of Kithi & Company Advocates filed a Notice of Change of Advocates and a consent signed by both that firm and Gordon Ogolla & Company Associates. Kithi & Company Advocates took over the matter on behalf of the 3rd Respondent.
4. The Petitioner objected strongly to the filing of the consent allowing Kithi & Company Advocates to take over the matter. The Petitioner has steadfastly been of the opinion that Gordon Ogolla & Associates was never properly on record and that, therefore, it could not enter into a consent by virtue of Order 9 Rule 9 permitting Kithi & Company Advocates to come on record for the 3rd Respondent.
5. Gordon Ogolla & Associates had filed a Bill of Costs which was pending before the Taxing Master. When it came up for hearing, the Petitioner's lawyers raised the objection that Kithi & Company Advocates were not properly on record. The Taxing Master referred the matter to the Judge for directions.
6. The parties appeared before Mulwa J. on 26/05/2016 and took up the matter. After briefly hearing the parties, the Learned Judge gave the ex tempore ruling that the "Consent filed on 17/07/2014 is adopted by the Court as the order of the Court." The consent in question is the one that permitted Kithi & Company Advocates to come on record in place of Gordon Ogolla & Associates.
7. On 19/10/2016, Kithi & Company Advocates proceeded to file a new Bill of Costs dated 17/10/2016. This is the Bill of Costs that proceeded to taxation before the Honourable Mosse on 16/05/2017. Before considering the merits of the Bill of Costs, the Honourable Mosse considered a Preliminary Objection filed by the Petitioner's lawyers on 08/02/2017. She gave a ruling dated 29/03/2017 dismissing the Preliminary Objection. The gist of the Preliminary Objection is the same one the Petitioner's counsel raised before Mulwa J. to wit that Kithi & Company Advocates were not properly on record. The Taxing Master made the finding that the issue of representation had already been resolved by the Learned Judge and that, therefore, it was not open to the Petitioner to raise the issue before the Taxing Master.
8. The Taxing Master eventually gave her ruling on the Bill of Costs dated 17/10/2016 on 12/10/2017. She taxed down the Bill from the proposed amount of Kshs. 54,327,323.52 to Kshs. 7,523,107.

9. The Petitioner failed to pay the amount. This prompted the counsel for the 3rd Respondent to file the Notice of Motion dated 07/06/2018 seeking for orders inter alia that this Honourable Court be pleased to enter judgment in favour of the 3rd Respondent against the Petitioner for the taxed amount (Kshs. 7,523,107). The Application also contains a prayer for interests at Court rates as well as for costs.

10. The Petitioner responded to the Application dated 07/06/2018 in two ways. First, she filed Preliminary Objections and Grounds of Opposition dated 12/06/2018. Second, the Petitioner filed a Chamber Summons Application dated 02/08/2018. As I understand both the Preliminary Objection and the Application, they are based on two factual and legal propositions:

i. First, the Petitioner is persuaded that the firm of, Kithi & Company Advocates is not properly on record; and that this vitiates the Bill of Costs filed and the entire taxation proceedings. As such, it is not proper to enter judgment based on the Certificate of Taxation as prayed by the 3rd Respondent.

ii. Second, the Petitioner believes that the Application to enforce the Certificate of Taxation is premature and in bad faith since, she claims, it was made before she could be furnished with reasons for the decision(s) on taxation of costs and hence has the capacity to scuttle the Petitioner's right to file a reference on an erroneous taxation.

11. On the other hand, the 3rd Respondent filed Grounds of Opposition to the Petitioner's Application. The 3rd Respondent is persuaded that the Petitioner's sole objective is to delay the hearing of his application 7th June, 2018 which seeks inter alia that Judgment be entered in favour of the 3rd Respondent for the sum of Ksh 7,523,107 together with interest being the cost taxed by the taxing officer. The 3rd Respondent finds the conduct of the Petitioner "wanting" since he "lodged the Bill of Costs way back in 2016 and the same was taxed on 12th October, 2017 and a certificate issued on 23rd May, 2018 and the same has never been objected to or set aside." He finds the objections to his Application to be "unfounded in law; improper; a clear abuse of Court process; frivolous, vexatious, hopeless and only fit for dismissal with costs."

12. To preserve judicial resources and time and expedite the resolution of the dispute, I directed that the Application by the 3rd Respondent dated 07/06/2018; the Preliminary Objection dated 12/06/2018; and the Application by the Petitioner dated 02/08/2018 be heard contemporaneously. I also directed the parties to file Written Submissions and return for oral highlighting if interested. Neither parties found it necessary to orally highlight their submissions.

13. I have now carefully read and analyzed the submissions filed by both parties. I have also read the copious authorities the parties have referred me to. For all the voluminous submissions, in my view, there are only two issues for determination:

i. First, is the Bill of Costs dated 17/10/2016 which was taxed on 16/05/2017 and a ruling delivered thereon on 12/10/2017 and a Certificate of Taxation dated 23/05/2018 null and void for the reason that the firm of , Kithi & Company Advocates was not properly on record when it filed the Bill of Costs?

ii. Second, is there a proper challenge to the Certificate of Taxation dated 23/05/2018?

14. The Petitioner has primarily relied on the provisions of Order 9 Rule 9 to mount her challenge to the Bill of Costs. Her argument is simple enough: a change of advocates only becomes effective by an order of the Court upon an application with notice to all the parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate. The Petitioner argues that initially, the firm of Kilonzo & Company Advocates was on record for the 3rd Respondent. Later on, the firm of Gordon Ogolla & Associates improperly file a Notice of Change of Advocates and purported to act for the 3rd Respondent. The Petitioner insists that Gordon Ogolla & Associates was not properly on record because it never complied with Order 9 Rule 9: it never made an application nor filed a consent between itself and Kilonzo & Company Advocates.

15. The Petitioner, therefore, argues that the firm of Gordon Ogolla & Associates could not competently enter into a consent with the firm of Kithi & Company Advocates for the latter to come on record for the 3rd Respondent: if the former was never properly on record, it could not competently pass on representation to the latter.

16. As I understand it, the argument is akin to the principle enshrined in the Latin maxim, *neo dat quod non habet* (no one can give what they do not have). Whatever the merits of that strident argument on which the Petitioner pivots her case, it is a moot one in the present case. This is because the Petitioner raised the objection before Mulwa J. and a ruling thereon was made adopting the consent as the order of the Court. The effect of the ruling by Mulwa J. on 26/05/2016 was to place Kithi & Company Advocates properly on record based on the consent between Gordon Ogolla & Associates and Kithi & Company Advocates. If the Petitioner was aggrieved by the ruling by the Learned Judge, the only recourse open to them would have been to appeal that decision or file for its review. The Petitioner did neither. It follows that it was not open to her to re-open the issue of representation later. It would not have been appropriate for the Taxing Master to second guess the ruling by the Judge respecting the issue of representation. It is still not appropriate for this Court to review or sit on appeal on a ruling by a fellow High Court Judge on that question. This effectively disposes the first issue delineated for analysis.

17. Turning to the second issue, the question is whether, taking Kithi & Company advocates as properly on record, the Petitioner can otherwise challenge the Certificate of Taxation issued herein vide her Application dated 02/08/2018 on any of the taxed items. I have come to the conclusion that she cannot. I have come to this conclusion for two reasons.

18. First, as our decisional law has variously established, the Advocates Remuneration Order is "*a complete code...It does not provide for an appeal from any sort of decision by the Taxing Officer...any complaint about any decision of the Taxing Officer whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the Bill of Costs is ventilated by way of a reference to the Judge in accordance with paragraph 11 of the Advocates Remuneration Order.*" (as per Ringera J. (as he then was) in *Machira & Company Advocates v Magugu [2002] 2 EA 428 at 433*. The import of this is that a party who is dissatisfied with the decision

of the Taxing Officer can only ventilate her grievance by way of filing a reference to the Judge. That reference must be filed within fourteen days of the decision by the Taxing Master.

19. This rule is not merely technical. It evinces the ethos of the Advocates Remuneration Order to minimize dilatory stratagems at the tail end of litigation. It is meant to enhance predictability of the taxation regime and to ensure that once parties have had their day in Court before the Taxing Master, only weighty objections are pursued; and even then, that they are pursued with expedition.

20. In the present case, the Petitioner did not bring a reference to challenge the taxing decision of the Taxing Master. Instead, she waited until the 3rd Respondent had filed an application to enforce the decision to object. This meant not only the form and substance of the objections is wrong but also that the objection is being brought well outside the statutory period envisaged (14 days); and without the leave of the Court.

21. The second reason the challenge to the Certificate of Taxation is improper is because, as expressed, it amounts to an appeal against the decision by the Taxing Master rather than a reference. The tenor of the objections taken up by the Petitioner evince a desire to appeal against the discretion of the Taxing Master rather than file a reference. While the difference qualitative rather than categorical, it is important to bear in mind that the Court would not normally interfere with the special jurisdiction of the Taxing Master lightly; it will only do so where "it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an interference that is based on an error of principle." (See *Republic v Ministry of Agriculture & 2 Others Ex Parte Muchiri W'Njuguna & 6 Others*).

22. This dispute has been in the Court system for more than ten years. The Petitioner lost at the Court of Appeal. She was ordered to pay the costs. The costs were taxed more than three years ago. To my mind, there is nothing eminently excessive about the taxed amount. In any event, the challenge to the process of taxation and the taxed amounts has been too late in coming. Litigation must come to an end. It is time to bring the curtains down on this one.

23. Consequently, I find the Application by the 3rd Respondent dated 07/06/2018 to be merited and I will allow it in the terms below. In the same vein, I find the Application by the Petitioner dated 02/08/2018 to be unmeritorious. The same is dismissed with costs. The orders emanating from these findings will be the following:

i. A judgment in favour of the 3rd Respondent against the Petitioner hereto for the sum of Kenya Shillings Seven Million Five Hundred and Twenty Three One Hundred and Seven (Kshs. 7,523,107) being the sum of costs taxed by the Taxing Officer is hereby entered.

ii. The said sum of Kenya Shillings Seven Million Five Hundred and Twenty Three One Hundred and Seven (Kshs. 7,523,107) will attract interests at Court rates from the date the ruling of the taxation was given to wit 12/10/2017.

iii. The Petitioner shall pay the costs of the two Applications.

24. Orders accordingly.

Dated and Delivered at Nakuru this 19th day of December, 2019

.....

JOEL NGUGI

JUDGE