



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

CIVIL CASE NO. 28 OF 1996

Y.A SHRETTA.....APPLICANT

VERSUS

LEISURE LODGES LIMITED.....RESPONDENT

RULING

This is a ruling on the Plaintiff's application dated 26th April 2017. It seeks to amend Notice of Motion dated 24th September 2015.

Grounds on the face of the application are that the petitioner's petition was struck out with costs to Vadag Establishment and to the Respondent Leisure Lodges Limited.

That the amendment being sought will enable the Court to effectually and completely adjudicate all questions involved in the application.

The application is supported by Affidavit sworn by the Applicant herein.

He averred that in the Bill of Costs 2nd Respondent and Vadag Establishment are claiming Kshs. 60,146,800 and 75,534,037.20 respectively.

He averred that the bills of costs are stale and not enforceable against the Applicant.

That due to inadvertent mistake the application dated 24th September 2015 omitted to include the Bill of Costs dated 18th April 2001. That the order made on 16th February 2001 is stale as it is only enforceable within the period of 12 years.

The Applicant attached a draft amended Notice of Motion.

In response Counsel for the Respondent filed Replying Affidavit sworn on 5th October 2017. Counsel confirmed in Civil Appeal No. 83 of 2000 the Court of Appeal dismissed the Applicants winding up petition and awarded costs of appeal and High Court to Vadag Establishment Limited.

Pursuant to Court of Appeal decision, Counsel for Vadag filed party and party Bill of Costs dated 18th April 2001 seeking kshs 75,534,037.00 as costs of Vadag from High Court winding up proceeding.

He averred that the bill was scheduled for 11th July 2001 when the Applicants Advocate sought adjournment to enable parties negotiate. It was adjourned to 15th August 2001 to enable parties negotiate further. On 15th September 2001 the parties recorded consent allowing items listed in paragraph 10 of the Affidavit and the remaining items to be argued. He attached copy of the consent.

Counsel submitted that the consent has not been set aside. He deponed that he fixed the matter for 24th and 25th September 2001; that the Applicant thereafter embarked on delaying taxation on the remaining items.

Counsel further submitted that a detailed ruling was delivered on objection raised by Dr Kamau Kuria. He attached a copy of the ruling.

He added that application for stay of taxation and Dr. Kuria Kamau's appointment to Goldenberg Commission of Inquiry delayed the hearing of Chamber Summons Application and taxation of Vadag's Bill of Costs dated 18th April 2001.

Counsel for the 1st Respondent deponed that parties agreed to substitute the Bill of Costs and filed submissions in 1st and 2nd Respondents' Bills of Costs dated 18th April 2001 and 21st September 2015 respectively, the Applicant filed the application dated 24th September 2015; The application is against the 1st Respondents Bill of Costs. The 2nd Defendant Bill of Costs is excluded in the application.

On 28th October 2015, the taxing master found it difficult to proceed with taxation of Vadag Bill of Costs dated 18th April 2001. She directed that the application do proceed before she could proceed to tax the bill.

Counsel for the 1st Respondent averred that, the Applicant filed application dated 24th September 2015 which caused stay of Vadag's taxation. That after failing to fix it for hearing for 2 years, the Applicant woke up from slumber and filed this application. That the Applicant has succeeded in delaying the disputed items in Vadag Bill of Costs for 16 years thus denying Vadag Establishment from enjoying fruits of its judgment delivered by the Court of Appeal on 16th February 2001.

That Vadag's Bill of Costs is already part heard as per consent recorded on 5th September 2001.

Counsel submitted that there are no timelines for taxing Bill of Costs especially those partly taxed.

I have considered rival submissions herein. I have also perused and considered averments by parties herein and submissions filed.

There is no dispute that parties herein recorded consent on 5th September 2001 allowing some of the items in Bill of Costs filed. They agreed that parties do argue in respect of the disputed items.

Thereafter taxation on the disputed items failed to take off due to applications or objections filed by the Applicant herein. The Applicant filed application dated 24th September 2015 but did not fix it for hearing until 2017, 2 years down the line when the filed Applicant this application seeking to amend the application filed in 2015.

It is quite clear from record that the 1st Respondent has made several made attempts to prosecute the Bill of Costs in respect of the disputed items but the Applicant has frustrated.

In the present application, the Applicant seek to include the 1st Respondents Bill of Costs in the prayer for striking out.

On perusal of the Applicant I note that the ground given is limitation of actions Act; that delay has rendered the Bill of Costs stale and unenforceable.

It is not disputed that the bill is partly taxed. One cannot therefore be right in saying Respondent has not taxed the bill within the required as part of it has been done by consent. Record clearly show that the 1st Respondent has been making efforts to set down the matter to argue the disputed items. It is evident that 1st Applicants efforts have been frustrated by the Applicant. The delays have substantially been contributed by the Applicant.

The bills were partly taxed by consent of both parties. The application seeks to strike out a bill which has been been taxed.

My view is that this application is aimed at occasioning further delay in taxation of the disputed items and denying the 1st Respondent costs awarded. The Applicant having substantially contributed to delay in this matter should not be allowed to take advantage of provisions of limitation of Actions Act. I find this an of the Court process.

I do not see merit in the application herein.

FINAL ORDER

Application dated 24th April 2017 is hereby dismissed with costs to the Respondents.

Ruling Delivered, Dated and signed at Nairobi this 25th day of October, 2018

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

LANGAT: COURT ASSISTANT

KARANJA: COUNSEL FOR PETITIONER/APPLICANT

