



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO 141 OF 2008

PAUL MATHEKA.....PLAINTIFF

VERSUS

PETER NGUI.....DEFENDANT

RULING

The Defendant herein has filed an application by way of a Notice of Motion dated 29th October 2015, seeking orders that the orders of the Deputy Registrar dated 26th January 2016 in which she taxed a Bill of Costs dated 9th January 2012 against the Defendant be varied and/or set aside. The Defendant alleges that there was an error on the face of the record as the costs of the Plaintiff had already been taxed and the Defendant executed against, and that the proceedings of the earlier execution formed the basis of Machakos High Court Civil Case No 85 of 2012. The Defendant in a supporting affidavit sworn on the same date attached a copy of the bill of costs dated 9th January 2012 filed by the Plaintiff herein, his replying affidavit to the said Bill of costs sworn on 8th April 2013, and a copy of the ruling by the Deputy Registrar wherein she taxed the Bill of Costs at Kshs 145,704/=.

Mulwa, Isika and Mutia Advocates for the Defendant filed submissions dated 28th November 2016, wherein the argument that there is an error on the face of record since the taxation of costs was being done a second time was reiterated, and it was urged that the Defendant invokes the power of this court to review the decision of Deputy Registrar to proceed with the taxation, as the Deputy Registrar while taxing the bill of costs does so on behalf of this court. Further, that it was therefore within the rights of the Defendant to seek review in this court under Section 80 of the Civil Procedure and Order 45 Rule I of the Civil Procedure Rules. Reliance was also placed on the decision of the Court of Appeal in **Paneras T. Swai v Kenya Breweries Limited, [2014] eKLR** in this regard.

The Response

The Plaintiff filed a replying affidavit in opposition to the application, which he swore on 25rd November 2015, and submissions dated 30th November 2016 filed by his Advocate, D. M. Mutinda & Company Advocates. The Plaintiff stated that the Defendant's application does not meet the threshold for review as stipulated under Order 45 of the Civil Procedure Rules, as the allegation that execution for Plaintiffs costs had already issued is unsubstantiated. Further, that the subject matter in HCCC No. 85 of 2012 and the proceedings in HCC No. 141 of 2008 are totally different. Therefore, that the Defendant 's application is clearly an afterthought calculated to deny him the fruits of his judgment.

The Plaintiff's Advocate submitted that the Defendant's application is defective and is brought in the wrong forum, in that having been dissatisfied .with the ruling of the taxing master, the Defendant should have filed a reference in accordance with paragraph 11(1) & (2) of the Advocates (Remuneration)

Order (2006). In addition, that under Order 45 of the Civil Procedure Rules, a person can only review a decree or order, and not a judgment or ruling, and the Defendant has not extracted a copy of order or decree which he is seeking to review and his application should therefore be struck out. Reliance was placed in the case of **Fidelity Commercial Bank -vs- Michael Mwangi & Another (2005) e KLR** in this regard .

In addition, that the said Order stipulates that one applies for review to the court which passed the decree or made the order without unreasonable delay, and that in this application the ruling sought to be reviewed was made by the Deputy Registrar on 26.01.2015 yet the present application was made before the High Court Judge on 29.10.2015, ten months after the ruling was delivered. Lastly, it was submitted that the Defendant has not met the requirements for an order of review under Order 45 rule 1 of the Civil Procedure Rules, 2010, and reliance was placed on the decision in **National Bank Of Kenya Limited vs Ndungu Njau , Civil Appeal No. 211 of 1996** in this regard.

The Issues and Determination

I have read and carefully considered the pleadings and submissions filed. I find that the main issue for determination is whether this Court should review and/or set aside the orders given in the ruling delivered herein by the Deputy Registrar dated 26th January 2016. This Court is minded of the applicable law and the grounds for setting aside or review of orders which are set out in Order 45 Rule 1 (b) of the Civil Procedure Rules as follows:

- i) There must be discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicants knowledge or could not be produced by him at the time when the decree was passed or the order made,
- ii) mistake or error apparent on the face of the record,
- iii) any other sufficient reason,
- iv) the application must be made without unreasonable delay.

The said provisions allow for review of a ruling from which no appeal has been preferred or is allowed, but such an application can only be made in the Court that made the order. In the present application the said orders as to the taxed costs were made by the Deputy Registrar of this Court, and any application seeking to vary the orders must be made before the said judicial officer, and ground shown to persuade him or her to vary or set aside the orders that had earlier on been given. The prayers seeking to review or set aside the taxed costs by the Deputy Registrar of Kshs 145,704/= are therefore not competently before this Court.

In addition as submitted by the Plaintiff, the jurisdiction given to the Deputy Registrar with regard to taxation of costs is under the Advocates Remuneration Order paragraph 10 which provides as follows:

“The taxing officer for the taxation of bills under this Order shall be the Registrar or a district or deputy registrar of the High Court or, in the absence of a registrar, such other qualified officer as the Chief Justice may in writing appoint; except that in respect of bills under Schedule IV to the order the taxing officer shall be the registrar of trademarks or any deputy or assistant registrar of trademarks”.

Paragraph 11 of the said Order provides the procedure to be followed when seeking intervention by this Court, when one is dissatisfied with a ruling of the Deputy Registrar, by way of objection and reference as follows:

“(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."

The Defendant's Notice of Motion dated 29th October 2015 is therefore accordingly dismissed for the foregoing reasons. The Defendant is however at liberty to apply for the orders sought before the Deputy Registrar/Taxing Officer. The Defendant shall meet the costs of the said Notice of Motion.

Orders accordingly.

DATED AT MACHAKOS THIS 22nd DAY OF MARCH 2017.

P. NYAMWEYA

JUDGE