



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

HIGH COURT CIVIL CASE NO.55 OF 2006

SARAH CHEBOO LANG'AT.....PLAINTIFF/APPLICANT

VERSUS

THE BOARD OF GOVERNORS, CHEPSEON COMPLEX SCHOOL,

Thro' MOSES YEGON, CHAIRMAN.....DEFENDANT/RESPONDENT

RULING

1. The applicant, who was the plaintiff in this matter, has filed an application dated 15th April 2016 seeking the following orders:

1. That the decision of the Deputy Registrar the resultant certificate of costs and/or taxation issued herein was issued without jurisdiction and ultra vires the Deputy Registrar powers and was therefore for setting aside ex-debito justitiae and accordingly quashed in its entirety.

2. That there having been no order of costs in the judgment of Hon. Ang'awa J. of the 16th day of December, 2008 there was no substratum to sustain the bill of costs and the resultant certificate of costs/decision and are all therefore for quashing from the record in their entirety.

3. That the Deputy Registrar decision/taxation having not been conducted in accordance with the taxation principles and the relevant remuneration order the same cannot stand and is hereby quashed in its entirety and the bill remitted before another Deputy Registrar for reconsideration afresh.

4. That costs of this application be provided for.

2. The application is premised on seven grounds set out in the application. In the said ground, the applicant argues, first, that there was no order for costs made in favour of the defendant respondent in the orders of Hon. Ang'awa J. issued on 16th December 2008 or of any other date. Secondly, that the Learned Judge, in exercise of her discretion under section 27 (c) of the Civil Procedure Act Cap.21 Laws of Kenya did not make an order for costs in the orders of 16th December 2008. Consequently, there was no substratum for the bill of costs dated 14th April 2014, and it was therefore filed in a vacuum and without jurisdiction.

3. It is further argued that as the orders of Hon. Ang'awa J. were neither appealed from, reviewed nor set aside, they are in force and no bill of costs could have been filed. The act of the Deputy Registrar in taxing the bill of costs was therefore illegal, irrational and void and made without jurisdiction and should be set aside *ex debito justitiae*.

4. According to the applicant, even if she is wrong on the above grounds, her application is merited as the Deputy Registrar should have taxed the bill in accordance with the taxation principles and the Advocates (Remuneration) Order. She cites paragraphs 3, 6 and 7 of the decision of the Deputy Registrar which relate to the instructions fees charged and the value of the subject matter and contends that there was no basis for the conclusion and decision reached by the Deputy Registrar.

5. In her affidavit in support of the application, the applicant avers that this matter was heard and a judgment entered on 16th December, 2008 by Hon. Ang'awa J. In the said judgment, there was no order for costs made in favour of the defendant/respondent, nor were there orders of any other date on costs to warrant the filing of the bill of costs and taxation thereof. She reiterates the grounds set out in support of her application and her contention that the Deputy Registrar acted without jurisdiction and in vain. She asks the court to allow her application and quash the decision of the Deputy Registrar and the certificate of taxation.

6. The respondent has filed an affidavit in opposition sworn by Wesley Kirui on 25th May 2016. Mr. Kirui is the Secretary to the Board of Governors of the defendant/respondent.

7. Mr. Kirui deposes that the averments by the plaintiff/applicant are calculated to deceive and mislead the court. He observes that the applicant tactically failed to annex what she considers the judgment of the court dated 16th December 2008 as she is well aware that the said decision was not the final judgment in this matter. He avers that the determination of Hon. Ang'awa J of the said date was not a judgment but a ruling on an application by the plaintiff to set aside a Land Registrar's Report dated 1st March 2007. A copy of the ruling dated 16th December 2008 is annexed.

8. According to the respondent, the costs taxed in this matter arose from a ruling on the respondent's preliminary objection dated 31st January 2012. The preliminary objection was upheld in a ruling delivered on 27th March, 2014 in the presence of Counsel for both the applicant and the respondent. The ruling, which had the effect of striking out the plaintiff's suit, has never been set aside or appealed by the applicant. It is therefore the respondent's deposition that the present application is not only misconceived but is also not premised on any legal or factual basis.

9. The respondent argues further, that the challenge to the Deputy Registrar's decision is without any legal basis and should be disregarded.

10. The parties have filed written submissions which they asked the court to rely on in rendering its ruling on this matter.

11. In submissions filed on her behalf dated 20th January 2017, the applicant argues at length on the question of jurisdiction, and cites various authorities in respect to the need for a court to act only in such matters where it has jurisdiction. She submits that it was Hon. Ang'awa J (as she then was) who had the discretion to award costs to the defendant/respondent, and since she did not do so in the judgment dated 16th December 2008, the bill of costs filed in this matter was null and void.

12. In the submissions in response filed by the respondent, it is argued that the applicant intends, by her application, to mislead the court. It is contended that the determination of 16th December 2008 was not the final judgment but a ruling in respect of an application by the applicant to set aside a Land Registrar's Report dated 1st March 2007. The respondent's contention, as averred in the replying affidavit, is that the bill of costs was in relation to a ruling on a preliminary objection which was determined in its favour in a ruling dated 27th March 2014 which had the effect of disposing of the applicant's suit. Costs were awarded to the respondent in the said ruling.

13. I have considered the application, the affidavit in support and in opposition thereto, as well as the court record on the matter. In particular, I have considered the ruling of Ang'awa J dated 16th December 2008. Two things are obvious from that ruling. First, as argued by the applicant, no costs were awarded

by the court. The ruling indicates that it was an application on the part of the plaintiff/applicant for the report of the Land Registrar dated 1st March 2007 to be set aside.

14. Secondly, as is evident from that ruling, there was no “determination” of the suit, nor was the said ruling a “judgment”. It did not dispose of the suit. Thus, the applicant’s contention in her application are based, whether deliberately or in error, on an untruth. Given that she is represented by Counsel who has read and understood the ruling, and knows the distinction between a judgment and a ruling of the court, it seems that there is an attempt to mislead the court.

15. The respondent has annexed a copy of the ruling dated 27th March 2014 which it alleges was the basis of its bill of costs dated 14th April 2014. The ruling relates to a preliminary objection in which the respondent argued, and its argument was upheld, that the present suit was *res judicata*. In that ruling, which determined the present suit, Waithaka J in the Environment and Land Court held that the issues raised by the plaintiff were *res judicata* and struck out the plaintiff’s claim with costs.

16. I have also considered the ruling of Hon. Ndururi on the respondent’s bill of costs. He notes, and dismisses, first, the plaintiff’s objection to the bill of costs on the basis that it was defective as it did not comply with the requirements of section 69 (1) of the Advocates Act on the manner of drawing a bill of costs. The objection related, it appears, to the manner of indicating the date on the bill of costs which, according to the plaintiff, should follow the format “YYMMDD” and not “DDMMYY”.

17. The second objection was, like the present application, based on the ruling of Ang’awa J of 16th December 2008. The plaintiff’s argument before the Deputy Registrar seems to have been that instructions fees should not have been charged. The court observed that it could not see how the ruling of 16th December 2008 could deprive the respondent the right to charge for instructions fees in the bill of costs.

18. I must confess, having found that the ruling of 16th December 2008 was not the judgment that disposed of the matter, and that the ruling of 27th March 2014 gave the respondent the costs of the suit, that I am also unable to find a basis for this challenge to the Deputy Registrar’s ruling.

19. The other objection to the Deputy Registrar’s ruling relates to the subject matter of the suit. The Deputy Registrar noted that the value of the subject matter was Kshs.2,000,000/- according to the bill of costs, and proceeded to tax instructions fees in accordance with schedule 6(1) (b) of the Advocates Remuneration Order, arriving at instructions fees of Kshs.107,800/-.

20. While the applicant in this case has challenged the findings of the Deputy Registrar on the above item, no submissions have been made with respect thereto in the written submissions dated 20th January 2017. The entire submissions are confined to arguments about the lack of jurisdiction in view of the plaintiff’s contention that no costs were awarded on 16th December 2008. While an allegation is made that the Deputy Registrar failed to follow taxation principles and the Advocates (Remuneration) Order, no attempt is made to illustrate which principles and how the Deputy Registrar failed to follow the said principles.

21. In the circumstances, I have no basis for disturbing the award of the Deputy Registrar. The application dated 15th April 2016 is accordingly dismissed with costs to the respondent.

Dated, Delivered and Signed at Kericho this 24th day of May 2017.

MUMBI NGUGI

JUDGE