



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. CIVIL APPLICATION NO. 83 OF 2015

LABH SINGH HARMAN SINGH LTD APPLICANT

VERSUS

HONOURABLE ATTORNEY GENERAL

THE PRINCIPAL REGISTRAR OF TITLES

DENACY INVESTMENT LIMITED RESPONDENTS

RULING

INTRODUCTION

1. Following a judgment of the Environment and Land Court delivered on the 20th February 2015 in the Petition No. 210 of 2010 by which the court struck out the petition with costs, the 3rd respondent therein filed a **Party and Party Bill of Costs** dated 24th April 2015 which was taxed on the 4th June 2015 in the absence of the counsel for the Applicant and a Certificate of Costs dated 8th June 2015 issued in the sum of Ksh.1,564,155/-
2. The Applicant subsequently unsuccessfully sought the setting aside of the taxation on the grounds that he was prevented from attending the taxation on the 4th June 2015 by the death of his sister-in-law on the same date. By a ruling dated 17th September 2015, the Deputy Registrar of the High Court struck out the application on the ground that she lacked jurisdiction to consider the application for setting aside of the taxing officer's order of 4th June 2015, holding that jurisdiction lies with the Judge in Chambers in terms of Rule 11 of the Advocates' Remuneration Order.

THE APPLICATION BEFORE THE COURT

3. The applicant consequently filed a Chamber Summons dated 17th September 2015 under Paragraph 11 of the Advocates' Remuneration Order, section 3A of the Civil Procedure Act, cap. 2 Order 40 of the Civil Procedure Rules and sought the following specific reliefs:
 1. *That this application be certified as urgent and service be dispensed with in the first instance.*
 2. *That there be a stay of execution of the certificate of Taxation pending hearing and determination of this application.*
 3. *That there be a stay of execution of the Certificate of Taxation pending hearing and determination of the Reference.*
 4. *That this Honourable court enlarges the time within which to file a reference against the decision of the taxing officer delivered on 4th June, 2015.*

5. *That the Reference filed herein be deemed as properly filed though filed out of time.*
 6. *That the costs of this application be provided for.”*
4. The application was based on the following grounds set out in the Chamber Summons:
- a. *That the 3rd Defendant’s Bill of Costs dated 24th April, 2015 was taxed ex-parte at Kshs. 1,564,155/= on 4th June, 2015.*
 - b. *That on 18th June, 2015, the Applicant filed a Notice of Motion application dated 17th June, 2015 under Certificate of Urgency seeking stay of execution of the Certificate of Taxation and praying that the order issued on 4th June, 2015 be set aside.*
 - c. *That the Deputy Registrar on 17th September, 2015 delivered a ruling striking out the said application on grounds that she does not have jurisdiction to set aside the taxing officer’s order of 4th June, 2015 and that the application ought to have been heard and determined by a Judge.*
 - d. *That it is for this reason that the Applicant now seeks leave of the court to file a reference out of time as the taxation was done ex-parte and the taxing officer failed to take into account the fact that the Bill of Costs is a party and party Bill of Costs that was filed by a stranger in the suit and also filed in the wrong suit.*
 - e. *That the Applicant’s advocate was unable to attend the matter for taxation on 4th June, 2015 because on the same day his sister in law who had been terminally ill passed on and was therefore not able to raise this important objection to the present bill.*
 - f. *That it is in the interest of justice that this application be allowed as the 3rd Defendant’s Bill of Costs was taxed at a colossal sum of money (Kshs. 1,564,155/=) and proclamation done on 17th June, 2015.*
 - g. *That if stay of execution is not granted, the 3rd Respondent will definitely proceed to execute against the Applicant thus rendering the intended reference nugatory.*
 - h. *That the 3rd Respondent company, Denancy Investments Limited is a Shell Company without any fixed abode or any known assets and therefore the Applicant will not be able to recover the Kshs.1,566,500/= taxed costs in the event it succeeds in this application.”*

PRELIMINARY OBJECTION

5. The Respondent filed a Notice of Preliminary Objection dated the 29th September 2015 to the applicant’s Chamber Summons dated 17th September 2015 as follows:
1. ***That the application dated 17th September, 2015 be struck out/dismitted in limine.***
 2. ***That costs of the application be to the Respondent.***

Which Objection is based upon the following and other or further grounds to be adduced at the hearing hereof:

1. *This court not being an ELC lacks jurisdiction to entertain this application.*
 2. *That at the heart of the dispute is a decision made by Justice Mutungi Kariuki sitting as an ELC Judge hence only an ELC can entertain a challenge to it.*
 3. *That in light of the foregoing this application is an abuse of the process of this court.*
 4. *That the Applicant is vexatious, frivolous and patently incompetent.*
6. Counsel for the parties – Mr. Ojwang’ Agina for the Respondent/objector and Miss Ameyo for the Applicant - made respective oral submissions on 5th October 2015 and ruling was reserved for the 29th October 2015.

ISSUE FOR DETERMINATION

7. The issue for determination by the Court is whether the ***Taxation of Costs*** arising from a petition

heard and determined before the Environment Court is a matter **“falling within the jurisdiction of the courts contemplated in Article 162 (2)”** as to oust the jurisdiction of the High Court in terms of Article 165 (5) of the Constitution of Kenya 2010.

DETERMINATION

The jurisdiction of the High Court

8. By virtue of Article 165 (5) of the Constitution of Kenya, the High Court has no jurisdiction to deal with matters reserved for the courts of equal status established under Article 162 (2) of the Constitution. Article 165 (5) provides :

“(5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).”

9. Article 162 (2) (b) of the Constitution of Kenya provides for establishment of a Court, (which is established as the Environment and Land Court by Act. No. 19 of 2011) to deal with disputes relating to land as follows:

*“(2) Parliament shall establish courts **with the status of the High Court** to hear and determine disputes relating to—*

(a)

(b) the environment and the use and occupation of, and title to, land.”

The High Court has therefore no jurisdiction over disputes relating to the environment and use and occupation of, and title to, land.

What is the subject matter of the application before the court?

10. However, the inquiry before the court is whether the application before it is a dispute relating to **“(b) the environment and the use and occupation of, and title to, land”** which is the exclusive province of the Environment and Land Court or it is a dispute under the Advocates Remuneration Order, which should be dealt with in accordance with the Advocates Act. The question whether the Court has jurisdiction over the application before the Court must be considered in the light of the subject matter of the application. If the application is one that relates to land, the High Court has no jurisdiction in view of the express terms of the Article 165 (5) of the Constitution and jurisdiction will then lie with the Environment and Land Court. Otherwise, the Court has jurisdiction to entertain the matter in exercise of its jurisdiction under Article 165 (3) of the Constitution.
11. I consider that the subject matter of the application before the court is the Certificate of Costs dated the 10th June 2015 issued by the Deputy Registrar of the High Court as the taxing officer following the taxation of the Party and Party Bill of Costs filed as a Miscellaneous Civil Application No. 83 of 2015 filed herein by the 3rd Respondent following the judgment delivered Kariuki J. sitting as an Environment and Land Court in a constitutional petition, Machakos High Court Petition No. 210 of 2010.
12. The subject matter of the application before the Court is not the dispute that was before the Environment and Land Court, which has in any event been determined by that Court in its Judgment of 20th February 2015 from which the taxation of the Bill of Costs arises. The subject matter of the application is simply the taxation of the 3rd Respondent’s Party and Party Bill of Costs following the judgment in the constitutional petition.

Application of the Advocates' Remuneration Order

13. The Advocates' Remuneration Order 2009 indicates the application of the Order as follows:

“2. Application of Order. Cap. 301, 296.

*This Order shall apply to the remuneration of an advocate of the High Court by his client in contentious and non-contentious matters, the taxation thereof and **the taxation of costs as between party and party in contentious matters in the High Court**, in subordinate courts (other than Muslim courts), in a Tribunal appointed under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act and in a Tribunal established under the Rent Restriction Act.”*

14. It would appear that there is need in the interest of clarity, for amendment to the Remuneration Order to include taxation of Bill of Costs arising from business in the **Environment and Land Court** as well as the **Employment and Labour Relations Court** as courts established by the Constitution of Kenya 2010 subsequent to the Remuneration Order of 2009 with equal status to the High Court. In the meantime the Order must apply to these courts as courts **‘with the status of the High Court’**.

15. For purposes of the Advocates' Act, cap. 16 of the Law of Kenya and the Advocates' Remuneration Order made there-under **“Court”** means the High Court. Paragraph 11 of the Advocates Remuneration Order provides as follows:

“11. Objection to decision on taxation and appeal to Court of Appeal.

(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 subparagraph (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), [and] may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.*

*(5) 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.”*

CONCLUSION

16. It is quite clear that for purposes of taxation of costs under the Advocates' Remuneration Order, the appropriate court to which reference may be had from the decision of the taxing officer of the Court is the High Court. Indeed, the respondent who now raises the preliminary objection to jurisdiction had itself filed its Bill of Costs for taxation before the Deputy Registrar of the High Court. It cannot be that the Deputy Registrar of the High Court has jurisdiction to tax the Bill of Costs but the Judge of the High Court has no jurisdiction to entertain a reference from such taxation under paragraph 11 of the Advocates Remuneration Order, quoted above. Moreover, in deciding the taxation, the Deputy Registrar and the Judge of this Court upon reference will **not** be

concerned with the merits of the dispute relating to the land, which was the subject of the determination by the Environment and Land Court; it is only concerned with the costs of the litigation business before that Court. As shown above in the application of the Advocates' Remuneration Order, the High Court also deals with the taxation of costs relating to business before itself as well as other courts and tribunals.

17. Instructively, section 14 of the Environment and Land Court Act provides that the enforcement of judgments, awards, orders or decrees shall accord to the Civil Procedure Rules as follows:

“14. Enforcement of Court Orders

A judgment, award, order or decree of the Court shall be enforceable in accordance with the Civil Procedure Rules.”

In this regard, Order 47 Rule 9 of the Civil Procedure Rules:

“9. A District Registrar with regard to suits tried in his area shall have the same power of taxing costs as the registrar has as a taxing officer under any Rules of Court, and all such rules shall apply to the taxation of costs by a District Registrar.”

18. Such Rules of Court, which guide the practice of the civil process of the High Court, are the Advocates' Remuneration Order made under the Advocates Act for the taxation of Bills of Costs in legal business between advocate – client and also party and party as in this proceedings. Section 94 of the Civil Procedure Act shows that taxation of costs is part of the enforcement or execution process of the court, as follows:

“94. Execution of decree of High Court before costs ascertained

Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.”

19. The subject matter in the taxation by the Deputy Registrar of the **Party and Party Bill of Costs** herein and the intended reference to the High Court is not any questions of ‘*the environment and the use and occupation of, and title to, land*’; it is simply the assessment of costs incurred in the litigation for purposes of execution of the Judgment, (which struck out the applicants petition No. 210 of 2010 with costs to the Respondents), which is the proper province of the Deputy Registrar of the High Court and thereafter reference to the judge of the High Court under the provisions of the Advocates' Remuneration Order, 2009, which are the applicable Rules of Court pursuant to section 14 of the Environment and Land Court Act that requires enforcement of judgments, awards, orders and decrees of that Court to be in accordance with the Civil Procedure Rules.

ORDERS

20. Accordingly, the Preliminary Objection dated 29th September 2015 is dismissed with costs to the Applicant. The Applicant's Chamber Summons dated 17th September 2015 will therefore proceed to hearing on the merits on a date to be fixed in consultation with counsel for the parties.

DATED AND DELIVERED THIS 29TH DAY OF OCTOBER 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Miss Awego for the Applicant

Mrs. Nzei for Mr. Agua for the Respondent

Ms. Doreen - Court Assistant.