



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. 560 OF 2014

PATRICK KARIGE MUNGE.....APPLICANT

-VERSUS-

RAPHAEL ARC MICHEAL MUNGE.....RESPONDENT

RULING

INTRODUCTION

1. Vide Notice of Motion Application dated the **24th February 2022**, the Applicant herein sought for the following Orders:

- a.(*Spent*)
- b. *There be an Interim Stay of Proceedings pending the hearing and Determination of this Application.*
- c. *There be a Stay of Proceedings pending the Hearing and Determination of this Application.*
- d. *This Honourable court be pleased to Set aside the Orders made on the 24th February 2022 withdrawing the Plaintiff's Application dated 19th January 2022.*
- e. *The Applicants Chamber Summons Application dated 19th January 2022 be reinstated for hearing and determination before this Honourable court own Merits.*
- f. *The Costs of this Application be provided for*

2. The subject Application is premised on the Grounds contained on the face thereof and same is supported by the Affidavit of one, Mr. Alex K Inyangu, Advocate.

3. Upon being served with the subject Application, the Respondent herein filed Grounds of Opposition dated the 3rd March 2022, as well as a Notice of Preliminary Objection also dated the 3rd March 2022, essentially which opposed the subject Application.

DEPOSITIONS BY THE PARTIES:

DEPOSITION BY THE APPLICANT

4. Vide Supporting Affidavit sworn by one, Mr Alex K Inyangu, Advocate, sworn on the 24th February 2022, the deponent has deponed as hereunder;

5. That on the morning of 24th February 2022, counsel informed Mr. Geoffrey Ochieng, Advocate to hold his brief in the matter and to take directions as pertains to the chamber summons application dated the 19th January 2022, which related to and or concerned variation of the decision of the taxing Master's Award (Certificate of Taxation of costs) rendered on the 12th March 2020.

6. It has further been averred that on the said date, namely the 24th February 2022, counsel was engaged before the Environment and Land Court at Kericho and because of the said engagement, Counsel informed his Associate to seek directions to have the subject matter/

Application canvassed and/or disposed of by way of written submissions.

7. Further, it has been averred that Mr. Ochieng who held brief for the deponent informed same that when the matter was called out, the court informed Mr. Ochieng that there was no notice of objection to Taxation, to ground the Reference and that in the absence of a Notice of objection, the Reference would be in vain.

8. It has been averred that based on the foregoing, counsel Mr. Ochieng who held brief for the deponent herein, chose to and indeed applied to have the Application dated the 19th January 2022, withdrawn.

9. It has further been averred that the withdrawal of the subject Application was premised and/or predicated on the fact that no Notice of objection to taxation had been filed and/or lodged, but however, it has since been confirmed that a Notice of objection to taxation was indeed filed and/or lodged.

10. In this regard, the deponent has proceeded to and annexed a copy of the said Notice of Objection to Taxation, which has been annexed and marked as annexure PKM 1.

11. Based on the foregoing, the deponent has averred that the withdrawal of the Application by counsel holding brief, who was not familiar with the file, was premised on a mistake and in this regard, the mistake under reference ought not to be visited upon the Applicant.

12. For clarity, the deponent has clarified that unless the subject Application is allowed, the Applicant shall be locked out from filing a further Reference to challenge the Certificate of Taxation and the consequential award in favor of the Respondent.

13. In the premises, the Applicant has pleaded with the court to consider the circumstances under which the withdrawal occurred and/or arose and thereafter, to review same so as to afford the Applicant an opportunity to be heard.

RESPONSE BY THE RESPONDENT

14. Vide Ground of Opposition dated the 3rd March 2022, the Respondent has opposed the subject Application and same has averred as hereunder;

15. The Application dated 19th January 2022, came up for hearing on the 24th February 2022 when the advocate for the Applicant applied to withdraw the same and the court was obliged by marking same as withdrawn with Costs to the Respondent.

16. The allegation that the advocate was 2 years post admission (*sic*) confirmed that he was duly admitted advocate and thus same was competent enough to handle any matter before the court.

17. In any event, the advocate was granted time and same elected to voluntarily withdraw the Application dated the 19th January 2022, albeit with costs to the Respondent.

18. Having withdrawn the Application dated the 19th January 2022, same cannot be reinstated by the court because the Civil Procedure Rules 2010, and in particular Order 25 thereof, provides for withdrawal of suit. However, there is no corresponding provision for reinstatement of the withdrawn suit or Application, like in this case.

19. In any event, the only remedy available to the Applicant is the filing of a fresh Application or, suit subject to the law of limitation.

20. Besides, it was also submitted that the honorable court is *Functus officio* and does not have the Jurisdiction to entertain the suit or Application which has been withdrawn by a Party.

21. Finally, it has been stated that the subject Application amounts to and/or constitute an abuse of the Due Process of the Court and therefore same ought to be dismissed with costs.

SUBMISSIONS:

22. On the 15th March 2022, the Notice of Motion Application dated the 24th February 2022, came up for hearing when it was agreed that same be canvassed by way of Oral submissions. Consequently, the Application proceeded for hearing on even date.

23. On behalf of the Applicant, it was submitted that when the Application dated the 19th January 2022 came for hearing counsel Mr. Inyangu, was represented by learned counsel Mr. Geoffrey Ochieng who held his brief, albeit with limited instructions to take directions to have the Application canvassed and/or disposed of by way of written submissions.

24. Nevertheless, counsel submitted that in the course of the directions, counsel Mr. Ochieng was confronted with an issue which same was unable to address and/or deal with, namely whether or no the Applicant herein had filed a Notice of Objection to Taxation.

25. Counsel further submitted that to the extent that Mr. Ochieng was unable to deal with and/or address the issue of the presence or otherwise of the Notice of Objection to Taxation, counsel Mr. Ochieng proceeded to and applied to withdraw the Chamber Summons Application dated the 19th January 2022.

26. Be that as it may, counsel for the Applicant further submitted that the withdrawal of the Application dated 19th January 2022, was based on a mistake, to the extent that the Applicant had duly and timeously filed a Notice of Objection to Taxation, a copy of which has since been attached to the current supporting affidavit.

27. It was counsel's further submission that the withdrawal of the Application dated the 19th January 2022, has therefore exposed the Applicant, who is likely to stand condemned without being afforded an opportunity to challenge the Certificate of taxation that was issued by the taxing master.

28. Finally, counsel for the Applicant, made emphasis on the need for Fair Hearing and proceeded to invoke the provisions of Articles 50(1) of the Constitution, 2010, and underscored the need to afford the Applicant an opportunity to be heard.

29. In response, counsel for the Respondent submitted that when the Application dated the 19th January 2022 came up, the counsel who appeared on behalf of the Applicant, voluntarily applied to withdraw the said Application and that premised on the request to withdraw, the court proceeded to and marked the Application as withdrawn.

30. It was the Respondent's further submission that having withdrawn the Application dated the 19th January 2022, the Applicant herein cannot be heard to apply to have the same reinstated for hearing and determination on merit.

31. Further, the Respondent submitted that under the provisions of Order 25 of the Civil Procedure Rules 2010, where a suit has been voluntarily withdrawn and thereafter marked as indeed withdrawn, the said suit, in this case, the Application, same cannot be reinstated. In this regard, counsel submitted that the only avenue available to the Applicant is to file a Fresh suit.

32. Finally, counsel for the Respondent observed and/or submitted that the court is not seized of the Jurisdiction to hear and entertain the subject Application and in that regard, the court should proceed to strike out the said Application.

ISSUES FOR DETERMINATION:

33. Having reviewed the Application dated the 24th February 2022, the Supporting Affidavit thereto, the Notice of Preliminary Objection and the Grounds of Opposition and having similar considered the submissions which were rendered by and/or on behalf of the respective Parties, the following issues Do arise and are germane for Determination;

a. Whether the Orders made on the 24th February 2022, warrant being set aside in the Interest of Justice and on the basis of the Inherent Jurisdiction of the Court.

b. What are the consequences of a failure or refusal to set aside the impugned Orders made on the 24th February 2022.

ANALYSIS AND DETERMINATION:

ISSUE NUMBER 1

Whether the Orders made on the 24th February 2022, warrant being set aside in the Interest of Justice and on the basis of the Inherent Jurisdiction of the Court.

34. It is evident and/or apparent that the Chamber summons Application dated the 19th January 2022, was fixed and/or scheduled for hearing on the 24th February 2022, when counsel Mr. Ochieng appeared before the court on behalf the Applicant whereas counsel Mr. Moriasi appeared for the Respondent.

35. During the course of the hearing of the said Application, namely, the Chamber summons Application dated the 19th January 2022, the court inquired from counsel for the Applicant whether a Notice of objection to taxation had been lodged and/or filed in line with Rule 11(1) of the Advocates Remuneration Order.

36. In answer to the said question, learned counsel Mr. Ochieng indicated that same was not privy to and/or aware whether such Notice of Objection to taxation to the decision of the taxing master, was ever filed or at all.

37. On the other hand, the court perused the Chamber summons Application dated the 19th January 2022 and no such Notice of objection to taxation was discernable and/or apparent.

38. In this regard, the court then after reverted to counsel and sought to know whether in the absence of a Notice of objection to taxation, it was still possible and/or legally tenable to maintain a Reference to taxation in line with Rule 11(2) of the Advocate Remuneration Order.

39. It was at this juncture that learned counsel Mr. Ochieng then chose and applied to withdraw the Application dated the 19th January 2022, and at the request and instance of learned counsel Mr. Ochieng, the court proceeded to and marked the Application as withdrawn, albeit with costs to the Respondent.

40. I must observe that it has now been brought to my attention that indeed a Notice of objection to taxation was timeously filed and that only the court copy was missing and/or somehow mislaid.

41. In this regard, it would not be just and/or expedient to maintain the order of withdrawal of the Application which was premised and/or predicated on the fact that a critical step, Notice of Objection to Taxation, had not been taken.

42. On the other hand, it has also been brought to my attention that the withdrawal herein was partially contributed to, by the fact that the counsel who was handling the matter on that material day was not only young in the profession, but was similarly not conversant with the file.

43. For clarity, this perhaps explains the inability of the said counsel to trace and/or isolate the critical document, namely the notice of objection to taxation, which document would have been helpful to the court in giving directions in respect to the impugned Application.

44. Based on the foregoing, I am minded to do justice in the matter and to ensure that the Parties are heard on the Merits on the Reference, which was evidently filed and/or lodged within the Statutory timelines.

45. Consequently and in this regard, I am obligated to pay homage to the decision in the case of *Chase International Investment Corporation and Another vs. Laxman Keshra and Others*, [1978] KLR 143; [1976-80] 1 KLR 891 to the effect that:

“If the circumstances are such as to raise equity in favour of the plaintiff and the extent of the equity is known, and in what way it should be satisfied, the plaintiff is entitled to succeed....”

46. In respect of the obtaining circumstance, it would thus be unfair to uphold the order of the withdrawal of the Application dated the 19th January 2022, which counsel for the Applicant has reasonably explained to have been made and/ or taken in error and thereby deny and/or deprive the Applicant of the Right to be heard on merit.

47. Suffice it to observe that, the Inherent jurisdiction of the court is wide and unfettered and the import thereof is to take care of situations certainly like the one beforehand, where the strict application of the law would occasion a miscarriage of justice.

48. For clarity, the extent and tenor of the Inherent jurisdiction of the court was captured and explained by the Authors of *Halbury’s Laws of England, 4th Edition Volume 37 Para 14* under the heading “*Inherent Jurisdiction of the Court*” at Page 23; as hereunder;

“The jurisdiction of the court which is comprised within the term “inherent” is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise (i) control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

ISSUE NUMBER 2

What are the consequences of a failure or refusal to set aside the impugned Orders made on the 24th February 2022.

49. Before venturing to address and resolve the second issue herein, it is important to reproduce the Provision of Rule 11 of the Advocate Remuneration Order. For clarity, the Order provides as hereunder;

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 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) far 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.

50. From the foregoing provisions, one thing which is apparent is that any litigant who is keen to challenge the decision by the taxing master and/or mistress must file the reference within 14 days from the date of issuance and service of the reasons by the taxing master. In this case,

the reference was previously filed vide the Application dated the 19th January 2022.

51. My understanding is therefore, that by the time of filing the Reference vide chamber summon dated 19th January 2022, the Applicant herein had been served with the reasons for taxation by the taxing master/mistress. For clarity, the Applicant was thus enjoined to move with haste and ensure compliance by filing the Reference within 14 days.

52. Based on the strict timelines provided and/or captured vide Rule 11 of the Advocates Remuneration Order, it then means, if the order of withdrawal, which is the subject of the current Application if not reviewed, then the Applicant herein stands locked out and cannot therefore challenge the decision by the taxing master/mistress whatsoever.

53. In my humble view, such kind of a decision would amount to a violation of a Party's Right of Access to Justice as stipulated under Articles 48 of the Constitution, 2010, as well as to Right to Fair Hearing under Articles 50 (1) of the Constitution 2010.

54. Consequently, this court is called upon to consider the consequences and/or corollary of any order that the court may give in respect of the subject Application and its impact on the Rule of Law, as well as the General Administration of Justice.

55. In my humble view, the wider interest of justice is better served by allowing the Application herein and reinstating the Chamber summons dated the 19th January 2022 for hearing and determination on Merits.

56. Nevertheless, the Applicant herein is responsible for the state in which the court and the Respondent have found themselves in and in this regard, the Applicant must therefore be ready to Indemnify the Respondent.

FINAL DISPOSITION:

57. Having addressed the issues which were outlined herein before and having taken into account the various statutory provisions of the law, more particularly Rule 11 of the Advocates Remuneration Order, as well as the Provisions of Articles 48 and 50 of the Constitution 2010, I find and hold that the Application under reference is Meritorious.

58. Consequently and in the premises, I make the following Orders;

- a. The Notice of Motion Application dated the 24th February 2022 be and is hereby allowed.*
- b. The proceedings and orders made on the 24th February 2022 be and are hereby set aside.*
- c. The Chamber Summons Application dated the 19th January 2022 be and is hereby reinstated for hearing and determination on Merits.*
- d. The Defendant/Respondent be and is hereby awarded thrown away costs of Kes.20, 000/= only to be paid within 14 days and in default same be at liberty to execute.*

59. It so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28th DAY OF MARCH 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant

Mr.Ochieng' h/b for Mr. Inyangi for the Applicant.

Mr. Moriasi for the Respondent.