



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION NO. 160 OF 2011

BETWEEN
EPHRAIM NJUGU NJERUPETITIONER
AND
REPUBLIC1ST RESPONDENT
P.M. WAMAE & COMPANY ADVOCATES.....2ND RESPONDENT

JUDGMENT

The Petitioner's Case

1. In order to understand the Petitioner's case it is necessary to set out the entire petition which states as follows;

The Petitioner is a citizen of Kenya and was a candidate in Siakago Constituency sponsored by National Rainbow Coalition (NARC) party in the General Election held in December 2002 but lost his bid for the position of M.P. and thereafter filed election petition number 13 of 2003 at Nairobi.

The election petition was filed in Court on the 24th day of January 2003 after payment by the election petitioner of the requisite legal fees deposit of Kshs.250,000/= and there was an agreement between the election Petitioner and the law firm of P.M. Wamae & Co. Advocates that the total legal fees for the election petition would be Kshs.800,000/= The election Petitioner paid much more legal fees than agreed to the tune of Kshs.1,180,000/= broken down as follows; Kshs.250,000/= Court deposit, Kshs.200,000/= payment to the first Respondent Advocates and Kshs.730,000/= payment for P.M. Wamae. The Petition never proceeded to hearing due to the omission of P.M. Wamae & Co. Advocates in that the Election Petition was not served on the Respondent. The matter went all the way to the Court of Appeal in Civil Appeal number 314 of 2003 where the Appellant was EPHRAIM NJUGU NJERU the current Petitioner. The 1st Respondent's bill of costs (party and party) against the Petitioner herein is awaiting taxation and the taxation should be halted to facilitate the process of this Petition and also because the said Bill of Costs is unconstitutional as it infringes the Advocate Remuneration Order and hence illegal. The said Bill of costs awaits taxation and has been issued by P.M. Wamae & Co. Advocates who were on record for the current Petition in the matter that was at the Court of Appeal. The said bill of Costs is intended to be charged on EPHRAIM NJUGU NJERU the current Petitioner. The said Bill of Costs is exorbitant and fraudulent first because there existed an agreement of the total fees payable in the election Petition and its sequel the Appeal in the Court of Appeal and Section 45 of the Advocates Act Cap 16 comes in handy here. Further to the above and in the alternative the applicable fee is governed by paragraphs 56 and 57 of the Advocates (Remuneration) Order and Schedule VI thereof.

The said Bill of Costs to the extent that it violates the Advocates Remuneration Order the fundamental statute governing legal fees, is unconstitutional and violates the Petitioner's fundamental rights and freedoms as stipulated in Sections 28 (Human dignity) 40 (Right to property) 48 (Access to justice) and 50 (Fair hearing) of the Constitution of Kenya as it is an attempt at unjust enrichment by the drawer of the Bill and therefore the said Bill of Costs fails the threshold test of the Bill of Rights in the Kenyan Constitution. The said Bill of Costs violates the human dignity of the current Petitioner and is an attempt at depriving him of property (cash) and not only attempts at obstruction of justice but also to the extent that it proceeded to hearing and taxation without serving EPHRAIM NJUGUNA NJERU nor giving a hearing to his Preliminary Objection of the Bill of Costs the said bill contravenes the aforesaid fundamental rights of the current Petitioner.

There is need for the Honorable Court's intervention for the purpose of ameliorative action on behalf of the current Petitioner. The taxing officer should not have entertained the said Bill of Costs nor allowed its proceeding to hearing in violation of the current Petitioner's entitlement to natural justice and fair hearing.

The Petitioner therefore prays that:

(a)The Taxing Officer should be permanently restrained from proceeding with the taxation of the said Bill of Costs and the said Bill should be declared unconstitutional and in contravention of the Advocates Remuneration Order and hence overturned and quashed.

(b)The costs of this matter do be provided by the Respondent.

(c) The Court do issue any other appropriate relief.

2. Together with the Petition, the Petitioner filed a Chamber Summons application dated 14th September 2011 where he sought order that, ***“the impugned Bill of Costs stayed pending the hearing and determination of the main Petition”***. When application came before me under certificate of urgency I directed that the firm of P.M. Wamae & Company Advocates be joined to the proceedings as a 2nd Respondent because I was of the view that the firm was a party directly affected by these proceedings as the bill of costs it had filed in High Court Misc. Application No. 203 of 2009 was filed by the firm against the Petitioner.

The Respondent's Case

3. The 2nd Respondent filed a Preliminary objection which sought to have the matter dismissed on the following grounds;

(1)That this honorable Court has no jurisdiction to entertain the Petition on the application hereof as the Bill of Costs, the subject matter of the Petitioner, is before the High Court with has jurisdiction under Rule 23 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedom of the Individual) High Court Practice and Procedure Rules, 2006 (hereinafter referred to as “the said rules”) to hear and determine as a preliminary point any Constitution issue that might arise in a matter of which the court is seized.

(2)The Petition has been presented and the application has been taken out in contravention of the mandatory provisions of Rule 13 and 21 respectively of the said Rules as neither the Petition nor the application is supported by an Affidavit, contrary to Rules 13 and 21 aforesaid.

(3)By reason of failure to support the Petition and the application respectively with an affidavit, there is no credible evidence disclosing any breach of any constitutional rights of the Petitioner.

(4)The presentation of the Petition hereof is an abuse of the Court process as it is an attempt to open an avenue for seeking repress which is parallel to the avenue already available to the Petitioner in the Court before which the Bill of Costs has been axed and is pending for the delivery of the ruling.

4. The advocate for the 1st Respondent Ms. Barasa submitted that the Petition does not disclose any breach of the Petitioner's fundamental rights as the matter is one between the Advocate and his client. She submitted that the Advocates Act (Chapter 16 of the Laws of Kenya) and the Advocates

Remuneration Order, 2009 provide a legal basis for the determination of disputes between advocates and clients and there is nothing to show that by application of the procedures, the Petitioner's rights and freedoms have been abridged.

5. Ms. Barasa submitted that the Petitioner's right to dignity has not been violated nor proof thereof shown. The right to property under Article 40 has not been violated as any execution would be in pursuance of a legal process and Article 50, which protects a fair process of taxation. She was of the view that there was sufficient redress under the Advocates Remuneration Order and this Petition should be dismissed.

6. Mr. Moibi, for the 2nd Respondent associated himself with the submissions of the 1st Respondent's Counsel. He reiterated the Advocate Act and Advocates Remuneration Order clearly provide procedures for relief of the respondent where he is aggrieved by the decision of the taxing officer. In his view the taxation of a bill of costs cannot be taken to infringe the right of any of the parties.

7. Mr. Agina, who appeared for the Petitioner, argued that in fact the matter should be directed to the Court seized of the taxation. When I drew his attention to the fact that the Deputy Registrar excised delegated authority and had no jurisdiction to deal with this matter he urged me to allow petitioner to withdraw the matter.

Article 23 of the Constitution

8. In considering this matter, I have had regard to the fact that the Petitioner is aggrieved by the legal process he has undergone and as a petitioner invoking the provisions of Article 23 of the Constitution, I take the view that I must hear and determine the case.

9. There is also the letter dated 27th October 2011, in reference to High Court Misc. 203 of 2009 where the Petitioner has narrated the circumstances he finds himself in. It is clear that all he wishes to see is justice done in his matter and in order to do full justice to the matter it is only proper that I deal with the case presented otherwise the Petitioner's grievances will continue to fester.

10. Since the Petitioner's complaints relate to other case I took steps to peruse the court files in the matters subject of the proceedings; High Court Election Petition No. 13 of 2003 and HC Misc. 203 of 2009.

The Election Petition

11. Nairobi High Court Election Petition No. 13 of 2009 is the election petition relating to Siakago Constituency between the Petitioner and Justin Bedan Njoka Muturi, T. Mithika Kiome and the Electoral Commission of Kenya. In the election Petition, the Petitioner was represented by P.M. Wamae & Company Advocates. The matter was heard by Justice Osiemo at first instance who struck out the Petition with costs on 12th November 2003. An Appeal was lodged being Civil Appeal No. 314 of 2003 and subsequently dismissed by the Court of Appeal 8th December 2006

12. Matters of elections petitions are governed by the provisions of section 44 of the former Constitution and the provision of National Assembly and Presidential Election Act (Chapter 7 of the Laws of Kenya). It is well established that once the constitution and parliament have provided a specific procedure, then that procedure must be followed. (See the case of ***Kipkalya Kones Vs. Republic Another exp. Kimani Wanyoike & Others***. CA Civil Application No. 94 of 2005 (Unreported) It is not for me at this stage to re-examine matters that have been litigated in the forum of the election petition court. In the circumstances, any complaint relating to the election petition must be dealt with by that court in accordance with the procedure provided.

13. I note that the reconstructed file for Nairobi Election Petition No. 13 of 2003 is available for perusal. The reconstruction order was issued by Justice Mwera on 12th March 2011. The Court of Appeal archives and contains all proceedings in the matter giving rise to the appeal. These files are available for the Petitioner to take further action.

The Bill of Costs.

14. HC Misc. 203 of 2009 is an advocate client bill of costs between P.M. Wamae and Company Advocates and the petitioner. It was filed in accordance with the Advocates Remuneration Order which provides for taxation of advocates fees in the event there is a dispute between advocate and client. The Advocates Act and Advocates Remuneration Order provide a specific procedure for determination of Advocate client disputes.

15. I have perused the proceedings in Hc Misc. 203 of 2009 and I note that the Petitioner herein as respondent was duly represented by the firm of Mugambi and Company Advocates. The said firm filed a Notice of Preliminary objection dated 10th September, 2009. An amended notice of preliminary objection was also filed on 25th June 2010. In both notices the petitioner raised objection as to the validity of the proceedings in view of a remuneration agreement between the parties.

16. When the matter came up for taxation, it proceeded and in her ruling dated and delivered on 3rd October, 2011, the learned Deputy Registrar stated, ***“The Respondent did not attend or file any submissions despite being served”*** She thereafter proceeded to tax the bill before her in the sum of Kshs.2,653,512.10 only.

17. It is the result of the Bill of Costs that has led to these proceedings. The process of taxation is what must be gauged to see whether any rights of the petitioner have been violated alleged.

Violation of fundamental Rights and Freedoms

18. It is trite law that a party who seeks relief under the provisions of Article 23 of the Constitution must be a person who claims that a right or fundamental freedoms in the Bill of rights has been denied, violated or infringed, or is threatened. It is the duty of the court then to determine whether indeed there are such violations.

19. The first alleged violation is that in Article 28 of the Constitution, the right to have a person’s dignity respected and protected. In my view, the agreement on fees is a consensual matter for which the law provides for a legal process for determination of any dispute on costs and fees through the Advocates Act and Advocates Remuneration Order. Invocation of a legal process, without more, does not amount to a violation of human dignity.

20. The Petitioner has stated that his right to property under Article 40 has been infringed. It is inevitable that once the due and statutory process of determining costs is invoked, a party may end up with liability for fees and costs. In my view, as long as there is due process, where a court judgment is as a result of established legal procedures, there can be no violation of Article 40 of the Constitution.

21. The Petitioner also avers that his right to access to justice under Article 48 had been infringed. I find that this allegation has no basis in so far as the petitioner had full access to the court, was duly represented by Counsel of his choice and is still entitled to move the court in a manner provided by statute for relief.

22. Article 50(1) governs the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal or body. In this case the Petitioner has the full benefit of counsel who lodged his objection to the taxation. He was availed the opportunity to be heard but nevertheless did not appear, either by himself, or his advocate, before the Deputy Registrar take advantage of it. I therefore, find and hold that the provisions of Article 50(1) have not been infringed.

Conclusion

23. I have considered the pleadings, submissions, evidence and court files before me and I am satisfied that the issue between the 2nd Respondent and the Petitioner is really one of fees which the Petitioner has attempted to elevate to the status of a constitutional or public law dispute.

24. In summary, I find no violation of the Petitioner's rights under the Bills of Rights. I sympathize with the Petitioner, who should now seek legal advice on the options available to him under the Advocates Act and Advocates Remuneration Order to set aside or appeal against the determination by the Learned Deputy Registrar.

25. My only option is to dismiss this petition and it is hereby dismissed with no orders as to costs.

DATED and **DELIVERED** at **NAIROBI** this 4th day of November, 2011.

D.S. MAJANJA
JUDGE

Mr. O. Agina instructed by P.N. Mbugua & Company Advocates for Petitioner.

Ms. Barasa instructed by the State Law Office for the 1st Respondent.

Mr. Moibi instructed by Ongweny and Moibi Advocates for the 2nd Respondent.