



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Election Petition 1 of 2008

DICKSON DANIEL KARABA PETITIONER

Versus

HON. JOHN NGATA KARIUKI 1ST RESPONDENT

JAMES KARIUKI GITAHU 2ND RESPONDENT

ELECTORAL COMMISSION OF KENYA 3RD RESPONDENT

RULING

The petitioner has filed two applications for consideration by this court. The court will begin by considering the one dated 4th December 2008. It is a Notice of Motion. It is brought under the **High Court Vacation Rules, The High Court (Practice and Procedure) Rules 1, 2, 3 and 9**. In addition it is under Order L Rule 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The substantive prayers of that application are:-

“3. The order of taxing officer given on 15th August 2008 disallowing the petitioner’s preliminary objection to the taxation of the respondents respective bills of costs dated 8th July 2008 and 9th July 2008 during the Court vacation be set aside;

4. Pending disposal of this application, all further dealings with costs taxed herein on 15th August 2008 be stayed.”

The main argument in support of this application was that the taxing master taxed the respondent’s bill of costs during the Summer High Court Vacation contrary to the provisions of The High Court (Practice and Procedure) Rules. Those rules provide that a judge has to be satisfied that a matter for hearing or trial is urgent for him to admit it for hearing. See Rule 3(1). The petitioner raised an objection before the taxing master objecting to the taxation proceeding during the High Court Vacation, to which the taxing master delivered a ruling on 15th August 2008.

In that ruling the taxing master after referring to Rule 3(2) stated:-

“Rule 3(2) also refers to a judge dealing with an application under subrule (1). Section 2 defines a judge to include the Chief Justice or a Puisne Judge or a Judge of Appeal. Evidently rule 3(2) of the Judicature Act does not apply to the taxing master.”

The taxing master proceeded to dismiss the petitioners object and taxed the respondent's bill as against the petitioner. Before delving deeper into the arguments presented before me in support of this application it is important in my view to consider the issue raised by the 1st respondent's counsel. Counsel argued that the taxing master having considered and delivered himself of the ruling on the objection of taxing the bill during the High Court Vacation, the petitioner ought to have sought orders of setting aside before the very taxing master. That the petitioner should not have filed an application such as the one before the court seeking that a High Court Judge do rehear the same objection. At this time I draw attention to the first prayer, herein before, of the petitioner. He seeks that a judge do set aside the finding of the taxing master over the petitioner's objection. The 1st respondent's counsel faulted the application on two main grounds. Firstly that the petitioner wrongly relied on the Civil Procedure Act and rules when in fact this matter touches on election petition and that being so the Civil Procedure Act and Rules, apart from where it is permitted, cannot apply to this action. Rule 18(7) of The National Assembly Elections (Election Petition) Rules provides:-

“The provisions of Order XVIII of the Civil Procedure Rules and the Oaths and Statutory Declaration Act shall apply to affidavits under this Rule.”

It is clear indeed that in matters relating election petitions only Order XVIII is imported. In response to this argument the petitioner queried what Act the respondent's had brought their bill of costs under. He was of the view that both the Civil Procedure Act and the Advocate's Act applied to the petitioner's application. In my view the application neither deals with the election petition perse and neither deals with the bill of costs. It falls in between the application seeks to set aside the ruling of the taxing master relating to objection of taxation during a High Court Vacation. I am of the considered view that it does not fall within the ambits of Cap 7. The application does not also fall within ambits of Cap 16 because the taxing master was dealing with a preliminary objection to taxation. The objection was based on the High Court (Practice and Procedure) Rules. The Civil Procedure does apply to this application. That being so the petitioner as correctly argued by the 1st respondent should have sought the aside of the order of the taxing master before the very same taxing master. In the alternative the petitioner should have appealed against that decision of the taxing master. I am therefore of the considered view that the petitioner's notice of motion dated 4th December 2008 is misconceived and without merit. The petitioner should have appealed against that decision of the taxing master. That is the finding of the court in respect of Notice of Motion dated 4th December 2008. The parties did however expend a lot of energy in argument on whether or not the taxing master was permitted to tax the bill during the High Court Vacation. I had the opportunity to consider this issue in the case of KAMUNYORI & CO ADVOCATES vs CANNON ASSURANCE (K) LTD HC MISC APP. NO 1090 of 2005 (Milimani). I made the following finding:-

“The High Court (Practice and Procedure) Rule affect the sitting of the High court. Indeed Rule 1(1) thereof state:

“The sitting of the High Court Shall be three in every year”.

The rules then proceed to enumerate the different vacations at the High Court at Mombasa and also by the other High Courts. Section 60(1) of the constitution of Kenya provides that there shall be a High Court. Section 60(2) enumerates who are considered as High Court Judges that is the Chief Justice and other number of judges, not less than eleven. The constitution does not state that the taxing officer is a High Court Judge. Accordingly when he sits in taxation he does not sit as a High Court judge. Accordingly the High court Vacation Rules do not apply to the taxing officer”.

Rule 3(1) and (2) of the High Court (Practice and Procedure) rules make it very clear that any party desiring to be entertain in a hearing or trial may apply to a judge for such trial or hearing to certified as urgent to be heard during vacation. Taxation is not a hearing or a trial. Indeed the

Black's Law Dictionary defines taxation as:-

“The Process of fixing the amount of litigation- related expenses that a prevailing party is entitled to be awarded.”

That being the definition I am of the considered view that taxation is not caught by the High Court vacation Rules.

Even if taxation was caught by those Rules Rule 3(3) provides that a registrar may entertain applications during vacation **“other than Summer Vacation in the Coast Province and in the Christmas Vacation elsewhere.”**

The preliminary objection was heard during Summer Vacation at High Court in Nyeri. It therefore follows that that rule did not apply.

I have considered the authorities cited by counsels in respect of this issue and I have found that they were not of an assistance to me on this issue. For example RE SHOWERING VINE PRODUCTS ETC (1968)3 ALLER 276 did not relate to taxation but rather to a petition under the companies Act of England. The petitioner's second application is by way of Notice of Motion dated 13th October 2008. It is brought under Order XLI Rule 4 Order XXI rule 22, Order L Rule 3 and 12 of The Civil Procedure Rules, Section 3A of the Civil Procedure Act and Rule 11 of The Advocates (Remuneration) order. The application seeks the followings prayers:-

3. *Execution of the order for costs herein be stayed pending the determination of appeal;*
4. *The taxing officer of this court do comply with Rule 11 of The Advocates (Remuneration) Order in response to notices given to him by the Advocates for the Petitioner;*
5. *That pending compliance with rule 11 aforesaid and the determination of reference thereof, if any, by a judge all further dealings with or incidental to the certificate of costs issued herein be stayed;*

Petitioners advocate however stated that prayer No. 4 and 5 had been spent and were not now being sought. The petitioner deponed in support that he has filed an appeal against this court's decision which dismissed his election petition. That following taxation of the respondent's bills of costs his advocate had requested the taxing master to give reasons of the said taxation for the purpose of filing a reference before a judge. It is now conceded by petitioner advocate that those reasons were supplied. The bills had been taxed at Kshs. 917,669 and the petitioner said that he is no longer a member of parliament and is not engaged in any income generating activities. He therefore stated that he would suffer serious financial hardship were the respondents to recover ksh.917,669 from him. The respondents in opposition to this application argued that the petitioner's application was incompetent because it relied on Civil Procedure Rules, High Court Vacation Rules and the Advocates (Remuneration) Order which were not applicable in view of the provisions or rule 18(7) of The National Assembly Elections (Election Petition) Rules. In support of that argument respondents relied on the case of NJAGI KANYUNGUTI & 4 OTHERS VS DAVID NJERU NJOGU NRB C.A.C.A NO. 181 OF 1994. In this case a party failed in an application where he had cited the wrong provisions of the law. Further the respondents argued that the appeal will not be rendered nugatory if stay is not granted. That the petitioner will not suffer substantial loss. Respondent in that regard relied on the case of JOHN GEOFFREY NGANGA VS RICHARD OTIENO KWACH HCCC NO. 311 OF (1996). The first respondent in his replying affidavit also stated that he earns kshs.700,000 net per month apart from other assets that he owned and he deponed that the petitioner would not suffer loss of the taxed costs if he succeeded in his pending appeal. Although the respondent stated that the petitioner had also made an application at the court of appeal for stay of execution, such an application was not annexed to the replying affidavit. I am there unable to confirm that. The only prayer that seeks the determination of this court is the one for stay of

execution of the taxed costs pending the determination of the appeal. I wish to state at the outset that the petitioner was in error in basing his application of 13th October 2008 on Civil Procedure Act and Rules. The costs were taxed under The Advocates (Remuneration) order under the advocates. That being so such costs can only be stayed under the provisions of the Advocate's Act. Under that order the only venue open to the petitioner once costs have been taxed is to file a reference before a Judge. The order does not provide for stay of execution. More over stay cannot be granted as sought by the petitioner because it is expected that a party who approaches the court with a matter would be prepared to pay costs awarded against him. He cannot be heard to plead his impecunuity. The cases that the petitioner relied upon to support his prayer were cases where the court granted stay of execution of a judgment, not stay of execution of taxed costs. Those cases were of no assistance to the petitioner. The 1st respondent has ably shown to the court that he will be in a position to refund the petitioner the taxed costs if the petitioner does succeed in his appeal. The petitioner's applications therefore dated 4th December 2008 fails. In the end the orders of this court are:-

1. That the petitioner's applications dated 13th October 2008 and 4th December 2008 are hereby dismissed with costs to all respondents.

MARY KASANGO

JUDGE

Dated and delivered this 9th day of June 2009.

M. S. A. MAKHANDIA

JUDGE