



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CIVIL CASE 49 OF 1997

ANDREW ACHOKI MOGAKA :::::::::::::::::::: PLAINTIFF

VERSUS

SAMSON NYAMBATI NYAMWEYA)

MARANGA NYASAE) :::::::::::::::::::: DEFENDANT.

R U L I N G.

The application before me was brought pursuant to Order 50 rule 17 of the Civil Procedure rules, as read together with sections 3, 3A and 63 (e) of the Civil Procedure Act.

It seeks to stay the execution of the warrants, which had been issued for the arrest of Alice Nyambati. It also seeks to set aside the taxation of the party and party costs together with all consequential orders arising therefrom.

The application also seeks the repeat of the exercise of survey and distribution of the assets of the partnership. And, finally, the applicant asks the court to award her the costs of the application.

According to the applicant, her advocates were not served with a notice indicating when the party and party costs were to be taxed. Her said advocates are the firm of Kasamani & Co. Advocates.

Mr. Charles Lutta Kasamani advocate did swear an affidavit to support the application, as did Alice Nyambati.

According to Mr. Kasamani, he did not attend the taxation because he had not been served with a notice to attend court. He also vehemently and categorically denied having ever given instructions to one Mr. Wafula Advocate, to attend the taxation on his behalf.

Therefore, the said Mr. Wafula was described by Mr. Kasamani as being a stranger, whose participation in the process of taxation deprived the exercise of any legality. It is for that reason that the applicant submitted that she had been condemned before being given an opportunity to be heard.

On her part, Alice Nyambati deponed that following the consent order recorded on 23/1/2007, the process of re-survey had already been carried out on the suit property. As the surveyor had complied with the terms of the consent order, the applicant believes that the issuance of warrants for her arrest, was improper.

Meanwhile, having learnt that Mr. Wafula Masiga had not been duly instructed by Ms. Kasamani & Co. Advocates to attend the taxation, Ms. Alice Nyambati did lodge a complaint, against the said gentleman, with the Complaints Commission. The said complaint is dated 1/3/2007.

As the verification report is said to have given to the 1st defendant 10 acres less than he was entitled to, the applicant submits that that calls for a proper survey to be carried out again, in the presence of all the parties. She believes that it is only if the survey was repeated, that each of the partners would get the 115 acres that they are entitled to.

In answer to the application, the plaintiff deponed that he was aware of the fact that on 9/10/2003, his Bill of Costs was taxed in the absence of Mr. Kasamani Advocate. However, he insists that Mr. Kasamani had been duly served.

The plaintiff makes the point that on 9/11/2004, he filed an application seeking orders to excise some 50 acres from the parcel allocated to the applicant, so that the same could be sold off in an endeavour to recover the plaintiff's taxed costs.

The 2nd defendant also filed a similar application against the 1st defendant.

The applications were consolidated, and were then argued on 23/6/2005. On that date, Mr. Masiga did hold brief for Mr. Kasamani, and he successfully opposed the consolidated application. In the circumstances, if the said Mr. Masiga is the same person as the Mr. Wafula Masiga who had held brief for Mr. Kasamani during the taxation, I believe that Mr. Kasamani would find it extremely difficult to persuade the court that he did not know him. Secondly, since the application in issue was flowing directly from the taxation process, one would have expected the 1st defendant to then have questioned the taxation first, rather than simply opposing the attempts at executing the certificates of taxation.

At the very latest; the 1st defendant became aware of the results of the taxations by 23/6/05.

In reality, the 1st defendant became aware of the taxation by 9/6/05, because on that date his advocate, Mr. Charles Lutta Kasamani, swore an affidavit in reply to the plaintiff's application dated 1/11/2004. By that replying affidavit, Mr. Kasamani stated, inter alia, that the 1st defendant had neither been served with the plaintiff's Bill of Costs nor invited to attend court for the taxation of the said Bill of Costs.

In that respect, the applicant's position, as regards non-service has been consistent. However, the plaintiff and the 2nd defendant fault the 1st defendant for not having challenged the taxation earlier than March, 2007.

The answer to that criticism is to be found from the 1st defendant's application dated 12/4/2006, through which his wife Alice Nyambati, asked the court to declare the 1st defendant to be a person of unsound mind who was therefore unfit to participate in the court proceedings.

On 27/10/2006 the advocates acting for the plaintiff and those acting for the 1st defendant filed a consent letter in court, appointing Alice Nyambati as the 1st defendant's guardian ad litem. That appointment was made because both parties were in agreement that the 1st defendant was of unsound mind and thus incapable of protecting his interests in the case.

That being the case, I find that it is a reasonable explanation for the delay in bringing an application to challenge the taxation of the plaintiff's Bill of Costs.

In the replying affidavit sworn by Mr. Jeremiah Onger Samba Advocate, he says that the 2nd defendant had not applied for execution against the 1st defendant. Therefore, in so far as the execution sought to be stayed is that which was instigated by the plaintiff, I hold that it is in the best interests of justice to stay it until the 1st defendant will have been afforded an opportunity to participate in the taxation of the plaintiff's Bill of Costs.

If the 1st defendant had intended to challenge the certificate of Taxation, the respondents contend that

he should have invoked the provisions of Rule 11 of the Advocates (Remuneration) Order. It was submitted that the 1st defendant should have raised an objection to the taxation, within 14 days. But, as there was no such an objection, the respondents submitted that the 1st defendant should have sought an extension of time within which to put forward an objection to the taxation.

It is the respondents' contention that the provisions of sections 3, 3A and 63 (e) of the Civil Procedure Act, and Order 50 rule 17 of the Civil Procedure rules were inapplicable to the reliefs sought in the application before me.

First, it is clear that the reliefs sought are not limited to the question of taxation. The reliefs include stay of execution and an order for survey to be carried out again. That being the position, I hold that the provisions of Rule 11 of the Advocates (Remuneration) Order would be wholly inadequate to address the reliefs sought.

Secondly, whenever there is an omnibus application, such as the one before me, it has been recognized and accepted that they ought to be brought by way of motion, pursuant to the provisions of Order 50 rule 1 of the Civil Procedure Rules.

In this case, the 1st defendant has invoked rule 17 of Order 50, because he contends that the taxation was conducted *ex parte*. And the respondent does accept the fact that the 1st defendant did not attend the taxation. Therefore, the 1st defendant cannot be faulted for invoking Order 50 rule 17 of the Civil Procedure Rules.

Rule 11 of the Advocates Remuneration Order provides as follows;

“(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.”

In my understanding, the said Rule 11 comes into play when a party objects to the decision of the taxing officer on one or more of the items on the Bill of Costs.

In this case, the 1st defendant is not just challenging the results of the taxation. He is saying that the whole process ought not to have been undertaken, as he had not been served with either the Bill of Costs or the notice for taxation. It is therefore my understanding that the application is outside the scope of Rule 11 of the Advocates Remuneration Order.

I am satisfied that by carrying out the taxation of the plaintiff's Bill *ex parte*, the learned taxing officer failed to give the 1st defendant an opportunity to be heard. That process was therefore a violation of the defendant's right to a hearing. Accordingly, I direct and do order that the proceedings of the taxation and any consequential orders arising therefrom be set aside.

In effect, the warrants for the arrest of the 1st defendant are hereby recalled and cancelled, as they emanate directly from the taxation process, which has been set aside.

Meanwhile, as regards the issue of survey of the suit property, the plaintiff has blamed the 1st defendant for refusing to pay his share of the surveyor's fees. That refusal is said to be frustrating the process of survey. However, the 1st defendant did tell the court that he was ready and willing to pay his share of the surveyor's fees.

As it is common ground that the exercise of survey was still incomplete, it is hereby ordered that each of the parties to this suit should pay their share of the surveyor's fees within the next 30 days. Within the same period of 30 days, the parties are to agree on the person who is to carry out the survey and also on the date when the survey is to be carried out. In default of payment of survey fees, the defaulting party

will have no right to be consulted by the others or by the surveyor, however, his share of the fees would be recoverable from him.

I also order that the taxation of the 2nd defendant's Bill of Costs be set aside. In so doing, I hold that it is more probable than not that Mr. Wafula Masiga advocate did not have the requisite instructions to hold brief for Kasamani & Co. Advocates. I say so because had he been duly instructed, Mr. Samba advocate, who says that he knows Mr. Masiga very well, would have easily got the said gentleman to swear an affidavit confirming that he had instructions to act for the 1st defendant, at the taxation.

As no such an affidavit is before court, I hold the view that even though it may appear that Mr. Wafula Masiga was instructed to hold brief for Mr. Kasamani, the deposition by Mr. Kasamani is uncontroverted. I therefore find no basis for arriving at the conclusion, such as the one Mr. Samba advocate did, that Mr. Kasamani was telling a lie, so as to assist the 1st defendant avoid his liability to pay costs.

It is to be borne in mind that the order for the payment of costs is still in force. Therefore, at the worst, the prejudice to be suffered by the respondents herein is only one of a temporary delay. That too, is one of the factors which I have taken into account in arriving at the orders made herein.

Finally, the costs of the application are awarded to the 1st defendant.

Dated and Delivered at Kitale this 15th day of October, 2007.

FRED A. OCHIENG.

JUDGE.