



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MACHAKOS

ELC. PETITION NO. 470 OF 2017

MWANGANGI MAKAU.....1ST PETITIONER
ZAKAYA KIMILI BEKE.....2ND PETITIONER
FRANCIS MUTISO MULATYA.....3RD PETITIONER
KENYA HUMAN RIGHTS COMMISSION.....4TH PETITIONER

VERSUS

COUNTY GOVERNMENT OF KITUI.....1ST RESPONDENT
THE ATTORNEY GENERAL.....2ND RESPONDENT
JULIUS MUMO THOMAS3RD RESPONDENT
JONATHAN MWANTHI THOMAS.....4TH RESPONDENT

RULING

1. In the Notice of Preliminary Objection dated 21st January, 2020, the 2nd, 3rd and 4th Petitioners (*the Petitioners*) averred that this court lacks jurisdiction to entertain the Bill of Costs as filed; that the Bill of Costs as filed is an abuse of the court process and that taxation proceedings cannot ensue without appropriate proceedings against the 1st Petitioner who is deceased.
2. The Petitioners finally averred that the firm of J.K. Mwalimu Advocates does not have instructions to file the Bill of Costs and that the firm of J.K. Mwalimu took over the conduct of the matter from the firm of Muinde and Company Advocates well after the Petition had been dismissed.
3. The Preliminary Objection proceeded by way of written submissions. The Petitioners' advocate did not file submissions.
4. In his submissions, the 1st, 3rd and 4th Respondents' advocate submitted that the Notice of Preliminary Objection by the Petitioners does not raise clear points of law and that the Preliminary Objection raises matters of evidence which require the court to ascertain certain facts.
5. It was the submissions of the Respondents that whether the 1st Petitioner is deceased or whether counsel for the 1st Petitioner has instructions to file the Bill of Costs are facts that must be ascertained by the court.
6. Counsel submitted that the Petitioners filed the Petition against the Respondents which was dismissed on 31st January, 2019; that the Petitioners filed an Application to reinstate the Petition which Application was dismissed with costs and that the Respondents' Bill of Costs is properly filed before this court.
7. The record shows that on 6th October, 2015, the Petitioners sued the Respondents vide a Petition dated 6th October, 2015. Alongside the said Petition, the Petitioners filed a Notice of Motion seeking for conservatory orders pending the hearing and determination of the Petition.
8. The firm of J.M. Muinde and Company advocates filed Grounds of Opposition and a Replying Affidavit on behalf of the 3rd and 4th Respondents. On 23rd March, 2019, the firm of J.K. Mwalimu and Company advocates filed a Notice of Change of Advocates to take over

the brief from the firm of J.M. Muinde and Company Advocates for the 3rd and 4th Respondents. All along, the firm of J.K. Mwalimu and Company advocates was on record for the 1st Respondent.

9. According to the record, this court dismissed the entire Petition on 31st January, 2019 for want of prosecution. The firm of J.K. Mwalimu and Company advocates came on record for the 3rd and 4th Respondents when the Petitioners' advocates filed the Application dated 6th February, 2019 to reinstate the suit.

10. Indeed, after filing the Notice of Change of Advocates on behalf of the 3rd and 4th Respondents, the firm of J.K. Mwalimu and Company Advocates filed Grounds of Opposition and a Replying Affidavit in Opposition to the Application dated 6th February, 2019. The said Application was dismissed with costs on 4th October, 2019.

11. The firm of J.K. Mwalimu and Company Advocates have filed the "1st, 3rd and 4th Respondents' Bill of Costs dated 4th November, 2019. In the Notice of Preliminary Objection, the Petitioners' Advocate has argued that the said Bill of Costs is invalid because the 1st Petitioner has since died; that the firm of J.K. Mwalimu and Company Advocates does not have instructions to file the Bill of Costs on behalf of the 1st Respondent and that the said firm took over the conduct of the matter after the Petition had already been dismissed.

12. A Preliminary Objection was defined in the case of *Mukisa Biscuits Company vs. West End Distributors Limited (1969) EA 696* at page 701 as follows:

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and occasion confuse the issues. This improper practice should stop."

13. Although the Petitioners have argued that the 1st Petitioner has since died, that allegation has to be ascertained. That being so, and in the absence of evidence that indeed the 1st Petitioner has died, and if so when, I find the objection to be unmeritorious.

14. The firm of J.K. Mwalimu has filed a Bill of Costs on behalf of the 1st Respondent. The 1st Respondent's advocate participated in the proceedings of 31st January, 2019 when the Petition was dismissed for want of prosecution. That being the case, it follows that the 1st Respondent's advocate had instructions to file the Bill of Costs on behalf of the 1st Respondent.

15. In any event, whether the 1st Respondent's advocate has instructions to pursue costs on behalf of the 1st Respondent is a fact that can only be ascertained by way of evidence, and not a Preliminary Objection. The Objection is therefore dismissed.

16. On the issue of whether the firm of J.K. Mwalimu and Company Advocates can represent the 3rd and 4th Respondents after the Petition has been dismissed, it is my finding that the said objection should have been raised when the said firm filed a Notice of Change of Advocates and before the Application dated 6th February, 2019 to reinstate the Petition was heard.

17. The Petitioners' advocate never raised the issue of the propriety of the firm of J.K. Mwalimu Advocates coming on record after the dismissal of the Petition. Having argued the Application for reinstatement of the suit, which was opposed by the firm of J.K. Mwalimu, the Petitioners' advocates acquiesced to the said representation.

18. The Petitioners cannot now oppose the Bill of Costs on the basis that the said firm came on record after the Petition had been dismissed. In my view, it is only the firm of J.M. Muinde and Company Advocates, which was on record on behalf of the 3rd and 4th Respondents from inception, that can raise the issue of who between the two firms is entitled to pursue costs on behalf of the 3rd and 4th Respondents, and not the Petitioners.

19. For those reasons, I find the Notice of Preliminary Objection dated 21st January, 2020 to be unmeritorious. The Notice of Preliminary Objection is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19TH DAY OF FEBRUARY, 2021.

O.A. ANGOTE

JUDGE