



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC NO. 820 OF 2017**

**KIMANI KABOGO.....PLAINTIFF/ APPLICANT**

**-VERSUS-**

**WILLIAM KABOGO GITAU.....DEFENDANT/RESPONDENT**

**RULING**

The Plaintiff herein **Kimani Kabogo**, filed this suit on **22<sup>nd</sup> December 2016**, against the Defendant and sought for inter alia indemnity against the Defendant out of breaches by the Defendant on his duties to the Plaintiff arising out of his position as proprietor in trust for himself, the Plaintiff and his family of **LR. No. 12825/27, 12825/33 and 12825/34**.

The Defendant filed his Defence on **17<sup>th</sup> March 2017**, and denied all the allegations made against him by the Plaintiff. He particularly denied the existence of any agreement to have the suit properties registered in his name to hold it in trust for himself and the Plaintiff as alleged.

On **19<sup>th</sup> October 2017**, the Plaintiff filed a Notice of Motion application under Certificate of Urgency and sought for prohibitory orders on the suit properties and an injunction orders against the Defendant. The said Notice of Motion application was objected by the Defendant who filed Grounds of Opposition on **14<sup>th</sup> December 2017**, and stated inter alia that the court has no jurisdiction to hear and determine the matter as the Plaintiff's claim is statute barred under provisions of **Section 4 of the Limitations of Actions Act. Cap 22 Laws of Kenya**. Further the Defendant also filed a Notice of Preliminary objection even dated.

The said Notice of Motion application and the Defendant's Grounds of Opposition and Preliminary objection gave rise to the Ruling of by this Court dated and delivered at Thika on the **10<sup>th</sup> of December 2018**, whereby the Court ruled that it had no jurisdiction to hear and determine the suit. The court found the Defendant/Objector's Grounds of opposition and the Preliminary Objection had merit and proceeded to strike out the Plaintiff's suit entirely for lack of jurisdiction with costs to the Defendant/objector. Having found that the court had no jurisdiction the entire suit and subsequent pleadings were struck out entirely with costs to the Defendant/Objector.

The Plaintiff herein being dissatisfied with the Ruling of the Court filed a Notice of Appeal on **17<sup>th</sup> December 2018**. On **18<sup>th</sup> January 2019**, the Defendant filed a Party and Party Bill of Costs dated **17<sup>th</sup> January 2019**. The said Bill of Costs was scheduled to be taxed on the **12<sup>th</sup> March, 2019**. However, on the **12<sup>th</sup> March, 2019**, the Plaintiff filed a Notice of Preliminary Objection to the Defendant's Bill of Costs.

The Notice of Preliminary objection to the Defendant's Bill of Costs was premised on the following grounds:-

- 1) That the costs should be confined to the preliminary objection as the court found that it has no jurisdiction.**
- 2) That the Defendant did not comply with Order 11 of the Civil Procure Rules and the case was not ready for hearing.**
- 3) That the pre-trial directions had not been taken and the Plaintiff has filed Civil Appeal No. 82 of 2019 which should be heard and determined before further steps are taken herein.**

The parties through their Advocates consented to canvass the Plaintiff's Notice of preliminary objection by way of written submissions.

The Plaintiff in his submissions filed by the Law Firm of **Njeru Nyaga and Company Advocates** on **13<sup>th</sup> September 2019**, submitted that the Plaintiff's Notice of Preliminary Objection is premised on the settled principle that once a court declares that it has no jurisdiction, it downs its tools instantly. He relied on the case of **Teresia Wairimu Kirima (Administrator of the Estate of G. K. Kirima – Deceased) ... Vs... Chairman, Rent Restriction Tribunal Nairobi & Another; Rose Muthoni & Another (Interested Parties) [2019] eKLR**, where the learned Judge could not award costs owing to the misdirection of the tribunal that had initially dealt with the matter. He guided parties that the Tribunal ought to vacate its subsisting orders and down its tools once it dispensed its primary role.

The Plaintiff submitted that the award of costs cannot therefore suffice in the instant case. He further submitted that the award of costs by the learned judge is an expansion of her mandate which is not justifiable in the circumstances. He urged the court to vacate the said order and dismiss the Defendant's Bill of Costs accordingly.

The Plaintiff further submitted that the Defendant had flaunted requirements of **Order 11 of the Civil Procedure Rules** and has turned to seeking costs even after their blatant refusal to comply with the said Order. The Plaintiff further submitted that the concept of unjust enrichment is an equitable one. The Plaintiff pleaded recognition by the eye of equity yet the Bill of Costs as filed is a veiled inequity. It was his submission that the Bill of Costs is untenable and the Defendant is seeking to unjustly enrich himself.

It was further submitted that pre-trial conferences and directions form the substratum of a matter, without it, a matter cannot proceed. Therefore, there is no basis for an award of costs for a matter where pre-trial directions were not given. It was the Plaintiff's further submissions that the award of costs has no basis as the directions had not been taken and indeed **Civil Appeal No. 82 of 2019**, should be heard and determined before further steps are taken.

The Defendant filed his submissions in opposition to the Plaintiff's preliminary objection on **18<sup>th</sup> November 2019**, through his Advocate **Messrs. Issa and Company Advocates**. The Defendant submitted that the preliminary objection raises three issues for determination:-

*i) What is the jurisdiction of the Deputy Registrar?*

*ii) Whether the Plaintiff is entitled to costs?*

*iii) Whether the taxation of the Defendant's bill of costs dated 17<sup>th</sup> January 2019 should await the determination of the Civil Appeal No. 82 of 2019.*

The Defendant submitted that **Regulation 10 of the Advocates Remuneration Order** empowers the Deputy Registrar with the jurisdiction to tax bill of costs as follows:-

*“The taxing officer for the taxation of bills under this Order shall be the registrar or district or deputy registrar of the High Court or, in the absence of a registrar, such other qualified as the chief justice may in writing appoint.”*

The Defendant submitted that the particulars of whether or not he is entitled to costs as contained in the Bill of Costs is for determination by the Deputy Registrar in line with **Regulations 10** of the **Advocates Remuneration Order**. The Defendant relied in the case of **Cecil G Miller t/a Miller & Company Advocates ...Vs...Parin Shariff & 3 others[2012] eKLR** where Justice Odunga held as follows;

*“However, it is trite that as a matter of good practice and prudence all matters ought to be filed at the lowest competent adjudicating body which can deal with issues in dispute. This practice is founded on the fact that a party should be given as much latitude as the law permits in challenging a decision. To deal with the matter at the higher echelons of judicial hierarchy, even if the higher court is clothed with jurisdiction may amount to denying a party the opportunity to object to the decision. In this case, if the High Court were to accommodate the said application, the opportunity to object to the decision which is available of the decision is made by the Deputy Registrar would be lost....Accordingly while not acceding to the objection raised, I, however decline to entertain the application and instead direct that the same be heard and determined by the Deputy Registrar under the provisions of paragraph 13A of the Advocates Remuneration Order.”*

It was the Defendant's submissions that the grounds raised in the preliminary objection in that regard amount to a response to the Bill of Costs which is well within the jurisdiction of the Deputy Registrar. The Defendant relied on the case of **Tom Ojienda & Associates ...Vs...Mumias Sugar Company Ltd [2018] eKLR**.

On the issue of the Defendant's costs, the Defendant submitted it is trite law that costs follow the event. The Defendant successfully had the suit struck off for want of jurisdiction on a preliminary point of law. It was his submission that the Defendant is therefore entitled to costs incurred up until the striking out. The Defendant quoted Lady Justice Nzioka in the case of **Muriuki Nguni -vs- Equity (K) Ltd [2018]** where the court stated;

*“However, in view of the fact that this claim was not fully canvassed in court, so as to determine which party would have been the successful, it is only fair and just that the Defendant be paid costs for defending the claim up to and including the date of withdrawal. In conclusion therefore, I find that the Plaintiff is entitled to costs in relation to prayer (a) of the Plaint, that is, from the date of filing of the suit until the date when the title was released, and the Defendant is entitled to costs from the date of entering appearance in this matter and defending the claim under prayer (b) of the Plaint until the time it was withdrawn.”*

The Defendant further submitted that lodging of an Appeal does not act as a stay of proceedings. The Defendant also submitted that it was incumbent on the Plaintiff to properly apply for stay of proceedings either under **Rule 5(2)(b)** of the **Court of Appeal Rules of Order 42 Rule 6** of the **Civil Procedure Rules** which the Plaintiff has not done and submitted that contention is a non-starter.

The Defendant urged the court to strike out the preliminary objection dated **11<sup>th</sup> March 2019**, as the same lacks merit and allow the Deputy Registrar to proceed with the taxation of the Defendant's Bill of Costs dated **17<sup>th</sup> July 2019**.

The court has now carefully considered the pleadings on record and the written submissions. The court too has considered the relevant provisions of the law and makes the following findings:-

It is not in doubt that on **10<sup>th</sup> December 2018**, the Court did deliver a Ruling herein it held that it had no jurisdiction to deal with the instant suit. Consequently the said suit was struck out entirely with costs to the Defendant/Objector. Immediately after the Ruling the Plaintiff/Applicant filed a Notice of Appeal on **17<sup>th</sup> December 2018**, and the Court issued the order on **19<sup>th</sup> December 2018**.

However, on **6<sup>th</sup> February 2019**, the Deputy Registrar issued a Notice of Taxation and informed the parties that the Defendant's Party & Party **Bill of Costs** would be taxed on **12<sup>th</sup> March 2019**. The said Defendants Party & Party Bill of costs had been filed on **18<sup>th</sup> January 2019**.

However, on the date of the hearing of the said Bill of costs, the Plaintiff filed a Notice of Preliminary Objection dated **11<sup>th</sup> March 2019**, which is the subject of this Ruling. Among the issues raised by the Plaintiff is that he has filed a **Civil Appeal No. 82 of 2019**, which should be heard and determined before further steps are taken herein. The defendant has vehemently opposed the instant Notice of Preliminary Objection.

In determining this instant Notice of Preliminary Objection, the Court will first consider what amounts to a **Preliminary Objection** and then juxtapose the said description herein and come up with a finding on whether what has been raised herein fits the said description. See the case of **Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696** where the Court held that;

***“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 had 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 not nothing but unnecessarily increase costs and, on occasion, confuse the issue. ”***

The same position was held in the case of **Nitin Properties Ltd ...Vs...Jagjit S. Kalsi & another Court of Appeal No. 132 of 1989[1995-1998] 2EA 257** where the Court held that;

***“A preliminary Objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of Judicial discretion.”***

Similarly in the case of **United Insurance Company LTD...Vs.. Scholastica A Odera Kisumu HCC Appeal No. 6 of 2005(2005) LLR 7396**, the Court held that;

***“ A preliminary Objection must be based on a point of law which is clear and beyond any doubt and Preliminary Objection which is based on facts which are disputed cannot be used to determine the whole matter as the facts must be precise and clear to enable the Court to say the facts are contested or disputed .”***

Therefore from the above holdings of the Courts, it is clear that a preliminary Objection must be raised on a pure point of law and no fact should be ascertained from elsewhere. See also the case of **In the matter of Siaya Resident Magistrate Court Kisumu HCC Misc. App No. 247 of 2003** where the Court held that;

***“A Preliminary Objection cannot be raised if any facts has to be ascertained.”***

Taking into account the above findings and holdings of various Courts on what amounts to a preliminary Objection, the Court now turns to the grounds raised by the Plaintiff herein.

Firstly the Plaintiff alleges that the costs should be confined to the Preliminary Objection as the Court found that it has no jurisdiction.

This Court finds that the above is not a pure point of law and should have been raised before the **taxing master** so that the said **taxing master** can ascertain the facts pleaded. The Plaintiff should only have come to this Court if dissatisfied with the finding of the taxing master. See the case of **Cecil G. Miller t/a Miller & Co Advocates...Vs... Parun Shariff & Others (2012) eKLR** where the Court held that

***“...It is trite that as a matter of good practice, all matters ought to be filed at the lowest competent adjudicating body which can deal with the issues in dispute.....this practice is founded on the fact that any party should be given as much latitude as the law permits in challenging a decision to deal with the matter at the higher echelons of Judicial hierarchy, even if the Higher Court is clothed with jurisdiction may amount to denying a party the opportunity to challenge a decision.”***

This Court finds that point **No. 1** as raised by the Plaintiff is not a pure point of law and should have been raised before the taxing master for determination before being raised in this Court.

On point **No. 2**, the Plaintiff has averred that the Defendant did not comply with **Order 11** of the **Civil Procedure Rules** and the case was not ready for a hearing. This too is not a pure point of law, but it is a point that calls for ascertainment of facts. Before arriving at a finding of whether **Order 11** was complied with, the Court will have to peruse the file and that amounts to ascertainment of facts. This is also an issue that ought to have been raised before the **taxing master** but not to be brought as a Preliminary Objection before this Court. The Role of a taxing master is defined by the Wikipedia as;

***“The Taxing master provides an independent and impartial process of assessment of legal costs, which endeavours to achieve a balance between the costs involved and the services rendered. The party seeking to have a bill of costs put before the Taxing***

**master, must lodge that bill with the Taxing master's office, together with a summons to tax and an order of the court/requisition to tax.”**

The 3<sup>rd</sup> point is that Pretrial Directions had not been taken and the Plaintiff has filed a **Civil Appeal No. 82 of 2019**, which should be heard and determined before any further steps are taken.

On the issue of Pretrial Directions, that too amounts to ascertainment of facts and should have been raised before the taxing master. Further the Plaintiff has alleged that he has filed **Civil Appeal 82 of 2019** and there should be no further steps taken until the appeal is heard and determined. It is not in doubt that the Plaintiff has filed the said referred appeal **No. 82 of 2019**. However, this Court will concur with the submissions made by the Defendant that lodging of an appeal does not act as a stay of proceedings. The Plaintiff has not sought for stay of this taxation proceedings. **Order 42 Rule 69** is very clear on this issue and its states as follows;

**“No appeal or second appeal shall operate as a stay of execution and proceedings under a decree or order appealed from except in so far as the Court appealed from may order.....”**

The Plaintiff has not sought for stay of taxation from this Court or even from the Court of appeal. Therefore the lodging of an Appeal in itself is not a stay of execution and this is not a pure point of law and consequently the Court finds that what the Plaintiff has raised does not amount to a Preliminary objection as stated in the **Mukisa Biscuit case**. The issue raised in this Preliminary Objection should be raised before the taxing master.

For the above reasons, the Court finds that the Notice of Preliminary Objection dated **11<sup>th</sup> March 2019**, as raised by the Plaintiff is not merited and the same is dismissed entirely with costs being in the cause.

*It is so ordered.*

**Dated, signed and Delivered at Thika this 7<sup>th</sup> day of May 2020.**

**L. GACHERU**

**JUDGE**

**7/5/2020**

**Jackline - Court Assistant.**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court

**By Consent of:-**

**Mr. Nyaga for the Plaintiff/Applicant**

**No appearance for the Defendant/Respondent**

**L. GACHERU**

**JUDGE**

**7/5/2020**