**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA IN BUSIA**

**ENVIRONMENT AND LAND COURT**

**JUDICIAL REVIEW NO. 1 OF 2016**

**REPUBLIC.....APPLICANT**

**VERSUS**

**1. CHIEF MAGISTRATE'S COURT AT BUSIA**

**2. CHARLES OPONDO OYENGA**

**3. HON. THE ATTORNEY GENERAL.....RESPONDENTS**

**EXPARTE**

**CHRISTOPHER JAKOYA ASIKA**

**R U L I N G**

1. There are two applications before me for determination; one dated 12/9/2017 and another dated 19/9/2017. This composite ruling is focused on them. The two were filed on 13/9/2017 and 21/9/2017 respectively. Both are post-judgement applications and relate to costs and/or execution.

**BACKGROUND**

2. This is a judicial review matter and the court delivered its judgement on 31/1/2017. The decision was in favour of Exparte Applicant – **CHRISTOPHER JAKOYA ASKIKA –** who is the respondent in the two applications. The aggrieved party was 2nd Respondent – **CHARLES OPONDO OYENGA –** and the two applications under consideration were made by his counsel on record **– FRANCIS OMONDI**.

3. It is clear that after the court delivered its judgement, the losing party decided to go on appeal. In the meantime, the other side decided to pursue the issue of costs. To that effect, Wanyama for the Exparte applicant filed a party and party bill of costs which the taxing master of the court assessed at Kshs.134,975/=.

4. Aggrieved, the 2nd respondent, through counsel, filed a notice of objection on 31/7/2017 intimating disagreement on assessment of most items and requiring that reasons for the assessment done be given. Thereafter, the first application, a summons in chambers which is essentially a reference, was filed under paragraph 11(2) of the Advocates (Remuneration) Order and Sections 3 and 3A of the Civil Procedure Act (cap 21, Laws of Kenya).

5. In the application, the 2nd Respondent's counsel is seeking the following orders:

(a) Spent

(b) There be a stay of execution of the taxing officer's decision made on 5/7/2017 pending the hearing and determination of this application and/or reference.

(c) The honourable court be pleased to set aside and/or vary the taxing officer's order on taxation made on 5/7/2017 on the respondents' party and party Bill of Costs lodged herein on 12/4/2017.

(d) Costs be provided for.

It is clear on the face of the application that counsel is objecting to the taxing officers award on instructions fees – which to him should be 28,000/= instead of the 100,000/= awarded – and is also taking issue with assessed sums in items Nos 3, 4, 5, 6, 7, 8, 9, 13, 14, 18, 21, 23, 24, 25 and 26. To counsel, the awards were either made in error or in contravention of the applicable law.

6. It would appear that the 2nd application was necessitated by developments initiated by the Ex-parte Applicant after the taxation of the bill of costs. It is obvious that the Exparte Applicant decided to proceed with execution to realise the taxed costs. The 2nd application was meant to arrest that move and the following orders were asked for:

> (a) The honourable court be pleased to set aside the execution proceedings commenced herein against 2nd respondent and the warrants of attachment and sale issued in the said proceedings be recalled and nullified.
>
> (b) The Exparte Applicant be condemned to pay auctioneers charges, if any, incurred in the execution of the nullified warrants.
>
> (c) Costs of this application be borne by the Exparte Applicant.

7. The application was anchored on the grounds that the execution was premature as warrants of attachment and sale were issued before a decree was drawn, which made the exercise null and void.

8. The Exparte Applicant responded in two ways: vide grounds of opposition dated 20/9/2018 and a replying affidavit of even date. The replying affidavit focused on the first application while the grounds of opposition addressed the second.

9. As regards the first application, counsel for Exparte Applicant deposed, *interalia*, that the application is incurably incompetent; that the stay already granted is unlawful; that as counsel for Exparte Applicant, he informed counsel on the other side of the date of taxation and being so informed, counsel on the other side made submissions after which taxation was done; that counsel on the other side then sought time to consult with client with a view of settling the taxed sum; that instead of settlement, what followed was a notice of objection and the first application; and that contrary to averments of the counsel on the other side, reasons for taxation of the disputed items were indeed furnished as asked for in the notice of objection.

10. Some of the other depositions relate to antecedents and history surrounding the matter, with Exparte Applicant's counsel pointing out how and when the matter started, how he came on record, the processes that attended the matter, and eventually the justification for using the latest remuneration order to tax the bill. The counsel was categorical that leave to file the matter was granted in 2016 and thereafter the application for review was filed. He wondered why the 2009 remuneration order should be used instead of the 2014 one, which is now applying. To the counsel, the bill was properly and lawfully taxed.

11. Regarding the 2nd application, counsel for Exparte Applicant filed grounds of opposition. He pointed out that the application lacks merit, is aimed at causing delay, and that the application is misconceived owing to the applicant's failure to comprehend properly the nature of the proceedings.

**SUBMISSIONS**

12. The application was canvassed by way of written submissions. The applicant's submissions were filed on 3/10/2017. Counsel for applicant submitted, *interalia*, that the taxing officer never gave reasons as required by law when objection was raised as to sums awarded during taxation. He pointed out that he got a response that adopted the descriptive or explanatory notes in her ruling during taxation as her reasons. That, counsel submitted, does not amount to compliance since such descriptive or explanatory notes would have been seen by the person raising the objection even before raising it in the first place.

13. Counsel went further and hypothesised that even assuming the response given constituted the reasons asked for, then the award of 100,000/= as instruction fee, for instance, was wrong as the law, which he pointed out to be the 2009 Advocates Remuneration Order, provides for 28,000/=. And even if one were to go by the current 2014 remuneration order, only 45,000/= is provided for. For the proposition that the taxing officer did not comply with the law, the court was offered the decided case of **PAUL GICHERU T/A GICHERU & CO. ADVOCATES Vs KARAGU (K) CONSTRUCITON COMPANY LTD: HCC Misc. Civil Application No. 124/07, ELDORET** for guidance.

14. Counsel also expressed misgivings concerning other awards. He pointed out items 12 and 13 for instance. He said that item 12 was treated as an item for service instead of attendance while the date of 21/6/2016 on which the award of the two items was pegged shows adjournment being caused by the Exparte Applicant (Respondent in the applications), not the applicant (who is 2nd respondent in the matter). Such awards were therefore not due to him.

15. Other items were also faulted for awards made on assumptions of wrong distance covered or lacking proper invoices or receipts as a necessary backup (see item 14). Still others (see item 18) were excessively awarded, some by more than double (shs.1,100/= instead of 540), while some seemed fictional or presumptive (item No. 21 – where award was made for bill not yet drawn or filed). Others, like items 30 and 33, were said not to be provided for.

16. The cumulative thrust of the submissions regarding the first application is that the taxing officer fell into error and ended up awarding an exorbitant final sum. Counsel for the applicant craved to have the taxation set aside or that at least some intervention be made.

17. As regards the second application, Omondi for applicant submitted that extraction of a decree or order in a given case is a mandatory pre-requisite to commencement of taxation process and where, as in this case, no such decree or order has been extracted, any taxation done is null and void. To buttress his position, Omondi availed the decided cases of **NATIONAL BANK OF KENYA Vs GILBERT NICHOLAS**

**OMBONGI & Another: HCC NO. 28/1997, ELDORET** and **KIARIE KARIUKI Vs WANJIKU KIHARA: HCC MISC CIVIL CAUSE NO. 43 of 1997, MOMBASA.**

18. The respondents' submissions were filed on 19/7/2017. Wanyama for respondent started by taking issue with the order of stay granted when the first application was filed. To him, a reference is like an appeal and a person seeking stay should satisfy the same criteria applied while granting such orders in appeals. The applicant is said not to have met this requirement and the court was told to vacate the order in the circumstances. The decided cases of **FRANCIS MASUNI KYANGANGU Vs BARNES MWEMA [2017] eKLR** and **FRANCIS KABAA Vs NANCY WAMBUI [1996] eKLR** were availed for guidance on the issue.

19. Counsel then proceeded to submit that the application for reference was incompetent as it was filed out of time and no leave of court was sought to file it. According to respondents counsel, the applicants counsel wasted time and failed to act timeously. The letter relating to reasons the counsel had asked for was said to have been written on 24/8/2017 while the reference was filed on 13/9/2017, some 19 days later. The law requires 14 days, not 19, and the reference, submitted Wanyama, was filed out of time. Wanyama pooh-poohed the date of 8/9/2017 mentioned by applicant's counsel as to when the taxing officer's letter was received, saying that such date was conveniently mentioned to purport to bring the filing of reference within time. To Wanyama, counsel should have sought leave of court as provided for in paragraph 11(4) of the Advocates Remuneration Order.

20. As a legal anchor to the need for leave from a jurisprudential standpoint, Wanyama availed the decided cases of **VISHISHT TALWAR Vs ANTONY THUO T/A THUO KANAI ADVOCATES [2014] eKLR, IN RE THE ESTATE OF GERALD KAMAU [2014] eKLR and MUTUKU MUTINGA & Another Vs JORETH LTD & 2 others: [2017] eKLR**. The court was told to dismiss the reference on this ground.

21. Wanyama also defended the taxing officer on allegations of failing to give reasons as required. It would be wrong, submitted Wanyama, to assert that taxation was not done in accordance with the law merely because detailed reasons were not given by the taxing officer. The taxing officer, it was averred, was exercising her discretion as she had always done. Moreover, pointed Wanyama, it was not demonstrated that the sums awarded were excessive in the circumstances or that the relevant law was not followed during the exercise. The case of **KORIR, KITOO & KIARA ADVOCATES Vs DEPOSIT PROJECTION UND [2005] eKLR** was cited to shed light on the issue.

22. On allegations that the award of Kshs.100,000 as instruction fee was excessive and/or erroneous, Wanyama averred that the applicable law was schedule VI paragraph J(II) of the Advocates (Remuneration) Amendment order, 2014, which allows for such an award. The law sought to be relied on by the applicants counsel was said to be obsolete. This matter was also said to be one of remarkable complexity given the various legal stages and processes it has undergone. Further, Wanyama asked the court to note that no error or shortcoming has been shown in taxation of items 3, 4, 5, 6, 7, 8, 9, 13, 14, 18, 21, 23, 25 and 26. The sums awarded were said to be modest and the taxing officer's discretion in awarding these items therefore cannot be faulted.

23. On the 2nd application, Wanyama submitted, *interalia*, that it is frivolous and lacks merit. There was, said Wanyama, nothing warranting the drawing of a decree. There was nothing to execute, the tribunal's award having been quashed. To counsel what remained only related to costs and had a decree even been drawn, it would not have conclusively provided for costs. Counsel opined that a certificate of cots is the proper and final document. The execution process was said to have been properly carried out upon provision of certificate of costs after taxation.

24. It appears to be Wanyama's position that a decree would be required to precede taxation of Advocate/client's bill of costs. That does not apply here, the issue at hand being one relating to party and party costs. All the cases cited by the applicant to support the need for extraction of decree first were said to relate to Advocate/client bill of costs. They were also said to be misleading regarding the issue at hand as they do not apply.

25. The respondent sees the second application as part of a scheme to frustrate execution by mounting un-necessary applications to buy time. The court was asked to dismiss the application.

26. I have considered the two applications, the responses made, and the rival submissions on each. It is necessary to begin with the first application. It is clear that the applicant's beef with the taxation that was done was that the remuneration order was not followed. And because of that some awards were made in error or in violation of law. But the respondent took a contrary view. To the respondent, the awards made were lawful, being the result of proper exercise of discretion as stipulated by law.

27. Differences of opinion regarding taxation started right from item one in the bill of costs. That item related to instruction fee, with the respondent asking for 100,000/= while the applicant, vide pre-taxation submissions dated 6/62017, seemed to give a concession of 28,000/=, arguing that that is what the applicable remuneration order – Advocates Remuneration Order 2009 – provided.

28. We need to look at that law. And the relevant provision is to be found in schedule VI, (J) which relates to prerogative orders. The provision reads as follows:

> **(J) Prerogative Orders –**
>
> **To present or oppose an application for a prerogative order; such sum as may be reasonable but not less than 28,000/=.**

To my mind, the provision allows the taxing officer to award any reasonable amount provided the amount is not less than 28,000/=. It is therefore a misapprehension of the law to posit that what is allowed is 28,000/=. What was awarded was Kshs.100,000/=. That award is not less than 28,000/= and is therefore within the law. Anyone wishing to contest it can only successfully do so by showing it was not reasonable.

29. In the submissions of the applicant's counsel for this application, an error was made. To counsel, 28,000/= is what is provided for. It bears repeating that what is provided for is any reasonable amount, which should not be less than 28,000/=. I think it is crystal clear; the amount of Kshs.28,000/= is not an award in the Remuneration Order. It is simply an amount below which the taxing officer cannot go. The award, to use the very words used, is **"such sum as may be reasonable".** And what is reasonable in my view depends on the circumstances of each case.

30. But the applicant's counsel seems aware that a higher award can be made. But this, he submitted, must be done having regard to **"the nature and importance of the matter, amount involved, interest of the parties or direction of the judge".** To counsel however, **"This was an ordinary judicial review cause that did not admit consideration of the foregoing variables".** To him therefore **"there was no justification to escalate the instructions fees from the basic sum of Ksh.28,000/= to Ksh.100,000".**

31. But what is the view of the respondents counsel? To him **"the matter was complex as it required amendment of pleadings and substitution of the deceased Exparte Applicant".** And also because even after leave to institute proceedings was granted, the applicant **"vigorously and freely pressed ahead with technical objections to the already granted leave application"** and it would therefore be pretentious on the part of the applicant's counsel **"to claim that the matter was a simple one".** Furthermore, submitted counsel, **"the size of the judgement given by the court exhibits a serious contest".**

32. Court's view? It is very clear to me that this was not the usual run-of-the mill judicial review matter. The circumstances attending or surrounding it and the decidedly technical approach taken by the applicant counsel in handling the issues arising made it reasonably complex. I need not regurgate the issues or the circumstances here. They are all there in the judgement. But to drive my point home, I would need to point out that in an ordinary judicial review matter, the provisions for judicial review contained in the Law Reform Act (cap 26) and order 53 of Civil Procedure Rules, are normally enough.

33. In this particular matter, the usual applicable law was not enough. The circumstances surrounding the matter and the technical objections raised by the applicant impelled the court to look up for other relevant law. To make sure that technical issues of procedural nature did not impede the overriding need to arrive at ultimate justice, the court had to have recourse to the Constitution of Kenya, 2010, and the Environment and Land Court Act, both of which have provisions granting empowerment to overcome inhibiting procedural concerns. I am therefore in agreement with the respondents counsel when he says that the matter was not ordinary. And I think the matter deserved more award than the minimum allowed by law. It required reaching out further for other enabling law to overcome the time-tight schedules within which events and processes in judicial review matters are supposed to happen. And that required grit and expertise.

34. The applicant's counsel also complained that the taxing officer failed to offer post-objection reasons as required by law. In the alternative, such of them as were given could not constitute reasons and/or were completely inadequate. It is necessary to appreciate that before taxation, the applicant's counsel had filed submissions in writing. Taxation then took place and the taxing officer gave a short ruling. When objection was later raised and reasons were asked for, the taxing officer communicated through a letter saying that her earlier ruling contained her reasons. From a purely legal and procedural perspective, the taxing cannot be accused of non-compliance. She responded to the request for reasons pointing out where the reasons could be found. One may have reservations about the brevity and lack of detail in her ruling but these are her reasons, which should be accepted as such.

35. Counsel also objected to various amounts awarded on several items. An example of this concerns items 12 and 13 where the taxing officer awarded Ksh.1,400 for each. Counsel alleged that the amounts awarded were for service. He faulted the award for item 12 saying it was for attendance, not service. It was counsel further argument that the date shown – 21/6/2016 – shows it is the Exparte Applicant who caused adjournment and he should not therefore have been awarded anything. Counsel went on like that, finding fault with awards made for various other items.

36. A question that comes to mind is this: Did counsel raise all these issues before the taxing officer? It seems clear to me that he did not, and where he touched on some items now disputed here, he submitted differently. Take for example item No. 12. At paragraph 5 of counsel pre-taxation submissions dated 6/6/2017 counsel submitted that that item together with item No. 17 should be billed at 1,100/=. What this means is that the attention of the taxing officer was never drawn to the averment made in the submissions now before me that item No. 12 was for attendance. In the pre-taxation submissions too, item No. 12 does not seem to be disputed. Counsel merely gives suggestion as to how it should be billed.

37. A cardinal consideration when a matter for taxed costs escalates to the judge is whether the issues disputed were raised before the taxing officer. If they were not, it becomes unacceptable to fault the taxing officer over issues not raised during taxation. And what the counsel did regarding item No. 12 and 13 is something repeated concerning various other items.

38. It is important to realise that submissions of the applicant's counsel both during pre-taxation and post-taxation stages were largely focused on the amounts awarded. Such focus is generally proper at the taxation stage. It is at that stage when both sides should try to persuade the taxing officer as to the amounts to be awarded or rejected. But when the matter escalates to the superior court, the game changes and counsel seems not to realise this. At this stage, you focus on principle, not amount.

39. The law is clear: Taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on what is presented before the taxing officer. When the matter therefore escalates to the judge, one should not expect the judge to have a marking scheme for mathematics to check what the taxing officer had done. And the judge will not interfere with what the taxing officer had done merely because he thinks the amounts awarded are somewhat too low or too high. He only interferes when it becomes apparent that the taxing officer erred in principle. Taxation is always an exercise of discretion and no judge is ever too quick to interfere with such exercise unless the imperatives of justice clearly demand it.

40. In this matter, I am not convinced that I should interfere. And I take this position because the submissions before me are misleading in various vital areas. It is probably important to point out some shortcomings: According to the applicant's counsel, the award on quantum should be 28,000/= because, said he, that is what the 2009 Advocates Remuneration order provides. Right? Completely wrong! The relevant

provision is in Schedule VI and provides for an award of NOT LESS than 28,000/=, meaning that more can be awarded in a deserving case. Besides, before the guidelines containing various amounts are given, the following guiding instructions appear **"The fee for instructions in suits shall be as follows, unless the taxing officer in his discretion shall increase or (unless otherwise provided) reduce it".** Isn't clear? The taxing officer has discretion to increase or reduce the amounts given as guidelines.

41. But I may even go further. The law applied to reviews on taxation for instruction fees was succinctly and tersely laid down in the old case of **WHITE Vs ALTRINCHAM URBAN DISTRICT COUNCIL [1936] / ALL ER 931, 932** as follows:

> **"On questions of quantum the decision of the taxing officer is generally speaking final. It must be a very exceptional case in which the court will even listen to an application to review his decision. In questions of quantum, the judge is not nearly as competent as the taxing officer to say what is the proper amount to be allowed; the court will not interfere unless the taxing master is shown to have gone wholly wrong".**

42. In this particular matter, the taxing officer awarded 100,000/= as instruction fee. As pointed out earlier, it should have been 28,000/= according to the applicant's counsel. Sample this: The figure of 28,000/= is suggested as a minimum in the 2009 Advocates Remuneration Order. In the year 2014, that figure had ceased to make any economic sense and a minimum figure of 45,000/= replaced it. Counsel for the Exparte Applicant is asking for his fees now – Year 2018. The matter is one of considerable complexity. And counsel for the applicant thinks 28,000/= is enough. I disagree.

43. When faced with a situation like this, I always bear in mind that the general level of remuneration of advocates should be good enough to attract worthy recruits to a very honourable profession. I therefore feel abit concerned where a counsel, in the name of serving his client, suggests a pauperising pittance as instruction fee for a fellow counsel. Exorbitant fees should be discouraged but beggary and pauperism should also not be an advocate's portion in life. I consider that the 100,000/= awarded by the taxing officer in this matter is a decent sum, given the current financial and economic realities.

44. It was also submitted that costs should start running when the substantive application in judicial review proceedings are filed. In other words, they should not start running when the application for leave is made. The reasons for this were stated to be that proceedings at the leave stage are generally exparte and that in any case, such proceedings are separate. I would say that it is not very much so. Consider this: A judicial review matter goes through two basic stages – the leave stage and the substantive hearing stage. The legally allowed documents for use – the statement and verifying affidavit – are introduced at the leave stage. In simple terms, the statement containing the relief sought, the grounds in support of the relief, and the affidavit containing verifying facts are all availed at the commencement of the proceedings when a party is asking for leave.

45. These same documents are expressly stated to be the same ones to be used in the second stage. The leave stage is also called the threshold or sieve stage. And it is so called because the court is enabled to have a preliminary view of the possible merits of the matter. Strictly speaking therefore, the leave stage is not a separate stage. It is a preliminary stage of the same proceedings. It is also the stage at which the Exparte Applicant's Locus Standi is made clear. There is therefore no total separation.

46. Let's now consider the issue of costs relating to the documents already mentioned. When counsel or a party is asking for such costs, particularly as regards perusal and drafting, would he have to refer to the documents as relating to the 1st or 2nd stage? Obviously, he would have to refer to the dates when they were drafted or drawn and these dates would fall to the leave stage. And that is why it becomes difficult to treat the leave stage completely as a separate stage. Both substantive and procedural law connects these two stages directly. In practise also, only one bill of costs is drawn for the whole suit. Counsel for the applicant is therefore not right on this issue.

47. Counsel for the applicant ultimately submitted **"that the taxing officer fell into grave error while taxing the bill and awarded the Exparte Applicant an exorbitant sum".** He asked that his application be allowed. Counsel for respondent (Exparte Applicant) on the other hand submitted that **"there is no error in principle. The sum awarded remained modest and cannot be held to be manifestly excessive as to distort the costs that the Exparte Applicant was entitled to".** In light of the various positions I have espoused in this ruling, it is obvious that I agree with counsel for the respondent. I therefore find the first application unmeritorious and dismiss it with costs.

48. I now turn to the second application. It is premised on the fact that no decree was drawn before warrants of attachment and sale were issued. According to the applicant's counsel, a decree should have been drawn as envisaged under Order 21 Rule 8 of the Civil Procedure Rules. Some decided cases stated elsewhere in this ruling were availed to buttress the position. It is true that the two cases availed embrace that position. Counsel asked the court to allow the application herein as no decree had been extracted. Counsel for the respondent on the other hand submitted that no decree required to be drawn in this matter as there was nothing to execute. He went on to submit that a certificate of costs is a proper and final document on which to anchor execution process.

49. It is necessary here to look at the law. Counsel for the applicant referred to Order 21, rule 8 of Civil Procedure Rules. Rule 8 has seven sub-rules. I will only set out subrule 1 and 2 to make my point. The other subrules will not be quoted as they have no bearing at all on the issue at hand. Here are the two first subrules:

> **1) A decree shall bear the date of the day on which the judgement was delivered**
>
> **2) Any party in a suit MAY prepare a draft decree and submit it for approval of the other parties to the suit, who shall approve it with or without amendment, or reject it, without undue delay; and if the draft is approved by the parties, it shall be submitted to the registrar who, if satisfied that it is drawn up in accordance with the judgement shall sign and seal the decree accordingly.**

50. From the forgoing, and more particularly if one looks at subrule 2, it is plain that it is not mandatorily required that a decree be drawn. The operative word is the optional "MAY" instead of the compelling "SHALL". In my view, counsel for the applicant should have gone

further and looked at order 21 Rule 9 which clearly anticipates situations where a decree is not drawn. It is necessary to set out the provisions of the rule:

> **(1) Where the amount of Costs has been:**
>
> **(a) agreed between the parties;**
>
> **(b) fixed by the judge or magistrate before the decree is drawn**
>
> **(c) certified by the registrar under Section 68A of the Advocates (Remuneration) Order; or**
>
> **(d) taxed by the court, the amount of Costs may be stated in the decree or order.**
>
> **(2) In all other cases, and where Costs have not been stated in the decree or order in accordance with sub-rule (1) after the amount of the Costs has been taxed or otherwise ascertained, it shall be stated in a separate certificate to be signed by a taxing officer, or, in a subordinate court, by the magistrate.**
>
> **(3) In this rule, "taxing officer" means taxing officer qualified under paragraph 10 of the Advocates (Remuneration) Order.**

51. It is clear then from a combined reading of Order 21 rules 8 and 9 that the drawing of a decree is not a mandatory requirement. The language of rule 8 subrule (2) infact makes it optional. A reading of order 9 sub-rule 1 merely directs that costs may be included in a decree or order where one has been drawn. And sub-rule 2 is even clearer. It starts with the expression **"In all other cases",** meaning cases where no decree or order has been drawn. It continues to make it mandatory to state costs **"In a separate certificate to be signed by the taxing officer…".** So it is a certificate of costs, not a decree or order, that is made mandatory by the Law.

52. If the applicant's counsel thought that a decree must be drawn, then he is wrong. The law does not make it mandatory and infact even envisages a situation where there is no decree or order. In this regard therefore, I am constrained to observe that the positions espoused in the cases availed by the applicant's counsel do not reflect the true legal position. And as counsel had made the issue of lack of decree the premise of his application, then it is obvious that the application is based on erroneous legal premise. It cannot therefore stand.

53. In light of all this, and having regard to what each side submitted, the second application cannot stand. I therefore find it unmeritorious and dismiss it with costs.

**Dated, signed and delivered at Busia this 4th day of October, 2018.**

**A. K. KANIARU**

**JUDGE**

**<u>In the Presence of</u>:**

Applicant: ……..……..……..……..…..……

1st Respondent: ……..……..……..……..……

2nd Respondent: ……..……..……..……..……

3rd Respondent: ……..……..……..……..……

Counsel of Applicant: ……..……..……..……

Counsel of Respondents: ……..……..……..…..……

Exparte Applicant ……..