



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 63 OF 2013**

**WILSON KIPRONO TUEL.....1<sup>ST</sup> PLAINTIFF**

**BETTY NGENY.....2<sup>ND</sup> PLAINTIFF**

**HELLEN NGENY.....3<sup>RD</sup> PLAINTIFF**

**DANIEL TUEL.....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**SAMWEL CHELULE RODAH CHERPTICH KOECH)**

**( Sued as Administrators of the Estate of Cheruiyot Arap Koech)-.....DEFENDANT**

**RULING**

***(Application seeking to make a reference on taxation of a bill of costs out of time; bill of costs filed and a preliminary objection raised and heard; no ruling on preliminary objection delivered but instead whole bill taxed in absence of counsel; taxation set aside; bill remitted to taxing master to first make a ruling on the preliminary objection).***

1. The application before me is that dated 12 June 2018 filed by the plaintiffs. The principal order sought is for this court to enlarge the time within which to file a reference against the decision of the taxing officer, delivered on 9 June 2017. The application is founded upon the grounds inter alia that the advocates then on record for the applicants did not advise them of the outcome of the taxation proceedings and that the fees awarded after taxation, were exaggerated.

2. The supporting affidavit is sworn by Mr. Daniel Tuel, the 4<sup>th</sup> plaintiff/applicant. He has deposed that they instructed the law firm of M/s Odhiambo & Odhiambo Advocates to file this suit on their behalf. It is averred that the 1<sup>st</sup> plaintiff, who is their father, died on 5 August 2014. The case of the other plaintiffs was dismissed on 18 February 2015 for non-attendance, which he states was due to no fault of their own, as their counsel on record advised them not to attend court. He has stated that the bill of costs filed by the defendant was not brought to their attention until a letter dated 20 March 2018 was sent to him by their erstwhile counsel alongside a party & party bill of costs. He has averred that the impression he got was that the case was still ongoing as counsel wanted a further deposit of legal fees of Kshs. 300,000/=. He has averred that he has now come to learn that the bill of costs was taxed and a ruling delivered on 9 June 2017, without their knowledge. Pursuant to the taxation, a proclamation of their goods was made which then prompted them to come to court.

3. The defendant/respondent has filed grounds of opposition to oppose the motion. It is contended inter alia that there is inordinate delay in filing this motion and that the applicants have been indolent. It is further argued that no notification as envisaged under Rule 11 (1) of the Advocates (Remuneration) Order has been shown, and that they should file a proper reference as envisaged under Rule 11(2) and (3) of the Advocates (Remuneration) Order.

4. In her brief submissions, Mrs. Karen Wanderi, learned counsel for the applicants, who took over the matter from M/s Odhiambo & Odhiambo Advocates, submitted inter alia that the fault was of the applicant's erstwhile advocates, who she claims were dishonest, and the same should not be visited upon the applicants.

5. I have gone through the record of this suit. The case itself was commenced through an Originating Summons which was filed on 7 August 2009 through the law firm of M/s Odhiambo & Odhiambo Advocates. The four claimants asserted that they were entitled to the land parcel LR No. 5438/2 by way of adverse possession. The suit was defended and eventually came up for hearing on 18 February 2015. On that day, none of the plaintiffs attended court and the suit was dismissed for non-attendance. A Party & Party bill of costs was filed on 6 February

2017 by the respondent who billed the sum of Kshs. 3, 533,544.00/= on the basis of a valuation report which showed that the suit property was worth in excess of Kshs. 181,000,000/=. The bill was placed before the taxing master, Hon. Mose, on 3 April 2017, with Mr. Magata being present for the successful defendant, and Mr. Aim of the law firm of M/s Odhiambo & Odhiambo Advocates also being present for the applicants. Mr. Aim raised a preliminary objection to the effect that the defendant could not introduce a valuation report at this stage of the proceedings. This preliminary objection was argued on that day and on 16 May 2017 and ruling reserved for 9 June 2017. The ruling was not delivered on 9 June 2017 and indeed I have no record that the matter ever went to court on that day. What happened thereafter is that a ruling on the whole bill, not the preliminary objection, was delivered on 18 January 2018. There is absolutely no evidence that counsel on record were ever notified of the delivery of the ruling. I believe counsel then on record for the applicant, expected that there will first be a ruling on the preliminary objection, then depending on the outcome of that ruling, the taxation of the bill to proceed inter partes. This was not done.

6. Although this application is brought pursuant to Rule 11 of the Advocates (Remuneration) Order, which inter alia directs a party who is objecting to the decision of the taxing officer to file a reference within 14 days, to me, this is a matter that requires the intervention of this court, pursuant to its inherent jurisdiction to do justice, under Section 3A of the Civil Procedure Act, Cap 21, Laws of Kenya, which provides as follows :-

*3A. Saving of inherent powers of court.*

*Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.*

7. Ordinarily, a reference under Rule 11, would be made where the taxation has proceeded smoothly without there being procedural issues. But in an instance where a taxation was done irregularly, without the other party being informed, this court cannot sit on its hands but must ensure that justice is done by the taxation being conducted in accordance with proper procedure. What the court ought to have done was to make a ruling on the preliminary objection before proceeding to tax the bill of costs. The applicant herein was never informed of the outcome of the preliminary objection and I have no record that the taxation of the bill of costs proceeded inter partes. No party should be condemned without being given an opportunity to be heard, which is exactly what happened in this case.

8. I have no option but to set aside the ruling of the taxing officer made on 18 January 2018 and also set aside the certificate of costs dated 30 January 2018. Instead, I direct the taxing officer to first make a ruling on the preliminary objection raised, and after making the ruling, proceed to tax the bill of costs inter partes.

9. The problem herein was not that of the parties, and I therefore make no orders as to the costs of this application. The applicant should not also be condemned to pay the auctioneers' costs. I direct that the auctioneer, who may have acted in good faith, be reimbursed by the defendant/respondent, any out of pocket expenses that he may have incurred, but not any other fees.

10. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 4<sup>th</sup> day of October 2018.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of: -**

Mr. Machage holding brief for Mrs. Karen Wanderi for the applicants.

Mr. Magata for the respondent.

Court Assistants: Nelima Janepher

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**