



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT KERICHO**

**ELC CASE NO 116 OF 2017**

**JOHN KIBET ROTICH.....PLAINTIFF/APPLICANT**

**VERSUS**

**ELIJAH KIBET SIELE.....DEFENDANT/RESPONDENT**

**RULING**

1. Vide an application dated the 23<sup>rd</sup> January 2020, brought pursuant to the provisions of Order 42 and Section (sic) 25 Rule 4 of the Civil Procedure Rules, Section 1A, 1B, 3 and 3A Civil Procedure Act, and Article 50,159(2)(d) (sic) and all other enabling provisions of the law, the Applicant herein seeks for a myriad of orders to wit; the reinstatement of the matter struck out on the 13<sup>th</sup> July 2018, the setting aside of the taxing officer's decision of 13<sup>th</sup> June 2018 and 4<sup>th</sup> December 2019 as well as all other taxation orders. The Applicant also seeks for an order of stay of execution of the rulings dated 13<sup>th</sup> June 2018 and 4<sup>th</sup> December 2019 and other related rulings thereto as well as costs of the application.

2. The said Notice of Motion was opposed by the Respondent through his Replying Affidavit sworn on 25<sup>th</sup> February 2020 to the effect that the application was incompetent, fatally defective, vexatious and an abuse of the court process with no legal backing for reasons that the Plaintiff's a suit was struck, for his failure to comply with the orders of the honorable court issued on 13<sup>th</sup> June 2018 and therefore in essence the application seeks that the court hears an Appeal of its own decision.

3. By consent, the application was heard by way of written submissions to which the Applicant submitted that pursuant to the striking out of his suit and taxation of the same thereafter, there was eminent danger of execution more so keeping in mind that the Advocate appearing for him acted without his express instructions and he only became aware of the matter at the time of the taxation. That he was desirous of prosecuting his suit and the mistakes of his former Advocate should not be visited on him.

4. The Applicant framed his issues for determination as follows;

- i. Whether this honorable court can reinstate the suit herein and the same be heard on merit.
- ii. Whether the re-instated suit can be transferred to Bomet Chief Magistrate's Court for hearing and determination.
- iii. Whether a mistake by an Advocate who acted (sic) express instructions of the client can be matted against he (sic) client.
- iv. Who bears the costs of this suit.

5. On the first issue for determination, the Applicant relied on Section 3A of the Civil Procedure Act and Order 51 Rule 15 of the Civil Procedure Rules as well as on the decided case in **Mbogo & Another vs. Shah EALR 1968** to submit that the court had discretion to set aside an ex parte order of the nature of a dismissal order in order to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. The said discretion however was not intended to assist a litigant who deliberately seeks to obstruct or delay the cause of justice.

6. It was his submission that in pleading for reinstatement of the suit, he had not been aware of the matter herein for he had not given the previous Advocate on record express instructions. He also submitted that the Respondent would not suffer any prejudice if the suit was re-instated as justice would be sufficiently served if parties were given an opportunity to be heard and the matter determined on merit.

7. On the second issue for determination, it was the Applicant's submission that pursuant to the provisions of Section 11 of the Civil Procedure Act, a suit ought to be instituted in the court of the lowest grade competent to try and determine it. That further and pursuant to the

provisions of Section 18(1) of the Civil Procedure Act, and owing to the pecuniary jurisdiction of the court, that this matter be transferred to Bomet Chief Magistrate's Court which had both the pecuniary and territorial jurisdiction to try and dispose of the same.

8. The Applicant's submission on the third issue for determination was that where justice of the case mandates, mistakes of Advocate's even where there were blunders, should not be visited on the clients when the situation could be remedied by costs. That he was not aware of the matter since he had not been informed of the proceedings by the previous Advocate on record as he was interested in following up with another matter before the Bomet Principal Magistrate's Court in Civil Suit No. 53 of 2015. That he only became aware of the matter upon service with taxation notices.

9. The Applicant asked the court to take into account the principles of proportionality and decide where the scales of justice lie. That the law was clear that the business of the court so far as possible was to do justice between parties and not to render nugatory that ultimate end of justice. That further the court in exercising its discretion, should opt for the lower rather than the higher risk of injustice.

10. On the last issue for determination, the Applicant's submission was that indeed costs followed the cause. He prayed to be awarded costs while relying on the decided case in **East African Standard Limited vs. Guardian Limited [1934] 16(1).KLR 23.**

#### **Respondent's submission.**

11. In opposing the Applicant's application, the Respondent framed his issues for determination as follows;

- i. Whether there are sufficient reasons given by the Plaintiff/Applicant to reinstate (sic) matter struck out on 13<sup>th</sup> July 2018 and to set aside the Taxing Officer's decisions of 13<sup>th</sup> June 2018 and 4<sup>th</sup> December 2019.
- ii. Whether the Plaintiff/Applicant has given sufficient reason to stay the execution of the ruling dated 13<sup>th</sup> June 2018 and the taxation ruling dated 4<sup>th</sup> December 2019.
- iii. Who should pay the cost of this application?

12. On the first issue for determination, the Respondent gave a background to the matter by submitting that initially, the Plaintiff/Applicant had instituted a suit against him via Bomet PMCC No. 53 of 2015 which he subsequently withdrew on 17<sup>th</sup> October 2017 and was ordered to pay costs of Ksh.90,450/=. That subsequently the Plaintiff/Applicant filed another suit against the Respondent in Kericho Misc Application No. 56 of 2016 which was dismissed with costs on 2<sup>nd</sup> June 2017 and he (Plaintiff/Applicant) was again ordered by the Taxing Officer to pay costs of Ksh.92,990/= on 15<sup>th</sup> November 2017.

13. That on 9<sup>th</sup> October 2017, the Plaintiff/Applicant instituted the current suit wherein the Defendant/Respondent filed an application on 15<sup>th</sup> March 2018 seeking costs and security for costs of the suit. That in a ruling dated 13<sup>th</sup> June 2018, the court directed the Plaintiff/Applicant to pay the costs amounting to Ksh. 183,440/= and to deposit the sum of Ksh 100,000/= as security for costs within 30 days failure to which the matter would be struck out. The Plaintiff/Applicant failed to comply and the matter was struck out on 27<sup>th</sup> May 2019 wherein the Defendant/Respondent filed his bill of costs on 21<sup>st</sup> June 2019 and effected service. On 22<sup>nd</sup> July 2019 the Plaintiff/Applicant's Counsel filed an application to cease acting which was allowed on 4<sup>th</sup> September 2019. Thereafter, the Plaintiff/Applicant appointed the firm of M/S Nyaata Advocates who filed their submissions on his behalf and in opposition of the Bill of Costs. The Bill of Costs was subsequently taxed via a ruling dated 4<sup>th</sup> December 2019 thus giving rise to the present application.

14. The Respondent faulted the Applicant's application for reasons that the same had been brought under the provisions of Order 42 of the Civil Procedure Rules which provision dealt with Appeals. The Respondent thus submitted that it was clear that the Applicant/Plaintiff was appealing the orders of the court which court lacked jurisdiction to entertain an appeal on its own orders. It was further the Respondent's submission that orders from this court could only be reviewed on appeal to the Court of Appeal as was provided for by Section 66 of the Civil Procedure Act and secondly a review of orders of a Taxing Officer could only be entertained by this court via a reference pursuant to the provisions of Section 11(1)(2) and (3) of the Advocates (Remuneration) Order.

15. The Respondent submitted that contrary to the Plaintiff/Applicant's submission, he had instructed Counsel to institute Bomet PMCC No. 53 of 2015, subsequently all the Applications pertaining to Kericho ELC 56 of 2016 were accompanied by affidavits sworn by the Plaintiff which affidavits have not been disowned. That it was therefore unbelievable for the Plaintiff/Applicant to contend that although he had instructed Counsel to institute suit in 2015, he failed to follow its progress until the year 2020. That it was further unimaginable that an Advocate would institute suit without instructions of a client.

16. The Respondent submitted that even for a second were they to accept the argument that the Plaintiff/Applicant's Counsel made a mistake, yet it was not law that the client should not bear the brunt of this Counsel's mistake. The case belonged to the Plaintiff/Applicant and not his Counsel and therefore he had a duty to follow up the same to its logical conclusion. Reliance was placed on the decided case in **Dayton Valuers Limited vs John Ngugi Nairobi HCCC No. E032 of 2019.**

17. On the second issue as to whether there ought to be stay of execution, the Respondent submitted that the matter was struck out on 27<sup>th</sup> May 2019 and therefore there existed nothing to stay. That there has been no appeal filed against the decision of the Taxing Officer of 4<sup>th</sup> December 2019 and a stay of execution order would therefore serve no purpose. That the court should not be asked to speculate on the unknown and issue orders in vain.

18. On the issue of costs, the Respondent relied on the provisions of Section 27(1) of the Civil Procedure Act to submit that although the

court had discretion to determine by whom the costs of any matter should be borne, however costs usually followed the event. That on various occasions, the Plaintiff/Applicant had unjustifiably and unnecessarily dragged the Respondents to court and therefore he should pay for costs of the vexatious application which was not merited and ought to be dismissed.

### **Determination.**

19. In consideration of the application herein the submissions thereafter as well as the annexed authorities, it is important to consider the genesis of the matter before me.

20. On the onset the Plaintiff Applicant's Application is defective having been brought under there wrong provisions of the law to wit Order 42 of the Civil Procedure Rules which specifically deals with Appeals, however the I find that citation of the wrong procedural rule is not fatal per-se to the Applicant's application and should not seal the fate of the said application.

21. I shall thus proceed to give consideration to the merits of the application. It is not disputed that the Plaintiff/Applicant had instituted a suit against the Respondent via Bomet PMCC No. 53 of 2015 which he subsequently withdrew on 17<sup>th</sup> October 2017 and was ordered to pay costs of Ksh.90,450/=. That subsequently the Plaintiff/Applicant filed another suit against the Respondent in Kericho Misc Application No. 56 of 2016 which suit was dismissed with costs on 2<sup>nd</sup> June 2017 and the Plaintiff/Applicant was ordered to pay costs of Ksh.92,990/= on 15<sup>th</sup> November 2017 by the Taxing Officer.

22. It is worth noting that the Plaintiff/Applicant did not comply with the orders of the court to pay the costs but instead instituted the present suit against the Defendant/Respondent on the 9<sup>th</sup> October 2017 wherein the Defendant/Respondent filed an application dated the 14<sup>th</sup> March 2018 pursuant to the provisions of Order 25 Rule 4, Order 26 Rule 1 of the Civil Procedure Rules and Section 3A, 63(e) of Civil Procedure Act, wherein he sought stay of the proceedings pending payment of the total sum of Ksh 183,440/= on account of the two previous matters herein mentioned above.

23. That in a ruling dated 13<sup>th</sup> June 2018 the court directed the Plaintiff/Applicant to pay the costs amounting to Ksh. 183,440/= and to deposit the sum of Ksh 100,000/= as security for costs within 30 days failure to which the matter would be struck out. The Plaintiff/Applicant failed to comply and the matter was struck out on 27<sup>th</sup> May 2019 wherein the Defendant/Respondent filed his bill of costs on 21<sup>st</sup> June 2019.

24. On 22<sup>nd</sup> July 2019 the Plaintiff/Applicant's Counsel on record filed an application to cease acting which was allowed on 4<sup>th</sup> September 2019. Thereafter the Plaintiff Applicant appointed the firm of M/S Nyaata Advocate who filed their submissions on his behalf and in opposition of the bill of costs. The Bill of costs was subsequently taxed via a ruling dated 4<sup>th</sup> December 2019 thus giving rise to the present application.

25. Given the above captioned scenario, I find the matters for determination as being;

- i. Whether there can be the re-instatement of this matter.
- ii. Whether the court can set aside the taxing officer's decisions of 13<sup>th</sup> June 2018 and 4<sup>th</sup> December 2019.
- iii. Whether there can be an order of stay of execution of the rulings.

26. Quite clearly, the Applicant's failure to pay costs as ordered by the court resulted into the suit being struck out upon an application by the Respondent under the provisions of order 25 Rule 4 and Order 26 rule 1 of the Civil Procedure Rules. The Applicant in his defence has laid blame on his previous Counsel whom he alleged did not inform him of the progress of the proceedings. I beg to differ. A close look at the proceedings will show that through the Applicant's sworn affidavit, he sought for PMCC No. 53 of 2015 to be withdrawn. Vide a Ruling of 2<sup>nd</sup> July 2017, the suit was dismissed with costs. The Applicant's Counsel was then served with the Bill of costs dated 17<sup>th</sup> January 2018 which they failed to challenge. Thereafter, the Applicant swore an affidavit in support of his Application in ELC Misc Application No. 56 of 2016 seeking to have the matter in PMCC No 53 of 2015 transferred to the ELC as well as for interim orders of injunction against the Repondent herein. The Application was dismissed with costs on 2<sup>nd</sup> June 2017. It cannot therefore be true that the Applicant had been left in the dark by his previous Counsel him having sworn and signed the Affidavits in support of his applications.

27. Although it is not in dispute that Article 50 coupled with Article 159 of the Constitution on right to be heard and the Constitutional desire to serve substantive justice to all the parties respectively, constitutes the defined principles which should guide the court in making a decision on matters of reinstatement of a suit which has been dismissed/struck out by the court, however the Court is also under an obligation to consider whether there are reasonable grounds to reinstate such suit after considering the prejudice that the Respondent would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.

28. In the present case, it is obvious that the Applicant is not desirous on complying with the court orders to pay costs but is bent on filing numerous suits and Applications to frustrate the Respondent and waste precious court time. The Applicant has not explained why he has not paid the costs as ordered by Court in the previous suits and neither has he filed appeals to challenge the said orders, but has now shifted blame to his previous Advocate whom he claims did not advise him on the progress of his case. Indeed if the Applicant finds that his Counsel was negligent, then his remedy lies elsewhere and not in setting aside of the dismissal order herein.

29. On the second issue for determination, I find that the Taxing Officer having rendered his decisions on the 13<sup>th</sup> June 2018 and 4<sup>th</sup> December 2019 respectively, it was incumbent upon the Applicant to seek for reasons for the decision of the Taxing Officer through a Notice of objection within 14 (fourteen) days after the decision and thereafter file his **Reference** to the judge by chamber summons.

30. Rule 11(1)(2) 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.

(2) The Taxing Officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

31. The law is clear, the filing of a notice of objection to taxation is a fundamental step for a party seeking to file a reference and failure to do so is not a technical issue which can be overlooked by the provisions of Article 159 (2)(d) of the Constitution for the sake of substantive justice. Rule 11(1) is a statutory provision which cannot be ignored or wished away.

32. On the third issue for determination, the Applicant has sought for an order of stay of execution of the rulings dated the 13<sup>th</sup> June 2018 and 4<sup>th</sup> December 2019 which I find ties up with the second issue for determination as discussed herein above. Further a court will, in granting stay of execution be guided by the presence of substantial loss and the provision of suitable security for due performance of the terms of the decree or order that may eventually be binding upon the Applicant which I find through the Applicant's previous conduct is devoid even in the present application. There has been no appeal filed to challenge the orders issued in the previous matters thus in essence therefore there is no suit pending and nothing to stay.

33. The Court of Appeal in the case of **Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010** held *inter alia* that:

**“...the Applicant cannot be allowed to invoke the “O2 principle” and at the same time abuse it at will...All provisions and rules in the relevant Acts must be “O2” compliant because they exist for no other purpose. The “O2 principle” poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the court's view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day.”**

34. All said and done, I find that this application is wholly incompetent. The Applicant herein seems to disregard court rules and procedure and is seemingly comfortable in the knowledge that failure to adhere to the same will not necessarily be fatal to his case. He and his Counsel ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules. It must be noted that the oxygen principle will not save Applicant in the present circumstance as his application is incompetent and is herein dismissed with costs.

**DATED AND DELIVERED AT KERICHO THIS 29<sup>TH</sup> DAY OF JULY 2021**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**