



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC NO.12 OF 2018

JOSEPH CHERUIYOT.....1st DEFENDANT/APPLICANT

LEONARD MUTAI.....2nd DEFENDANT/APPLICANT

GEOFFREY MUTAI.....3rd DEFENDANT/APPLICANT

COLLINS MUTAI.....4th DEFENDANT/APPLICANT

VERSUS

RICHARD KIMUTAI A. MIBEL.....PLAINTIFF/RESPONDENT

RULING

1. Pursuant to a judgment delivered on the **20th day of July 2018**, the 1st Applicant/Defendant has now filed the present Application by way of a Chamber Summons dated 10th February 2020 brought under the provisions of Order XXI rule 22(1), Order XXXIX rule 1, 3 and 9, Order IXB rule 8 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, and all other enabling provisions of the law where he seeks for Orders of stay of the sale of his property by M/S Indomitable Auctioneers and the setting aside of the court's Order dated the 24th January 2020 alongside all consequential Orders thereafter.
2. The said Application is supported by the grounds set on its face as well as on the supporting affidavit of Joseph Cheruiyot the 1st Applicant herein, dated the 10th February 2020.
3. Pursuant to the filing of the application, the Plaintiff/Respondent filed their Notice of Preliminary Objection dated to 19th February 2020 objecting to the application for reasons that it was fatally incurably defective, bad in law as it was brought under there wrong provisions of the law, was incompetent and misconceived. That further, the said application was an abuse of the process of the court and ought to be dismissed with costs.'
4. On the 9th February 2021, the court directed that the application be heard by way of written submissions to which only the Plaintiff/Respondent complied. Their submissions were to the effect that the Applicants' application was bad in law as the same was brought pursuant to the wrong motion to wit a Chamber Summons and pursuant to repealed provisions of the law and therefore the Applicant's did not deserve any Orders as sought.
5. That the Applicants' application sought for stay of execution of the courts Orders dated 24th January 2020 which had directed the Respondent to sale by auction the Applicant's livestock on grounds that the

costs sought to be recovered and the proclamation notice was high and exaggerated. That indeed the Applicant's application was therefore challenging the ruling by the Deputy Registrar of the High Court on the party and party bill of costs dated 19th October 2016. That they had served the Applicants who failed to appear and a ruling was delivered on 27th November 2019.

6. The Respondent's submission therefore was that the Applicant's application lacked the backing of the law as the procedure for challenging a decision of a taxing officer was provided for under Section 51 of the Advocates Act and rule 11 of the Advocates (Remuneration) Order. That the said provision of the law provided that for a person who sought to object to a decision of the taxing officer must, within 14 days from the receipt of the reasons of the taxing officer's ruling, apply to the Judge in chambers by way of a Reference through a Chamber Summons under Rule 11 of the Advocates (Remuneration) Order, setting out the grounds of his objection. That the Applicant's application was a clear departure from the provisions of the rules of the Advocates (Remuneration) Order and did not deserve any Orders sought.

7. The Respondent further submitted that the ruling was delivered on 27th day of November 2019 wherein the Applicant filed his application on 10th February 2020 which was two months and 10 days after the ruling. That this was inordinate delay in the circumstance, the judgment having been delivered on the 20th July 2018.

8. That the Applicants cannot be heard to say that they were unaware of the existence of the suit against them wherein in fact they had filed a Notice of Appeal on 18th June 2019 which was 11 months after the date of the judgment.

9. The Respondent further submitted that the Applicant's application had been overtaken by events, the auctioneers having already been instructed to attach the properties. That the only remedy available for the Applicant was to deposit in court the amount owing.

10. That the filing of their Preliminary Objection was premised on the case of **Mukisa Biscuits Manufacturing Co. Ltd-v- West End Distributors Limited (1969) EA. 696** to which they had raised the objection purely on a point of law citing the fact that the Applicant had come before the court on the wrong provisions of the law as earlier on enumerated. That pleadings must conform to law or rule of court which went to the root of the jurisdiction of the court which operates with the laid down provision of the law. That in the absence of the said procedure or in a situation where the party cites the wrong provision, the court should down its tools as soon as it discovers it lacks jurisdiction to adjudicate over the matter.

11. That by the Applicant coming before the court on the wrong provisions of the law to stay the taxation Order by the taxing master, his application was bad in law and therefore he cannot benefit from citing the wrong provisions where there was a specific provision providing for the procedure for solving his grievances. The Respondents sought for their Preliminary Objection to be allowed and the Applicant's application struck out with costs.

Determination.

12. I have considered the 1st Applicant's Application by way of a Chamber Summons brought under the provisions of Order XXI rule 22(1), Order XXXIX rule 1, 3 and 9, Order IXB rule 8 of the Civil Procedure Rules, Section 3 A of the Civil Procedure Act where he seeks for Orders of stay of the sale of his property by M/S Indomitable Auctioneers and the setting aside of the court's Order dated the 24th January 2020 and all the consequential Orders thereafter.

13. I have also considered the Respondent's Preliminary Objection to the Applicant's application on account of the same having been brought under the wrong provisions of the law despite there being clear procedure for the redress of the Applicant's particular grievance as prescribed by the act of parliament.

14. It is not in dispute that judgment against the Applicant was delivered on the **20th day of July 2018** wherein a permanent injunction was hereby issued restraining the Applicant and his co-defendants from

trespassing upon, causing to be sub-divided, ploughing or doing any other acts which are prejudicial to the Respondent/Plaintiff's proprietary interest in land parcel number L.R No. **Kericho/Kipchorian/Lelu Block 7(Chepkechei)/379**. The Applicant and his co-defendants were also ordered to vacate the suit property within three months from the date of the judgment failing which the Respondent/Plaintiff could apply for an eviction Order. Further the Applicant and his co-defendants were ordered to pay Kshs. 60,000/= Mesne profits, Kshs. 100,000/= as general damages, as well as costs of the suit.

15. Thereafter the Respondent/Plaintiff filed his bill of costs dated 15th October 2019 which came up for taxation on 6th November 2019 and although the Applicant and his co-defendants had been served and an affidavit of service filed, they failed to attend court and/or file any objection wherein the bill was taxed at Kshs. 275,991/= via the tax master's ruling of 27th November 2019 and an attachment Order subsequently issued on 27th January 2020, thus giving rise to the present Application.

16. Pursuant to the laid down chronology of events as they unfolded, I find the matter arising for the Court's determination as being whether the Plaintiff/Respondent's Preliminary Objection has merit and should be upheld.

17. Indeed there is no dispute the 1st Applicant's Chamber Summons dated the **20th day of July 2018** seeks to set aside the Order of the Taxing Master, Hon. S.K Ngetich the Deputy Registrar, dated 27th January 2020.

18. Paragraph 11 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.

19. 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.

20. Indeed in the case of **Lubulellah & Associates Advocates vs N. K. Brothers Limited [2014] eKLR** the court of Appeal observed that;

"The law is very clear that once a taxing master has taxed the costs, issued a Certificate of costs and there is no reference against his ruling or there has been a ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter judgment. An Applicant is not required to file suit for the recovery of costs.

21. I find that an Order by the Taxing Master concerning taxation of a Bill of Costs can only be challenged before a Judge by way of a reference initiated by way of a Chamber Summons as required by the provisions of paragraph 11(2) of the Advocates Remuneration Order and not by way of the repealed provisions of Order XXI rule 22(1), Order XXXIX rule 1, 3 and 9, Order IXB rule 8 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act as in the present instance.

22. A Preliminary Objection according to the decided case by the Court of Appeal in the case of **Mukisa**

Biscuits Manufacturing Co. Ltd–v- West End Distributors Limited (1969) EA. 696 was stated to be thus:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

23. In the case of **Quick Enterprises Ltd. vs. Kenya Railways Corporation, Kisumu HCCC No.22 of 1999**, the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

24. Guided by the dictum in the above cited cases and having regard to the reasons that I have stated in this ruling, I find that the Preliminary Objection dated 19th February 2020 is merited and I therefore allow it. Consequently, I strike out the application dated 10th February 2020 with costs to the Plaintiff/Respondent.

DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 7TH DAY OF OCTOBER 2021.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE