



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 13 OF 2009

NEPTUNE CREDIT MANAGEMENT LIMITED.....1ST PLAINTIFF

BRYAN YONGO.....2ND PLAINTIFF

=VERSUS=

DR. JIGISHA P. JANI.....1ST DEFENDANT

JAYA SAILESH JANI.....2ND DEFENDANT

RULING

INTRODUCTION

1. The Ruling herein is in respect of two Applications, namely the Notice of Motion Application dated 22nd February 2021, and the Chamber Summons dated the 11th August 2020, respectively, which were filed by and/or on behalf of the 2nd Plaintiff/Applicant.
2. Vide the Application dated 11th August 2020, the 2nd Plaintiff/Applicant has sought for the following reliefs;
 - i. *There be Stay of Execution of the Certificate of Taxation pending hearing and determination of the Reference.*
 - ii. *The Ruling of the taxing officer dated the 4th June 2020 be set aside.*
 - iii. *The Honourable court be pleased to enlarge time within which to file a Reference against the decision of the taxing officer dated the 4th June 2020.*
 - iv. *The reference filed herein be deemed as properly filed though filed out of time.*
 - v. *In the alternative, the Applicant be granted leave to file a Reference against the Decision of the taxing officer out of time.*
 - vi. *Costs of the application be provided for.*
3. The subject Application is based and/or premised on the various and/or numerous grounds enumerated at the foot thereof and same is further supported by the affidavit of the 2nd Plaintiff/Applicant herein sworn on the 11th August 2020.
4. Upon being served with the said Application, the Defendants/Respondents filed a Replying affidavit sworn on the 8th November 2020, to which the Defendants/Respondents responded to the said Applications, as well as the latter Application dated the 22nd February 2021.
5. Vide the Application dated the 22nd February 2021, the 2nd Plaintiff/Applicant has sought for the following Reliefs;
 - i. *The Honourable court be pleased to set aside the Ruling and order made on the 15th February 2021, dismissing the Applicants application dated the 11th August 2020.*
 - ii. *The Honourable court be pleased to reinstate the Applicants application dated the 11th August 2020, for hearing and*

determination on merits.

iii. Costs of the Application be provided for.

6. The subject Application herein is premised on the grounds that have been enumerated at the foot thereof and same is further supported by the affidavit of the 2nd Plaintiff/Applicant herein, sworn on the 22nd February 2021.

7. It is imperative to note that the Defendants/Respondents also responded to the latter Application vide the Replying affidavit sworn on the 8th November 2021, wherein same expressed their opposition to the Application for discharge and/ or setting aside of the Dismissal orders.

SUBMISSIONS BY THE PARTIES

8. The subject matter came up for hearing of the Application dated the 22nd February 2021, on the 28th September 2021, on which date the attention of the court was drawn to the orders of the court made on the 15th February 2021, wherein it was contended that this court (*differently constituted*) dismissed the 2nd Plaintiff's/Applicant's Application dated the 11th August 2020.

9. Nevertheless, upon perusing the records of the court and particularly, the orders made on the 15th February 2021, it became apparent that the honourable court did not Dismiss the Application dated the 11th August 2020, in the manner alleged by the 2nd Plaintiff/Applicant.

10. For the avoidance of doubt, the court record is as hereunder;

Court:

“file to be closed and archived signed”

11. Having appraised my self of the nature of the orders made by the court on the 15th of February 2021, and being alive to the fact that there were two pending applications, I therefore ordered and/or directed that the two Applications, namely the initial Application dated the 11th August 2020, and the latter Application dated the 22nd February 2021, be heard and disposed of together.

12. On the other hand, I further ordered and/or directed that the parties do file and exchange written submissions as pertains to the two Applications within set timelines and thereafter directed that the subject matter be mentioned on the 8th November 2021, for further directions.

13. On the return date, that is the 8th November 2021, it transpired that the Defendants/Respondents had not filed their response to the two Applications and same sought for indulgence of the court and leave to file their responses within 7 days.

14. Pursuant to the request by and/or at the instance of the Defendants/Respondents, the court granted to and in favor of the Defendants/Respondents, the liberty sought and thereafter directed that upon the filing of the response, the parties were to file and exchange written submissions on the two Applications.

15. However, come the next mention date, namely the 7th of December 2021, neither of the parties had filed their written submissions to and in respect of the two Applications. Consequently, the court directed that the two Application be canvassed and/or disposed of by way of oral submissions.

16. On his part, the 2nd Plaintiff/Applicant submitted that same was previously represented in the matter through the firm of M/s Liko & Anam Advocates, who remained his advocates, up to and including post delivery of judgment in the subject matter.

17. It was the 2nd Plaintiff/Applicant's further submissions that after the delivery of judgment and before the taxation of the bill of costs, the said advocate indicated to the court that same no longer had instructions in the matter and were therefore seeking time to cease acting for the 2nd Plaintiff/Applicant herein.

18. It was the 2nd Plaintiff/Applicant's further submissions that despite the intimation by his advocates that same were keen to cease acting, that information was not relayed to him (*the 2nd Plaintiff/Applicant*) and thus same was not aware of the intention of the advocate to cease acting.

19. Nevertheless, the 2nd Plaintiff/Applicant further submitted that when the bill of costs was eventually taxed, same was taxed without any representations, on his behalf and therefore the bill of costs was taxed *Exparte*.

20. The 2nd Plaintiff/Applicant further submitted that upon realizing that the bill of costs had been taxed *Exparte*, same filed a Notice to Act in person, as well as the Application dated the 11th August 2020, whereby same sought to challenge the taxation or in the alternative leave to file a Reference out of time.

21. It was the 2nd Plaintiff/Applicant further submissions that the said Application dated the 11th August 2020, was fixed for mention on the 15th February 2021, when according to the 2nd Plaintiff/Applicant, same was dismissed for non-attendance.

22. The 2nd Plaintiff/Applicant further submitted that the Dismissal of the said Application on the 15th February 2021, which was a mention date, was irregular, unlawful and thus illegal. In this regard, the 2nd Plaintiff/Applicant sought for orders that the said Application be reinstated.

23. As concerns the merits of the Application dated the 11th August 2020, the 2nd Plaintiff/Applicant contended that the bill of costs was exaggerated and was in any event, taxed without being afforded an opportunity to be heard.

24. It was the 2nd Plaintiff/Applicant's submissions that same has a constitutional right to be heard and therefore the proceedings leading to the Exparte taxation by the taxing officer have condemned himself without being heard.

25. Finally, the 2nd Plaintiff/Applicant submitted that the court has a discretion to grant the Application dated the 11th August 2020, and in this regard the 2nd Plaintiff/Applicant quoted the decision in **Shah v Mbogo (1967) EA**, which the 2nd Plaintiff/Applicant contended conferred the court with discretion.

26. On their part the Defendants/respondents herein submitted that the Plaintiffs/Applicants Application under reference, amounted to an abuse of the due process of the court and was a mere delaying tactic by the 2nd Plaintiff/Applicant to evade paying the costs.

27. I must point out that this aspect of the Defendants/Respondents submissions, provoked and annoyed the 2nd Plaintiff/Applicant, who thereby remarked, that the young lady advocate did not seem to understand the weight of the file and circumstance of the case.

28. Be that as it may, the court intervened and pleaded with the 2nd Plaintiff/Applicant to allow the advocate to ventilate the Defendants/Respondents' position and with the plea of the court the Defendants/Respondents counsel was able to proceed with her submissions.

29. It was the Defendants/Respondents's further submissions that the date of the taxation of the party and party bill of costs was fixed and/or taken in the presence of the 2nd Plaintiff's/Applicant's advocate. Consequently, the Defendants/Respondents contended that the 2nd Plaintiff/Applicant was therefore aware of the scheduled date for taxation.

30. On the other hand, the Defendants/Respondents further testified that following the taxation of the bill of costs, the 2nd Plaintiff/Applicant herein had the right to challenge the taxation by filing a Notice of Objection to Taxation and thereafter a Reference. However, no such steps and/or actions were taken and/or better still, timeously taken.

31. Further, the Defendants/Respondents also submitted that the two Applications filed by the 2nd Plaintiff/Applicant, were similarly premature and were incompetent. In this regard, the Defendants/Respondent implored the court to strike out the Applications.

32. Finally, the counsel for the Defendants/Respondents submitted that the 2nd Plaintiff/Applicant had filed the Application dated the 11th August 2020, with undue and/or inordinate delay. Consequently, the Defendants/Respondents contended that the Application was defeated by the **Doctrine of laches**.

33. In response, the 2nd Plaintiff/Applicant submitted that he took great exception to the aspersions cast upon him by counsel for the Defendants/Respondents.

34. The 2nd Plaintiff/Applicant further stated and reiterated that the counsel for the Defendants/respondents did not now the circumstance of this case and therefore counsel should desist from casting aspersions on him.

35. Besides, the 2nd Plaintiff/Applicant further contended that it is his constitutional right to file the subject Applications and in any event, the Application is not meant to delay the execution of the costs or at all.

36. It was the 2nd Plaintiff/Applicant's further submissions that he had not instructed any other advocate to act for him in the subject matter and his only known advocate were M/s Liko & Anam Advocate.

37. Lastly, the 2nd Plaintiff/Applicant submitted that the subject Applications, are informed by the fact that the taxation proceedings, were taken and/or carried out without notice unto him and without participation by himself, which was a breach of his constitutional and Fundamental Rights.

ISSUES FOR DETERMINATION

38. Having reviewed the Chamber Summons Application dated the 11th August 2020, and Notice of Motion Application dated, the 22nd February 2021, together with the supporting affidavit thereto and having listened to the submissions by the 2nd Plaintiff/Applicant, as well as the Defendants/Respondents, *the following issues arise and are thus germane for determination.*

- i. Whether the Chamber Summons Application dated the 11th August 2020, was dismissed on the 15th February 2021, to warrant reinstatement.*
- ii. Whether the Application dated the 11th August 2020, is competent in light of **Order 9 Rule 9 of the Civil Procedure Rules.***

iii. *Whether the court the court has jurisdiction to validate a Reference filed out of time.*

iv. *Whether the court can extend time to file a Reference out of time without and in the absence of a Notice of Objection to Taxation.*

ANALYSIS AND DETERMINATION

ISSUE NUMBER 1

Whether the Notice of Motion Application dated the 11th August 2020, was dismissed on the 15th February 2021, to warrant reinstatement.

39. The 2nd Plaintiff/Applicant herein contended and/or submitted that the Application dated the 11th August 2020, was dismissed by the court on the 15th February 2021, and as a result of the said dismissal, same was compelled to file and/or lodge the subsequent Application dated the 22nd February 2021.

40. Despite the averments by and/or on behalf of the 2nd Plaintiff/Applicant, I have had the occasion to peruse the court record and I have noted the import and tenor of the orders made by the court on the 15th February 2021.

41. In my humble understanding, the court did not take cognizance of the pendency of the Application dated 11th August 2020, and neither did the court make any orders speaking to and/or concerning the said Application.

42. In short, the Chamber Summons Application dated the 11th August 2020, was never dismissed by the court and therefore same has remained alive and awaiting determination.

43. Owing to the foregoing observation, it is my finding that the latter Application, namely the Application dated the 22nd February 2021, which sought to reinstate the Application dated the 11th August 2020, was unnecessary.

44. At any rate, it is apparent and/or evident that the latter Application was informed by the belief and/or impression that in fact that the honourable court had dismissed the previous Application, which position, was/is erroneous and/or otherwise incorrect.

45. Based on the foregoing, it is my further finding that the Notice of Motion Application dated the 22nd February 2021, was unnecessary surplusage and same is therefore expunged from the record of the court.

46. Suffice it to say, that the Chamber Summons Application dated the 11th August 2020, is alive and same does not require an order for reinstatement, in the manner sought or at all.

47. For clarity, I shall therefore proceed to attend to and/or deal with same, both as pertains to its competence and Merits.

ISSUE NUMBER 2

Whether the Application dated the 11th August 2020, is competent in light of Order 9 Rule 9 of the Civil Procedure Rules.

48. It is common ground that the Plaintiffs/Applicants and in particular the 2nd Plaintiff/Applicant herein, was duly represented in this matter by a firm of advocates, namely M/s Liko & Anam Advocates, up to and including the delivery of the judgment in this matter. For clarity, the judgment in this matter was delivered on the 18th March 2019.

49. Subsequently and upon the delivery of the judgment, the Defendants/Respondents, who were the successful parties in the subject proceedings proceeded to and lodged their bill of costs for taxation.

50. It is also important to note that when the bill of costs came up for taxation on the 25th November 2019, one Mr. Gachuhi, Advocate, appeared in court for and/or on behalf of the Plaintiffs/Respondents, during the taxation of the bill of costs and same sought for time to properly come on record on behalf of the Plaintiffs/Respondents.

51. Pursuant to and in line with the request by the said advocate, the honourable taxing master proceeded to and indeed granted liberty to the advocate to perfect his coming on record and to ensure that the Documents, were duly filed before the return date for taxation.

52. Nevertheless, the honourable taxing master proceeded to and directed that the bill of cost shall now be taxed on the 2nd March 2020, by which time the new advocates were expected to have formerly come on record for the Plaintiffs/Applicants herein.

53. From the foregoing it is imperative to note, that the Plaintiffs/Applicants herein duly retained, engaged and/or instructed a firm of advocates to appear for same, in course of prosecution of the subject matter.

54. In any event, the fact that the Plaintiffs/Applicants herein had retained and/or engaged a firm of advocates to appear for same in the

matter, was further confirmed and vindicated vide the submissions of the 2nd Plaintiff/Applicant himself, when he stated that his only previous advocate was M/s Liko & Anam Advocates and not anyone else.

55. Suffice it to say, that the Plaintiffs/Applicants were duly represented by a firm of advocates up to and including the delivery of the judgment.

56. Owing to the fact, that judgment had been delivered and/or rendered in respect of the subject matter, it was therefore important that if the 2nd Plaintiff/Applicant was keen to act in person and file a Notice of intention to act in person, same ought to have sought for and obtained leave of the court before filing the Notice to act in person, which was dated the 11th August 2020.

57. In this regard, it is important to take cognizance of the provisions of **Order 9 rule 9 of the Civil Procedure Rules 2010**, which provides as hereunder;

“9. Change to be effected by order of court or consent of parties [Order 9, rule 9.]

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

10. Procedure [Order 9, rule 10.]

An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.”

58. I have perused the court record as well as the proceedings of the court, made and/or taken after the delivery of the judgment on the 18th March 2019, and I must say that I have not come across any Application filed by and/or on behalf of the 2nd Plaintiff/Applicant, whereby same sought for leave to act in person and or file a Notice of intention to act in person.

59. On the other hand, I have also not discerned any minutes of the court, where an order was endorsed, either on the basis of an Application or a consent, authorizing the 2nd Plaintiff/Applicant to act in person.

60. In the absence of an order by the honourable court authorizing the 2nd Plaintiff/Applicant to act in person and thereby proceed to file documents in own name, I find and hold that both the Notice to act in person and the Application dated the 11th August 2020, were filed without the requisite leave and have therefore been made in contravention of the law.

61. In my humble view, the two sets of Documents are therefore a nullity in law and no legitimate proceedings and/or orders, can ensue and/or emanate from the same.

62. In support of the forgoing position, I beg to adopt and reiterate the decision in the case of **Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169**; where Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said as hereunder;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

63. On the other hand, I also wish to point out that the Rules of procedure herein were meant to regulate and aid substantive justice and it is often stated that the Rules of the hands maidens of justice. For clarity, I wish to add, handmaidens of Substantive Justice.

64. Owing to the foregoing, it is ordinarily incumbent upon the litigants and their advocates, where appropriate, to ensure compliance with the rules of procedure and where there is an infraction thereof, to seek to remedy the default.

65. However, in respect of the subject matter the evident infraction and/or failure to comply with the law, was neither remedied nor explained. Consequently, the default to comply with the law herein must thus suffer the legal consequence of such failure.

66. At any rate, many a times litigants and advocates, who have not paid keen attention to the Rules of procedure and by extension the dictates of the law, would quickly invoke the provisions of Article 159 (2) (d) of the Constitution 2010, and seek to refuge thereunder.

67. Nevertheless, it has been pointed times without number that the provisions **Article 159 (2) (d) of the Constitution 2010**, is not a cure and/or panacea for all ills, infractions and/or violation of the law. For clarity, the said provision of the constitution, does not white wash all irregularities, improprieties and/or illegalities.

68. In support of the foregoing statement, I apply and restate the position of the law as captured in the decision in the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others [2013] eKLR**, where the honourable court of appeal observed as hereunder;

“We do not consider Article 159 (2) (d) to be a panacea, nay, a general whitewash, that cures and mends all ills, misdeeds and defaults of litigation”.

69. Perhaps and for emphasis only, the foregoing position was also upheld by a five (5) judge bench of the Court of Appeal in the case **MUMO MATEMU Vs. TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS** Civil Appeal No. 290 of 2012 as follows;

“In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under Section 1A and 1B of the Civil Procedure Act (Cap 21) and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases.”

70. Based on the foregoing observations, I am afraid that the Chamber Summons Application dated the 11th August 2020, is fatally incompetent and is otherwise, a nullity *ab initio*.

ISSUE NUMBER 3

Whether the court has jurisdiction to validate a reference filed out of time.

71. On the other hand, the 2nd Plaintiff/Applicant herein concedes that same had filed a Reference against the Certificate of taxation, *albeit* out of time and having done so, the 2nd Plaintiff/Applicant now seeks leave of the court to validate the said Reference.

72. Suffice it to say, that a legal Document, which is filed out of time and without leave of the court is itself a nullity and cannot be the subject of validation.

73. To the contrary, a party and/or litigant who desires to file a legal documents and/or pleadings out of time, is called upon to approach the court for leave to extend and/or enlarge time, and upon enlargement of such time, same can thereafter proceed to lodge the requisite pleadings and/or documents.

74. However, in the instant case, it is stated that the Reference has been filed out of time and now the 2nd Plaintiff/Applicant wishes the court to sanction the late filing and thereby deem same as properly filed.

75. In my humble view, a document and/or pleadings filed without leave, is *ipso facto* a nullity and therefore same cannot attract validation by and/or at the instance of the court.

76. In support of the foregoing position, I adopt and apply the decision in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** where the Honorable Court observed as hereunder;

“What we hear the applicant telling the Court is that he is acknowledging having filed a ‘document’ he calls ‘an appeal’ out of time without leave of the Court. Pursuant to rule 33(1) of the Court’s Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court’s Rules, this Court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires.

By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.

To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court”.

77. Guided by the foregoing position of the law, I must decline the invite by the 2nd Plaintiff/Applicant to validate a Reference filed out of time, which in my humble view is a nullity in law.

ISSUE NUMBER 4

Whether the court can extend time to file a reference out of time without and in the absence of a Notice of Objection to Taxation.

78. Besides, the Chamber Summons dated the 11th August 2020, also has a limb, whereby the 2nd Plaintiff/Applicant, is craving for the honourable court to enlarge and extend time within which to file a Reference against the certificate of taxation issued and/or rendered by the taxing master on the 4th June 2020.

79. I must point out that the issue of extension and/or enlargement of time, where appropriate, is discretionary and therefore a court of law is seized of jurisdiction so to do.

80. Nevertheless, it must also be pointed out that before the court can exercise discretion one way or the other, the party or litigant seeking for such discretion must be able to place before the court sufficient reasons or explanation, as to why the intended action, was not taken within the stipulated timeline.

81. In support of the foregoing, I adopt and invoke the decision in the case of **Nicolas Kiptoo Arap Salat v IEBC & Others (2014) eKLR**, where the honourable court observed as hereunder;

“It follows that when considering whether to grant an extension of time for an appeal against a final decision in a case of any complexity, the courts should consider “all the circumstances of the case” including;

- a. **the interests of the administration of justice;***
- b. **whether the application for relief has been made promptly;***
- c. **whether the failure to comply was intentional;***
- d. **whether there is a good explanation for the failure;***
- e. **the extent to which the party in default has complied with other rules, practice directions and court orders;***
- f. **whether the failure to comply was caused by the party or his legal representative;***
- g. **the effect which the failure to comply had on each party; and***
- h. **the effect which the granting of relief would have on each party.***

82. Be that as it may, the exercise of the discretion, for the extension and/or enlargement of time must be geared towards achieving a just and legitimate purpose. For clarity, the discretion must not be exercised in vain and/or futility.

83. As pertains to the subject matter, the court is being requested to extend time within which to file a Reference against the certificate of taxation. However, it is common ground that before a Reference can be lodged, the person seeking to lodge the Reference must have filed a Notice of Objection to taxation within the statutory 14 days.

84. In the alternative, if no Notice of Objection to taxation was so filed within statutory 14 days from the date of taxation, then it behooves the claimant to first seek for Extension of time within which to file a Notice of objection to taxation.

85. For the avoidance of doubt, the procedure for challenging a certificate of taxation, like the one before hand, is well stipulated and/or provided for under the provision of **Rule 11 of the Advocates Remuneration Order**, which provides as hereunder;

- 11. Objection to decision on taxation and appeal to Court of Appeal**
- (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.**
 - (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.**

86. From the foregoing provisions, it is evident that an Applicant is entitled to approach the court for extension of time, but such an approach must abide by and adhere to the legal strictures, stipulated under the law.

87. As concerns the subject Application, I must point out that there is no prayer for extension of time within which to lodge and/or file a Notice of Objection to taxation, as by law required.

88. In the absence of such a prayer, this court cannot digress outside the pleadings and grant Reliefs beyond what the court has been asked.

89. In my humble view, the 2nd Plaintiff/Applicant herein must stand and/or fall on the basis of pleadings filed and in this case the chamber summons application dated the 11th August 2020.

90. Suffice it to say, that parties are bound by their pleading and so is the court. Consequently, in the absence of a prayer for extension of time to file a Notice of Objection to taxation, the intended Reference would be a nullity.

91. For the avoidance of doubt, a compliant Notice of Objection to taxation is paramount and forms the foundation or the *sine Quo non* of

any Reference and/or intended Reference.

92. In support of the foregoing statement, I can do no better than to revisit the decision of the court of appeal in the case of **Machira & Company Advocates v Arthur K Magugu & Another (2012) eKLR**, where the court of appeal held as hereunder;

“As we have pointed out the intendment of the Rules Committee in providing for objections to bills of costs to be dealt with by references and not appeals or reviews was expedition. If vague notices are given taxing officers might be forced to give their reasons for their taxation of each item including even those not objected to. That would of course defeat the purpose of that expeditious procedure. Having not specified the items objected to and sought reasons for their taxation, the Respondents notice of 1st August 2001 was fatally defective. It follows that the Respondents reference based on it was incompetent and we agree with counsel for the Appellant that it should have been struck out.”

93. In a nutshell, the limb of the Application seeking for Extension of time within which to file the Reference, has been made in *vacuum*.

FINAL DISPOSITION

94. Having addressed and/or otherwise considered the itemized issues for determination, I come to the conclusion as hereunder;

i. *The Notice of Motion Application dated the 22nd February 2021, was unnecessary and same is hereby expunged from the record of the court.*

ii. *The Chamber Summons Application dated the 11th August 2020, is not only premature and incompetent, but same is also a nullity.*

iii. *The Chamber Summons Application dated the 11th August 2020, be and is hereby Dismissed.*

95. The legal issues adverted to and/or deliberated upon herein were raised by the court and not by counsel for the Defendants/Respondents. Nevertheless, the said issues are anchored on substantive law and therefore the silence on the part of the Advocate and/or ignorance thereof, does not confer jurisdiction on the court.

96. Based on the foregoing observation, I direct that Each party shall bear their own costs in respect of the two Application herein.

97. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER 2021.

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT.

MILIMANI

In the Presence of;

Ms. June Nafula

Mr. Bryan Yongo – 2nd Plaintiff/Applicant

Ms. Sebastian for the Defendants/Respondent