



REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
ELECTION PETITION NO. 3 OF 2017

JAMES KARIMI KARUBIU.....PETITIONER/APPLICANT

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION (IEBC).....1ST RESPONDENT

SAMUEL LEPATI SEKI.....2ND RESPONDENT

RULING

1. This ruling arises from the Election Petition filed by the Petitioner on the 6.9.2017.

Upon application by the Respondents to strike out the petition on the 16.10.2017, the said petition was struck out with ORDERS that:

- 1) *The petitioner shall pay the 1st and 2nd Respondents costs capped at Shs.300,000/=.*
- 2) *The costs be taxed and certified by the Deputy Registrar.*

2. Pursuant to the court order the Respondents filed party and party bill of costs on the 29.1.2018 which was taxed by the taxing officer of the court on the 22.5.2019 at Kshs. 454,053/= and a certificate of costs issued for the said amount. It is dated 21.6.2019. No objection by way of a reference was filed by the petitioner to challenge the decision of the taxing officer.

3. There being no stay of the decision, the Respondents took out execution proceedings to recover the taxed costs.

At all material times, the petitioner was duly represented by Advocates - M/S Munene Maringa & Associates, who have since withdrawn from acting for the petitioner.

4. By a Notice of Motion application take out by the Petitioner, dated 31.8.2020, under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act and Order 9 rule 9, Order 22 Rule 22 and Rule 6 of the Civil Procedure Rules 2010 (CPR), the Petitioner seeks ORDERS:

- 1) *Spent*
- 2) *Spent.*
- 3) *Spent.*

4) *That a stay of execution be granted in respect of the Decision of the Taxing Master contained in the Certificate of costs dated 21.6.2019 with regard to the 1st and 2nd Respondents bill of costs filed on 29.1.2018 pending the hearing and determination of this application.*

5) *That a stay of execution be granted in respect of the Decision of the Taxing Master contained in the Certificate of costs dated 21.6.2019 with regard to the 1st and 2nd Respondents bill of costs filed on 29.1.2018 pending the hearing and determination and Petitioner's intended Reference against the decision of the Taxing Master.*

6) *That leave be granted for the Petitioner to file a reference out of time against the decision of the Taxing Master contained in*

the Certificate of costs dated 21.6.2019 with regard to the 1st and 2nd Respondents bill of costs filed on 29.1.2018.

7) That costs of this application be provided for.

8) Any other orders that meets the ends of justice.

The grounds for the application are stated at the face of the application, and supporting affidavit sworn by the petitioner on the 31.8.2020 and annexures thereto.

5. In opposing the application, the Respondents filed their Replying Affidavit as well as submissions on the 19.1.2021.

The applicant, in response to the applicant's submissions filed their submissions on the 25.11.2020 and authorities to buttress their submissions. They have been considered.

6. Issues for Determination

(1) Whether the applicant should be granted leave to file a Reference out of time against the taxing officer's decision and the certificate of costs.

(2) Whether an order of stay of execution against the taxing officers' decision pending hearing and determination of the intended reference, if issue No.1 is determined in the petitioner's favour.

(3) Costs.

7. Analysis and Determination

The power to grant or deny an order for extension of time to do any act or taking any proceedings under the Civil Procedure Rules is donated by **Order 50 rule 6**, upon terms that the court may deem fit, as the justice of the case may require extension of time is at the discretion of the court.

8. The applicant has the burden of laying a basis to the satisfaction of the court, upon consideration as to whether any party may suffer prejudice by the enlargement of time, if granted, and whether the application has been brought without undue delay and sufficient reasons for the delay – **Nicholas Kiptoo Arap Korir Salat -vs- IEBC (2014) eKLR.**

9. **Matters of party and party costs fall under clause II of the Advocates' Remuneration Order.** It provides;

Clause II 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 14 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.

(4) The High Court shall have power in its discretion by order to enlarge time fixed by sub paragraph (1) or (2) and may with leave of the judge but not otherwise, appeal to the Court of Appeal.

10. The applicant blames his former Advocates for not objecting to the taxing officers decision by a reference, and urges that he should not be punished for mistakes of his former Advocates, by his failure to request for reasons for the decision and filing the reference. It is a further submission that as a sign of good will, the capped costs by the High Court of Shs.300,000/= has been deposited in court hence the respondents shall not suffer any prejudice should the orders sought are granted.

11. Enlargement of Time?

A mistake, as described by the court in **J.G. Builders V. Plan International (2015) eKLR** citing **Belinda Murai & Others - vs -Amos Wainaina (1978) KLR 2782** is a mistake regardless of who commits the mistake. It continued to render that:

"The door of justice is not closed because a mistake has been committed by a lawyer who ought to know better.

The court should do whatever is necessary to rectify it".

12. There is not dispute that the High Court capped the election petition's costs payable by the Petitioner/Applicant at Kshs.300,000/=. There is too no contestation that the taxing officer of the court taxed the costs at Shs.454,053/= which is Shs.154,053/= over and above the capped costs. Whether this can be said to be erroneous or deliberate act by the taxing officer, a mistake was committed this time by the taxing officer.

13. The offending decision was rendered on the 21.6.2019 when the certificate of taxation was issued. Other than citing a mistake by his former advocates for failure to file the reference, no other reason is stated.

For a period of about 14 months, the applicant went to sleep and was awakened by execution proceedings, upon which he approached the court for a remedy by this application.

14. The decree as drawn shows the taxed costs as Kshs.300,000/= but added thereto is a certificate of costs in the sum of Shs.154,053/=. The applicant submits that the taxing officer erred in adding costs and interests to the capped costs, which in his view can only be resolved in a reference hearing, which he urges to be allowed out of time.

15. The Supreme Court in **Moses Mwicigi & 14 Others V. IEBC & 5 Others (2016) eKLR** rendered that it is important that procedural imperatives be followed by parties who wish to approach the court for remedies.

However, whenever necessary the court is also, empowered to exercise its discretion, to disregard the hard and straight jacket rules and procedures, to dispense justice, as such are but handmaidens of justice, and being not cast on stone, may be overlooked if justice of the case so demands, in line with **Article 159 (2) (d) of the Constitution** which mandates courts to dispense justice without undue procedural technicalities, for the ends of justice to be met.

16. In **Alfred Ochieng Opiyo T/A Ochieng Opiyo & Co. Advocates -V- Export Hydro Pump & Services (Africa) Ltd (2018) eKLR**, the court, citing **Article 159 (2) (d)** rendered that;

“Courts and tribunals shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities”.

17. The procedure set out under **Rule II of the Advocates Remuneration Order** is very simple and good law to challenge taxed bills of costs between parties and or Advocates – client costs.

The requirement that the taxing officer gives reasons for their decision is equally a good procedural step, for the parties to clearly understand the issues they may raise in their references to the judge.

18. **Stay Orders?**

Though the applicant avers and submits that he has deposited the capped costs sum of Kshs.300,000/= into court to cushion the respondent from suffering prejudice, he has not provided any evidence, by the deposit slip or any demonstration of the same. To that extent, the Respondent submits that the applicant has committed perjury and ought to be punished.

19. Further it is the respondent's submission that a similar application to the present application dated **5.8.2019** was filed and determined, thus rendering the present application *Res judicata* – wherein the petitioner was directed to deposit the sum of Shs.300,000/= into court. The applicant has neither denied this submission nor tendered submissions on the issue.

20. I have taken liberty to peruse the court proceedings. There is an application by **Notice of Motion dated 5.8.2019 by the Petitioner, wherein orders sought were for stay of execution, and review and discharge, vary or set aside the assessed costs in the bill of costs dated 22.1.2019 at Shs.453,803/=**, on same grounds as stated in the present application, having arisen from the taxing officer's decision on costs.

21. The said application upon perusal of the court record, seems not to have been placed before the court for hearing (the court stands corrected if it was heard and orders granted), because thereafter this application dated 31.8.2020 was filed. No order to that effect has been annexed to these proceedings, if indeed such orders were issued by the court. The matter of perjury cannot be determined at this stage, nor whether or not the present application is *Re-judicata* without any proof that a similar application was heard and determined by a competent court, in terms of **Section 7 of the Civil Procedure Act**.

22. The Court of Appeal in **Label Singh Harman Singh Ltd - vs- AG & 2 Others (2016) eKLR** held that,

“taxation of costs is part of the execution process complete with its provisions for stay of execution, under the Civil Procedure Rules.....”.

It follows, in my view that the provisions of the Civil Procedure Act, and the Rules with regard to stay of execution will apply to proceedings, which are of a civil nature, for the reference or an objection to the court from the taxation of a Bill of costs by a taxing officer of the court, under the Advocates' Remuneration Order.

23. The applicant has annexed a draft intended Reference to the supporting affidavit.

It is urged that if stay is not granted, the intended reference will be rendered nugatory. Upon consideration, it is my considered view that the Applicant/Petitioner has made out a case deserving of the orders he seeks in the application dated 31.8.2020. It would not serve the ends of justice to shut the applicant from the seat of justice due to a procedural technicality whether by his advocate or himself.

The issues raised as to whether the capped costs by the High Court included **other costs in the sum of Shs.154,053/= as stated in the**

decree shall be best determined during the hearing of a reference, before the Judge.

24. Consequently, I find merit in the said application and direct/order as hereunder:-

1) The Applicant is granted leave to file a reference to the judge in respect of the decision of the taxing officer contained in the certificate of costs dated 21.6.2019 with regard to the 1st and 2nd Respondents bill of costs filed on the 29.1.2018. The reference shall be filed within 21 days of this ruling.

2) That an order of stay of execution of the decree arising from the certificate of costs dated 21.6.2019 is hereby granted, but subject to the petitioner depositing the sum of Kshs.300,000/= into court within 21 days of this ruling. In default, the stay order shall lapse upon expiry of the 21 days stay period.

3) Costs of this application shall abide the outcome of the intended reference.

Orders accordingly.

Signed electronically.

J. N. MULWA

JUDGE

DELIVERED AT CHUKA THIS 8TH DAY OF APRIL, 2021.

L. W. GITARI

JUDGE