



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

MISC. CIVIL CASE NO. 17 OF 2016

BETWEEN

GEOFFREY NJUGUNA MUNGA.....APPLICANT

VS

GEOFFREY KARONGO & 9 OTHERS.....RESPONDENTS

RULING

1. This matter was first filed as a taxation of the party and party bill of costs. The bill of costs was filed on 22nd July, 2016 by **GEOFFREY KARONGO** (hereinafter Karongo) against **GEOFFREY NJUGUNA MUNGA** (hereinafter **Njuguna**). Karongo sought costs to be taxed in respect to Kiambu Chief Magistrate's court Civil Case No. 92 of 2010 and High Court Civil Appeal No. 608 of 2013.

2. I am not sure why the bill of costs were not file under the files where the costs were awarded and one does therefore wonder how the taxing master was able to proceed with the taxation without considering the proceedings to which the costs apply. I have noted a pattern or habit which has cropped into use where parties on being awarded costs open a new file, more often a Miscellaneous file, where there are costs for taxation. That opening of new files denies the taxing master, and the High court if there is a reference, of having sight of proceedings and pleading which are all necessary in the determination of the taxation of the bill of costs. In my view that habit is undesirable for the attainment of a just decision on costs.

3. In this matter the Amended Bill of Costs filed by Karongo, was taxed on 4th April, 2017 whereby Njuguna was required to pay Kshs.52,888/= in costs.

4. Njuguna filed an application dated 4th November, 2019 seeking review of the order on taxation. By a ruling dated 28th May, 2020, the taxing master upheld Karongo's preliminary objection that taxing master lacked jurisdiction to entertain the application because provision of paragraph 11(2) of the Advocates Remuneration Order provides for challenge of taxed cost to be heard by the High Court. The taxing master therefore dismissed Njuguna's application dated 4th November, 2019.

5. Undeterred Njuguna filed an application dated 10th June, 2020 seeking, from this Court, enlargement of the period to file a reference against the taxation of Karongo's bill of costs.

6. That application was met by a preliminary objection filed by Karongo which objection will be considered by this Ruling. The objection is in the following terms:-

1. *THAT the application and the issue of whether costs were lawfully and properly awarded by the Deputy Registrar (which is the crux of the present application) is Res Judicata and offends the provisions of Section 7 of the Civil Procedure of the Civil Procedure Act as the matter has already been determined by the Environment and Land Court in ELC 73 of 2018 in a Ruling delivered by Justice Okong'o on 5th May, 2020 page 21 of the ruling.*

2. *THAT this honourable court lacks jurisdiction under section 150 of the Land Act 2012 to hear the current application being an a matter concerning and relating to use and occupation of land as the underlying substratum.*

3. *THAT the application is therefore grossly incompetent and an abuse of the court process and the same should be dismissed with costs.*

7. By the submissions filed by Karongo in support of the first objection above, Karongo stated that the issue of taxation of costs was ruled

upon by the Environment and Land Court (ELC) in Civil Appeal NO. 73 of 2018. Karongo referred to that ELC Ruling, a copy which was not supplied to the court and despite several attempts to find that Ruling in the Kenya Law Reports website I was not successful. I am therefore unable to appreciate, how if at all, that ruling affects this present matter. For that reason the first objection is dismissed.

8. On the second objection Karongo seeks the finding by this Court to that this matter cannot be entertained by the High Court because it involves or concerns the use and occupation of land and that therefore it is only ELC which can hear this matter.

9. I must say I am at loss to appreciate that objection because as stated before this matter was filed as a party and party bill of costs. How that bill of costs relates to the use or occupation of land, I do not know. It follows that the second objection also fails and is dismissed.

10. Karongo fell into error in raising the preliminary objection. It was not a proper objection. The celebrated case of **MUKHISA BISCUIT MANUFACTURERS LIMITED VS. WEST END DISTRIBUTORS LTD (1969) E.A. 696** Judge of Appeal Law, JA stated:-

“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 pleading and which if argued as Preliminary Objection may dispose of the suit.”

11. It is worth considering the above quoted portion of **Mukhisa Biscuit** case (supra) here. Karongo introduced matters that are not arising from the pleading and even when he raised a point of law, that this lacks jurisdiction to hear this matter, that point is not clear and is unsupported by any pleading before me. What Karongo essentially asked this Court to do is to exercise its discretion to find in his favour. The objection was in my view blurred by facts that are not before court. Karongo should have borne in mind what was stated in the case **SIMBA PLATINUM LTD VS SAMBA LIMITED & ANOTHER; ASHA WANJIKU ALI (Interested party)(2021) eKLR** as follows:-

“13. In the instant case the averments of the Interested Party that the motor vehicle KBQ 631 C is owned by Simba Poa Limited and not the Plaintiff/Applicant calls upon this Court to require the parties prove ownership through the process of evidence.

14. In the case of **ORARO V MBAJA [2005] 1 KLR 141 Ojwang J, (as he was then) expressed himself as follows: -**

‘...The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...’

16. In **J N & 5 OTHERS V BOARD OF MANAGEMENT, ST. G. SCHOOL NAIROBI & ANOTHER [2017] eKLR** Mativo J, observed correctly in my view, as follows:

‘... a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record...’

12. In my view, the objections raised by Karongo are in view of the above discussions, unmerited. Accordingly, the preliminary objection dated 14th July, 2020 is dismissed with costs.

RULING DATED AND DELIVERED AT KIAMBU THIS 5TH DAY OF OCTOBER, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant : Ndege

For Geoffrey Karongo: Present Mr. Muchiri

For Geoffrey Njuguna : Present in person

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE