



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

ELECTION PETITION NO. 14 OF 2017

SETH AMBUSINI PANYAKO.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION....1ST RESPONDENT

THE RETURNING OFFICER, KAKAMEGA COUNTY.....2ND RESPONDENT

CLEOPHAS WAKHUNGU MALALA.....3RD RESPONDENT

RULING

1. The application for determination is the summons dated 24th March 2021. It seeks stay of the certificate of costs dated 21st November 2018, return of motor vehicle registration mark and number KCQ 490U, the setting aside of the said certificate of costs and the assessment of costs afresh.

2. The grounds upon which the application is based, as well as the factual background to it, are set out on the face of the application and in the supporting affidavit, sworn by the petitioner on 26th March 2021. His principal case is that he was never notified of the bill of costs for taxation and the process of taxation, and that the entire process was shrouded in secrecy and mystery. He states that he had notified the parties of his address of service, which he asserts he never changed. He avers that he was never served with any of the processes relating to the taxation. He avers that his motor vehicle was threatened with illegal impounding over the same.

3. There is a reply to the application by the 3rd respondent. He states that Cherere J, in a ruling delivered on 20th December 2017, had capped costs at Kshs. 3, 000, 000.00, on a 50:50 basis between the 1st and 2nd respondents on one hand and the 3rd respondent on the other. He asserts that there never was an order that the petitioner pays him a maximum of Kshs. 1, 500, 000.00. He states that the 3rd Respondent filed his bill of costs, dated 7th August 2018. Several notices of taxation, were allegedly issued by the Deputy Registrar. The bill of costs dated 23rd August 2018 was served, at the home of the petitioner, on 27th August 2018, and an affidavit of service filed. The taxing court was satisfied with the service, and proceeded to tax the bill at Kshs. 1, 131, 384.00. After that his advocates instructed auctioneers, Messrs. Jakacha Auctioneers, to recover the amount, which culminated in the attachment of motor vehicle KCQ 490U, which according to the records attached, from the National Transport and Safety Authority, belonged to the petitioner.

4. The other reply to the application is by Grace Chepchirchir Ronoh, the 2nd respondent, through an affidavit sworn on 8th April 2021. She avers that the 1st and 2nd respondents had not taken out any warrants of execution or instructed any auctioneers to recover the costs awarded by the court, and that they had not proclaimed KCQ 490U at all. She states that the 1st and 2nd respondents were still waiting for the bill of costs at the Court of Appeal, between the same parties, to be taxed first, so that they claim payment for all the bills. She avers that any attempt to stay execution of their bill of costs would be in vain as they had not made any application for its execution. She avers that the petitioner is challenging the ruling of the taxing officer of 18th November 2018 without following the established procedure. She asserts that that process cannot be bypassed. She has gone into detail on all the efforts that the 1st and 2nd respondents made to have the bill served on the petitioner before taxation. She asserts that the petitioner was always properly served, and on his own volition chose to stay away from the court when the bill was being taxed, and he should not be heard to complain now that he was excluded from the process.

5. The two applications dated 24th March 2021, were filed during the High Court Easter recess, and were placed before Aburili J, who was the Judge on duty then, on 26th March 2021. The court certified them urgent, and an interim order for stay of execution or taking of possession of KCQ 490U was made, pending hearing of the matter *inter partes*. Further orders were made, on 30th March 2021, to stop disposal of the motor vehicle pending hearing of the applications *inter partes*.

6. The applications were eventually argued before me on 15th April 2021. Mr. Busiega, for the petitioner, argued that the petitioner was not made part of the proceedings which led up to the execution proceedings, and that he was deprived of his right to be heard, and it was on that basis that setting aside of the taxation was being sought. He submitted that execution was being sought two years outside the law, and that it was mandatory that a notice to show cause should have been issued. He asserted that no notice to show cause was ever served. His second argument was that, even if there was a notice to show cause, the taxation was done without involving the petitioner, as there was no evidence of service of the process upon him. He also raised issue with the 3rd respondent having to obtain orders from the lower court for seizure of the car when he was claiming to have a valid certificate of taxation from the High Court. He also argued that the motor vehicle was co-owned by the petitioner and Ngao Credit Limited. On the application by the 3rd respondent, it is submitted that it was done by an advocate, since the supporting affidavit was sworn by the advocate, and he had, therefore, descended into the arena of conflict. He submitted that the 3rd respondent was not entitled to the security for costs, and he should have pursued the security for costs first before pursuing the vehicle. The petitioner blamed his previous advocates for keeping him in the dark, and asked that he be not penalized for the sins of his advocates. He raised issue with the affidavits of service placed on record, on grounds that they were not specific on the persons served.

7. Dr. Malala, on behalf of the 3rd respondent, submitted that due process was followed before the attachment was done, as there was a valid certificate of taxation, auctioneers were properly instructed, who made proclamations and issued notifications of sale. He submitted that since the car had been proclaimed and attached, it no longer belonged to the petitioner, and should remain at the auctioneer's yard until the debt was paid in full. It was asserted that the petitioner never served the notice to act in person on the 3rd respondent. It was argued that the petitioner had given diverse addresses as his residences, in an effort to evade service. He asserted that the petitioner was properly served. He submitted that, although the petitioner was entitled to a hearing, he chose not to avail himself of that opportunity by not turning up in court. On the ownership of the motor vehicle, it was argued that the attached records showed the petitioner as the sole owner of the subject motor vehicle. On the order from the lower court, it was submitted that the same had nothing to do with attachment, but was obtained to facilitate access to the motor vehicle as it was blocked by another, and orders were required to have that other moved out of the way. It was submitted that Rule 11 of the Advocates Remuneration Order provided an elaborate procedure where a party was aggrieved by the outcome of a taxation, yet the petitioner had not availed himself of that procedure, instead he was seeking stay of the execution, to circumvent that procedure. He accused the petitioner of adopting manouvres to avoid payment of the taxed costs, and generally to do the right thing. He asked that the respondents be allowed to go ahead with the execution process.

8. Mr. Wesonga, for the 1st and 2nd respondents, submitted that 1st and 2nd respondents had not sought execution against the petitioner. He argued that the petitioner should have filed a reference against the taxation. He further submitted that the setting aside order was being sought twenty-eight months after the same was made, that is after considerable delay, and way outside the fourteen days allowed in Rule 11 of the Advocates Remuneration Order. He said that the court had no jurisdiction to entertain an application filed outside the time allowed in law, without leave of court. He cited *Nicholas Kiptoo arap Salat vs. IEBC & 7 others* [2014] eKLR, *Mohamed Sakim Balal & another vs. ESS Investments Ltd* [2020] eKLR, *Alyushin Restaurant Ltd vs. Kenya Conference of Catholic Bishops & another* [2020] eKLR. He submitted that the 1st and 2nd respondents made efforts to serve the petitioner, which the petitioner did not traverse by way of a replying affidavit. He submitted that the initial notice of taxation was served on the petitioner's then advocates, who received it. He argued that the petitioner was served but he chose to stay away. He cited several decisions on service of court process, being *Govind Meghji & 2 others vs. M. Aggarwal & another* [2017] eKLR, and *Jibril Brothers Enterprises Ltd vs. Abdulaziz Nassor Athman* [2020] eKLR.

9. The petitioner seeks the setting side of the taxation principally on the basis of lack of service of taxation notice. I have perused the record before me. The journey to the impugned taxation began on 20th December 2017, when Cherere J awarded costs and capped them at Kshs. 3, 000, 000.00, to be shared equally between the 1st and 2nd respondents on one part and the 3rd respondent on the other, and to be taxed by the Deputy Registrar. The bill of costs for the 1st and 2nd respondents, dated 28th March 2018, was lodged at the registry on 15th April 2018; while that by the 3rd respondent is dated 7th August 2018, and was filed herein on even date. The matter was placed before the Deputy Registrar on 5th July 2018, who directed that, as the matter was not in the cause list for that day, the bill for taxation be deferred to 15th August 2018. A notice of taxation, scheduled for 15th August 2018, was thereafter issued by the Deputy Registrar, dated 5th July 2018, addressed to Nchoe Jaoko & Co. Advocates and Malala & Co. Advocates, for the petitioner and the 3rd respondents, respectively. On 13th July 2018, the petitioner, in person, lodged a letter at the registry, dated 11th July 2018, seeking to have the deposit of Kshs. 500, 000.00 released to him, now that the petition had been concluded, to which the Deputy Registrar endorsed remarks that costs be taxed first. There is an affidavit of service on record, sworn on 14th August 2018, returning service of the notice of taxation of 5th July 2018, which indicates that that notice was received on 18th July 2018, by Nchoe Jaoko & Co. Advocates, under protest.

10. Both bills came up on 15th August 2018, before the Deputy Registrar, and the court directed that since the bill for the 1st and 2nd respondents had been received by the advocates for petitioner under protest, on grounds that they had no instructions, it was prudent that the same be served personally on the petitioner, and the matter was then fixed for mention on 29th August 2018. Come 29th August 2018, it transpired that the petitioner had been served on only the previous day, the court directed that the matter be mentioned on 12th September 2018. Thereafter the two bills were handled separately. The bill by the 3rd respondent came up for the last time on 26th September 2019, when the court expressed itself to have been satisfied that the petitioner had been properly served, and taxed the bill against him in a ruling delivered on 21st November 2018; while that by the 1st and 2nd respondents came up for the last time on 24th October 2018, the court was satisfied that the petitioner had been properly served, and delivered its ruling on the bill in 21st November 2018. The 1st and 2nd respondents were unhappy with the ruling on their bill, and brought a reference before the Judge, which was disposed of in a ruling that was delivered on 27th November 2020.

11. Regarding service, an affidavit of service sworn by Daisy Nabalayo Wakoli, for the 1st and 2nd respondents, on 14th August 2018, indicates that the petitioner was served with notice of a taxation, dated 5th July 2018, through his advocates, Nchoe Jaoko & Co. Advocates, who received the same on 18th July 2018, under protest, on grounds that they had no instructions. There is another affidavit on service on record, sworn by Nicky E. Ademba, on 27th August 2018, which indicates that he served, on behalf of the 3rd petitioner, the bill of costs and taxation and notice of taxation dated 23rd August 2018, on a woman who claimed to be the wife of the petitioner, at his home at Joyland within Kakamega town. The said affidavit of service did not return to court copies of the documents that were allegedly served on the alleged

woman. The other affidavit of service was sworn on an unknown date, by Daisy Nabalayo Wakoli, for the 1st and 2nd respondents, filed herein on 12th September 2018, and it indicates that service was effected on 4th September 2018 on unnamed wife of the petitioner at his home within Kakamega town, but she refused to receive the process because she was not the petitioner, and the process server left her with the papers, copies of which were not attached to the affidavit of service returned to court as required. Daisy Nabalayo Wakoli swore another affidavit of service on 20th September 2018, to return service on a notice of taxation dated 19th September 2018, on an unnamed wife of the petitioner, at Ikonyero, who accepted service but declined to acknowledge the same by signing the papers. However, she allegedly gave to the process server a copy of the notice by the petitioner to act in person dated 5th September 2018. The process server subsequently travelled to Syokimau Estate, off Mombasa Road, at Great Wall Phase II, off Beijing Road, but she was unable to trace the petitioner. She thereafter sent a copy of the notice of taxation to the petitioner through the email address indicated in the affidavit of service. There is another affidavit of service, sworn on 20th September 2018, by Nicky Ademba, indicating that he served, on instructions of the 3rd respondent, a notice of taxation, on 19th September 2018, at Emusinga area, Kakamega town, on a brown woman, who claimed to be the spouse of the petitioner, who informed him that the petitioner had travelled to Nairobi, she accepted service, but declined to sign the papers.

12. What is clear from the above is that the bills of costs for taxation and the taxation notices were never served on the petitioner personally. Instead, they were all served on a brown woman, whose name is not given, but who is described as the spouse of the petitioner. The place of service in the affidavits of service is said to be at the home of the petitioner, within Kakamega town, at places said variously to be at Joyland, Emusinga and Ikonyero. I dealt with issues around that kind of service in my ruling of 26th July 2019. The woman who was served severally with process by the process servers for the three respondents was not identified by name. It would be not sufficient to merely describe the persons served as a brown woman and a wife of the petitioner without her identifying by name, and, where she had refused to identify herself by name, say so in the affidavit of service. It should be deposed as to how the process server got to know the name of the person allegedly served, or the fact that that person was a spouse of the party named in the pleadings. The place where the alleged service was done is equally important. It is not clear to me where the home of the petitioner, where the service allegedly happened, was situated, whether it was Joyland or Ikonyero or Emusinga. It could be that these names refer to one and the same place, I have no way of knowing that. Use of different names for the place of service would create doubt in my mind as to whether indeed there was any service at all at the places mentioned. Service of court process, and particularly of notices for hearing, is critical. Fair hearing is at the heart of the doctrine of rule of law, for no person should be condemned unheard. Natural justice is all about each party being heard, and, therefore, when dates are fixed for any hearing, all the parties ought to be notified of such dates. Where it is apparent that there was no proper notice of any process, then serious questions should arise about the fairness of the process.

13. I note that after the initial notices of taxation were served on his advocates, Nchoe Jaoko & Co. Advocates, and the latter indicated that they had no instructions, the petitioner filed the notice to appear in person, dated 5th September 2018, on 7th September 2018. There is no affidavit of service to indicate whether he thereafter served the same on any of the respondents. However, the process server for the 1st and 2nd respondent has deposed that the spouse of the petitioner did give to her a copy of the notice when she went to serve her. That averment lends to credence to the claim by the process server that she did indeed serve notice of taxation at the residence of the petitioner at Joyland, and that the person that she served was his wife. That should wipe out any doubts that I have entertained regarding the said service, which I have expressed in paragraph 12 here above.

14. The second issue about the notice to appear in person, dated 5th September 2018, is that it indicates the physical address of the petitioner to be in Machakos, being Mombasa Road, off Beijing Road, Great Wall Phase II, Syokimau. I doubt whether this address was useful in any way, for it refers to an estate, Great Wall Phase II. There is no reference to a specific house or building or residence where the petitioner could be found. Little wonder., therefore, that the process servers were unable to trace the petitioner at that address. It would be unrealistic to expect that process servers would knock at all the doors to the all the houses within the Great Wall Phase II, in an effort to trace the petitioner for purposes of service. The argument that the petitioner ought to have been served at that address is hollow in the circumstances.

15. The most effective way of impeaching service of court process is by way of cross-examination of the process server on the veracity of the averments made in their affidavit of service. The petitioner has not taken that route. If his case is that the person that the process servers allege to have had received process on his behalf was not his spouse, or that the place where the service was effected was not his residence, then he ought to have sought to cross-examine the two process servers. He did not take that direction, and, therefore, the averments made in the affidavits would stand. Of course, I have raised issues about the manner that the affidavits of service were drawn, but those doubts are somewhat cleared by what I have stated in paragraph 13 here above. The credibility of the process servers should have been attacked on the issues I have alluded to here above, and the fact that the petitioner did not do so leaves the averments in their affidavits of service largely intact. The taxing officer believed them, and, much as I entertain the misgivings that I have expressed above, I shall not interfere with the finding of the taxing officer on the service, for the reasons that I have given in paragraph 13 here above.

16. Overall, it is my finding that the petitioner was properly served with the processes that led up to the taxation, and that he chose to stay away, and he is now raising issues after the processes of execution has caught up with him.

17. I have noted, from the filings and submissions by the petitioner, that he does not raise any issues with the manner of the taxation of the bills, for his concern is mainly with the fact that he was not served with taxation notices. I raise this as setting aside of orders for the sake of it, or so as to allow a party to go through the motions, would be of no use, where the carrying out of fresh taxations would yield the same result. He has not suggested that the taxing officer made errors in the manner she taxed the bills or was wrong in some principle or other, or that if he had participated in the taxations the outcome would have been different.

18. The petitioner complained that the 3rd petitioner levied attachment on his property without first having a notice to show cause issued, yet the certificate of costs was more than twelve months old. I have perused through the record, and noted that the 3rd respondent lodged at the registry, on 19th February 2019, an application for execution of the decree, by way of arrest and detention in civil jail of the petitioner; simultaneously with a draft notice to show cause form, duly filled, and the same was duly executed by the Deputy Registrar on 22nd February 2019. The petitioner was to appear for notice to show cause on 20th March 2019. On 20th March 2019, that notice was stood over to 3rd April 2019. On 3rd April 2019 the same was stood over to 24th April 2019, to allow for service of the notice on the petitioner. On 24th April 2019, it was stood over to 12th June 2019 for similar reasons. A fresh notice to show cause, dated 23rd October 2019, was taken out by the 3rd

respondent. Efforts to have the notice to show cause heard appear to have been derailed by the reference proceedings that were conducted before the Judge in the intervening period, at the instance of the 1st and 2nd respondents, and the taxation that was ordered with respect to some of the taxed items. After I delivered my ruling on 27th February 2020, renewed its efforts to have the notice to show cause served on the petitioner were made the 3rd respondent by writing to court on 11th March 2020. It would appear from the record that no notice to show cause was issued, instead the applicant lodged an application for warrants of attachment and sale of the assets of the petitioner. That application was lodged in court on 22nd December 2020. A warrant to that effect was issued by the court on 14th January 2021, and the subject motor vehicle was proclaimed on 26th January 2021. The warrants were renewed on 18th March 2021.

19. As the execution process appears to have proceeded without the benefit of a notice to show cause, should I set aside the execution process by way of attachment and sale? The petitioner herein was ordered to pay costs to the respondents. He has not paid the said costs, and the order for payment of costs has not been set aside or varied. He had made a deposit of Kshs. 500, 000.00, and it would appear that the half share due to the 3rd respondent was released to him, and he is now claiming the balance, based on the taxed costs. The petitioner is, therefore, indebted to the 3rd respondent and bound to pay him the costs as taxed. Whereas the petitioner is pleading with the court to have his motor vehicle released, he has not made any offer to settle the costs due. Ideally, the petitioner has come to court with unclean hands. He owes the respondents costs, and has made no efforts to have the issue settled. He cannot have his cake and eat it. Of course, due process ought to be followed, but the petitioner should offer security with regard to what he owes.

20. After taking into account everything, the orders that commend themselves to me to make are as follows:

(a) That I find that the petitioner was properly notified of the taxation process, and, therefore, the taxation proceedings were properly conducted, and there is no basis for their setting aside;

(b) That I find that the certificate of costs in favour the 3rd respondent, being more than one-year-old, the 3rd respondent ought to have had notices to show cause issued before levying execution by way of attachment and sale of the property of the petitioner;

(c) That consequently, I will set aside the mode of execution adopted by the 3rd respondent, to allow the 3rd respondent follow the correct procedure, but, as a condition, the petitioner shall deposit in the court the amount of Kshs. 1, 095, 399.00, within the next fourteen days, pending hearing of notice to show cause;

(d) That I shall allocate a date, at the delivery of this ruling, when the parties shall appear before the Deputy Registrar, to confirm whether the petitioner has complied with the order in (c) above, to show cause why the amount, or any part of it, deposited under (c), above, cannot be released to the 3rd respondent, and for further orders or directions with respect to the costs due to the 1st and 2nd respondents;

(e) That should the motor vehicle be still under the custody of Jakacha Auctioneers, the same shall not be released to the petitioner before he deposits the money in (c), above, and

(f) That the respondents shall have the costs of these proceedings.

21. It is so ordered.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 12th DAY OF November 2021

W MUSYOKA

JUDGE