



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**MISCELLANEOUS CIVIL CASE NO. E096 OF 2021**

**BETWEEN**

**1. YVONNE DAMARIS KIMANTHI**

**2. LINCOLN KARINGO NJERU**

*(suing in their capacity as administrators of the estate of*

**NEWTON MUGENDI NJERU (DECEASED).....APPLICANTS**

**VS**

**1. KENYA COMMERCIAL BANK LIMITED**

**2. METRO LOGISTICS LIMITED**

**3. BARCLAYS BANK OF KENYA LIMITED.....RESPONDENTS**

**AND**

**1. GACHANJA MUHORO & SONS.....1<sup>ST</sup> THIRD PARTY**

**2. PATHOLOGISTS LANCET KENYA LIMITED..2<sup>ND</sup> THIRD PARTY**

**RULING**

1. **KENYA COMMERCIAL BANK LIMITED**, hereinafter the applicant, filed the chamber summons filed in court on 14<sup>th</sup> July, 2021. By that application, this Court is moved to stay execution for costs awarded to **YVONNE DAMARIS KIMATHI and LINCOLN KARWINGO NJERU**, hereinafter the respondents. The applicant by that application additionally seeks for enlargement of time within which to file a reference against taxation or in alternative for an order that the certificate of costs be set aside.

**BACKGROUND**

2. The respondent filed a case before the Thika Chief Magistrate's court, Civil case No. 537 of 2016 against the applicant as the 1<sup>st</sup> defendant and against another defendant namely, **METROL LOGISTIC LIMITED**, the 2<sup>nd</sup> defendant. The Thika Court dismissed the case against the applicant but ordered the applicant to pay the respondent's costs of that suit. The respondents filed this miscellaneous cause before this Court seeking the Deputy Registrar of this Court to tax those costs awarded by the Thika Chief Magistrate's court and payable by the applicant.

3. The Bill of Costs filed in this cause is clearly titled, "Party to Party Bill of Costs." That title ought to have led the taxing master of this Court to inquire which court awarded those costs. The taxing master however did not make such inquiry but proceeded to tax costs of the subordinate court, Thika Chief Magistrate, in the absence of the applicant.

**ANALYSIS**

4. At the centre of this matter is whether the taxing master had jurisdiction to tax the respondent's bill of costs for a matter that was determined at Thika Chief Magistrate's court.

5. I respond to that issue identified above by citing the case ANGELO GITONGA VS. ANGERO GITONGA & ANOTHER (2010) eKLR along these lines:-

***“I would just like to quote from a case I have decided in the past to show my point of view on the taxations being undertaken by the subordinate court. This is in the case MATHIU ELIJAH SOLO VS. JOSEPH MURIRA High Court Misc. Case No. 5 of 2008 where I had this to say:-***

***“There is no provision in the Advocate’s (Remuneration) Order for taxation of Subordinate Court’s Costs. A practice is however arising, where parties in the subordinate court file laborious and detailed bill of costs, and then engage the magistrate in the process of taxation. That in my view is uncalled for and should be discouraged. Subordinate court’s party and party costs should be assessed, following the provisions of Schedule VII of the Order. Where a party desires to invoke the learned magistrate in exercise of his discretion on instruction fee, such should be addressed when the court makes an order for costs to be paid.”***

6. The Schedule of the **Advocates (Remuneration) Order** provides for costs awarded in the subordinate court. Discernibly, that Schedule does not provide for taxation but for assessment of such cost by the subordinate court. That Schedule most importantly does not provide for costs awarded by the subordinate court to be taxed at the High Court. To then proceed with the taxation in the High Court of such costs, was a travesty. To reiterate this position, I cite the case NYAMONGO & NYAMONGO ADVOCATES VS. PAN AFRICAN INSURANCE COMPANY LIMITED & ANOTHER (2016) thus:-

***“The legal position is that costs in the subordinate court matters are assessed (not taxed) under schedule V11 of the Advocates Remuneration Order which is specifically titled: “costs of proceedings in Subordinate courts.”***

***The above position is further fortified by paragraph 51 of the Advocates Remuneration Order which provides:-***

***“Subject to paragraph 22, the scale of costs applicable to proceedings in subordinate courts (other than Kadhi’s courts is that set out in Schedule V11.”***

***The applicant herein was a party to the suit in the lower court which was compromised in his favour. That being the case, in the event that the subordinate court ordered that he be paid his costs of that suit, then he ought to have filed his party to party bill of costs in the subordinate court for assessment.”***

7. There is no doubt that the taxing master did not have jurisdiction to proceed with taxation of costs awarded by the subordinate court. It is useful to cite the apt words of the Court of Appeal in the case PHOENIX OF E.A. ASSURANCE COMPANY LIMITED VS. S.M. THIGA T/A NEWSPAPER SERVICE (2019) eKLR as follows:-

***“1. At the heart of this appeal is the issue of jurisdiction. It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?***

***2. In common English parlance, ‘Jurisdiction’ denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae.”***

8. There is no doubt that the act of taxing the subordinate costs by the taxing master of this Court was an act that was void. Such an act is therefore amendable to being set aside as was stated in the case PHOENIX OF E.A. ASSURANCE COMPANY LIMITED (supra).

***“MACFOY V UNITED AFRICA CO LTD [1961] 3 All ER, 1169, comes into play and Appeal No. 6 of 2018 would therefore fall by the wayside. In that case it was held thus:-***

***‘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...’*** (Emphasis ours)

9. That taxation of 17<sup>th</sup> June, 2021 and the resultant certificate, Taxation will consequently be set aside.

## CONCLUSION

10. The act of taxing the subordinate court’s costs by the taxing master of this Court was to do an act that was void and consequently this Court grants the following orders:-

(a) The taxation of 17<sup>th</sup> June, 2021 and the certificate of taxation dated 9<sup>th</sup> July, 2021 are hereby set aside and vacated.

(b) The chamber summons filed on 14<sup>th</sup> July, 2021 succeeds as per prayer 5 and the costs thereof are awarded to **Kenya Commercial Bank Limited** to be paid by **Yvonne Damaris Kimanthi and Lincoln Kar Wingo Njeri** assessed at Kshs.shs.20,000/=.

(c) This file is hereby closed.

**RULING DATED AND DELIVERED AT KIAMBU THIS 11<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**MARY KASANGO**

**JUDGE**

Coram:

Court Assistant: Maurice

For: Gachanja Muhoro & Sons – Mr. Mahugu

For KCB: Miss Njagi H/B Chyeriot

For Yvonne Damaris Mr. Kaingu

**COURT**

Ruling delivered virtually.

**MARY KASANGO**

**JUDGE**