



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**MISCELLANEOUS APPLICATION NO. 35 OF 2018**

**PATRICK NGARI NJERU.....APPLICANT**

**VERSUS**

**JOHN NGARI MBAKA.....RESPONDENT**

**R U L I N G**

**A. Introduction**

1. This ruling pertains to preliminary objection dated 10<sup>th</sup> July 2018 by the respondent in response to an application dated 28<sup>th</sup> June 2018 that sought to set aside the respondent's party and party bill of costs and an order of retaxing the aforementioned bill of costs.

2. The instant preliminary objection is grounded on the fact that this court has no primary jurisdiction over the ruling the Magistrate's Court Executive Officer dated 1/06/2018 made by virtue of Rule 31 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 as applied together with Rules 2 and 6 (1) (b). Further the preliminary objection is grounded on the fact that an application under paragraph 11(2) of the Advocates Remuneration Order cannot be subject of an originating process.

3. The applicant opposes the preliminary objection on the grounds that this court has jurisdiction by virtue of Paragraph 11(2) of the Advocates Remuneration Order and also because the respondent's bill of costs dated 27<sup>th</sup> March 2018 was taxed pursuant to the judgement of the Chief Magistrate dated 1/03/2018 and Rule 31 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 and Schedule 7A of the Advocates Remuneration Order, 2014. The applicant also asserts that the Chamber Summons dated 28<sup>th</sup> June 2018 is an originating process by virtue of Paragraph 11(2) of the Advocates Remuneration Order.

**B. Analysis & Determination**

4. I have considered the pleadings of both parties. The gist of the respondent's preliminary objection is that this court is not an election court as provided under Rule 31 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 as applied together with Rules 2 and 6 (1) (b) and as such cannot sit on appeal over the trial court's ruling dated 1/06/2018. The respondent further asserts that the chamber summons dated 28/6/2018 does not amount to an originating process by virtue of Paragraph 11(2) of the Advocates Remuneration Order.

5. Rules 6 (1) (b) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 defines what constitutes an election court for the purpose of determining disputes in County Elections. It states;

***“6. (1) An election court shall be properly constituted, for purposes of hearing—***

***i. (b) a petition in respect of an election to a county assembly, if it is composed of a Resident Magistrate designated by the Chief Justice under***

***ii. section 75 of the Act.”***

6. For avoidance of doubt, the election court in respect of the Election Petition No. 1 of 2017 was the Chief Magistrate's court sitting at Embu. In my considered view, that Section 6 of the Act refers to an election dispute and not a dispute over the taxing of costs which is subject of the chamber summons dated 28/06/2018.

7. In the case of **Donholm Rahisi Stores (firm) v EA Portland Cement Ltd [2005] e KLR** Waweru J held:

***“taxation of costs whether those costs be between party and party or between advocate and client is a special jurisdiction reserved to the taxing officer by the Advocates Remuneration Order. The court will not be drawn into the arena of***

***taxation except by way of reference (from a decision on taxation) made under Rule 11 of the Advocates Remuneration Order.”***

8. The record reveals that on the 1/03/2018, the Chief Magistrate court awarded costs of the Election Petition 1 of 2017 to the respondents and others not before court against the applicant who was the petitioner. The parties herein failed to reach a consent on the costs which were capped by the court at Kshs. 500,000/=. The 3<sup>rd</sup> respondent proceeded to file his Bill of costs dated 27/03/2018 which was taxed by the executive officer at Kshs. 347, 350/=.

9. Being dissatisfied with the taxing officer's decision, the applicant wrote a letter dated 21<sup>st</sup> June 2018 seeking reasons from the taxing officer that informed his decision. There is no evidence on record that the aforementioned reasons were advanced to the applicant. Subsequently, he filed the chamber summons dated 28/06/2018 subject of the instant preliminary objection.

10. It is imperative to note that the taxing officer of the magistrate's court is the Executive Officer of that court. after rendering the ruling on costs of an election petition or of any other matter, if any party is dissatisfied, he/she should direct his claim to the magistrate's court that heard the election petition or the suit.

11. The applicant argues that the High Court has jurisdiction to entertain an application challenging the Executive officer's ruling by virtue of Paragraph 11(2) of the Advocates Remuneration Order. In my view paragraph 11 refers to the Deputy Registrar of the High Court who is its taxing master. Any application challenging the Deputy Registrar shall be lodged before a judge in the High Court.

12. It therefore follows that any application challenging the Executive officer's ruling on taxation, shall be referred to the magistrate who has original jurisdiction on the petition or the suit. Such an application cannot be entertained by the High Court for it is against the hierarchy of courts as established.

13. It is therefore correct that this court has no primary jurisdiction over the ruling of the Executive Officer dated 12/06/2018. The applicant ought to have filed his application before the Chief Magistrate who heard the election petition and whose behalf the Executive Officer was acting in exercise of duties of taxing costs.

14. It is my finding that the application dated 10<sup>th</sup> July 2018 is not properly before the court and is misconceived.

15. I therefore find preliminary objection merited and hereby uphold it.

16. The application is hereby dismissed with costs.

17. It is hereby ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 20<sup>TH</sup> DAY OF JANUARY, 2020.**

**F. MUCHEMI**

**JUDGE**

**In the absence of all the parties**