



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL AND TAXI DIVISION**

**MISCELLANEOUS CIVIL APPLICATION NUMBER 294 OF 2010**

**IN THE MATTER OF: TRUST BANK LIMITED (IL)**

**AND**

**IN THE MATTER OF: COMPANIES ACT, CAP 486 LAWS OF KENYA**

**KENYA DEPOSIT INSURANCE CORPORATION (formerly known as  
DEPOSIT PROTECTION FUND BOARD), AS LIQUIDATOR OF  
TRUST BANK LIMITED (IN LIQUIDATION) .....APPLICANT**

**VERSUS**

**AJAY SHAH .....1<sup>ST</sup> RESPONDENT**

**PRAFUL SHAH.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The ruling herein relates to a notice of motion application dated 31<sup>st</sup> October 2019. It is brought under the provisions of section, 3A of the Civil Procedure Act, the Inherent powers of the Court and Orders 51 Rule 1 of the Civil Procedure Rules 2010.

2. The applicant is seeking for orders that

*a) A declaration that the ruling delivered on 19<sup>th</sup> April 2017 is null and void;*

*b) That the said ruling of 19<sup>th</sup> April 2017; by the Deputy Registrar in the taxation of the 1<sup>st</sup> Respondent's Bill of Costs be set aside; and*

*c) That the costs of this application be provided for.*

3. It is supported by grounds thereto and an affidavit of Micah Lekeuwan Nabori. He averred that, the judgement in this matter was given by the Honourable Court on; 30<sup>th</sup> May 2013, in favour of the applicant.

4. The first Respondent being aggrieved by the judgement, appealed to the Court of Appeal in; Civil Appeal No. 158 of 2013 Ajay Shah vs Deposit Protection Fund Board (as Liquidator). Similarly the second Respondent also filed a separate appeal number; Civil Appeal No. 174 of 2013 Praful Shah Vs Deposit Protection Fund Board (as Liquidator).

5. On 17<sup>th</sup> June 2016, the Court of Appeal delivered its judgement on the first Respondent's appeal which was successful. That the Court of Appeal stated as follows:

*“It is trite that costs follow the event and this appeal is allowed with costs in favour of the appellant and 2<sup>nd</sup> respondent.”*

6. Pursuant thereto, the Registrar of the Court of Appeal issued three separate orders dated; 19<sup>th</sup> August 2016, which states under item 4 as

follows: “Costs be and are hereby awarded in favour of the appellant and 2<sup>nd</sup> Respondent.” That there is no reference to the costs of the High Court in the said Order.

7. On 17<sup>th</sup> June 2016, the same Registrar issued another order embodying the decision of the Court of Appeal and under which item 4 is different and states as follows:

*“As costs follow the event and this appeal, the appellant and the 2<sup>nd</sup> respondent are hereby awarded costs of this appeal and the costs of the suit before the High Court.”*

8. That, after the Court of Appeal delivered the judgement in the 1<sup>st</sup> Respondent’s appeal, the 2<sup>nd</sup> Respondent filed an application in his appeal before the Court of Appeal; seeking orders that the decision or judgement in 1<sup>st</sup> Respondent’s appeal, do apply and be binding to his appeal. The application was dismissed by a ruling delivered on 22<sup>nd</sup> February 2019.

9. Thus, based on the facts herein, the Honourable Court’s judgement delivered on 30<sup>th</sup> May 2013, against the Respondents is still valid and binding as against the 2<sup>nd</sup> Respondent until his appeal is heard and **determined**.

10. **However, the Respondents filed** a replying affidavit dated 11<sup>th</sup> November 2019 sworn by Ajay Shah, the 1<sup>st</sup> respondent herein. He averred that the Court of Appeal delivered judgement in; Civil Appeal No. 158 of 2013, on 17<sup>th</sup> June 2016, reversing the judgement of the High Court in; High Miscellaneous Case No. 294 of 2010 and awarding the costs of the appeal and those of the suit before the High Court to; Ajay Shah and Praful Shah

11. That, the Court of Appeal issued its order on 16<sup>th</sup> August 2016 in accordance with the settlement of terms of the order on 29<sup>th</sup> July 2016. Thereafter, as required by Rule 34(2) of the Court of Appeal Rules, a draft order was forwarded to the Advocates for the Applicant and 2<sup>nd</sup> Respondent by a letter dated 24<sup>th</sup> June, 2016. Therefore, there are no contradictory orders as alleged or at all.

12. That the applicant filed an appeal; Supreme Court Petition No 13 of 2016; *Deposit Protection Fund Board (presently known as the Kenya Deposit Insurance Corporation) v Ajay Shah & another*; challenging the Court of Appeal decision but the appeal was also dismissed by a decision delivered on 7<sup>th</sup> December, 2018. Thereafter the applicant filed an application for review in the Court of Appeal’

13. In the meantime, on 12<sup>th</sup> July 2016, the 1<sup>st</sup> respondent filed a bill of costs dated 8<sup>th</sup> July 2016, in the High Court for taxation. The Applicant objected to the bill by filling a preliminary objection dated 11<sup>th</sup> day of August 2016, which was overruled by a ruling delivered on 9<sup>th</sup> day of January 2017 then the bill was taxed and allowed the bill at Kshs. 40, 173, 412.00, on 19<sup>th</sup> April 2017. The Taxing Master issued the Certificate of Taxation on 20<sup>th</sup> April 2017, certifying the taxed costs.

14. That, the only way that a taxation ruling can be challenged is by way of filing a taxation Reference and not by way of an application to set aside. The taxation Reference must be filed within 14 days from the date of delivery of the ruling. There has been no taxation reference filed, whether within time or at all. Thus, the inherent power of the court ought not to be invoked where there are provisions dealing with a particular subject.

15. Further, by a letter dated 25<sup>th</sup> April 2019, the 1<sup>st</sup> Respondent’s Advocates gave notice to the Applicants of the intention to take out judicial review proceedings against the Applicant. That there was an exchange of letters between Advocates of the parties. Even then the applicant did not file this application until after a period of 2years and 6 months,

16. As no payment was made, the 1<sup>st</sup> Respondent commenced judicial review proceedings, in matter number; 254 of 2019 *Ajay Shah v Kenya Deposit Insurance Corporation* set for direction on 13<sup>th</sup> November 2019. The documents on the judicial review matter were served in the applicant on 1<sup>st</sup> October 2019, but the applicant again remained inactive. Therefore, the applicant has in disregard of the law made every effort to stop him from enjoying the fruits of the judgement of the Court of Appeal delivered on 17<sup>th</sup> June 2016.

17. I have considered the application in total in the light of the affidavits, arguments and submissions tendered and I find that; the first issue to deal with is; whether the court has jurisdiction to hear and determine the application herein. In that regard the decision of; *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1*, become relevant, where the Court of Appeal held as follows

*“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”*

18. In the instant case, the issue raised in relation to jurisdiction is twofold whether; the court has jurisdiction to entertain an application seeking to set aside the decision of the taxing officer and whether the Hon. Deputy Registrar of the Court of Appeal has jurisdiction to correct the errors in the decisions of the court.

19. As regard the 1<sup>st</sup> issue, I find that the provisions of; Rule 11 of the Advocates (Remuneration) Order provided the procedure to follow when challenging the decision of the taxing officer and states that:

*“(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 fourteen 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.”*

20. The respondent argues that, the application as framed is not a reference as it does not comply with these provisions above (herein “Rule 11”). I have considered the documents annexed to the affidavit in support of the application and I find that; there is no compliance with these provisions of Rule 11, in that there is no evidence that: -

*a) a notice was given to the Hon. taxing officer objecting to the decision of taxation and/or taxation of any items; or*

*b) a formal reference filed and/or served upon the other parties to the matter within the stipulated period.*

21. In that regard the respondent argument that the applicant has not properly moved the court as per the laid down procedure has merit. In any case, even if the court were to consider and hold that the application herein is intended for all purpose and intent; to be an application under Rule 11, the same cannot be a reference for it should have been filed within fourteen (14) days, from 19<sup>th</sup> April, 2017, when the impugned decision was made but it was not filed until, 31<sup>st</sup> October 2019

22. Furthermore, a reference is filed as a chamber summons application and not a notice of motion as herein. However, more fundamentally, the Application is premised on the provisions of section 3A of the Civil Procedure Act, which confers on the court power to make such orders that may be necessary to make justice achievable.

23. However, a court has no inherent **power** to do what is prohibited by the law. Further, this section **does** not invest in the court, jurisdiction over matters which are not in its cognisance. Thus, a court cannot invoke its inherent power, if there are specific provisions of the Civil Procedure Act and/or Rules, 2010, dealing with the specific issue. Inherent powers itself means those which are not specified in Civil Procedure Rules. Therefore, the inherent power can be invoked to support the provisions of the Civil Procedure Rules but not to override or evade other express provisions thereof.

24. If the applicant intended to file a reference then the application herein fails that test. In that regard I concur with the respondent’s that there is no competent reference. Indeed, the respondents have cited several authorities where the court has declined to hear a party on an application challenging the decision of the taxing officer, which is not properly filed as a reference pursuant to Rule 11 and I fully associate with the same.

25. Even if one were to consider the application herein otherwise, the issues raised herein of; errors in the orders extracted and/or issued by the Hon Deputy Registrar can only have been heard in the first instant before the taxing officer and subsequently during the hearing of the reference. It is in that application that; the court will indicate whether the Hon. taxing officer made a decision based on an error in the order extracted from the decision of the Court of Appeal or otherwise.

26. It also suffices to note that the court jurisdiction to hear a reference is appellate jurisdiction that should be properly invoked it therefore follows that the hearing and setting aside of an order is primarily the power of the court issuing the same.

27. In the given circumstances of this case I uphold the objection raised to the application and rule that as the applicants have not followed the laid down provisions to invoke the jurisdiction of the court then there is no valid and/or competent application to determine and/or the inherent power of the court is not available for the court to hear and determine this application. I therefore dismiss it with costs to the respondents.

28. It is so ordered.

**Dated, delivered and signed in an open court on this 21<sup>st</sup> day of January, 2020**

**GRACE L NZIOKA**

**JUDGE**

In the presence of: -

Mr. Ruto for Mr. Kiragu Kimani for the 1<sup>st</sup> Respondent

Ms. Aketo for Mr. Oyatsi for the Applicant

Dennis -----Court Assistant

Dennis -----Court assistance