



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 631 OF 2019

PARAGON ELECTRONICS LIMITED.....APPLICANT

-VERSUS-

APEX STEEL LIMITED.....RESPONDENT

RULING

1. This ruling is the product of the Chamber Summons dated 27th September, 2019 filed by the applicant and supported by the grounds set out in its body and the facts deponed in the affidavit of *Clemence Wakio*. The applicant sought for the following orders:

(i) Spent.

(ii) Spent.

(iii) THAT this Honourable Court be pleased to set aside the decree and certificate of stated costs assessing the sum of Kshs.26,000/ as attendance fees, Kshs.14,400/ as service of summons/notices & drawing of affidavit of service and Kshs.12,810/ as other disbursements.

(iv) THAT this Honourable Court be pleased to re-assess the fees payable as attendance costs, service of summons/notices & drawing of affidavit of service and other disbursements in respect of Milimani CMCC NO. 704 OF 2013 and make a finding on the same.

(v) THAT in the alternative and without prejudice to the foregoing, this Honourable Court be pleased to remit the costs for fresh assessment with directions on the assessment.

(vi) THAT costs of the application be provided for.

2. In his affidavit, the abovementioned deponent who is a representative of the applicant company stated that judgment was entered against the applicant on 7th June, 2019 in Milimani CMCC NO. 704 OF 2013 in the sum of Kshs.1,935,756.60/ plus costs of the suit and interest at court rates from 15th February, 2013.

3. The deponent further stated that being aggrieved by the above decision, the applicant has lodged an appeal against the same vide High Court Civil Appeal No. 361 of 2019, adding that the applicant filed an application seeking an order for stay of execution in the said appeal, to which the High Court directed the parties to agree on the terms relating to provision of security.

4. According to the deponent, the respondent subsequently proceeded to extract the decree and certificate of costs without the participation of the applicant, which costs total the sum of Kshs.243,810.90/.

5. It was the deponent's contention that the applicant is aggrieved by the aforementioned assessments made in the certificate of costs and is of the view that the magistrate in question erred in his/her assessment contrary to the provisions of the Advocates (Remuneration) Order 2014.

6. The deponent also pointed out that as a result of the disputed assessments, the parties herein are unable to agree on the terms for provision of security.

7. The respondent put in Grounds of Opposition dated 22nd November, 2019 in response to the Summons, raising the following grounds:

(i) THAT the application is frivolous, vexatious and an abuse of the court process and no sufficient grounds exist to warrant the

orders sought by the applicant.

(ii) THAT the application for stay being sought in respect to the judgment delivered on 7th June, 2019 in Milimani CMCC NO. 704 OF 2013 is res judicata, the same having been sought in High Court Civil Appeal No. 361 of 2019 and dismissed by Honourable Lady Justice Githua on 14th November, 2019. In the circumstances, this court is ipso facto functus officio.

(iii) THAT an order to set aside the decree and certificate of costs cannot be granted before the intended appeal is heard and determined.

(iv) THAT prayer (iii) of the Summons is therefore premature and misplaced.

(v) THAT the decree and certificate of costs in the subordinate court are assessed and issued by the court administratively and it is the applicant's recourse to file the appropriate application before the said court and this Honourable Court has no jurisdiction.

(vi) THAT the jurisdiction of the High Court to re-assess costs only arises from taxation of costs by a Deputy Registrar.

(vii) THAT the application filed herein is unknown in law as it is neither an appeal nor an application for review nor a reference and ought to be dismissed.

(viii) THAT the application lacks merit, is misconceived, is incompetent and should be dismissed with costs to the respondent.

8. The Summons was disposed of through written submissions. On its part, the applicant maintained that by virtue of its supervisory jurisdiction over subordinate courts provided for under Article 165(6) and (7) of the Constitution coupled with the absence of an explicit provision for challenging the assessment made by a magistrate, the High Court has power to entertain an application seeking to challenge a subordinate court's assessment of costs.

9. In so submitting, the applicant drew this court's attention to **Mathiu Elijah Solo v Joseph Murira [2009] eKLR** where the High Court held thus:

“Then one might ask, is there a provision for challenging the assessment made by magistrate? In the Advocate's (Remuneration) Order, I could not find a specific provision for such a challenge. I am however of the view that the court can invoke, in view of that Lacuna, its inherent power to check such assessments of costs. Since paragraph 11 provides that references can be challenged by way of chamber summons, I find I cannot fault the applicant for approaching this court in the same way.”

10. On the merits of the Summons, it was the applicant's contention that whereas Schedule IV(6) of the Advocates (Remuneration) Order 2014 provides for Kshs.1,400/ as the fee for attendances in court or in chambers while Schedule 7(7) prescribes Kshs.5,000/ where a hearing lasts a full day and the sum of Kshs.2,100/ thereafter in respect to subordinate courts, the magistrate awarded Kshs.26,000/ for attendances without basis.

11. On the question of assessment of service of summons/notices & drawing of affidavit of service, the applicant argued that the certificate of costs does not indicate the services or affidavits being referred to so as to justify the sum of Kshs.14,400/ made.

12. The applicant was equally of the view that no proof was submitted to the subordinate court to show that the court fees for filing the suit amounted to Kshs.70,350/ yet the subordinate court awarded this sum. On a similar note, it was the applicant's contention that the respondent did not avail any receipts to show expenses incurred so as to warrant an award of Kshs.12,810/ for disbursements.

13. The respondent on its part submitted that while it is the law prescribed under Section 27 of the Civil Procedure Act that both the High Court and the subordinate courts have jurisdiction to assess and award costs, this court cannot re-assess or tax the certificate of costs as the same has not been made available for this court's perusal.

14. It was further the respondent's argument that the applicant was wrong in approaching this court through a reference under the provisions of Paragraph 11 of the Advocates (Remuneration) Order and should have instead either filed an application seeking a review of the assessment or approached the High Court by way of an appeal. Reliance was placed on the case of **Dalmas Okach Randa v Peter Lolwe Ombo [2013] eKLR** where the court rendered the following:

“The court is not dealing with a reference from the taxing officer, but an assessment of costs in a matter that was heard and determined by a subordinate court. The motion that filed the “reference” was indicated to be brought under paragraph 11(2) of the Advocates Remuneration Order...If the applicant was aggrieved by the assessment by the trial court he should have gone back on review, or appealed the decision to the High Court.”

15. The respondent maintained that the assessments by the subordinate court were done to scale and that contrary to the position taken by the applicant, the requisite documents were availed to the subordinate court for consideration.

16. I have considered the grounds laid out in the body of the Chamber Summons Reference, the facts deponed in the affidavit supporting it, the Grounds of Opposition and the contending submissions and authorities relied upon.

17. Before I address the merits of the Summons, I wish to consider the very crucial jurisdictional issue raised by the respondent. I have looked at the Advocates (Remuneration) Order and it is my observation that there is no specific provision on challenging an assessment of costs made by a subordinate court. A similar conclusion was arrived at in **Mathiu Elijah Solo v Joseph Murira [2009] eKLR** and **Angelo Gitonga v Angelo Gitonga & Another [2010] eKLR** both cited by the applicant in its submissions.

18. The respondent seems to agree with the above observation. Needless to say, its issue lies with the procedure through which the applicant approached this court. Upon my perusal of the Summons, I noted that the same was brought under inter alia, the provisions of **Rule 11 of the Advocates (Remuneration) Order (“the Order”)**, otherwise referred to as **Paragraph 11. Rule 2** of the Paragraph in particular stipulates that a party who is aggrieved by the decision of a taxing officer is required to object to the taxation in question and thereafter file a reference.

19. It is apparent from the present facts that the costs were assessed by a magistrate and not a taxing officer within the definition offered under Paragraph 10 of the Order, hence Paragraph 11 cannot apply.

20. Be that as it may, I have already established that there is no specific procedure in law for challenging the assessment of costs made by a subordinate court. More importantly, I am alive to the supervisory jurisdiction given to the High Court over subordinate courts under **Article 165(6) of the Constitution** which affirmatively answers the question on whether this court has jurisdiction to entertain the present application.

21. The above position was stated in **Angelo Gitonga (supra)** and echoed in **John Nyariki v British American Insurance Company (Kenya) Limited [2015] eKLR** where the court held that:

“In the same manner that Kasango J invoked the inherent jurisdiction of the court in the case of Angelo Gitonga v Angelo Gitonga & Another (Supra) this court found that it could have interfered with the assessment of the magistrate in the subordinate court as the assessment was clearly premised on the wrong principles of law and fact.”

22. It is therefore apparent that my analysis is a departure from the reasoning taken by the High Court in **Dalmas Okach Randa v Peter Lolwe Ombo [2013] eKLR** cited by the respondent, when it found the reference incompetent for being brought under Paragraph 11(2) of the Order.

23. Having settled the above, I now turn to the merits of the application. To begin with, the parties brought to my attention the subsisting appeal against the judgment delivered by the subordinate court. I have perused a copy of the memorandum of appeal annexed to the application and I have noted that among the orders being sought consequently is an order seeking to have the judgment, decree and costs of the suit set aside.

24. I must mention that at this stage, this court has not had the opportunity to look at the lower court file. It is also clear from the foregoing that the appeal is yet to be determined.

25. That said, I am of the considered view that the applicant would therefore be jumping the gun in urging this court to re-assess the costs at this stage. To my mind, the conclusion of the appeal will virtually impact on the costs and the applicant will have every opportunity to move the court appropriately once the appeal is concluded if it so wishes.

26. The upshot is that the Chamber Summons is unmerited and is hereby struck out with no order on costs.

Dated, signed and delivered at NAIROBI this 6th day of February, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Applicant

.....for the Respondent