



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

MISC. APPLICATION (JR) NO. 3 OF 2017

**IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW
FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

AND

**IN THE MATTER OF LAW REFORMS ACT5, SECTION 8 AND 9
AND IN THE MATTER OF COOPERATIVES SOCIETIES ACT CAP 490**

BETWEEN

REPUBLIC.....APPLICANT

AND

THE BOARD OF MANAGEMENT ASILI

CREDIT AND SAVINGS COOPERATIVE.....1ST RESPONDENT

ASILI CREDIT AND SAVINGS COOPERATIVE.....2ND RESPONDENT

HOMA BAY COUNTY COMMISSIONER FOR COOPERATIVE....3RD RESPONDENT

THE COMMISSIONER OF COOPERATIVES.....4TH RESPONDENT

AND

ABUTO GEORGE OMOLLO.....EX-PARTE APPLICANT

RULING

[1] This is a ruling on the preliminary objection vide the notice of preliminary objection dated 2nd September 2019 and filed herein on 3rd September 2019, directed at the notice of motion dated and filed herein on 13th August 2019, by the ex-parte applicant against the four respondents.

The first and second respondents are the applicants/objectors and have listed four (4) grounds for the objection viz:-

- (a) This court has no jurisdiction in law to hear the application as the subject matter touches on the bill of costs taxed pursuant to the provisions of the Advocates Remuneration Order.
- (b) The application offends Order 11 of the Advocates Remuneration Order.
- (c) The application offends the known procedural laws.

(d) There is no appeal against the judgment of the court which dismissed this judicial review cause with costs.

[2] These grounds are more or less repeated in the grounds of opposition separately filed alongside the notice on 3rd September 2019.

As was held in the famous case of **Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distribution Ltd. [1969] EA 696**, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

In the premises, it is only grounds (a) and (b) of the notice of preliminary objection and grounds (c) and (d) of the grounds of opposition which are truly relevant for the purposes of this objection.

Grounds (c) and (d) of the notice and grounds (a) and (b) and (e) of the grounds of opposition are irrelevant as they do not raise points of law. They must therefore and are hereby overruled and dismissed.

[3] In essence, the objection is founded on the issue of jurisdiction of this court to entertain the impugned application by the ex-parte applicant. The issue touching on the Advocates Remuneration Order would invariably be brought into play when considering the issue of jurisdiction.

Basically, the genesis of the impugned application can be traced to the ruling of this court made on 2nd February 2018, dismissing the judicial review cause which had been instituted by the ex-parte applicant against the four respondents.

The dismissal was precipitated by a preliminary objection raised by the first and second respondents who are also the objectors herein. The ex-parte applicant (the respondent in this preliminary objection) was ordered to bear the costs.

[4] After the ruling, the ex-parte applicant through **Messrs Nyauke & Co. Advocates**, filed a notice of appeal on the 8th February 2018.

On their part, the successful objectors presented a party and party's bill of costs dated 8th August 2018. This was filed on 16th August 2018, after which in the months of September, October and November 2018, notices for taxation of the bill were issued by the Deputy Registrar of this court.

The record shows that the notice issued in November 2018, was served upon the ex-parte applicant through his advocates, Nyauke & Co. yet another notice for taxation was issued in March 2019 and served upon the said Nyauke & Co. Advocates.

Accordingly, the bill was fixed for taxation before the Deputy Registrar on the 2nd April 2019. Thereafter, a judgment/ruling notice was issued for 14th June 2019, on which date the bill was taxed at Kshs.234, 550/= and a certificate of costs issued accordingly.

[5] The objectors then sought to execute the decree for costs by way of attachment and sale of the ex-parte applicant's property. In that regard, warrants of attachment and sale were issued to a firm of Auctioneers **i.e. Ssebo Intel Company Auctioneers**, which commenced the attachment process by proclaiming the judgment debtor's motor vehicle Reg. No. KAW 571 Nissan Sunny Saloon.

The proclamation together with the auctioneer's interim bill of costs were filed herein on 11th July 2019. However, on the 15th July 2019, the judgment debtor/ex-parte applicant filed a notice of motion for stay of execution of the decree and change of advocate from **Messrs Nyauke & Co. Advocates** to **Messrs Tom Mboya & Co. Advocates**.

This application was brought under the provisions of the Civil Procedure Act and Rules under a certificate of urgency. The court directed the Deputy Registrar to have the application served for inter-parties hearing on a date to be fixed in the registry.

[6] The record shows that the application was fixed for hearing inter-parties on 24th September 2019. But, before that date, the judgment debtor/ex-parte applicant through learned counsel, **Mr. Mboya**, seemingly proceeded under the vacation rules to the High Court at Kisii with the impugned application dated 13th August 2019.

On 15th August 2019, the High Court at Kisii heard the application ex-parte and granted interim orders of stay of execution pending inter-parties hearing of the application on 3rd September 2019 at this court.

On 3rd September 2019, the matter was placed before the deputy registrar who directed that it be placed before this court for directions on 4th September 2019, on which date, Mr. Mboya, applied for a fresh hearing date of the impugned application, leave to amend the application and file further affidavits and for extension of the interim orders.

[7] Learned counsel, **Mr. Obach**, appeared for the first and second respondents/judgment creditors on behalf of **Bw'oigara Getange & Co.**

Advocates, and brought it to the attention of the court that there existed another application for contempt of court which could affect these proceedings.

This application dated 13th August 2019 was therefore fixed for mention for directions on 24th September 2019. The existing interim orders were accordingly extended and the applicant/judgment debtor was granted leave to amend his application and file additional affidavits with corresponding leave to the respondents/judgment creditors.

[8] On 24th September 2019, directions were given in the absence of the respondents to the effect that there being a preliminary objection dated 2nd September 2019, against the impugned application dated 13th August 2019, the preliminary objection be heard prior to the hearing of the application on the 13th November 2019, on which date the applicant and/or advocate failed to appear. The respondents appeared through learned counsel, **Mr. Ngila**.

The matter was therefore adjourned to the 28th January 2020, due to the absence of the applicant.

Come the 28th January 2020, both parties appeared through their respective counsel and argued the preliminary objection.

[9] Having considered the rival arguments and the history of this matter, it is the opinion of this court that first and foremost inasmuch as the ex-parte application dated 13th July 2019 and filed on 15th July 2019, remains pending for hearing and determination, the appearance of learned counsel, **Mr. Mboya**, on behalf of the ex-parte applicant, is irregular as no leave has ever being granted to him to appear on behalf of the applicant instead of Messrs Nyauke & Co. Advocates especially at this juncture when the matter is in the execution stage.

The advocates on record for the applicant and remain on record are Messrs Nyauke & Co. Advocates.

Learned counsel, **Mr. Mboya**, could not therefore purport to argue the preliminary objection and indeed the impugned application on behalf of the ex-parte applicant and without the necessary leave of the court to come on record on behalf of the applicant in place of Messrs Nyauke & Co. Advocates. In doing so, learned counsel, with due respect, controverted the provisions of **Order 9 Rule (9)** of the **Civil Procedure Rules**.

[10] It would therefore follow that the impugned application in its original form dated 13th August 2019 and in its amended form dated 13th September 2019 is improper before court inasmuch as it was drawn and filed by an advocate who acted without proper authority and coming on record irregularly. It is instructive to note that when the matter was forwarded to the Kisii High Court under the vacation rules, the necessary chamber summons dated 13th August 2019, contained a prayer for a change of advocates (i.e. prayer 4) but this was not granted in the interim or otherwise and was to avail inter parties hearing of the application.

Only prayer 3 of the application was granted in the interim i.e. there be stay of execution of the warrant of attachment dated 3rd July 2019, and all consequential orders pending inter-parties hearing of the application.

Indeed, as contended by the objectors/respondents herein, the firm of Nyauke & Co. Advocates validly remains on record for the applicant.

The firm of Tom Mboya & Co. Advocates is therefore a “stranger” in these proceedings and whatever pleadings it has filed herein on behalf of the applicant is incompetent, misconceived and an abuse of the court process. This reason is sufficient enough to strike out and dismiss the impugned application in its original form or as amended.

[11] Be that as it may, the main suit was a judicial review cause which was struck out and dismissed essentially for want of jurisdiction with costs to the respondents who thereafter filed their bill of costs which was taxed against the ex-parte applicant who then came up with the interlocutory applications dated 13th July 2019 and 13th August 2019 intended to forestall the execution of the respondents’ certificate of costs issued by the Deputy Registrar on 14th June 2019.

Interestingly, although this was a judicial review matter brought under the Law Reform Act (Cap 26 Laws of Kenya), the applications were brought under the Civil Procedure Rules which do not apply to judicial review matters save Order 53 of the Rules as was held in the case of **Republic –vs- Communication Commission of Kenya (2001)1 EA 199**, in which the Court of Appeal stated that:-

“---- On their own terms the provisions of Section 8 and 9 of the Law Reform Act which vests in the High Court of Kenya the power to issue orders of Mandamus, Prohibition and Certiorari are not subject to any other Act of Parliament.”

[12] In the same case, the Court of Appeal affirmed that the Law Reform Act was not subject to any other Act of Parliament.

Basically, judicial review jurisdiction is neither civil nor criminal. It is a special jurisdiction and where an Act of Parliament confers special jurisdiction, the Civil Procedure Act and the Rules made thereunder do not apply.

Therefore, if the ex-parte applicant herein was aggrieved by the dismissal of the main suit by this court on 2nd February 2018, he ought to have filed an appeal at the Court of Appeal as provided for under **Section 8 (5)** of the **Law Reform Act** which states that:-

“Any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal”.

[13] Instead of appealing the dismissal of the main suit, the ex-parte applicant wrongfully preferred to file the said interlocutory applications which were apparently aimed at the outcome of the taxation proceedings before the deputy registrar, yet he had already filed a notice of appeal dated 8th February 2018 through Nyauke & Co. Advocates.

The taxation proceedings before the deputy registrar were anchored on the Advocates Remuneration Order and if the ex-parte applicant was aggrieved by the ruling of the taxing officer made on 14th June 2019, he was required to move the court under **Rule 11** of the **Advocates (Remuneration) Order** which provides that:-

“(1) should any party object to the decision of the taxing officer he may within fourteen days after the decision give notice 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”.

[14] Surely, the impugned application was not the reference contemplated under the aforementioned provisions of the remuneration order, neither was it the appeal contemplated under Sub Section (3) of the Rule or even Section 8 (5) of the Law Reform Act. Undoubtedly, the ex-parte applicant must have belatedly realized his mistake and sought to amend the impugned application so as to contain a prayer for enlargement of time within which to file a reference to this court against the decision of the taxing officer made on 14th June 2019 and to have the reference already filed deemed as properly filed out of time.

From all the foregoing observations and factors, it is clear that the impugned application offends the provisions of **Rule or Order 11 (1) and (2)** of the **Advocates Remuneration Order** such that the jurisdiction of this court to deal with the matter at this juncture is not yet acquired.

In the circumstances, the preliminary objection by the first and second respondents must and is hereby sustained and allowed in terms of grounds (a) and (b) of the notice of preliminary objection and grounds (c) and (d) of the grounds of opposition.

The impugned application dated 13th August 2019 as amended on 13th September 2019, is hereby struck out and dismissed with costs to the first and second respondents.

Ordered accordingly.

J.R. KARANJAH

JUDGE

05.02.2020

[Delivered and signed this 5th day of **February, 2020**]