



REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

MISCELLANEOUS APPLICATION NO.141 OF 2019

IN THE MATTER OF THE ADVOCATES ACT CAP 16 LAWS OF KENYA

AND

IN THE MATTER OF CIVIL SUIT NO.1045 OF 2016

GLADYS PERERUAN.....PLAINTIFF/APPLICANT

VERSUS

BETTY CHEPKORIR.....DEFENDANT/RESPONDENT

AND

IN THE MATTER OF APPLICATION FOR TAXATION OF PARTY & PARTY BILL OF COSTS

BETWEEN

GLADYS PERERUAN.....PLAINTIFF/APPLICANT

VERSUS

BETTY CHEPKORIR.....DEFENDANT/RESPONDENT

RULING

1. The defendant filed a preliminary objection dated 2.9.2020 against the application dated 17th December 2019, on the grounds that:-
 - i. The said application is fatally defective and an abuse of the court process.
 - ii. The court has no jurisdiction to hear and determine the application.
 - iii. The application is frivolous, vexatious and an abuse of the court process.
 - iv. The applicant is a vexatious litigant.

Response

2. The defendant/respondent filed her replying affidavit in response to the preliminary objection and averred that she had filed a bill of taxation dated 21.1.2019. A ruling was delivered by Hon. H.O Barasa. She further filed an application for extension of time to file an appeal against the said ruling, vide application no. 141 of 2019 which application was allowed. She was furnished with reasons for taxation after following up with the Honourable magistrate by writing letters to Engineer law courts where he is currently stationed. This was in compliance with section 11 of the Remuneration Order that the objecting party may within 14 days' write to the taxing officer indicating the items objected to.

3. In addition to the above, she averred that this court has the discretion to enlarge the time within which an objecting party may write to the

taxing officer to contest the taxed bill of costs. It was therefore clear that she had not delayed this case in any way.

4. Lastly she deposed that the preliminary objection should be dismissed with costs.

Submissions

Defendants/respondents submission

5. It is their submission that the applicant filed an objection to the taxed bill of costs. The court delivered a ruling. The applicant instead of filing an appeal as required under Rule 11 sub rule 3 filed this instant application thus amounting to an abuse of the court process. This court was referred to ***Twiga Motor Ltd. V. Hon. Dalmas Otieno Onyango(2015)eklr***, the court held that the time limits in rule 11 of the Advocates Remuneration Order had been put for a reason. Failure to adhere to the said time lines would mean that the application would be rendered incompetent in the 1st instance.

Plaintiff/applicant's submissions

6. On whether this court has jurisdiction to hear and determine this preliminary objection it was submitted that paragraph 11 of the Advocates Remuneration Order provided for an aggrieved party to itemize the objecting items within 14 days. This court under rule 11(4) of the Advocates Remuneration Order had the jurisdiction to extend the period within which to file an appeal. See ***Nakuru Misc. applic. No. 383 of 2011, RiftValley Agricultural Contractors Ltd v. Hari Gakinya t/a Hari Gakinya and Company Advocates.***

7. Further it was urged that paragraph 11(2) of the Advocates Remuneration Order provided for the taxing officer to record and forward to the objector the reasons for his decision and the objector may within 14 days, make an application by chamber summons, setting out the grounds for the objection.

8. Finally, the court was urged to dismiss the preliminary objection with costs.

Analysis and determination.

9. The issue for determination is whether the application dated 29.7.2019 is an abuse of the court process.

10. The applicant herein was the plaintiff in the lower court suit and judgment was entered in her favour for a sum of ksh 212,500/-. The applicant assessed her costs of the suit at ksh 569,362.80 but the same was taxed by the trial court at Ksh124,115/-. The applicant was aggrieved by this ruling and opted to file an objection and reference to this court. It was their case that the ruling of the taxing officer had no basis in law, the taxing officer had acted contrary to the well settled principles of law, the taxing officer had exceeded and abused his discretion with impunity and highhandedness and that the defendant was aided in-order not to pay full costs dully incurred by them.

11. The defendant/respondent strongly opposed the application in her grounds of opposition dated 4.10.2019 citing that the same was an abuse of the court process. This court extended the time within which to file a reference.

12. Costs in a suit is guided by the Advocates Remuneration Order.

13. Section 11 of the same provides as follows: "1) *should any party object to the decision of the taxing master, he may within 14 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 reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge in chamber summons, which shall be served on all parties concerned setting out the grounds of objection.*"

14. The applicant in her submissions urged this court that she had given reasons for the delay in filing the chamber summons application and further that she had followed the due procedure as provided by the law whereas, the defendant/respondent urged that this court did not have the jurisdiction to hear and determine this application.

15. The power of this court is derived from paragraph 11(4) of the *Advocates Remuneration Order 2009* which provides that:

"The high court shall have the power in its discretion by order to enlarge the time fixed by sub paragraph(1) or subparagraph(2), may, with leave of the judge but not otherwise, appeal to the Court of Appeal."

"The high court shall have the power in its discretion by order to enlarge the time by subparagraph(1) or subparagraph(2) for the taking of any step: application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the court may direct, and may be so made not with standing that the time sought to be enlarged may have already expired."

16. Indeed as stated in ***Twiga Motor ltd v. Hon. Dalmas Otieno(supra)***, this court finds that the applicant followed the guidelines above and therefore it cannot be said that it is an abuse of the court process. The applicant was granted an extension of 14 days to notify the taxing officer of the contested items and from the annexures the taxing officer who was on transfer was informed.

17. This court is guided by the Court of Appeal decision of ***Kimani Wanyoike v. Electoral Commission of Kenya CA 213/95*** (un reported) where it was held:

“ Where there is a law prescribed by either a Constitution or an Act of Parliament governing a procedure for the redress of any particular grievance that procedure should be strictly followed.”

18. The Court of Appeal in **Speaker of the National Assembly v. Karume (2008) 1 KLR 425** the Court stated as below:

“ In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

19. The purpose of a preliminary objection was broadly discussed in **Charles Onchari Ogoti v. Safaricom Ltd & anor [2020]eklr** as follows:

"[9] This court is aware of the leading decision on Preliminary Objections where the Court of Appeal for East Africa, then the highest court for purposes of this jurisdiction and the others in **East Africa in Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd. (1969) EA 696**, where Law J.A. and Newbold P. (both with whom Duffus V-P agreed), respectively at 700 and 701, held as follows:

Law, J.A.:

“So far as I am aware, a Preliminary Objection consists of a pure 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. Examples are an objection on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Newbold, P.:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

[10] The Supreme Court of Kenya, now the highest court in the land has broadly confirmed, and extended, the nature and scope of Preliminary Objections in cases discussed below, and its decision thereon is binding on this court and all courts below it by virtue of Article 163 (7) of the Constitution of Kenya 2010.

[11] In case cited by the 1st Respondent, **David Nyekorach Matsanga & Another v. Philip Waki & 3 Others [2017] eKLR**, the three-judge bench of the High Court (Lenaola, J. (as he then was), Odunga and Onguto, JJ.) after considering various holdings of the Supreme Court of Kenya on question of Preliminary Objection held as follows:

“We quickly turn to the question whether we have before us a Preliminary Objection proper. Traditionally, the case of Mukisa Biscuit Manufacturing Co Ltd v. West End Distributors Ltd [1969] EA 696 has been the watershed as to what constitutes Preliminary Objections. The Court of Appeal in **Nitin Properties Ltd v. Singh Kalsi & another [1995]eKLR** also captured the legal principle when it stated as follows:

“A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

In **Hassan Ali Joho & another -v- Suleiman Said Shabal & 2 Others ...SCK Petition No. 10 of 2013 [2014] eKLR** the Supreme Court stated that:

“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”

20. The preliminary objection if allowed may dispose off the entire suit without giving parties the opportunity to be heard. This has to be done with caution that the court has a duty to hear all parties and determine the case on merit. In addition this court has also a duty to safeguard itself against abuse of its process.

21. The court is guided by Order 2 rule 15 of the Civil Procedure Rules on when a suit can be struck out as provided below:

(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that:

- a) it discloses no reasonable cause of action or defence in law; or
- b) it is scandalous, frivolous or vexatious; or
- c) it may prejudice, embarrass or delay the fair trial of the action; or

d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

22. The defendant/applicant had urged that this application was an abuse of the court process and it was further vexatious and frivolous. The applicant had reasons to seek the court to extend the time within which to file a reference. The applicant avers her reference has a high chance of success and the same should not be locked out from proceeding to full hearing.

23. The court in *Trust Bank Ltd v. Amin Co. Ltd &anor(2000) KLR*, stated as follows in describing what amounted to a frivolous pleading:

“A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action?”

24. Weighing the application dated 17/12/2019 on the foregoing parameters, I do find that it is not frivolous, vexatious and an abuse of the court process as urged. The Preliminary Objection therefore lacks merit and is dismissed with costs to the Respondent.

S.M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 6th day of October, 2020.

In the presence of:-

Ms Badili for the Applicant

Mr. Nyachiro for the respondent

Ms Gladys - Court assistant