



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

E.L.C CASE NO. 4 OF 2016

PETER KIPKOECH BEISOL.....PLAINTIFF

VERSUS

JONAH KIPNGENO SITIENEY Alias JONAH

SITIENEY.....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff /Applicant filed a Chamber Summons application pursuant to Rule 11(2) of the Advocates (Remuneration Order, 2014 and Order 22 of the Civil Procedure Rules seeking the following prayers:

- a. Spent
- b. That this honourable court be pleased to stay execution of the orders issued by this Honourable court on 27th February 2019 pending the hearing and determination of this application
- c. That this honourable court be pleased to set aside the decision of the taxing officer delivered on the 27th February 2019 as far the same relates to taxation of the Defendant's Bill of Costs dated 19th October 2016, the quantum awarded thereon and the reasoning with respect to the said award.
- d. That this honourable court be pleased to re-tax the said bill of Costs.
- e. That in the alternative to prayer (d) above this honorable court be pleased to remit the Bill of Costs dated 19th October 2016 for re-taxation before a different taxing officer with appropriate directions thereof
- f. That the costs of this application be provided for

2. The application is supported by the applicant's affidavit sworn on the 2nd day of May 2019. In the said affidavit the applicant deposes that he was not present when the ruling on the Bill of costs was delivered and he was not served with the order emanating from the taxation. He further deposes that he is dissatisfied with the decision of the taxing officer as it defies the principles of taxation.

3. In response to the application, the Defendant /Respondent filed a Notice of Preliminary Objection as well as a Replying Affidavit. The Preliminary Objection raises the issues that the application is bad in law, incompetent and fatally defective as it has been filed without following the right procedure.

The court directed that Preliminary Objection be heard first and both parties filed their submissions.

4. In support of the Preliminary Objection, learned counsel for the Defendant/Respondent submitted that the procedure for challenging the results of taxation is provided under paragraph 11 of the Advocates Remuneration Order. The said provision states that if any party objects to the decision of the taxing officer, he should, within 14 days after the decision give notice of the items of the taxation to which he objects and upon receipt of the notice, rule 11 (2) obligates the taxing officer to forthwith record and forward to the objector the reasons for his decision. Thereafter, the objector may within fourteen days from the receipt of the reasons apply to the judge by chamber summons, which shall be

served on all parties concerned, setting out the grounds of his objection. He submitted that the applicant never asked for the reasons for taxation nor did he issue a notice of the items to which he objects, he therefore submits that the application is incompetent and bad in law and the same ought to be struck out with costs. He submitted that even though the applicant alleges that the taxing officer erred in principle, he has not demonstrated what principles were breached as the taxing officer taxed the party and party costs at Kshs. 89,131/= which was adequate for a land matter where the Civil Procedure Rules had been complied with.

5. In his submissions in response, learned counsel for the Plaintiff/Applicant submitted that the court ought to be guided by the provisions of Article 159(2) (d) of the Constitution of Kenya which enjoins the court to administer justice without undue regard to procedural technicalities. He submitted that there was no reason to ask for the reasons for taxation as the same were succinctly contained in the ruling delivered on 27th February 2019. He cited the case of **Evans Thiga Gaturu Advocates v Kenya Commercial Bank Limited Milimani Commercial & Admiralty Division Miscellaneous Application No. 343 of 2011** where Odunga J held that where there are reasons on the face of the decision, it would be futile to expect the taxing officer to furnish further reasons.

6. Regarding the time for filing the Reference he submitted that although the Advocates Remuneration Order provides for 14 days, the same was filed two months after the ruling was delivered as the neither the applicant nor his advocate was present on 27th February 2019 during the delivery of the ruling on taxation. He further submitted that the Defendant's advocate did not serve them with the Certificate of costs before execution. Furthermore, the defendant did not issue a ten-day notice of the decision before applying for execution. The Plaintiff only learnt of the decision of the taxing officer upon being served with the Proclamation of Attachment on 26th April 2019. He submitted that under Paragraph 11 (4) of the Advocates (Remuneration) Order the court had the power to enlarge time. He therefore urged the court to exercise its discretion to enlarge the time for filing the reference and deem the reference filed on 2nd May 2019 to have been properly filed.

ISSUE FOR DETERMINATION.

7. The singular issue for determination is whether the reference filed by the plaintiff is incompetent and if so, whether the Preliminary Objection ought to be upheld.

ANALYSIS AND DETERMINATION

8. It is common ground that the reference was not filed in accordance with the provisions of the Advocates (Remuneration) Order in the following respects; Firstly, no notice was given to the taxing officer within 14 days of the items of the taxation to which the Plaintiff was objecting. Secondly, the Plaintiff did not file the reference within 14 days from the date when the decision was made. Thirdly and most importantly, the Plaintiff did not seek leave of the court to file the reference out of time in this application. Even though I agree with counsel for the Plaintiff that in the instant case, it was unnecessary to ask for the reasons for the taxing officer's decision, the applicant cannot get away with not seeking leave to file the reference out of time as this was the only way he could persuade the court that the delay was not deliberate.

9. Although article 159(2) (d) of the Constitution of Kenya enjoins the court to administer justice without undue regard to procedural technicalities, it is these same procedures and rules that guide the court in arriving at a just decision. Indeed, the Plaintiff's counsel has in his submissions urged the court to exercise its discretion under Paragraph 11(4) of the Advocates (Remuneration) Order to enlarge time, albeit irregularly, as he ought to have done so before filing the reference. The said rule provides as follows:

Paragraph 11(4) **"The High Court shall have power in its discretion by order to enlarge the time fixed by sub-paragraph (1) 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 notwithstanding that the time sought to be enlarged may already have expired"**

10. The above rule envisages that one must make a formal application for enlargement of time, so that the other side can have an opportunity to respond, not by way of submissions as the plaintiff's counsel has done in this case.

11. As was observed by the Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR**

"In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act(Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy".

I am duly guided by the above decision.

12. In view of the foregoing, I uphold the Preliminary Objection and dismiss the Plaintiff's application with costs to the defendant.

Dated and Signed this 21st day of January 2020.

J.M ONYANGO

JUDGE

Dated, signed and delivered at Kericho this 5th day of February, 2020.

ANTONY KANIARU

JUDGE