



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

MISC. APPLICATION NO.13 OF 2018

ASW(a minor suing through next friend HRS).....APPLICANT

VERSUS

JIANGXI ZHONGMEI ENGINEERING

CONSTRUCTION COMPANY LIMITED.....RESPONDENT

RULING

The application dated 26.11.2018 seeks the following orders:-

- (a) That due to its urgency this application be certified urgent and heard ex-parte in the first instance.*
- (b) That the Honourable court do issue an order for consolidation of Marsabit PMCC No.8 of 2016 and Marsabit PMCC No.22 of 2016 for purposes of hearing and determination of this application.*
- (c) That the honourable Court be pleased to issue orders for stay of execution of the certificate of costs issued by the honourable court on 15th October, 2018 in Marsabit PMCC No.8 of 2016 and Marsabit PMCC No.22 of 2016 as against the defendant/Applicant pending the hearing and determination of this application.*
- (d) That there be an order to review and set aside the certificate of costs issued on 15.10.2018 in Marsabit PMCC No.8 of 2016 and Marsabit PMCC No.22 of 2016.*
- (e) That this honourable court be pleased to give an order directing Marsabit PMCC No.8 of 2016 and Marsabit PMCC No.22 of 2016 to undergo full taxation process on the party and party costs with the involvement of the defendant's advocates.*
- (f) That the costso f this application be provided for.*

The respondent filed a notice of Preliminary Objection dated 4.1.2019 which is based on the following grounds:

- 1. That the Honourable Court lacks jurisdiction to entertain this matter as presented.*
- 2. That the application is incompetent, misconceived and misplaced.*
- 3. That the application is incurably defective and should not be entertained.*
- 4. That the application is in respect of costs assessed by the court which costs can only be challenged by way of a Reference filed in the High Court in accordance with Rule 11 of the Advocates Remuneration Order, hence order (e)on the notice of motion seeking re-taxation cannot be allowed.*
- 5. That Order (e) on the Notice of Motion for re-taxation is filed out of time without leave of the Court hence it cannot be entertained.*
- 6. That Order (d) on the Notice of Motion seeking Review must be brought under its specific provisions, to wit, Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, 2010 (Chapter 21, Laws of Kenya) meaning that Order (d) on the Notice of Motion cannot be granted.*
- 7. That costs in the subordinate court are at the discretion of the court not of the parties and are assessed by the court itself not*

taxed as is the case in the High Court and as such the Respondents herein cannot be blamed for the Court's assessment of costs.

8. That order 21, rule 8 cited on the face of the application relates to preparation and dating of decrees and/or Orders and has nothing to do with either Review of Decrees or Orders and also does not apply to a Reference on Costs and as such it does not apply to this application.

The Court directed that the Preliminary Objection be heard first. Mr. Orayo, counsel for the respondent submit that the application contravenes Rule 11 of the advocates remuneration order which Rule makes the procedure in taxation matters. The applicant ought to have filed a reference and not a miscellaneous application. The reference ought to have been filed within 14 days from the date of taxation. The application was filed out of time. The Court lacks jurisdiction to entertain the application. The prayer for review cannot be granted. Costs in the Magistrate's Court are assessed by the court itself. Order 21 Rule 8 of the Civil Procedure Rules has nothing to do with review of decrees or orders or reference on costs. The application is totally defective and untenable in law and should be dismissed with costs.

Mr. Tunen for the applicant contend that the Court has jurisdiction to determine the matter. Section 63 (e) of the Civil Procedure Code is applicable. The Court has jurisdiction to issue the orders being sought. The application is based on the contention that the assessment of the Court did not undergo the due process. The application is seeking due process. The applicant did not file a reference under Rule 11 of the Advocates Remuneration Order because there was no taxation. There was no decree or order served on them so that they could respond by way of reference. The application does not only seek review but also seeks the setting aside of the certificate of costs so that the process of taxation can be done afresh and involve the applicants. The cost ought to have been taxed.

Rule 11 of the (Advocates Remuneration) Order, 1962 states as follows: -

Objection to decision on taxation and appeal to Court of Appeal

(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.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(4) The High Court shall have power in its discretion by order to enlarge the time fixed 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 notwithstanding that the time sought to be enlarged may have already expired.

Counsel for the respondent maintain that an objection to assessment of costs by the subordinate court can only be by way of reference. On his part, counsel for the applicant contends that there was no taxation of the costs and therefore could not have filed a reference. The application by the applicant seeks to remit the bill of costs to the Magistrate's Court and allow the applicant to participate in the assessment of the costs.

I have gone through the record of the trial court in both files. In PMCC No. 8/2016, the plaintiff was awarded Ksh.7000 as special damages and Ksh.600,000 as general damages. Parties recorded a consent on liability at 70:30% in favour of the plaintiff. The total award after contribution is Ksh.427,000. The trial court assessed costs at Ksh.468,755 on 9.10.2018.

With regard to PMCC No. 22 of 2016 the total decretal sum is Ksh.715,000. There is an award of Ksh.50,000 for pain and suffering, Ksh.150,000 for loss of expectation of life, Ksh.640,000 for loss of dependency, Ksh.25,000 special damages and Ksh.50,000 as funeral expenses. The plaintiff's costs was assessed at Ksh.514,730.

My understanding of the application dated 26.11.2018 is that the applicant feels that it was condemned unheard. Although the trial court assessed the respondent's bill on its own, the applicant feels that it ought to have had an input in the matter. It is true that the respondent's bill of costs was assessed by the trial court. The respondent's bill of costs for PMCC No.8 of 2016 was drawn at Ksh.635,465. It was taxed at Ksh.468,755. Similarly, the bill of costs for PMCC No.22 of 2016 was drawn at Ksh.665,465. It was taxed at Ksh.514,730. The party drafting a bill of costs knows that it will be assessed or taxed. In most cases the bill will not be drawn per scale. Some items will be charged through the drafter's own assessment of the costs. It is prudent that the party liable to pay the bill also evaluate it and if need be raise objection to those items it feels have been overcharged.

My view on the dispute relating to assessment of costs is that parties should be accorded the opportunity to raise any objection on any item on the bill of costs. It cannot be held that the assessment of costs by a Magistrate is guided by divine intervention. The end result is that a party will be called upon to settle the costs. Such a party should not be made to pay the costs without even knowing the basis of the assessment. The proper procedures would have been for the successful party to send its bill of costs to the unsuccessful party. The party liable to settle the bill should be able to interrogate the bill of costs and point out the items it feels are on the higher side. Should there be no consensus between the parties, the dispute should be handled by the taxing officer irrespective of whether the case was handled by a subordinate court or the High Court. A losing party should not be called upon to settle a bill of costs simply because it is presumed that the bill was assessed independently and objectively by the trial court. No one should be condemned unheard. I do find that the Preliminary Objection is a mere technicality and does not solve the dispute at hand. All what the applicant is seeking is the re-submission of the bill of costs to the trial court with a view to having it re-assessed with the applicant's input. At this moment this court cannot evaluate whether the assessment is fair or not. The applicant was not invited to comment on the bill of costs.

The other objections relating to Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules relating to applications for review are not relevant. The same applies to order 21 rule 8 and section 63(e) of the Civil Procedure Act as cited on the application.

I do find that the preliminary objection is not merited and is hereby dismissed. Parties shall meet their own respective costs.

Dated and Delivered at Marsabit this 2nd day of April, 2019

S. CHITEMBWE

JUDGE