REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

ELECTION PETITION NO. 4 OF 2013

M'NKIRIA PETKAY SHEM MIRITI.....PETITIONER

-VS-

RAGWA SAMUEL MBAE.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

SAMUEL MUCHERU.....3RD RESPONDENT

RULING

[1] This Ruling relates to two (2) applications dated 9th March 2018 and 21st August 2017 filed separately by the petitioner and the 1st Respondent, respectively. The Court directed the parties to canvass both applications through written submissions. Parties obliged. I will refer to the respective application as petitioner's application and 1st Respondent's application.

The petitioner's application

[2] I will begin with the petitioner's application although it was the later filing. The petitioner's Application is dated 9th March 2018 and prays for a number of reliefs, to wit:

> **a. A stay of execution of the Certificate of costs dated 31st July 2017,**
>
> **b. That the taxation proceedings, certificate of taxation and decree dated 4th April 2017 to be set aside and**
>
> **c. The Bill of costs to be struck out.**

[3] From the petitioner's supporting affidavit and objection filed, it is discernible that his major gravamen is:-

> **a. That the taxing Officer erred in Law and in fact in taxing the Respondents Bill of Costs dated 24th July 2015 at Kshs. 2,377,517/= contrary to the judgment by the Court of Appeal in Nyeri in *Civil Appeal No. 47 of 2015 between Petkay Shem Miriti and Ragwa Samwel Mbae & 2 Others* which the Court capped costs of all the 3 Respondents at Kshs. 2,500,000/=.**
>
> **b. That the taxing officer erred in fact and in law in proceeding ex-parte with taxation of the 1st Respondent's Bill of costs.**
>
> **c. That it is from the irregular and unlawful ex-parte taxation proceeding that the 1st Respondent has obtained an irregular Certificate of costs of Kshs. 2,377,517/= and a decree thereto. That the award is misguided and should be dismissed with the costs as the 1st Respondent is only entitled to recover a maximum of Kshs. 833,333/=.**

[4] So he prayed for his application to be allowed.

1st Respondent's reply

[5] The 1St Respondent filed grounds of opposition to the petitioner's application dated 9th March 2018. It was argued that the Application was filed with undue and unexplained delay. The Application is aimed at denying the 1st Respondent a chance to enjoy the fruits of its judgment and that the Application has not met the necessary conditions to warrant the orders sought. He also averred that the petitioner was well aware of the taxation proceedings.

1st Respondent's application

[6] The 1st Respondent's application is dated 21st August 2017 and prays:-

> **a. That the sum of Kshs. 500,000/= deposited in court as security to be released to the firm of M/s Mithega Kariuki & Co. advocates in part settlement of the costs taxed in favour of the 1st Respondent.**

[7] The 1st Respondents Application was supported by the Affidavit of Manasseh Kariuki Karoki, an advocate of the high Court of Kenya practicing in the firm of Mithega Kariuki & Co. advocates.

[8] Gathering from the supporting affidavit to and submissions in support of the Respondents Application, the following arguments have been made:-

> **i. That the judgment in this matter was delivered on 27/9/2013. The petitioners appeal to the Court of appeal was unsuccessful.**
>
> **II. That the 1st Respondent Costs was taxed in the sum Kshs. 2,377,517/=. The petitioner is yet to settle the costs.**
>
> **iii.That the Security deposited in Court ought to be released to the 1st Respondent in part settlement of the taxed costs.**

Petitioner's reply

[9] The petitioner replied to the 1st Respondents Application through a Replying affidavit dated 20th May 2018. He averred that Kshs. 500,000/= held by the Court should not be released to the 1st Respondent without the 1st Respondent being able to justify the amount as due to it following a proper, lawful and also inclusive taxation of costs in the matter.

ANALYSIS AND DETERMINATION

[10] Antecedent to the contestation before me is the decision of the Court of Appeal in *Civil Appeal No. 47 of 2013 M'Nkiria Petkay Shen Miriti and Ragwa Samuel Mbae& 2 Others* where the appellate court held;

> **"……..However, we are of the considered view that the Learned Judge misdirected herself on the cap she placed on the total costs payable by the appellant. This is because the cap of Kshs. 5 million is excessive and contrary to the average cap placed by the Election Court in similar Elections Petitions. We therefore, set aside the cap of Kshs 5 million on the total costs payable to the respondent and substitute it with a cap of 2.5million**
>
> **147. Save for the ground on costs we find that the appeal has no merit and is accordingly dismissed with costs to the respondents. We direct that the costs in the High Court shall not exceed Kshs. 2.5 Milllion while costs of this appeal shall not exceed Kshs. 1 Million……."**

[11] The above determination paved way for taxation of costs by the taxing master of this court. A Bill of costs was filed on 24th July 2015. On record are; an Affidavit of Service of the Bill of costs dated 11th April 2016 and of the taxation Notice dated 29th November 2016 both sworn by Joel Maitethia M'Rukinga. The Bill of costs was objected to by a Notice of preliminary objection dated 8th April 2016. Parties also filed written submission to the notice of preliminary Objection. The main argument by the petitioner in the Preliminary objection was that the taxing officer lacked jurisdiction to hear and determine the Bill of Costs as filed.

[12] I note that on 27/9/2016 the Honourable Deputy Registrar delivered a Ruling dismissing the preliminary objection and allowed the petitioner to file an objection to the Bill of costs if need be. Parties were to agree on a mutually convenient date when the bill of costs can be taxed. See what the taxing master stated in the Ruling that;

> **" In my view the fact that the bill is drawn in excess of the costs capped costs, the jurisdiction of this Court cannot be ousted……The costs payable are always taxed by the taxing master unless otherwise directed by the trial Court."**

[13] I agree entirely with the finding and reasoning by the taxing master. By capping costs the election court does not tax cost. Taxation of costs is done by the taxing officer of the court in accordance with the applicable law and rules. Therefore, as the taxing master of the court, the DR had jurisdiction to tax the Bill of Cost herein. But I note again that the petitioner filed an application dated 7th December 2016 to stay execution and a review of the Ruling dated 27th September 2016. The taxing master on 21/03/2017 dismissed the application and stated as hereunder;

> **"…….From the foregoing, it is clear counsel for the applicant does not intend to file any objection to the bill of costs no**

matter how much time he is given because of his firm belief that this court has no jurisdiction to the tax the bill herein by virtue if Rule 34 of the Elections Parliamentary and County Elections Petition Rules 2013 to tax costs in Election Petitions. It is black and white that, counsel failed to file any objection as directed in the Courts Ruling dated 27/9/2016. The issue raised that no notice of that Ruling was given is an excuse. I say that because even after the record was corrected and counsel was given time to file his objection, he still insisted on seeking a date for Ruling for the application for review….."

[14] Subsequently, the taxing master taxed the bill and delivered a ruling on 4/4/2017. The petitioner filed his notice of objection on 29th March 2017. In these circumstances, and contrary to his allegations, I find and hold that the Petitioner was aware of and is taken to have taken part in the taxation. I reject his arguments on the contrary.

Reference

[15] That being the case, the procedure under paragraph 11 of the Advocates (Remuneration) Order below kicks in that:

"11. 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.

4. 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.

5. 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."

[16] Instead of filing a ''reference'' the petitioner has engaged in circumlocutions which do not serve the course of justice. Nonetheless, the content of his application is akin to a reference for it seeks:-

i. A stay of execution of the Certificate of costs dated 31st July 2017,

ii. That the taxation proceedings, certificate of taxation and decree dated 4th April 2017 to be set aside and

iii. The Bill of costs to be struck out.

[17] The petitioner's objection has been obstinate; that the taxing master did not have jurisdiction to tax the Bill of Costs. It bears repeating that the DR as the taxing officer had jurisdiction to tax the Bill of Costs herein.

[18] The argument by the petitioner that the taxing Officer erred in Law and in fact in taxing the Respondents Bill of Costs dated 24th July 2015 at Kshs. 2,377,517/= contrary to the judgment by the Court of Appeal in Nyeri in *Civil Appeal No. 47 of 2015* does not hold sway as the taxing master taxed the Bill of Cost within the cap placed by the Court of Appeal which is Kshs. 2,500,000/=.

[19] The Court of Appeal did not apportion the costs into three equal portions; a portion for each Respondent. The capping was placed generally on total costs payable to the respondents. I am aware that, courts have taken the view that, IEBC and the Returning officer are required by law to be parties in the suit, and therefore, where they are the successful party, a court does not make a separate award of costs for each. See **ONDONGO VICTOR ROBERT vs. IEBC & 2 OTHERS** where the court described IEBC and the RO as ''Siamese twins' joined together in the hip. Cost to these parties is therefore awarded and taxed to them in that manner. And taxed costs thereof will be on the basis of costs incurred and due to them by law. If we go by the proposition by the petitioner, the RO and IEBC should each get 1/3 of the capped costs. In my view, this is not only against the rules of taxation of costs but also erroneous and indefensible formulation in law. Therefore, in the circumstances, I find it odd when the petitioner suggests a separate award of cost to IEBC and the RO. His apportionment of the costs before taxation into three portions has no basis and is selfish. I therefore dismiss that argument. But this decision is not intended to close debate on this important issue which is still under interrogation amongst legal scholars and practitioners, judicial officers and other disciplines.

Orders

[20] On the basis of the foregoing analysis, I find that:-

1. The petitioner's application dated 9th March 2018 lacks merit and is hereby dismissed with costs to the 1st Respondent.

[21] With regard to the 1st Respondent's application, this is relevant. The 1st Respondent has sought to have the security of Kshs. 500,000/= deposited in court to be released to the firm of Mitheka Kariuki Advocates in part settlement of the taxed costs. Part VII of the Elections

(Parliamentary and County Elections) Petition Rules, 2017 is relevant. Rule 33 (3) specifically provides;

> **"(3) The court may direct that the whole or any part of any moneys' deposited by way of security may be applied in the payment of taxed costs."**

[22] The costs have been taxed and in light of the above provision the deposit should be used in part payment of the taxed costs, No incidentals that owe in relation to this petition. Again, the petitioner has not shown that he has paid the taxed costs herein. Accordingly, I find the 1st Respondents Application to be meritorious and I allow it.

[23] The upshot is that;

> **a. The petitioner's application dated 9th March 2018 is hereby dismissed with costs to the 1st Respondent.**
>
> **b. The sum of Kshs 500,000/= deposited in court as security shall be released to the firm of M/S Mithega & Kariuki Advocates in part settlement of the taxed costs in favour of the 1st Respondent.**

Dated signed and delivered at Meru in open court on 2nd day of April, 2019.

.....

F. GIKONYO

JUDGE

In presence of

M/s Nyaga for 1st respondent

Muriu Mungai for 2nd and 3rd respondents

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F. GIKONYO

JUDGE