



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
MISC APPLICATION NO 128 OF 2016

MUNIKAH & COMPANY ADVOCATES.....APPLICANT

VERSUS

HERI DEVELOPMENT LIMITED.....1ST RESPONDENT

CHURCH OF GOD IN EAST AFRICA (KENYA).....2ND RESPONDENT

CHURCH OF GOD IN EAST AFRICA (TRUSTEES).....3RD RESPONDENT

CHURCH OF GOD IN EAST AFRICA PROPERTIES.....4TH RESPONDENT

RULING

The Applicant filed application dated 29th September 2017 and sought following orders;

- 1) That pending *inter partes* hearing the Court should issue an order for stay of the Deputy Registrar/Taxing Master reading of the Ruling on the Applicant's Bill of Costs dated 11th March 2016 and any consequential orders thereto;
- 2) That the Proceedings of 7th July 2017 and 22nd September 2017 which the Deputy Registrar decided to issue a Ruling on the said Bill of Costs be vacated or set aside;
- 3) That the matter ought to be placed before the Judge/High Court to hear the parties on the question of retainer between the Applicant and Respondents;
- 4) The Applicant be granted leave to file Supplementary List of Documents and Supporting Affidavit in support of the Bill of Costs;
- 5) The Court may grant any other orders as the demands of justice dictates;
- 6) The costs of the application be provided for.

The Defendants/respondents filed and raised Preliminary Objection to these proceedings on 22nd March 2018;

- 1) That the Court lacks jurisdiction to hear and determine the Applicant's Notice of Motion dated

23rd September 2017 as this not a Reference;

2) This Court lacks jurisdiction to arrest the delivery of the Ruling on the Bill of Costs before the Taxing Master or interfere with the Taxing Master's jurisdiction as donated by Advocates Remuneration Order;

3) Without requisite jurisdiction the court ought to strike off/out the instant application filed on 29th September 2017;

The parties through Counsel lodged written submissions on the Preliminary Objection that the Court lacks jurisdiction to stop taxation proceedings that are awaiting delivery of the taxing Master's Ruling.

DETERMINATION

ISSUE

Does this Court have the requisite and competent jurisdiction to hear and determine the application filed on 29th September 2017?

The parties filed written submissions on the matter first with regard to the Preliminary Objection to the Application of 27th September 2017. Applicant submitted through Counsel the following;

1) By virtue of agreed written submissions filed by parties; the Respondents raised the issue of retainer of the Applicant by the Respondents.

2) The Taxing master lacks requisite jurisdiction to hear and determine the issue of retainer

3) The jurisdiction of the Taxing Officer is to tax the Bill of Costs before him/her as provided by **Paragraph 13 A of Advocates (Remuneration) Order** and reference was made to the case of **Abincha & Co Advocates vs Trident Insurance Co. Ltd [2013] eKLR**. The import of the case was/is where there is an issue whether or not costs are due to the advocate that could be taxed or there is a competent bill of costs or not is determined by the High Court then the Bill of Costs is referred back to the Taxing Master for taxation.

4) The Applicant filed pre-emptive proceedings under **Article 159 COK 2010** after Respondents raised the issue of retainer in their submissions. These are not Objection to Taxing master's proceedings.

The Respondents vide the Preliminary Objection and submissions raised following matters;

1. Rule 11 of the of the Advocates Remuneration Order makes provision for filing a reference. **Rule 11(1) of the Advocates Remuneration Order** provides that;

“Should any party object to the decision of a Taxing officer, 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. Rule 11 (2) of the Advocates Remuneration Order provides that

“The taxing Officer shall forthwith record and forward to the objector reasons for the decision on those items and the objector may within 14 days from receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned setting out grounds of his objection.”

3. The Applicant having opted to invoke the jurisdiction of the High Court under **Rule 11(2) of the Advocates Remuneration Order**, the Applicant did not wait for the Taxing Master to deliver her ruling.

The Applicant did not ask for reasons for the decision as is the prescribed procedure upon conclusion of the taxation proceedings that lead to the reference.

ANALYSIS

1. The Preliminary Objection is a question of law that goes to the root of the competency of the matter before Court and/or the jurisdiction of the Forum/Court.
2. In the instant case it is not disputed that taxation proceedings commenced and concluded whilst awaiting determination, the Applicant sought by a Pre-emptive application to stall/stop/ arrest delivery of the Ruling so as to allow /afford the Applicant opportunity to ventilate on the issue of Retainer now raised by the Respondents for the 1st time in their submissions.
3. This Court finds that it lacks competent jurisdiction to arrest delivery of Ruling by Taxing Master on taxation proceedings that commenced and concluded before the Taxing Master. There is no evidence shown to this Court that any issue was raised before the Taxing Master with regard to Retainer or objected to by any of the parties.
4. It is unprocedural and against the interests of justice to halt proceedings at this stage without legal basis or cogent facts that parties were denied right to fair hearing.
5. If the matter has been heard and no objections were raised at the time then legally, this Court lacks jurisdiction to arrest delivery of Ruling because something new/overlooked came to light after proceedings ended.

If the decision is read out by Taxing Master and any party is aggrieved then there is a review/reference or appeal as mode of redress are available to any party.

6. This Court is guided by the following authorities;

The renowned case of **Owners of the Motor Vessel Lilian 'S' –vs- Caltex Kenya Ltd** provides:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

In the Court of Appeal of Kenya decision in the case of **Sharma vs Uhuru Highway Development [2001]2 EA 530**; it was held...

“the High Court Judge not being seized of the taxation itself and there being no appeal or reference to him as provided for by paragraphs 11(1) and 12 of the Advocates Remuneration Order from a decision of the taxing officer who was dealing with the taxation and the taxation not being a suit filed in the High Court for recovery of costs, simply had no jurisdiction at all, to hear as he did the Respondent’s application to strike out the application for taxation. This by itself makes his hearing of and of ruling of 19th May 2000 of the Respondent’s application a nullity from the word go”

DISPOSITION

This Court finds that it lacks jurisdiction to hear and determine the instant application to halt delivery of Ruling by Taxing Master on the Bill of Costs filed and heard by parties. This Court can only deal with the Taxing Master’s decision in a Reference which is not the case here.

Any action without requisite jurisdiction is a nullity and order void *ab initio*. I decline to hear

the application of 27th September 2017 and uphold the Preliminary Objection filed on 22nd March 2018.

DELIVERED SIGNED & DATED IN OPEN COURT ON 15TH JULY 2019

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

N/A FOR APPLICANT

N/A FOR THE RESPONDENT

COURT ASSISTANT – ISAIAH OTIENO