



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISC. CIVIL APPLICATION NO. 1 OF 2018

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION..... 1ST APPLICANT

ISHMAEL HASHIM.....2ND APPLICANT

VERSUS

RICHARD NCHAPI LEIYAGU..... RESPONDENT

RULING

1. The application is dated 10/01/2018 and is premised under the provisions of Section 51(2) of the Advocates Act, Order 51 Rule 1 of the Civil Procedure Rules, Section 3A and Section 26 of the Civil Procedure Act; the applicants sought and prayed for the following Orders;

- a) That judgment be entered for the applicants against the respondents in the sum of Kshs.559,360/- being the sum certified on the 2/12/2016 by the Deputy Registrar as costs;
- b) That the sum of Kshs.559,360/- be paid with interest at the rate of 14% from the 2/12/2016 until payment in full;
- c) That costs of the application be awarded to the applicants;

2. The applicants relied on the grounds on the face of the application and on a Supporting affidavit made by the 2nd applicant Ishmael Hashim and is dated 10/01/2018;

3. At the hearing hereof the applicants were represented by learned counsel Mr.Oyunge whereas the respondent was represented by learned counsel Miss Ahomo; the parties were directed to canvas the application by way of filing and exchanging written submissions and thereafter directed to highlight the written submissions; hereunder are the applicants submissions;

APPLICANTS' SUBMISSIONS

4. Counsel submitted that the matter relates to the payment of costs arising from an appeal where the applicant was successful and costs were capped at Kshs.3.5Million and Kshs.1.5Million to the 1st and 2nd respondents; the Court of Appeal had directed that the costs be taxed by the taxing officer; on the 15/03/2017 the applicant was awarded costs in the sum of Kshs.559,360/- by the Deputy Registrar Nyeri; the applicants contend that the order was that the sum was to accrue interest at the rate of 14% per annum with effect from the 2/12/2016 until payment in full;

5. The contention that the award was defective as the Deputy Registrar who gave the order lacked jurisdiction as it was not gazetted to determine any issues arising from Nyeri High Court Petition No.4 of 2013 was a misapprehension of the law;

6. The Certificate of Taxation established the costs of the petition and that the Deputy Registrar did not determine the merits or demerits of the Petition;

7. It is trite law that the applicants as decree holders can apply to the High Court for the Certificate of Costs to be admitted as an order of the court to facilitate execution by the holder in instances where the respondent has failed to satisfy the Certificate of Costs;

8. Counsel submitted that this court had jurisdiction to determine and deliberate the application; and that the applicant had a right to benefit from the fruits of its labour;

RESPONDENT'S SUBMISSIONS

9. In response the respondents had filed grounds of opposition contesting the application; and submitted that the application was fatally defective as Section 51 of the Advocates Act is only applicable to advocate/client bill of costs and not party and party costs which were awarded in the judgment delivered; case law relied on **Re-Interstate Petroleum Company Limited [2015] eKLR** and **Cecilia Wambui Kihara vs Ephantus Wambugu Waweru [2014] eKLR**; where the court observed that Section 51 of the Advocates Act only applied to Advocate/Client Bill of Costs;

10. Judgment ought to be in terms of the Certificate of Costs and not any sums as claimed by the applicant; and the Certificate of Costs only bears the sum of Kshs.559,360/- and does not award any interest as prayed in the application; in any event the judgment alluded to did not also award any interest on the costs; this inclusion was an attempt by the applicant to review the judgment of the Election Court;

11. On jurisdiction counsel submitted that they were not challenging the jurisdiction of the Deputy Registrar who taxed and awarded the costs; but challenged the jurisdiction of this honorable court to hear and determine the application; the respondent's contention was that the party and party costs were recoverable within the main cause where costs are awarded; the main suit being the Election Petition;

12. Reference was made to Rule 6 of the Elections (Parliamentary and County) Rules 2017 which provides the jurisdiction of the court; that this court was not gazetted as an Election Court and therefore lacked jurisdiction to hear and determine any issues arising from Nyeri High Court Petition No.4 of 2013;

ISSUES FOR DETERMINATION

13. After taking into consideration the rival submissions of the parties' counsel, this court has framed the following issues for determination;

- (i) Whether this court has jurisdiction to determine the instant application arising from a taxation of costs in an Election Petition;
- (ii) Whether the application was brought under the proper provisions of the law;
- (iii) Whether the interest on the costs forms part of the Certificate of Costs;

ANALYSIS

Whether this court has jurisdiction to determine the instant application arising from a taxation of costs in an Election Petition;

14. The applicant submitted that the respondent's contention was that the award was defective as the Deputy Registrar who gave the order lacked jurisdiction as that court was not gazetted to determine any issues arising from Nyeri High Court Petition No.4 of 2013;

15. But this court notes that this was a misapprehension of the respondent's submissions as counsel for the respondent had submitted that they were not challenging the jurisdiction of the Deputy Registrar who had taxed and awarded the costs; but were challenging the jurisdiction of this honorable court to hear and determine the application; that the court lacked jurisdiction as it was not gazetted to determine any issues arising from Nyeri High Court Petition No.4 of 2013; the respondent also argued that the costs being party and party costs were recoverable within the main election petition;

16. On jurisdiction this court is of the view that is the first question the respondent ought to have raised at the earliest opportunity; reference is made to the renowned case of **Owners of Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Ltd [1989] KLR 1**;

17. The respondent ought to have raised the issue at the very first instance and by way of a Preliminary Objection to enable this court to dispose of it before it considers the subject matter of the application;

18. In this instance the issue of jurisdiction can only be addressed in the context of the subject matter of the application before this court; the subject matter herein is grounded on the Certificate of Costs issued on the 2/12/2016 by the Deputy Registrar High Court Nyeri from the taxation of a Bill of Costs following a judgment delivered in an Election Petition; but it is not the dispute that was before the Election Petition; and this court reiterates that the subject matter is related to taxation of costs; this court derives its jurisdiction specifically from the Advocates Act to hear and determine matters related to the consequences of taxation such as recovery of the taxed cost and references; refer to the case of **Doonholm Rahisi Stores vs East African Portland Cement [2005] eKLR**;

19. This court reiterates that the subject matter of the Election Court has since been determined and that in the instant application the applicants are seeking the entry of judgment on the basis of the Certificate of Taxation so as to recover the taxed costs under the provisions of Section 51(2) of the Advocates Act; this section gives this court the jurisdiction to enter judgment provided the Bill of Costs has been taxed and the taxing master has issued a Certificate of Costs;

20. For the above reasons this court is satisfied that it derives its jurisdiction to hear and determine the instant application from the above provisions of the Advocates Act and to make any order it deems fit; which then leads to the next issue whether the application is properly before this court;

Whether the application was brought under the proper provisions of the law;

21. The respondent submitted that the application was fatally defective as Section 51(2) of the Advocates Act is only applicable to

advocate/client bill of costs and not party and party costs which was the costs awarded in the judgment delivered in the Election Petition; the case law the respondent relied on was **Re-Interstate Petroleum Company Limited [2015] eKLR** and **Cecilia Wambui Kihara vs Ephantus Wambugu Waweru [2014] eKLR**; where the court observed that Section 51 of the Advocates Act only applied to Advocate/Client Bill of Costs;

22. Section 51(2) of the Advocates Act reads as follows;

“The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the court, be final as to the amount of the costs covered thereby, and the court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”

23. The respondent contends that the Section 51(2) of the Advocates Act only applies and is restricted to an Advocate/Client Bill of Costs; it is this court's considered view that there are no two separate regimes for taxation of Party/Party costs and Advocate/Client costs; there is no separate regime for enforcement and recovery of the taxed costs; the certificate of costs is the final determination of costs by the taxing master be it Party/Party or Advocate/Client; and as earlier stated the consequences of such taxation falls within the ambit of this court either by way of reference or adoption of the certificate;

24. This court is satisfied that the application brought by the applicant seeking for the adoption of the Certificate of Costs is proper and properly before this court;

25. In this instance the certificate of costs has not been appealed against, set aside or varied; and this court is satisfied that from the material placed before it that all the conditions as set out in Section 51(2) of the Act have been satisfied and that this is a suitable case for it to exercise its discretion in favour of the applicant and therefore proceeds to enter judgment against the respondent for the certified sum;

Whether the interest on the costs forms part of the Certificate of Costs;

26. The applicant has included a claim for interest from the 2/12/2016 till payment in full; in rebuttal the respondent submitted that the judgment of the Election Court dated the 4/10/2013 made no reference to the issue of interest on the costs; and the Certificate of Costs also made no reference to an award for interest on the costs from the date of taxation till payment in full;

27. The application herein is for judgment as per the Certificate of Costs; under the provisions of Section 26 of the Civil Procedure Act this court has the discretion to order interest on the principal sum both from the date of the suit to the date of the decree at such rates as the court deems reasonable; the factors this court will consider for disallowing interest on the taxed costs is that firstly, the costs herein arose from an election petition as opposed to a liquidated demand; secondly that there was no award for interest made in the judgment and neither did the Deputy Registrar award any interest in the Certificate; and for these reasons this court finds that this is not an appropriate case in which it should exercise its discretion in favor of the applicants in making an award for interest on the costs;

28. There shall be no interest applicable on the certified costs.

FINDINGS AND DETERMINATION

29. For the forgoing reasons this court makes the following findings and determination;

(i) This court finds that it has jurisdiction to hear and determine the application;

(ii) The application is found to be proper and properly before the court

(iii) This court finds that all the conditions set down in Section 51(2) of Advocates Act have been satisfied; the Certificate of Taxation dated the 2/12/2016 is hereby adopted and judgment is hereby entered in favour of the applicants against the respondent in the sum of Kshs.559,360/-;

(iv) There shall be no interest applicable;

(v) Each party to bear their/its own costs of this application.

Orders accordingly.

Dated and Signed at Nyeri this 5th day of December, 2019.

HON.A.MSHILA

JUDGE