



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYAHURURU
ELC APPLICATION NO. 92 OF 2017

JOSEPH CHEGE GATUA.....1st PLAINTIFF/ APPLICANT

ZAKARIA KARIMI GATUA.....2nd PLAINTIFF/ APPLICANT

-V E R S U S-

CHARLES MWANGI MATHENGE.....DEFENDANT/ RESPONDENT

RULING

1. Before me is a Notice of Motion dated 3rd August 2017 and filed on the same day pursuant to Section 1A, and 1B of the Civil Procedure Act Order 51 rule 1 and 2 of the Civil Procedure Rules, and Rule 72 and 76 of the Advocates Remuneration order (2009) and all other the enabling provisions of the Law, where the Applicant seeks for orders that:-

i. Spent

ii. Spent

iii. That the court be pleased to set aside ex parte orders of taxation of costs on 10th July 2017 as well as the certificate of costs issued thereafter together with all the other execution proceedings or subsequent orders in respect thereto.

iv. That the defendant's bill of costs dated the 2nd June 2016 be re-taxed afresh in the presence of the plaintiffs as well as their Counsel.

v. Costs of this application be provided for.

2. The said application was supported by the grounds on the face of the application and the Affidavit, sworn by Joseph Chege Gatua the 1st Plaintiff /Applicant herein, on the 3rd August 2017 and filed on the same date as well as an Affidavit sworn on 3rd August 2017 by Bob Robert Mwaniki, a student at Kenyatta University.

3. The Application was argued by Mr. Sigilai Counsel for the Applicant while Miss Wangechi appeared on behalf of the Respondents herein.

4. The Applicant's Counsel laid the basis for the said application to the effect that on the 16th February

2015, Judgment was delivered in Environment and Land Court Case No. 375 of 2013 where the learned trial Judge dismissed the counterclaim as unmaintainable but maintained the plaintiff's case in terms of prayers 1, 2, and 3 which prayers I shall produce for ease of reference.

i. A declaration that the NGARUA DIVISION LAND DISPUTE TRIBUNAL'S DECISION and AWARD in Tribunal Case No 9 of 2006 as well as the adoption thereof as the judgment and decree of the NANYUKI SENIOR PRINCIPAL MAGISTRATE'S COURT LAND CASE NO 37 OF 2006 are null and void abinitio or nullities

ii. A declaration that the Plaintiffs are the joint owners and the registered absolute proprietors of title no LAIKIPIA/KINAMBA MWENJE BLOCK 1/1235 to the exclusion of all

iii. An order of inhibition do issue to inhibit the registration of any dealings with title No LAIKIPIA/KINAMBA MWENJE BLOCK 1/1235 until and/or pending the hearing and determination of this suit

5. That thereafter the trial Judge condemned the Plaintiff to pay the cost of the suit.

6. That subsequently the Defendant filed their Bill of cost dated the 2nd June 2016 and included two prayers therein being;

i. Instruction fee for defending the case

ii. Instruction fees to prosecute the counter claim.

7. The Applicant took issue with the second Bill submitting that since the counterclaim had been dismissed for being un-maintainable with no orders to cost, yet the Respondent had gone ahead to include it in his Bill of costs.

8. That they had filed a preliminary objection to the same which application had not been heard as parties were in agreement that they would refer the matter to Hon lady justice Waithaka who had heard the matter, for interpretation as to whether the Respondents could claim for costs that had been dismissed.

9. In the pendency of the preliminary objection, the Respondent went ahead and sought for a date for taxation on his bill which was obtained ex-parte.

10. That the taxation Notice dated the 9th June 2017 was not served upon them and they came to know about it on the 28th July 2017 vide a letter dated the 27th July 2017. That when he inquired about the same from the Respondent's counsel, he was informed that his firm had been served.

11. Counsel was categorical that the Notice was served upon a clerk who was a student in his office and who had been directed by the person who effected the service to receive the same which he did and stamped the same. The student however did not diarize the same or inform him of the same.

12. That vide an affidavit sworn by the said student which was not controverted, he admitted to having received the notice, not diarized it or informed counsel of the impending matter.

13. Counsel submitted that this was an excusable mistake and inadvertent in the circumstance and could be excused by allowing the application.

14. That the process server's Affidavit of service was contradictory to the effect that it did not state which room number the notice was served, that he served a female secretary in contradiction to the student who was male. That pursuant to the ex-parte taxation, a certificate of cost was extracted on the 14th July 2017 and the same was brought to his attention on the 28th July 2017.

15. The respondent by their action intended to defeat paragraph 11 of the Advocate's remuneration Act 2009 which required any objection to be filed within 14 days. Counsel relied on the provisions of Rue 51 (2) of the Advocates Remuneration Act, Article 159(2) (b) of the Constitution, and Section 1B of the Civil Procedure rules as well as the annexed Authorities to buttress his application thereby calling for the court to exercise its discretion to set aside the orders of taxation and certificate of costs therein.

16. The Application was opposed by Counsel for the Respondent who submitted that she was the person who had sworn the affidavit of service which was an administrative issue.

17. That indeed Counsel for the Applicants had not disputed the Notice of taxation nor the Stamp appearing on the same. That when the matter came up in court for taxation, neither he nor his client were present.
That there was an affidavit of service duly filed which was admitted by the Deputy Registrar as duly served.

18. That the Deputy Registrar then proceeded to tax the bill of costs on the strength of which he extracted a certificate of cost and served.

19. Counsel relied on paragraph 11 of the Advocates Remuneration order to submit that these were clear provisions which ought to have followed if the Applicants were aggrieved but they instead had chosen to stay the whole certificate of costs.

20. The fact that the person who received the Notice did not diarize it should not be visited upon her client and that supervision of a law firm was entirely the duty of an advocate because the employees working therein were agents of the Advocates who had employed them.

21. As a matter of practice, issues of Notices were not usually received by Advocates per se but by the person therein who has access to the stamp. That the lawful process was followed to have the matter taxed and counsel should have written to the taxation officer on his objection to the bill as taxed.

22. The Respondent relied on the decided case of **Remco Ltd vs. Mystry Jakva Parbat & Co. Ltd [2002] EA** to submit that staying of the entire certificate was an abuse of the court process and was a way to take the matter backwards yet it was a fairly old matter.

23. That the issues to be raised were issues within the jurisdiction of the Deputy Registrar and not necessary this court and that discretion ought to be exercised judiciously. The Respondent's Counsel thus prayed for the application to be dismissed.

24. In rejoinder counsel for the Applicant reiterated his earlier submission adding that the issue raised in the preliminary objection had not been determined and that the whole idea of bringing about this application was to stop the whole process so as to enable him address the issues raised in the Preliminary objection.

25. Further that Rule 11 of the Advocates' Remuneration Act was not applicable in the instant case as it was one of the procedures of challenging the Bill of cost.

26. That Section 51 of the Advocate's Act allowed the setting aside of the taxation in the absence of one of the parties.

27. That the application had merit and should be allowed.

28. I have considered the foregoing. The first issue for consideration is whether the application is properly before the Court.

29. The provisions of Paragraph 11 of the Advocates (Remuneration) Order provide as follows;

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 object.

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.

30. In the case of **Machira & Co. Advocates vs. Magugu [2002] 2 EA 428** Ringera J (as he then was) held that:-

“As I understand the practice relating to taxation of bills of costs, any complaint about any decision of the taxing officer whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the bill of costs is ventilated by way of a Reference to a judge in accordance with paragraph 11 of the Advocates Remuneration Order.”

31. I need not belabor on the Application and on the point that the law in Article 159 of the Constitution should not be used as a panacea for all ills and omissions in approaching the court. In the absence of appropriate Reference to challenge the decision of the Taxing Officer made on the 2nd June 2016 in compliance with the mandatory provisions of Paragraph 11 of the Advocates Remuneration Order, I do hereby proceed to strike out this application with costs to the Respondents advocate.

Dated and delivered at Nyahururu this 7th day of February 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE