



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL MISC. REFERENCE APPLICATION NO. 1 OF 2018

K. MBERIA & PARTNERS ADVOCATES.....PLAINTIFF

VERSUS

THE PROPERTY REALITY LIMITED.....DEFENDANT

RULING

By a notice of motion dated 3rd April 2018 filed in court 4th April 2018. The applicant challenges the ruling and certificate of taxation dated 23rd March 2018.

The main prayers sought are as follows:

- (1) That there be a stay of execution of certificate of taxation dated 23rd March 2018 certifying costs due to the plaintiff from the defendant at Ksh. 506, 300 pending the outcome of this motion.**
- (2) That the certificate of taxation dated 23rd March 2018 be set aside.**
- (3) The costs of this application be paid for by the plaintiff.**

Arguments on behalf of the Applicant

In support of the application is a detailed affidavit sworn by Learned Counsel Cynthia Mirugah seized of the matter before the Deputy Registrar. The gist of Learned Counsel's dispositions is that the award of taxed costs suffers from the legal infirmity due to the variance of procedure and final outcome. The affidavit evidence by Learned Counsel traces the history of the matter indicative of some missteps in the conduct of the Judicial proceedings. Learned Counsel highlights in the affidavit under paragraph (4) that upon each party filing submissions, an oral decision reached on 6th July 2017 dismissed the award of costs to the plaintiff. Learned Counsel contended that the written ruling by the taxing master was in contrast with the oral pronouncement.

According to Learned Counsel further averments, the issue took a different turn on 23rd March 2018 when Ms. Kagweno Advocate informed them through a letter demanding payment of taxed costs of Ksh. 506,108.

In reference to the contents of the demand notice Learned Counsel travelled to Kajiado court where on perusal of the record she confirmed the notice on the decree made on 26th July 2017 and the letter from the plaintiff dated 23rd March 2018. Further, Learned Counsel deposed that on several occasions they have sought audience with the trial court including applying for a certified copy of a ruling detailing reasons but with no success. That the failure to provide reasons as a requirement of the law occasioned such prejudice as they could not proceed to file the reference.

The response on behalf of the Respondent

In the counter affidavit filed by the respondent counsel Mr. Kamura opposed the notice of motion by the applicant. Mr. Kamura contended that if the applicant was dissatisfied with the ruling filing a reference was the way to seek a remedy. Counsel further submitted that the applicant is estopped from challenging the certificate of costs through this kind of procedure. In essence, counsel for the respondent invited the court to invoke section 99 of the Civil Procedure Act to amend any certificate or arithmetic omissions in the certificate of costs and the original ruling. Counsel for the respondent prayed for the dismissal of the application for want of merit.

Analysis and Resolution

It is undisputed that the respondent holds a certificate of taxed costs. The question to ask is whether the integrity and sanctity of the process

can be impeached where the Judicial Officer fails to give his/her decision which in the long-run occasion some miscarriage of justice.

The Law

The supreme Law of the Land under Article 10 provides for National Values and Principles of governance which are binding to state officers and public officers whenever any of them enacts, applies or interprets any law. Makes or implements public policy decisions or applies or interprets this constitution.

Under section 3 of the Administrative Action Act No. 4 of 2015 any person performing a judicial function under the constitution or written law pursuant to section 4 (2) is under a legal duty to give written reasons for any decision reached in the course of a judicial process. Section 25 of the civil Procedure Act provides that the court after the case has been heard shall pronounce judgement, and on such judgement a decree shall follow. To borrow a leaf from section 169 of the CPC every judgement shall contain the point or points for determination, the decision thereon and the reasons for the decision.

In accordance with the provisions of paragraph 11(1) (2) of the Advocates Remuneration Order the duty to give reasons that the Deputy Registrar is imposed by the order. In short giving reasons by a tribunal or court is set out in the constitution and other statutory provisions. This resonates well with some of the key constitutional values in delivery of justice namely integrity, transparency, fairness and accountability in both adjudication and final decision.

It is trite that court provide reasons for judgments/rulings or decisions as a duty to the public and to explain why the parties won or lost.

The rationale for giving reasons in a judgement or ruling or decision was espoused in the persuasive authority in the case of **Soulemezis Versus Dudley (Holdings) PTY Limited, 1987 10 NS WLR 247, 279 where MC Hugh JA held:**

“The giving of reasons for a judicial decision serves three purposes:

First, it enables the parties to see the extent to which their arguments have been understood and accepted as well as the basis of the Judges decision. As Lord Macmillan has pointed, the main defect of a reasoned judgement is not only to do but seem to do justice. Secondly, the giving of reasons furthers judicial accountability. A requirement that Judges give reasons for the decisions, grounds of decision that can be debated, attacked and defended – serves a vital function in construing the Judiciary’s exercise of power. Thirdly, under the common law system of adjudication, courts not only resolve disputes they formulate rules for application in future cases.”

Further in deciding a similar question, the Learned Judges in the case of **Commonwealth Versus Versus Pharmacy guild of Australia 1989 91 ALR 65; 68** held as follows in the following passage:

“The provision of reasons is an important aspect of the tribunal’s overall task. Reasons are required to inform the public and parties with an immediate interest in the outcome of the proceedings of the manner in which the tribunal’s conclusions were arrived at. A purpose of requiring reasons is to enable the question whether legal error has been made by the tribunal to be more readily perceived than otherwise might be the case. But that is not the only important purpose which the furnishing of reasons has. A prime purpose is the disclosure of the tribunal’s reasoning process to the public and the parties. The provision of reasons engenders confidence in the community that the tribunal has gone about its task appropriately and fairly. The statement of bare conclusions without the statement of reasons will always expose the tribunal to the suggestion that it has not given the matter close enough attention or that it has allowed extraneous matters to cloud its consideration. There is yet a further purpose to be served in the giving of reasons. An obligation to give reasons imposes upon the decision-maker an intellectual discipline. The tribunal is required to state publicly what its reasoning process is. This is a sound administrative safeguard tending to ensure that a tribunal such as this properly discharges the important statutory function which it has.”

The above principles from a common law jurisdiction in my view fits the present situation. In our context giving reasons in any judgement or ruling by judicial officers is both a constitutional and legal duty.

In the instant motion, what the applicant was demanding does not give room for the taxing master to entertain a notion of to give or not to give reasons for his/her decision.

I have reviewed the record of the lower court it is not in dispute that the applicant and the respondent had a Misc. Application No. 9 of 2017 before the Deputy Registrar.

As evidenced from the record an award of taxed costs of Ksh 506,108 was made on 6th July 2017. On 10th July 2017 the applicant wrote a letter to the Deputy Registrar seeking to be provided with reasons for the quantum under paragraph 11(1), (2) of the Advocates Remuneration Order. There is no evidence that such a requirement was acceded to or complied with by the Deputy Registrar as per the provisions of the statute.

Being dissatisfied with the delay in responding to the request the applicant wrote a reminder on 6th September 2017 with a copy to the Chief Justice. The letter was in reference to the frustrations of not getting assistance from the trial court.

In considering the record the applicant has not been supplied with the reasons to date. The lower court record as formulated and constituted revealed that the typed ruling is not signed by the author of the ruling. The purported certification by a Deputy Registrar has no date save for the stamp of the court. The owner of the signature certifying the ruling cannot be positively identified from the record. The subsequent

certificate of costs was signed on 23rd March 2018 by an unknown Deputy Registrar. The scope of the award in the written ruling is at variance with the certificate of costs.

Based on the foregoing the applicant has challenged the entire decision on the grounds that the initial oral pronouncement take home was a dismissal of the taxation. Either from the circumstances which she was not able to comprehend a written ruling, awarding taxed costs of over Ksh 500,000 was issued to the respondent. To me these are concerns of a grave nature that the authenticity city and credibility of the decision is being impugned this court must therefore raise to the occasion by undertaking an enquiry through the evidence and the record to establish whether such a decision can be left to stand.

As reiterated above, the constitution under Article 10 and Article 47 (1) section 4 (2), paragraph 11(1) (2) of the Advocates Remuneration Order imposes a duty for Judges and Magistrates to provide reasons for their decisions. I am then of the view that a breach of the requirement of these provisions were violated by the Deputy Registrar.

In the present case what the applicant was looking for falls within these provisions of the law. It was the only way the applicant was to appreciate a logical connection between the application on taxation and final verdict.

The impugned decision was arrived in July 2017. The applicant was aggrieved by the outcome and was desirous of exercising his right of appeal or review. In order to satisfy the requirements of the Advocates Remuneration Order the applicant had a time limit to which he was to file a reference challenging the certificate of taxation. As it emerged from the affidavit evidence and submissions the applicant did not take the necessary steps in absence of the reasons being supplied to appreciate the basis of the decision. Where there are conflicting facts in a dispute it is usually the reasons provided for which sets out the position taken by the tribunal or court.

I agree with the legal maxim that justice should not only be done but should manifestly and undoubtedly be seen to be done in the administration of justice. [See also Article 159 (a) and (b)] of the constitution. In my judgement the suppression of reasons demanded of the Deputy Registrar was a derogation from this doctrine.

Having considered the notice and submissions by counsel I am of the following conceded view that the dictates of procedural fairness and in particular the right to give reasons has been infringed by the trial court. Indeed, the right to fairness and due process is regarded as the bed rock of administration of justice. There is prima facie evidence that the applicant has not been treated fairly since the decision was rendered on 6th July 2017.

The values underlying the duty imposed upon judicial officers is so noble and onerous to a level that individuals appearing in the various courts should have the opportunity to be heard fairly and have decisions affecting their rights explained to them. Succinctly put the impugned decision had a profound impact on the applicant because it imposed a penalty of taxed cost of Ksh. 506,300 which required that reasons be given on how the figure was arrived at by the court. What the failure to supply reasons did was to deprive the applicant the right of an appeal or review to a superior court. It is also clear from the record that the certified copy of the ruling could not be authenticated in view of the findings made elsewhere in this ruling.

I am satisfied in this review that the validity of the decision has been put into question. To me the irregularity referred to by the applicant is of a nature that it amounted to a failure of justice for it to be left to stand.

In the considerations I find merit in the notice of motion dated 3rd April 2018. I quash the certificate of cost and the judicial proceeding to that effect. For the interest of justice, the Misc. Application No. 9 of 2017 is hereby remitted back to the lower court for hearing and disposal by another Deputy Registrar. The cost of this application to await the outcome of the taxation.

Dated, Signed and Delivered in open court this 4th May 2018 at Kajiado

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Miruga for Mrs Mwangi

Mr. Kamura for the Respondent

Mr. Mateli – Court Clerk