



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CONSTITUTIONAL PETITION NO.4 OF 2012

1. FRANCIS MULAMA OTUMA

2. EZRA SOLOMON MACHINDA APPLICANTS

VERSUS

1. JONATHAM ANGOTE1ST RESPONDENT

2. COMMISSIONER FOR SHARIF2ND RESPONDENT

3. ENG. PHILIP OKUNDI3RD RESPONDENT

4. ORANGE DEMOCRATIC MOVEMENT

(ODM) PARTY4TH RESPONDENT

AND

5. MANASE B. ETEMESI5TH RESPONDENT

RULING

1. The Applicant(s) herein filed a Chamber Summons together with a Constitutional petition dated 16th March 2012. After hearing the Chamber Summons, the trial judge in his ruling dismissed the same and awarded costs to the 5th Respondent on the 29th March 2014.
2. The 5th Respondent filed a bill of costs pursuant to the ruling delivered on 29th May 2014 and sought taxation of the same. This prompted the applicants to file the application dated 2nd June 2015 brought pursuant to Sections 1A and 1B and 63(e) of the Civil Procedure Act Cap 21 Laws of Kenya and other enabling provision of the Law seeking for ORDERS THAT:-
 1.
 2. Pending the inter parties hearing of the application, there be stay of proceedings and particularly the taxation proceedings pending before the Deputy Registrar.
 3. The Honourable Court do give directions for hearing of the main suit and allocate a hearing date for the same.
 4. All costs arising from all interlocutory applications in the matter abide the final outcome of the suit.
 5. The Honourable Court do issue other or further orders as shall meet the justice of the case.

3. The application is based on the grounds on its face and is also supported by the annexed affidavit of AGGREY B.L. MUSIEGA ADVOCATE. He depones that the applicants filed the Petition dated 16th March 2012 in this matter which is pending hearing as no date has been given for its hearing together with a Chamber Summons seeking interim relief. He attributes the delay in the hearing of the petition and the Chamber Summons to the initial reference of the dispute to arbitration which process failed and later the transfer of the judge who was hearing the matter. He adds that the Chamber Summons was heard and a ruling delivered and thereafter the 5th Respondent's Counsel quickly drew and filed the Bill of Costs dated 18th June 2014. He claims that the 5th Respondent's Counsel has refused to take a hearing date for the main petition as he insists on taxing the bill. He contends that the effort by Counsel for the 5th Respondent to tax a bill on an interlocutory application in the middle of a hearing is not legally supported and contends further that the advocate will not merely stop at taxation but will move to execute the taxed costs thereby prejudicing and embarrassing the applicants.

The Response

4. The application is opposed. MARISIO LUCHIVYA ADVOCATE for the 5th Respondent filed his replying affidavit dated 8th October 2015. He explains that the 5th Respondent filed his bill of costs pursuant to the order of costs awarded in the ruling dated 29th March 2014. He contends that there is no illegality in the 5th Respondent taxing a bill of costs pursuant to a valid ruling which has not been appealed against, reviewed or set aside. He further explains that in the ruling dated 29th May 2014 the learned judge noted that the applicants had no *locus standi* to bring the petition to Court as they had not produced or annexed any documents to show that they were members of the 4th Respondent. He adds that the declaratory orders sought by the applicants/petitioners had in any event been found to have been overtaken by events since the petition ought to have been determined before the General Elections of March 2013. It is the view of Mr. Luchivya that this Honorable Court cannot grant orders in vain as the applicant's Counsel wants the petition to proceed whereas the remedies sought on the petition cannot be granted by reason of the fact that the Petitioners were found to lack *locus standi* to move the Court in this matter.
5. Mr. Luchivya adds that the ruling dated 29/05/2014 finally determined the entire petition hence the orders sought in this application shall be an exercise in futility and unenforceable. He maintains that the bill of costs is not hinged on an illegality as alleged and that the applicants had a duty to immediately pay the 5th Respondent costs awarded to him and having failed to do so the 5th Respondent had no option but to file the Bill of Costs. He is of the further opinion that no statutory provision bars the 5th respondent or any other person from taxing a bill of costs on costs awarded by a competent Court during pendency of proceedings.

Submissions

6. Parties canvassed the application by exchanging written submissions. What comes out clearly from the submissions by A.B.L MUSIEGA ADVOCATE for the applicant is that a Court cannot allow taxation of costs upon an application before the conclusion of the case. This Courts attention was drawn to the Civil Procedure Rules Order 51 Rule 11 which provides:

“(1) It shall not be necessary in an originating summons, application or other process to ask for costs, or for general or other reliefs which may be granted by the Court as it thinks just.

(2) Unless the Court otherwise orders for special reasons to be recorded, costs awarded upon an originating summons, application or other process shall be taxed only at the conclusion of the suit.”

7. On his part the 5th Respondent submits that there is no illegality in pursuing costs that have been validly awarded and especially so after he has duly complied with Section 49(d) of the Advocates Act Cap 16 which provides that **“At any time after a bill of costs has been filed and the suit has**

been set down for hearing any party may take out a summons for directions as to whether such a bill should be taxed by the taxing officer before the suit is heard.” He further submits that in its ruling the judge found that the applicants had no legal capacity to file the Petition and that the orders had already been overtaken by events since the Petition ought to have been heard before the national general elections of March 2013.

8. The 5th Respondent contends that for the applicant to want this matter to proceed for hearing of the main suit amounts to an abuse of the Courts process as the orders sought cannot be granted or even if granted, such shall be an exercise in futility or shall be unenforceable. He adds that the onus of fixing the suit for hearing is on the petitioner and not the respondent.

Determination

9. This Court is aware of the fact that the ruling dated 29/03/2014 that awarded costs to the 5th Respondent has not been appealed against. Thus the orders granted therein stand as they are. What is in contention however is whether the 5th Respondent can legally proceed with the taxation of his bill of costs whereas the Petition is still pending determination. The rival submissions clearly show that the parties do not agree on whether or not the 5th Respondent should proceed with the taxation.
10. This Court has looked at the ruling delivered on the 29/03/2014. It is true that the Court ruled that the applicants had no legal capacity to file the said application and that the orders sought had already been overtaken by events since the petition ought to have been heard before the national general election of March 2013. However, the Court did not strike out or dismiss the Petition. Further, Section 49 (d) of the Advocates Act Cap 16 Laws of Kenya requires that 5th Respondent in this matter seeks directions of the Court as to whether his bill of costs should be taxed by the taxing officer before the suit is determined. There is no evidence on record that such directions have been sought by the 5th Respondent or by any other party. In the circumstances, I find and hold that it is premature for the 5th Respondent to insist on taxing the bill of costs before such directions are taken.
11. I also want to point out that the duty of setting down the petition for hearing falls squarely on the shoulders of the petitioners/applicants. They cannot continue to agitate against the 5th respondents desire to have his bill taxed simply because the Petition is still pending, and yet they have not shown what efforts they have made to have their Petition heard and determined expeditiously. They must do so otherwise they will be accused of indolence.
12. For the reason that directions, as to whether the 5th respondent's bill of costs should be taxed or not, have not been taken, I allow the application and direct as follows:-
 1. The application dated 2nd June 2015 is hereby allowed in terms of prayer 2 thereof but with costs to the 5th Respondent.
 2. The 5th Respondent shall file for directions under Section 49 (d) of the Advocates Act within forty five (45) days of the date of this ruling.
 3. Meantime, the applicants must set down the Petition for hearing within 60 days from the date of this ruling failing which the Petition shall stand dismissed for want of Prosecution with costs to the 5th Respondent.

13. Orders accordingly.

Ruling delivered, dated and signed in open Court at Kakamega

this 11th day of February 2016.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Ondieki for Musiega (present) for applicants

Mr. Luchivya (absent) for 5th Respondent

Mr. Lagat - Court Assistant