



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

MISC. CIVIL APPLICATION NO. 7 OF 2013.

JUDICIAL REVIEW.

BENARD MALESI ::::::::::::::::::::::::::::::::::::::: EX-PARTE APPLICANT.

VERSUS

TEACHERS SERVICES COMMISSION ::::::::::::::::::::::::::::::: RESPONDENT.

AND

LAVENDAR SHIVACHI :::::::::::::::::::::::::::::::::::::::INTERESTED PARTY.

RULING

INTRODUCTION.

1. The petitioner/respondent herein filed an ex parte application dated 4th October, 2013 seeking leave to apply for orders of certiorari against the decision of the applicant herein Teachers Service Commission. The application was dismissed with costs on the 5th day of February, 2015 and the applicant went ahead and taxed its bill of costs on the 19th August, 2015. The costs were not disputed by the respondent hence the application herein.

The application.

2. The applicant has filed the Notice of Motion herein dated 6th January, 2016 seeking for orders:-

- (1) That the applicant's costs taxed at Ksh.96,244/= be deemed judgment of this honourable court;*
- (2) That upon grant of prayer (1) above interest to accrue on the taxed costs at court rates with effect from 19th August, 2015;*
- (3) That the costs of this application be provided.*

3. The application was based on the grounds that since costs had been taxed on the 19th August, 2015 and had not been disputed, the respondent had not paid the same till date. The application is supported by the affidavit of PATRICIA NAEKU an Advocate of the High Court of Kenya who has the conduct of the matter herein wherein she more or less confirms that taxation was done and that the same has not been challenged but remains unsettled.

Grounds of Objection.

4. The application is opposed by the respondent Benard Malesi who has filed the following grounds of objection.

(1) That the orders sought are not known in law and therefore not attainable;

(2) That the costs taxed cannot be deemed as judgment;

(3) That the applicant did not have any counter-claim to the application that had been filed by the respondent for Judicial Review and, therefore, no judgment can accrue for the applicant;

(4) That costs as assessed cannot attract interest;

(5) That the application lacks merit.

5. The respondent wants the application dated 6th January, 2016 dismissed with costs.

Submissions.

6. The application was canvassed by way of written submissions which the parties filed and exchanged.

7. The applicant maintains that the orders that have been sought in the Notice of Motion dated 6th January, 2015 are known in law. They have relied on the Advocates Act Cap 16 Section 51 (2) and Section 27 of the Civil Procedure Act and have cited several cases to back up their submission. They have further submitted that courts award costs in Judicial Review matters and that courts have the discretion to award interest.

8. The respondent maintains that the decision of the court to dismiss its application for leave to file for judicial review orders of certiorari ended at that stage of dismissal. He submits that costs as assessed cannot therefore be part of the judgment but can only form a decree. The respondent further submits that since the applicant did not file a counter claim they were not entitled to any judgment because he did not plead for any. He adds that interest can only accrue from the principal. He maintains that in their proceedings, there were absolutely no figure claimed that could be regarded as principal. He adds that issues/matters of judicial review are in the realm of constitutional reference and they do not attract costs.

Determination.

9. Having considered the application, the subject of this ruling, the affidavit in support, grounds of objection as well as the submissions on record the issue for determination is whether Judicial review matters and/or proceedings do attract costs?

10. Cost have been defined in Black's Law dictionary as:-

(1) The charges or fees taxed by the court, such as filing fees, jury fees, court house fees and reporter fees. Also termed court costs;

(2) The expenses of litigation, prosecution, or other legal transaction especially those allowed in favour of one party against the other. Also termed as litigation costs.

11. From the above definitions costs are expenses of litigation. It does not matter whether the issues pleaded are Constitutional, Civil or Criminal in nature. Costs are discretionary and are awarded to the successful party in a suit/case.

12. Section 51 (2) of the Advocates Acts stipulates that:-

“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 recovered thereby; and

the court may make such order in relation thereto as it thinks fit including where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”

13. The only two (2) grounds that could cause a court not to enter judgment on a certificate of costs are where the said certificate has been set aside and/or altered and/or where the retainer has been disputed none of which has happened in this case. In view of the fact that costs has not been impeached by the court the same is thus final. See **DALY & FIGGIS ADVOCATES VS. HOMELEX LTD [2013] e KLR** in which Havelock J. agreed with the interpretation of section 51 (2) of the Advocates Act.

14. The law is set that once a taxing master has taxed the costs, issued a certificate of costs and there is no reference against his ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter judgment. An applicant is not required to file suit for the recovery of costs. The certificate of costs is final as to the amounts of the costs and the court would be quite in order to enter judgment in favour of the applicant against the respondent herein for the taxed sum indicated in the certificate of taxation that was issued. This position has been held by this court in **H.C. Misc. 486 of 2012 E.W. NJERU & CO. ADVOCATES VS. ZAKHEM CONSTRUCTION (K) LIMITED** and several other courts regarding the entry of judgment upon issuance of a certificate of costs that had not been set aside or impugned. The position is based on the provisions of section 51 (2) of the Advocates Act Cap 16 (Laws of Kenya) and Section 48 (3) of the Advocates Act.

15. For the above reasons, the applicant’s Notice of Motion dated 6th January, 2016 has merit and the same is hereby allowed in terms of Prayer (1). Interest on the taxed amount will be at court rates with effect from 19th August, 2015.

DATED at KAKAMEGA this 10TH day of NOVEMBER, 2016.

C. KARIUKI

JUDGE.

In the presence of:-

.....**Minisi for Mukavale****for the Ex-party Applicant.**

.....**N/A****for the Respondent.**

.....**N/A** **Interested party.**

.....**Anunda** **Court Assistant.**