REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

ELECTION PETITION APPEAL N0. 3 OF 2013

CHARLES NYAGA NJERU ….....
APPELLANT/APPLICANT

-VERSUS-

THE INDEPENDENT ELECTROL AND BOUNDARIES COMMISSION
….....1ST RESPONDENT

NEVERT NTWIGA.....2ND RESPONDENT

RULING

1. The applicant **CHARLES NYAGA NJERU** through a notice of motion dated 27th June 2014 pursuant to Section 1A, 1B, Section 80 (b) of the Civil Procedure Act and Rule 37 (1) and (2) of the Election Petition Rules 2013, Article 159 2(d) of the Constitution of Kenya, 2010 seeks the following orders:-

1. **The court does stay the order for execution of costs taxed herein until further orders of the court and/or until re-taxation is done.**

(2) That court does review the orders of the court herein taxing respondents bills herein in excess of Kshs. 300,000/- by the court.

(3) That court do clarify the extent to which the capping of the costs for the respondent was to apply, such that whether each respondent was to get Kshs. 300,000/- or their total taxation was not to exceed Kshs. 300,000/- but with items justifiable under the provided scales.

2. The application is based on the ground on the face of the application interalia; that court capped costs herein at Kshs. 300,000/-upon delivery of judgment on 21st January, 2014. That the respondent subsequently filed bills of cost each for Kshs. 300,000/- or thereabout exceeding the figure the courts fixed as limit that the Deputy Registrar taxed the bills in disregard of the scales provided for the taxing bills and award almost all the items in the bill violating both the order on costs and scales provided by the law and that the issue of capping of costs and the extent of the same was raised in objection but the Deputy Registrar ignored the same.

3. The Notice of motion is supported by an affidavit by the applicant in which affidavit it is deponed that the capped costs for both the respondents and ordered it should not exceed Kshs. 300,000/- for both. He deponed that the bill of costs was exaggerated and not in tandem with the scale provided by

law; that the bill was to be taxed inaccordance with the law; that the bill was taxed on guess work ground to justify getting each Kshs. 300,000/- or closer to that figure, that the bill should be retaxed within the law and ensure that any claim in the bill is justified by the scales provided; that the sum of Kshs. 600,000/- or thereabout is grossly oppressive, inhuman, against the principles of Article 10 of the Constitution and above all immoral by any standard.

4. The 1st respondent is opposed to the application. It filed Replying affidavit dated 15th September 2014 through Hiram Nyaburi advocate for the 1st respondent deponing that on 21st January, 2014 the applicant's appeal was dismissed and court capped costs at Kshs. 3,000,000/- for each of the respondents to be taxed by the Deputy Registrar and attached copy of the court's judgments marked **"HNO1"** that the 1st respondent's bill dated 26th February 2014 was filed and served. The bill is marked as **"HNO2"**. That on 3rd June 2014 the 1st Respondent's bill was taxed at Kshs. 210,202/-. He avered that the Bill of costs was drawn to scales provided by the law taking into account the nature and importance of the matter, the length of time involved, the immense public interests in the matter, volume of documents studied and complexity of issues involved. The counsel further termed the applicant's notice of motion as containing "false statements and misleading since the basis of the amount taxed in the 1st respondent's bill ofcosts was within the limits provided by the High Court of maximum of Kshs. 300,000/- for each of the respondents."

5. The 2nd respondent is similarly opposed to the applicant's application and relied on the affidavit by M/s. Muthoni Ndeke, an advocate for the 2nd respondent who has deponed that the bill of costs taxed was not in excess and that the costs was upon dismissal of the applicant's appeal capped at Kshs. 300,000/- for each of the respondents annexing copy of the judgment marked **"MN1".** The counsel further deponed that if the applicant felt aggrieved by the judgment of the High Court he should have appealed against the same to the Court of Appeal and prayed for the notice of motion to be dismissed.

6. The parties counsel agreed to have the notice of motion determined by way of written submissions. The applicant filed his submissions on 21st January 2015; the 1st respondents filed their submissions on 19th January, 2015 and the 2nd respondent on 8th January 2015 respectively. The court has carefully considered the pleadings by all parties, the counsels submissions and annextures thereto. The issue for determination can be summarized as follows:-

(**a) Whether the court in capping costs at Ksh. 300,000/- was cummulative costs for both the respondents or was for each of the respondents?**

(b) Whether the taxing master erred in taxing the Bill of Costs in excess of Ksh. 300,000/- for both the 1st and 2nd respondents.

(c) Whether the applicants application challenging the decision of taxing master is incompetent?

7. In the court's judgment dated 21st January, 2014 as regarding costs it stated:-

"The upshot is that the appellant's appeal is dismissed with costs of the appeal to the respondents capped at Kshs. 300,000/- for each of the Respondents to be taxed by the Deputy Registrar." (underlining mine)

8. The court's judgment is in black and white. It is clear and specific that each of the respondents costs was capped at Kshs. 300,000/ and not capped at Kshs. 300,000/- for both the respondents.

9. The applicant's contention that costs was capped at Kshs.300,000/- for both the respondents is erroneous and not supported by the court's judgment. There is nothing that the court is supposed to clarify as its judgment is clear and specific on the issue of capped costs. The order is clear that the total taxable costs by the Deputy Registrar could exceed Kshs. 300,000/- for both respondents. The

applicant's contention that the capping of costs at Kshs. 300,000/- for each of the respondents is grossly oppressive, inhuman, against the principles of Article 10 of the Constitution and above all immoral by any standard, with all due respect is not for this court to decide as this court cannot sit on appeal on its own judgment. The least the applicant could have done when the appeal was dismissed was to appeal against the capping on costs by the court. The issue raised cannot in my view be entertained in an application challenging taxation of Bill of Costs by the Deputy Registrar at this stage.

10. 1n view of the foregoing I find and hold that there is no room for speculation as regards the intention of the judge regarding the capping of cost for the respondents. I therefore find that the order on costs was and is very clear and cannot be mistaken as regards what each of the respondents costs was capped at.

11. The applicant contention is that the taxing master erred in taxing the respondents bill in excess of Kshs. 300,000/- . The respective respondents bill of costs as drawn and filed did exceed Kshs. 300,000/- nor was any of the bill taxed in excess of capped costs of Kshs. 300,000/- . The 1st respondents Bill of costs was taxed at Kshs. 210,202/- whereas that of the 2nd Respondent was taxed at Kshs. 209,841/-. In view of the bill of costs as drawn and sum taxed, I do not agree with the applicant that the taxing master made an error in taxing the bill of costs. The applicant's contention that the Bills were taxed contrary to the court's judgment is misplaced and without support from the record available.

12. The applicant's application challenging the taxation of the Bill of costs by the taxing master is supposed to be filed by way of Chamber summons and not by way of notice of motion under **Rule 11 of the Advocates Remuneration Order under the Advocates Act.** The said **Rule 11 of the Advocates Remuneration Order** provides:-

> "11. ***(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 objects."***

13. It is provided under the aforesaid order that any party aggrieved by the taxing master's decision on taxation and wishing to object to such decision he or she must within 14 days of the decision give notice in writing to the taxing master of the items of the taxation in which he or she objects to and within 14 days of receiving the reasons proceed to apply to a judge by Chamber Summons, served on all parties. The 1st respondent contend that the applicant did not comply with **Order 11 of the Advocates Renumeration Order.** The applicant has not in his application demonstrated he issued notice to the Deputy Registrar/ taxing master within 14 days of the decision on the items of the taxation to which he was objecting nor has he demonstrated that any reasons were issued on taxation. This court was not told what items the Applicant is objecting to nor did the applicant attach copy of the reasons given by the taxing master for taxing the bill of costs the way the court did. This court in my view cannot on its own motion assume the responsibility of retaxing the bill of costs without there being specific objection on itemized items or comment on items to which objection has been raised. This court cannot be left to speculate on the basis on the taxing of the bill of costs by the Deputy Registrar. The applicant is obligated to lay basis as to why he is aggrieved by texation of particular items and one way of doing this is by giving notice as required stating the items which were not properly taxed and file the chamber summons within the speculated period. A party cannot in my view move the court as he deems fit without complying with the provisions of **Order 11 of the Advocates Renumeration Order.** I am therefore of the view that this application as drawn and filed is incompetent for failure to comply with **Order 11 of the Advocates Renumeration Order.**

14. The upshot is that the applicant's application must fail. I therefore make the following orders;

> **(a) The applicant's application is without merits, is bad in law and incompetent and the same is struck out.**
>
> **(b) In view of the nature of the application and having struck out the application I order than each party to bear its own costs of this application.**

DATED at Meru this 11th day of June 2015.

J.A. MAKAU

JUDGE

11.6.2015

Delivered in open court in the presence of:

M/s. Charles Kariuki & Kiome Associates for Applicant

M/s. Iseme Kamau & Maema Advocates for 1st respondent

M/s. Muthoni Ndeke & Co. Advocates for 2nd respondent

Court clerks – Penina/Mwenda

J.A. MAKAU

JUDGE

11.6.2015