



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 216 OF 2015

RAPHAEL KIPSOI ARAP KORIR.....PLAINTIFF

VERSUS

MUSKIE LIMITED.....1ST DEFENDANT

BENJAMIN KISOI SILA T/A LEGACY AUCTIONEERS SERVICES.....2ND DEFENDANT

LEGACY CONNECTIONS LTD.....3RD DEFENDANT

NYARIKI T/A BASELINE AUCTIONEERS.....4TH DEFENDANT

POST BANK CREDIT LTD.....5TH DEFENDANT

RULING

[NOTICE OF MOTION DATED 7TH OCTOBER, 2019]

1. The Plaintiff moved the Court through the Motion dated 7th October, 2019, seeking for temporary stay of execution pending hearing and determination of the application, review and or setting aside of the exparte ruling of 19th July, 2019 on the bill of costs, the hearing of the bill of costs *denovo*, and leave for M/s Bitok & Sambu Advocates to come on record for the Plaintiff. The application is based on the thirteen (13) grounds marked (a) to (m) on its face and supported by the affidavit sworn by Raphael Kipsoi Arap Korir, the Plaintiff on the 7th October, 2019. The Plaintiff's case is that his advocates did not inform him of the preliminary objection, and the ruling thereof through which his suit was struck out. That the bill of costs and the taxation were not brought to his attention. That he was not served with the notice to show cause why execution should not issue. That the certificate of costs served upon him was not signed and its authenticity is therefore questionable. That the execution without a fair hearing on the bill of costs will infringe upon his constitutional right.

2. The 1st Defendant opposed the application through their grounds of opposition dated 11th October, 2019 and replying affidavit of even date sworn by Musembi Ndolo Advocate. The 1st Defendant's case is that the application is incompetent and bad in law for failing to comply with **Order 9 Rule 9 of the Civil Procedure Rules**; that there is no pending appeal against the judgment of 16th October, 2017 and decree of 21st August, 2019, and therefore prayer 2 is an abuse of court process; and prayer 3 is incompetent as it offends **Rule 11 of Advocates Remuneration Order**. That further prayer 4 has not been notified to all advocates on record. That the Advocate for the Plaintiff had been served with the bill of costs dated 9th November, 2017 and the ruling of 19th July, 2019 was regular. That the Plaintiff has not indicated what items on the taxed bill of costs he intends to make a reference and or appeal on, and the application should be dismissed with costs.

3. The application came up for hearing on the 17th October, 2019 when directions on filing written submission among others were given. The learned Counsel for the 1st Defendant and the Plaintiff filed their written submissions dated the 11th October, 2019 and 27th January, 2020.

4. The following are the issues for determinations;

(a) Whether the Plaintiff has made a case for reviewing or setting aside of the ruling of 19th July, 2019.

(b) Whether the firm of Bitok & Sambu Advocates has properly moved the Court to be allowed to come on record for the Plaintiff.

(c) Who pays the costs of the application?

5. The Court has after considering the grounds on the Motion, the affidavit evidence, submission by learned Counsel, and the record come to the following findings;

(a) That this proceedings was commenced by the Plaintiff through the Plaintiff dated 6th March, 2012 filed through M/s Karanja-Mbugua & Company Advocates as **Nakuru Hccc No. 64 of 2012**, and upon being transferred to this Court, it was registered as Eldoret ELC No. 216 of 2015.

(b) That the record confirms that M/s Komen Kipchirchir & Company Advocates for the Plaintiff filed their written submissions dated the 17th October, 2016 to the 1st Defendant's preliminary objection dated the 21st July, 2016. That the said Counsel for the Plaintiff attended Court and or was represented on the 25th July 2016, 17th October 2016, 6th October 2017 and 16th October, 2017 when the suit was struck out with costs being awarded to the 1st to 4th Defendants. That the claim by the Plaintiff that his counsel on record did not brief him on the preliminary objection, and the ruling thereof does not therefore suffice as a basis of seeking for review or setting aside of the taxation of the bill of costs that was subsequently done by the Deputy Registrar.

(c) That going by the copy of the 1st Defendant's Advocate Party to Party Bill of Costs dated the 7th November, 2017 in the record, it is clear it was filed on the 15th November, 2017. The taxation notice dated the 15th February, 2018 was issued, and vide the affidavit of service by Musembi Ndolo of 15th November, 2018, the Counsel for the Plaintiff was served with a hearing notice dated 31st October, 2018 on 2nd November, 2018 for 20th November, 2018. That the proceedings of 20th November, 2018 confirms that Counsel for the Plaintiff was present. That a consent by counsel present was entered that the 1st Defendant's bill of costs be disposed by way of written submissions. The Counsel for 1st Defendant was to file and serve their submissions in the cause of that day, after which the Plaintiff was to file and serve theirs in ten (10) days after service. That the foregoing clearly shows that the Plaintiff's claims that the bill of costs was not brought to his attention is not sufficient basis of seeking to review or set aside the ruling on the taxation as his Counsel on record had been duly served, and participated in the proceedings leading to the consent on filing and exchanging written submissions.

(d) That subsequent to the consent of 20th November 2018, the 1st Defendant filed their submissions but the Plaintiff did not. That on 3rd June 2019, the Deputy Registrar fixed the ruling on taxation for the 12th July, 2019. That the copy of the ruling on taxation dated 19th July, 2019 shows it was delivered on the same date. There is no indication as to whether a notice had been served upon the Counsel for the parties, and none was represented.

(e) That a warrant of attachment of immovable property in execution of a decree for money dated the 27th September, 2019 was subsequently issued to Nasioki Auctioneers. That considering that the bill of costs was taxed on the 19th July, 2019, and the application for execution was filed and issued on the 27th September, 2019 which is less than a year from the date of the decree, then the 1st Defendant was not obligated to take out and serve notice to show cause under **Order 22 Rule 18(1)(a) of Civil Procedure Rules**. That the claim by the Plaintiff that notice to show cause why execution should not issue would not suffice to review or set aside the taxation ruling.

(f) That **Order 9 Rule 9 of Civil Procedure Rules** requires change of advocate after judgment to be by Court Order or consent of parties. That as M/s Bitok & Sambu Advocates seeks under prayer 4 to come on record for the Plaintiff, and they have not obtained the consent of the other parties in the suit, they were obligated to serve their application upon all the parties in the suit under **Order 9 Rule 9(a) of Civil Procedure Rules**. There is no evidence tendered to confirm that the application was served upon the 2nd to 4th Defendants.

(g) That applications for review of decree or order are provided for under **Order 45 of the Civil Procedure Rules**. That though the application herein has not cited that provision, an applicant seeking for review of an order or decree has the obligation to show the new or important matter or evidence that was not within their knowledge, or could not be availed to the court when the decree or order was made, among others. That further, such an application for review under **Order 45 Rule 2 of Civil Procedure Rules** should be made before the Judicial Officer who made the order sought to be reviewed, unless where such an officer has already left the station or service. That the taxation ruling of 19th July, 2019 is by *Hon. G. N. Sitati*, Deputy Registrar who is still serving at the station, and the Plaintiff should have made his application before the said Deputy Registrar, or the Deputy Registrar now handling Environment and Land Court taxation.

(h) That in view of the finding in (g) above, and as the application is not a reference to the Judge or an appeal against the Deputy Registrar's ruling of 19th July 2019, the Court finds the Plaintiff has failed to make a case for the review or setting aside of the decree or order arising therefrom.

6. That flowing from the foregoing, the Court orders as follows;

(a) That the Plaintiff's Motion dated the 7th October, 2019 is without merit and is dismissed with costs to the 1st Defendant.

(b) The file be closed.

Delivered virtually and signed at Eldoret this 30th day of September, 2020

S. M. KIBUNJA

JUDGE

In the presence of:

Plaintiff: No appearance.

Defendants: No appearance.

Counsel: Mr. Ochami for Bitok Sambu for Plaintiff and Nyamweya for Musembi Ndolo for Defendants.

Court Assistant: Christine

and the ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.