



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

WINDING UP CAUSE NO. 1 OF 2011.

**IN THE MATTER OF INTESTATE PETROLEUM
COMPANY LIMITED.**

AND

**IN THE MATTER OF COMPANY ACT CHAPTER
486 LAWS OF KENYA.**

BETWEEN

**AFRICA OIL TURKANA
LIMITED ::::::::::::::: 1ST PETITIONER.**

**AFRICA OIL
CORPORATION ::::::::::::::: 2ND
PETITIONER.**

**AFRICA OIL KENYA
BV ::::::::::::::: 3RD PETITIONER.**

**VERSUSA KENGAR MONENA :::::::::::::::
1ST CONTRIBUTOR.**

**ERICK PATRICK ADERO OBAT ::::::::::::::: 2ND
CONTRIBUTOR.**

**MOSES OMBOYO ONYANGO :::::::::::::::
3RD CONTRIBUTOR.**

**LUCY MUTHONI GATIMU ::::::::::::::: 4TH
CONTRIBUTOR.**

**EDWARD KINGS ONYANCHA MAINA ::::::::::::::: 5TH
CONTRIBUTOR**

R U L I N G.

In the month of October, 2011, three companies i.e. **Africa Oil Corporation, Africa Oil Turkana Ltd.** (formerly Turkana Drilling Consortium (K) Ltd and **Africa Oil Kenya B.V.** (formerly Lundin Kenya B.V.), filed this Winding Up petition (i.e. Winding Up Cause No. 1 of 2011) against another company known as **Intestate Petroleum Company Ltd.** on account of an alleged debt of Ksh. 4,915,221/= being costs awarded to the petitioners vide a certificate of taxation issued by the Deputy Registrar of this court dated 7th June, 2011.

A demand was made for payment of the debt within a period of three (3) weeks but Intestate Petroleum Co. Ltd failed to comply and hence, the Winding Up Cause by the three petitioners. However, the shareholders of Intestate Petroleum Co. Ltd. including **Edward Kings Onyancha Maina** (herein, the fifth (5th) contributor) filed a notice of preliminary objection to the Winding Up Cause.

The objection was heard and upheld by this court on the basic ground that the petition was incompetent and incurably defective as drawn. The petition was thus halted before it could be heard on the merits. The costs of the Winding Up Cause were awarded to the objectors shareholders who moved with speed and filed their bills of costs for taxation by the court's Deputy Registrar.

The bills of costs were presented by the fifth contributor (Edward King's Onyancha Maina) for and on behalf of the rest of the contributors of Intestate Petroleum Co. Ltd. The notice of taxation was directed at the three petitioners in the Winding Up Cause and a company known as **Centric Energy Corporation** currently operating as **0903658 B.C. Ltd.** (herein, the supporting creditor.)

The three petitioners and Centric Energy Corporation raised objections to the bills of costs in which a sum of Ksh. 1,544,400,754,415 was demanded from them by the fifth contributor and his partners. The sum was later enhanced to Ksh. 1,693,012,887,634 vide an amended bill of

costs filed herein on 7th May, 2013.

In both bills, the greater sums of Ksh. 1,029,600,362,000/= and Ksh. 1,128,674,996,250/= respectively are based on the value of crude oil as estimated in a report by Gustavson & Associates dated 1st January, 2010 made at the instance of Centric Energy Corporation and declarations made by Tullow Oil P/C in September, 2012. Apparently, the fifth contributor treated as the subject matter of the Winding Up Cause, the crude oil reserves in Blocks 10BA, 10BB, 12A and 13T situated in Turkana County whose value is estimated at over 7.522 billion barrels and which was the actual subject matter of a judicial review application No. 30 of 2010, Pitting Interstate Petroleum Co. Ltd. against the three petitioners as well as Centric Imaging Incorp, Platform Resources Incorp and the Permanent Secretary, Ministry of Energy.

The application was heard and dismissed by the court on the 16th December, 2010. The costs were awarded to the three petitioners and others. These were assessed at Ksh. 4,915,221/= vide a certificate of taxation issued by the Deputy Registrar of this court and dated the 7th June, 2011. It was that amount of money which was treated as a debt owing to the three petitioners and was demanded as such from Interstate Petroleum Co. Ltd.

The failure by Interstate Petroleum Co. Ltd. to discharge the debt within the prescribed period gave rise to the present Winding Up Cause No. 1 of 2011 and hence the present application by the fifth (5) contributor dated **25th January, 2014** prompted by the ruling made by the Deputy Registrar on 2nd July, 2013 while assessing the aforementioned disputed bills of costs presented by the fifth contributor and partners who were awarded costs in the sum of Ksh. 108,365/= which was amended to Ksh. 115,925/= by consent of the parties herein.

It may be noted that the certificate of costs issued and signed by the Deputy Registrar refers to a sum of Ksh. 114,175/= . it was dated

2nd July, 2013, but appears to have been cancelled meaning that it had no effect.

In cancelling the said certificate on the 10th July, 2013, the Deputy Registrar noted that there was only one bill of costs in favour of all the contributors and that the bills of costs were not to be separated for each contributor.

The Deputy Registrar affirmed that the taxed costs amounted to Ksh. 108,365/= but there is no certificate to that effect neither is there a validly signed certificate for the agreed costs of Ksh. 115,925/=.

This application is, in the opinion of this court, an acrimonious reaction by the fifth contributor to the ruling on taxation by the Deputy Registrar. It was preceded by a letter of complaint by the fifth contributor to the Honourable the Chief Justice of the Republic dated 15th July, 2013. To say the least, the letter was no more than an unwarranted and malicious attack on the person of the Deputy Registrar by a disgruntled litigant.

Courts are in existence to administer justice in accordance with the law and the evidence. A person who submits to the court's jurisdiction must also honourably accept the verdict of the court whether favourable or unfavourable as there is always room for appeal to a higher court in the event that a litigant is dissatisfied with an unfavourable ruling.

Letters of complaint in an unconcluded matter are unhelpful and may impact negatively on the complainant.

Be that as it may, the present application is premised on several provisions of the Civil Procedure Act and Rules, the Judicature Act, the Ethics and Anti-Corruption Act 2003, the Income Tax Act, the Environment Management and Co-ordination Act, the Evidence Act, The Company Act and Winding Up Rules, the Advocates Remuneration

Order and the Constitution of Kenya.

Of all these, only the **Advocates Remuneration Order** and perhaps the Supreme Law (Constitution of Kenya) are relevant for the purposes of the present application which is essentially targeted at the ruling on taxation by the Deputy Registrar made on the 2nd July, 2013.

The basic order being sought by the fifth contributor is the nullification and/or setting aside of the ruling on taxation by the Deputy Registrar and in particular to the effect that items No. 1, 2, 3, 4, 5, 6, 19, 20 and 26 of the bills of costs dated 10th April, 2013 amended on 6th May, 2013 be struck out and the finding to the effect that the subject matter was not the oil in Turkana or its value or that the case did not concern the oil in Turkana and even if it did, the oil was not owned by any of the parties least of all the contributors.

Other orders being sought by the fifth contributor in the application are not relevant if not outrightly misconceived as they do not relate to the challenged ruling on taxation by the Deputy Registrar. These additional orders are seemingly an attempt to introduce alien causes of action for which orders cannot be granted on the basis of this application. Separate suits would be required to litigate on matters relating to the Resources Evaluation Report by M/s. Gustavson Associates, Tullow Oil PLC and Capital Gain Tax Liabilities etc.

In relation to the Taxation proceedings conducted by the Deputy Registrar on 2nd July, 2013 and from which this application evolves, the basic issue for determination is whether the application is competent and proper before the court and if so, whether the fifth contributor would be entitled to orders for the nullification and/or setting aside of the disputed order.

It is admitted in the fifth contributor's supporting grounds that the certificate of taxation is yet to issue from the Deputy Registrar and that

the taxed amount is yet to be paid to him as contributor. He indicates that he was directed to procure written reasons for the taxation ruling made on the 2nd July, 2013 and in default to file a reference pursuant to Rules 11, 13, 43 and 77 of the Advocates Remuneration Order. He also indicates that no written reasons were furnished by the Taxing Master/Deputy Registrar despite requests made vide letters dated 15th July, 2013 and 5th December, 2013. That his written request for the necessary reasons from the Deputy Registrar was served on 5th December, 2013 with an expiry period of fourteen (14) days which lapsed on 8th January, 2014 thereby allowing him (fifth contributor) to file the present application on 25th January, 2014.

Suffice to say that the application is the reference to the judge contemplated by the fifth contributor. Indeed, his supporting grounds five (5) to thirty (30), relate to matters which would ordinarily be dealt with in a reference or by way of appeal. Grounds 37, 38, 52, 53, 54, 56, 58 and 59 would also be dealt with in a similar manner.

But, is the present application or reference competent and proper before the court?

The petitioners and the supporting creditor do not think so and this is reflected in their respective grounds of objection to the application which serve as their respective response thereto filed herein on 25th June, 2014.

The petitioners essentially contend that the application is time barred, fatally defective, without legal foundation and an abuse of the court process. That, some of the issues are "***res-judicata***" and no error of principle was committed by the taxing master to warrant interference of his decision.

The supporting creditor contends that the application is "***res-judicata***" and that it is premature thereby divesting this court of jurisdiction to

hear an objection to the ruling of the taxing officer made on 2nd July, 2013. that, the court has no jurisdiction to adopt the Resources Evaluation Report referred to herein for purposes of taxation in this matter, neither does the court have jurisdiction to make declaratory orders pertaining to Capital Gains Tax liability. That, the parties have executed and filed a consent fixing the taxed costs at Ksh. 115,925/= so that an objection to the taxation cannot be maintained unless and until the consent is set aside. That, Tullow PLC was not a party to the Winding Up Cause No. 1 of 2011 and no orders for costs was made against it in the cause. That, the allegations made against Tullow Oil PLC are completely irrelevant to the taxation of the bills of costs presented by the fifth contributor. That, the application is based on mere fantasy and on irrelevant, spurious, unsubstantiated and malicious allegations made by an unqualified person against an honourable Deputy Registrar and Advocates of the High Court of Kenya. That, the application is intended to waste judicial time, has no foundation in law, is frivolous and an abuse of the court process.

It may not be correct to say that this application is based on mere fantasy when it is acknowledgeable that a successful litigant is entitled to costs if there are no good reasons for deprivation thereof.

In this cause, the fifth contributor and his partners were the successful litigants in so far as the Winding Up Petition was struck out and dismissed not on the merits but for want of form.

The fifth contributor/applicant filed his written submissions which he orally highlighted at the hearing of the application.

Learned Counsel, **M/s. Macharia,** appeared for the petitioners while learned counsel, **Mr. Omondi,** appeared for the supporting creditor. They both made oral submissions in highlighting their respective grounds of opposition and written submissions.

After due consideration of the submissions by all the parties and with regard to the competence and propriety of the application, solace may be sought in the provisions of the Advocates' Remuneration Order which clearly spells out the procedure for raising an objection to taxation by way of a reference and which applies to the remuneration of an advocate of the High Court by his client in contentious and non-contentious matters, the taxation thereof and the taxation of costs as between party and party in contentious matters in the High Court.

Rule 11(1) of the Remuneration Order provides that any party objecting to the decision of the taxing officer may within fourteen (14) days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

Herein, the taxing officer conducted the taxation proceedings on the 7th May, 2013 (7/5/13) in the presence of the fifth contributor, the first contributor (**Maosa Kengara Monena**), the third contributor (**Moses Omboya Onyango**), the petitioners through **M/s. Macharia** and the supporting creditor through **Mr. Omondi**. Thereafter, the ruling on taxation was fixed for 2nd July, 2013 on which date the first contributor and counsel for the petitioners appeared before the Taxing Officer/Deputy Registrar. The fifth contributor/applicant and the supporting creditor did not appear.

The taxing officer in his ruling taxed the appropriate bill of costs at Ksh. 108,365/= against the petitioners and supporting creditor. The parties later consented to enhance the amount to Ksh. 115,925/= due to an arithmetical error.

It is instructive to note that an earlier attempt by the fifth contributor to amend the original bill of costs was disallowed by the Taxing officer on the 7th May, 2013.

After the ruling on the 2nd July, 2013, any aggrieved party had the

liberty to raise an objection as provided under Rule 11 of the Remuneration Order and presupposedly after the issuance of a certificate of costs.

The certificate of costs which was issued and signed by the Deputy Registrar on the 2nd July, 2013, referred to a sum of Ksh. 114,175/= as the taxed costs. The certificate was however cancelled and rendered worthless for purposes of execution.

No certificate of costs has been issued for the original amount in the sum of Ksh. 108,365/= nor for the enhanced amount in the sum of Ksh. 115,925/= agreed by all the parties.

Nonetheless, a notice of objection against the ruling on taxation dated 8th July, 2013, was filed by the fifth contributor on 15th July, 2013. The notice was also a request to the Taxing officer to provide reasons for his decision on the objected items but these were unnecessarily extended to include matters which were irrelevant.

Interestingly, the notice was dated on the same 8th July, 2013 as the consent correcting the quantum in the ruling of the taxing officer dated 2nd July, 2013. Yet, the new corrected amount was not referred in the notice which also contained a default clause.

Rule 11(2) of the Remuneration Order does not contain provision for a default clause if reasons are not provided by the taxing officer within a desired time. The period within which the taxing officer may provide his reasons is not specified but under rule 11 (4), a party may apply for enlargement of time for the taking of any step under the rules (1) and (2). This would include enlargement of time to obtain reasons from the taxing officer.

The applicant/fifth contributor did not apply for any enlargement of time but instead issued another notice requesting for reasons on the 5th

December, 2013. This later notice was somehow at variance with the initial notice issued on 8th July, 2013. Both notices were simply filed in the court file. There was no indication that the notices were actually served upon the taxing officer.

And, even if both notices were served upon the taxing officer it is apparent that the reasons for his decision have not been given or provided as requested.

In the meantime, this entire matter has been subjected to side-shows including a consent letter increasing the taxed amount, complaints by the applicant/fifth contributor against the taxing officer/Deputy Registrar, deposit of the agreed taxed amount into court by the petitioners and the supporting creditor, demands for the release of the agreed amount to the contributors, including the fifth contributor, applications by the fifth contributor to amend the original bill of costs and set aside the ruling of the taxing officer. In fact, such application dated 9th August, 2013 was heard and dismissed by this court on the merits on the 5th December, 2013. It is to that extent that this present application would be "***res-judicata***", a principle applicable even in constitutional matters and which pre-supposes that there must be an end to litigation and that a party should not be vexed twice over the same cause. The rationale behind "***res-judicata***" is that if the controversy in issue is finally settled or determined or decided by the court, it cannot be re-opened (see, **E.T VS. A.G. & Another (2012) e KLR**).

In the ruling by this court dated 5th December, 2013, it was resolved that the fifth contributor's application was pre-mature for want of reasons from the taxing officer. It was found that the process of taxation had not been completed to make way for lawful interference by this court by way of a reference. The application was also found to be a reference under Rule 11 of the Remuneration Order.

This present application apart from being “**res-judicata**” is another premature reference as no valid certificate of taxation has been issued by the Deputy Registrar and no reasons for the Deputy Registrar's ruling on the 2nd July, 2013 have been given. All these, added to the sideshows indicated hereinabove leaves no doubt in the mind of this court that there has been a gross abuse of the court process by mostly the fifth contributor/applicant.

A straightforward taxation procedure in a Winding Up Cause has suddenly and “miraculously” metamorphosed into a fresh claim of all the crude oil deposits discovered recently in the County of Turkana which were never the subject matter of this cause. Indeed, the Deputy Registrar was correct when he remarked in his ruling of the 2nd July, 2013, that:-

“..... the subject matter is not about the oil in Turkana or its value. It is simply about Winding of Interstate Petroleum Company Limited. The quantity of oil in Turkana is neither here nor there in this matter. The case did not concern the oil in Turkana. Even if it did, the oil is not owned by any of the parties, least of all the contributors.”

As of now, the position is that the Deputy Registrar taxed the costs at Ksh. 108,365/= but a certificate of taxation has not issued to that effect. The parties purported to increase the sum to Ksh. 115,925/= vide a consent letter dated 8th July, 2013 and filed herein on 11th July, 2013. No certificate of costs was issued for that enhanced amount and could not be issued as the consent was never formally endorsed by the Deputy Registrar or this court as an order of the court. The question of

setting aside the consent would not arise in the circumstances.

A certificate for the sum of Ksh. 114,175/= was issued, signed and ultimately cancelled.

The fifth contributor made a request for the reasons behind the ruling of the Deputy Registrar but the same have not been provided to date thereby divesting this court of any jurisdiction to interfere with the taxation process at this juncture and rendering the present application null and void "***ab initio***".

There is no valid proof that the Deputy Registrar was served with the notices of objection for him to respond and provide reasons for his ruling. The filing of the notices by the fifth contributor did not amount to service of the same upon the Deputy Registrar.

Without necessary reasons from the Deputy Registrar, this court would not be in a position to determine whether the Deputy Registrar erred in principle or exercised his discretion wrongly. There would be no basis of setting aside or nullifying the ruling by the Deputy Registrar (see, **Lennah Wanjiku Koinange vs. Majanja Luseno & Co. Advocates.**)

In sum, it would therefore follow that this application is not only incompetent and improper before this court but also an abuse of the court process. The fifth contributor is not entitled to the orders sought against the petitioners and the supporting creditor.

The application thus stands dismissed with costs to the petitioner and the supporting creditor against the fifth contributor/applicant only.

Ordered accordingly

[Read and signed this 9th day of October 2014.]

J.R. KARANJA.

JUDGE.