



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
JUDICIAL REVIEW 372 OF 2007

REPUBLIC.....APPLICANT

-VERSUS-

THE PUBLIC PROCUREMENT COMPLAINTS

REVIEW AND APPEALS BOARD.....1STRESPONDENT

KENYA POWER & LIGHTING CO. LTD.....2NDRESPONDENT

EXPARTE

EAST AFRICAN CABLES LIMITED

RULING

Two applications by way of Notice of Motion have been filed in this case on behalf of the Exparte Applicant herein and there appears to be confusion regarding which application was to be the subject of the Court's Ruling which ought to have been delivered on 28th February 2012 but which was subsequently differed to 6th April 2012. The said pending applications are the Notice of Motion dated 19th October 2010 and the Notice of Motion dated 1st September 2011.

When counsel for the exparte applicant and for the 2nd respondent attended the court on 19th October 2011, Mr. Njeru for the exparte applicant sought hearing date for the application dated 19th October 2010. On 18th November 2011 when the application was fixed for hearing, case was mentioned before Korir, J who gave directions for filing of written submissions by the parties in respect of the application dated 19th October 2010.

When the case was next mentioned before me on 26th January 2010, counsel for the exparte applicant and for the 2nd respondent appeared and M/s Waweru for the exparte applicant informed the court that all parties had filed written submissions which they were entirely relying on and they were ready to take a Ruling date.

The court relying on M/s Waweru's word that parties had infact filed written submissions and assuming that the submissions filed were in respect of application dated 19th October 2010 as per earlier directions given by J. Korir fixed the matter for Ruling on 28th February 2012. Unfortunately due to pressure of work, I was not able to peruse the court record before 28th February 2012 so that when counsel for the 2nd respondent appeared in court on 28th February 2012 and Ruling was rescheduled to 6th April 2012, I had not been able to confirm what kind of documentation if any parties had placed in the court record.

On going through the court record, I have discovered to my surprise that no written submissions were actually filed by any of the parties in respect of the application dated 19th October 2010. The only written submissions that are on the court record are the submissions made on behalf of the 2nd Respondent dated 20th January 2012 but which were not apparently properly filed since they do not bear any official filing stamp though attached to them is an official receipt showing that filing fees for their filing had been paid on 23rd January 2012. On the face of the said written submissions, a date of 26th January 2012 is clearly written on the top right hand corner but it is not clear what that date is supposed to represent.

Be that as it may, I have perused the said written submissions and they appear to be made in respect of the exparte applicant's Notice of Motion dated 1st September 2011 which is basically a reference against the decision of the Taxing Master on *Item I* in the bill of costs dated 22nd August 2007.

A quick perusal of the court record reveals that the said application has never been fixed for hearing and no directions on filing of written submissions in respect of that application had ever been given by the court. It is therefore obvious that the 2nd respondent may have confused the status of the two applications and instead of filing submissions for the application dated 19th October 2010, which had been fixed for hearing on 18th November 2011, the 2nd respondent filed written submissions for the application dated 1st September 2011 for which no steps had been taken by the applicant for its prosecution.

It is however not clear why despite the parties assurance to the court on 26th January 2012 that they had both filed written submissions in respect of application dated 19th October 2010 given the earlier directions given in the matter, there is no indication from the court record that such written submissions were ever filed.

The above notwithstanding, I have considered the application dated 19th October 2010 and noted that it principally seeks the setting aside of the certificate of taxation dated 5th June 2009 issued by this court's Deputy Registrar and setting aside of the notice to show cause why execution for the amount of taxed costs should not be issued against the applicant at the instance of the 2nd respondent.

In the alternative, the applicant seeks that the said notice to show cause be stayed pending the hearing and determination of an intended reference. The application is supported by an affidavit sworn by Nancy Wanjiku Mbugua and annexures thereto.

Having considered the prayers sought in the said application and in view of the fact that the exparte applicant has now filed a reference in the form of application dated 1st September 2011 objecting to the decision of the Taxing Master on the bill of costs dated 22nd August 2007 which formed the basis for the issuance of certificate of taxation dated 5th June 2009, I find that it is both fair and in the interest of justice that the application dated 19th October 2010 be allowed in order to give parties herein an opportunity to be heard on the said reference so that they can ventilate all issues they may have regarding

the said taxation and in the process enable the court to conclusively determine the amount of costs payable to the 2nd Respondent.

If the certificate of costs is not set aside, the applicant in my view is likely to suffer great prejudice given that the said certificate will continue to remain validly on record as evidence of the final amount of costs due to the 2nd respondent and may form the basis of further court orders being issued against the applicant under Section 51(2) of the Advocate's Act yet there is a pending reference objecting to the taxation of the said costs whose determination may or may not affect the amount taxed.

In order to appreciate the kind of prejudice that the applicant stands to suffer if the certificate of costs is not set aside, I think it is necessary to reproduce in full Section 51(2) of the Advocates Act which states as follows:

“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 covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgement be entered for the sum certified to be due with costs”.

In view of the foregoing, I think it would be appropriate to set aside the certificate of costs issued herein since taxed costs reflected therein are disputed and in order not to render the applicant's reference nugatory.

In the circumstances, I find merit in the application dated 19th October 2010 and it is hereby allowed in terms of Prayers 1 and 2.

Costs of the application will be borne by the applicant.

In order to facilitate hearing of the application dated 1st September 2011, let parties attend the court on **19th June 2012** for directions.

Dated, Signed and Delivered at Nairobi this 5th day of **June**, 2012.

C. W. GITHUA

JUDGE

In the presence of:

Florence – Court Clerk

Mrs. Ndiho for Applicant

Mrs. Otaba for 2nd Respondents