



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**JUDICIAL REVIEW 3 OF 2017**

**(Formerly Machakos Misc. Civil No. 147 of 2011)**

**REPUBLIC.....APPLICANT**

**VERSUS**

**DISTRICT COMMISSIONER – MAKUENI.....RESPONDENT**

**-AND-**

**JOSEPH MUTUSE NZUVE.....1<sup>ST</sup> INTERESTED PARTY**

**HARRISON NZUVE KYULE.....2<sup>ND</sup> INTERESTED PARTY**

**AGNES NDUKU MAWEU.....2<sup>ND</sup> INTERESTED PARTY**

**-AND-**

**CYRUS MULI KOLA (*as legal representative of***

**KOLA MATOLO alias KULA MATOLO).....EX-PARTE APPLICANT**

**RULING**

1. What is before this Court for ruling is the Interested Parties’ notice of motion application dated 01<sup>st</sup> October, 2019 and filed in court on even date for orders: -

**1) Spent.**

**2) THAT leave be granted to the firm of MANTHI MASIKA & COMPANY ADVOCATES, 3<sup>RD</sup> FLR, SARTAJ BUILDING, P. O. BOX 1380-90100 MACHAKOS, to come on record on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties in place of the firm of J.A MAKAU & COMPANY ADVOCATES.**

**3) Spent.**

**4) THAT the Court do set aside the Ruling made on 17/04/2019 as it was obtained unprocedurally and without giving the Interested Parties an opportunity to be heard and the Bill of Costs dated 18/12/2018 be Taxed afresh.**

**5) THAT the costs of this Application be in the cause.**

2. The application is expressed to be brought under section 3A of the Civil Procedure Act, Order 22 Rule 19(2) of the Civil Procedure Rules and other enabling provisions of the law. It is predicated on the grounds on its face and is further supported by the affidavit of Harrison Nzuve Kyule, the 2<sup>nd</sup> Interested Party herein, sworn with the authority of the 1<sup>st</sup> Interested Party.

3. Cyrus Muli Kola, the Ex-parte Applicant herein, has opposed the application vide his grounds of opposition dated 30<sup>th</sup> October, 2019 and filed in court on 31<sup>st</sup> October, 2019.

4. The grounds are: -

- 1) **The application/Notice of Motion is misconceived, bad in law, is an abuse of this Honourable Court's process, and orders sought therein (other than the prayer for leave to change Advocates) are NOT capable of being granted.**
- 2) **The Interested Party/Applicants herein have all along been represented by advocates, and all the court processes, including the Party and Party Bill of Costs and Taxation Notices thereon, were duly served as by law provided.**
- 3) **The Interested Party/Applicants chose NOT to attend court for taxation on the date fixed for taxation, and taxation proceeded as by law provided.**
- 4) **Upon execution proceedings (for recovery of the taxed costs) being taken out, the Interested Party/Applicants were duly and personally served with the appropriate Notice(s) to show cause, BUT they chose NOT to attend court and to show cause as required.**
- 5) **The Taxation order in issue CANNOT be set aside, and neither can it be stayed as sought by the Interested Party/Applicants.**
- 6) **There must be an end to litigation.**

5. The application was canvassed by way of written submissions.

6. In grounds 1, 2, 3, 4 and 5 upon which the application is predicated on, the Interested Parties have stated that the Environment and Land Court at Makueni entered judgment in Judicial Review No.3 of 2017 on 13<sup>th</sup> December, 2017, where it awarded costs of the Application to the Ex-parte Applicant, that the Ex-parte Applicant went ahead and filed a Bill of Costs dated 18<sup>th</sup> December, 2018 and caused it to proceed for taxation before the Deputy Registrar at Makueni and which was taxed at Kshs.159,703/= by ruling dated 17<sup>th</sup> April, 2019, that the Ex-parte Applicant did not serve the Interested Parties or their Advocates on record with a Taxation Notice for the Bill of Costs dated 08<sup>th</sup> December, 2018 as required by law and proceeded to have the Taxing Master tax the bill of costs ex-parte, that the Interested Parties have never been served with the Taxing Master's Ruling on the Bill of Costs dated 08<sup>th</sup> December, 2018 nor the extracted Decree from the Judgment of the ELC Court and only learned of the same when they were served with a Notice to Show Cause on 30<sup>th</sup> September, 2019, that it was unprocedurally wrong and a contravention of the Interested Parties' right to a fair hearing, for the Ex-parte Applicant to proceed to tax his Bill of Costs against the Interested Parties without serving them with a Taxation Notice and without inviting them to participate in the proceedings.

7. In paragraphs 2, 3, 4, 5, 6, 7, 8 and 9 of the supporting affidavit, the 2<sup>nd</sup> Interested Party has deposed that the Environment and Land Court Makueni entered Judgment in this matter on 13<sup>th</sup> December, 2017 and where it awarded costs of the suit to the Ex-parte Applicant, that the Ex-parte Applicant proceeded to draw a Bill of Costs and had it taxed before the Honourable Deputy Registrar Makueni, by ruling dated 17<sup>th</sup> April, 2019 for Kshs.159,703/=, that the Ex-parte Applicant did not serve them with a Taxation Notice for the Bill of Costs dated 18<sup>th</sup> December, 2018 and proceeded to have the bill taxed ex-parte, that he is informed by his Advocates on record and whose information he verily believes that the Ex-parte Applicant had the Bill of Costs dated 18<sup>th</sup> December, 2018 taxed unprocedurally as he did not serve them with a Taxation Notice as required by law, that he is informed by his Advocates on record and which information he verily believes that their right to a fair hearing was contravened as they were not invited to participate in the Courts proceedings in taxing the Bill of Costs, that they learned of the Court's ruling and the Decree on 30<sup>th</sup> September, 2019 when they were served with a Notice to Show Cause as the same were never served upon them, that he is advised by his Advocates on record and which information he verily believes that the Ruling dated 17<sup>th</sup> April, 2019 is null and void as it was acquired unprocedurally and should be set aside and the Bill of Costs dated 18<sup>th</sup> December, 2019 be taxed afresh, that they will be highly prejudiced and suffer irreparable loss if this Court does not issue a stay of execution of decree dated 08<sup>th</sup> July, 2019, until this Application is heard and determined inter-parties, as there is a Notice to Show cause why they should not be committed to civil jail.

8. The Counsel for the Interested Party began by correctly submitting that this Court has the powers to set aside an irregular judgment/order as of right and that the power to set aside an irregular judgment/order should not be discretionary to the courts. In support of his submissions, the Counsel cited the case of **Ms. Sharriff & Co. Advocates vs. Omari Mbwana Zonga [2020] eKLR** where P.J.O Otieno, J observed: -

*“being an application to set aside a default judgment, I do appreciate the law to be that if there be on record a regular judgment, then I do consider if there be a triable issue but if the judgment is irregular on account of no service of defective service then the court has no discretion to exercise but must set aside as of right[1]. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. He has had the rules of natural justice affronted to his disadvantage and such a judgment flies on the face of every attribute of a justice system. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. That I hold to be the law even in a dispute like this one being a dispute on costs between an advocate and a client. It would not, to me, be the law that taxation conducted and a certificate issued without due service of a notice of taxation will stand merely because no reference was lodged within the time prescribed by the Advocate Remuneration Order.”*

9. Arising from the above, the Counsel submitted that the ruling of the Taxing Master dated 17<sup>th</sup> April, 2019 should be set aside for the fundamental reason that it was acquired irregularly for: -

**1) The Interested Parties were never served with a taxation notice.**

**2) The Interested Parties have never been served with any hearing notice of the bill of costs.**

**3) The Interested Parties were never served with the Taxing Master's ruling or the extracted decree.**

10. With regard to the contention that the Interested Parties were never served with a taxation notice, their Counsel submitted that no affidavit of service was produced to show that service of taxation notice was ever served. The Counsel went on to add that it is the Interested Parties' submissions that they or their Advocates then on record were never served with a taxation notice as prescribed by law to show that the bill of costs had been lodged against them before the Taxing Master and requiring them to enter appearance. It was the Counsel's view that this fact is uncontroverted and as such, this is a fundamental denial, violation and/or infringement of the Interested Parties right to a fair hearing as envisaged in **Article 50(1) of the Constitution of Kenya, 2010.**

11. On the issue that the Interested Parties were never served with any hearing notice of the bill of costs, their Counsel submitted that the Respondents proceeded and prosecuted the bill of costs exparte without ever informing the Interested Parties of its pendency in court.

12. Regarding the issue that the Interested Parties were never served with the Taxing Master's ruling or the extracted decree, their Counsel submitted that after acquiring the decree in their bill of costs, the Respondents did not serve it upon the Interested Parties or their Advocates then on record so as to demand payment of the sums therein within a stipulated or reasonable time as required by law. The Counsel went on to submit that the Respondents instead went ahead and took a notice to show cause why the Interested Parties should not be committed to civil jail for non-payment of the decretal sum. The Counsel termed the action as being against the laws of natural justice as it was deliberate and a well calculated move by the Respondents to punish the Interested Parties by sending them to jail without giving them a chance to even pay the decreed amount. The Interested Parties further submit that they will be highly prejudiced and will suffer irreparable loss if they are put in civil jail for non-payment of the decree sum for there is a pending arrest warrant. The Interested Parties further submit that they will be made to pay the decretal amounts to a bill of costs they did not have an opportunity to question the amount taxed.

13. Arising from the foregoing, the Interested Parties submitted that they have established that the Taxing Master's ruling dated 17<sup>th</sup> April, 2019 was acquired irregularly and therefore it is irregular by itself and for that reason the same should be set aside and have the Respondents Bill of Costs dated 18<sup>th</sup> December, 2018 referred back to the Taxing Master to be taxed afresh.

14. On the other hand, the Exparte Applicant submitted that the (party and party) Bill of Costs dated 18<sup>th</sup> December, 2018 and filed in court on 19<sup>th</sup> December, 2018 was fixed for taxation on 27<sup>th</sup> March, 2019. The Counsel for the Exparte Applicant pointed out that an affidavit of service was duly filed on the 27<sup>th</sup> March, 2019 when the matter came up for taxation before the Taxing Master who reserved them for ruling on 17<sup>th</sup> April, 2019 when the same was taxed at Kshs. 159,703/=. That thereafter the certificate of costs was subsequently signed and issued by the Taxing Master on the 28<sup>th</sup> June, 2019 as by law provided. The Counsel went on to submit that execution proceedings for recovery of the taxed costs subsequently issued and the Interested Parties were served with notices to show cause why they could not be arrested and committed to prison for failing to pay the aforesaid costs. That the Interested Parties were served on the 29<sup>th</sup> September, 2019 and an affidavit of service filed on 02<sup>nd</sup> October, 2019. The Exparte Applicant further submitted that the Interested Parties have not presented prayer 2 in their said application. The Exparte Applicant submitted that the Manthi Masika and Company Advocates who are the incoming firm of Advocates has not demonstrated that the application was ever served on the firm of J.A Makau & Advocates who are the outgoing firm as per the mandatory requirements of Order 9 Rule 9(a) and (b) of the Civil Procedure Rules. The above being the case, the Counsel for the Exparte Applicant submitted that the law firm of Manthi Masika & Co. Advocates has never come on record after the judgment in this matter as by law required, and cannot, therefore be allowed to prosecute the application herein or what currently remains of it, thus the application is incompetent and ought to fail.

15. The Counsel referred the court to Rule 11 of the **Advocates (Remuneration) Order** which provides: -

**Rule 11**

*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.*

*(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a Judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of this objection.*

*(3) Any person aggrieved by the decision of the Judge upon any objection referred such Judge under sub-paragraph (2) may, with the leave of the Judge and not otherwise, appeal to the Court of Appeal.*

*(4) The High Court shall have power in its discretion by order to enlarge the time fixed by sub-paragraph (1) or (2) for the taking of any step; application for such order may be made by chamber summons....."*

16. Arising from the above, the Counsel submitted that the Interested Parties have not told the court which taxed items in the aforesaid Bill of Costs and the Taxing Master's decision thereon they are objecting to. Further, the Counsel submitted that the Interested Parties have not sought the exercise of the Court's discretion in enlarging time under **Rule 11(4) of the Advocates (Remuneration) Order.** The Counsel pointed out that the law does not provide for the setting aside of the entire ruling/decision on taxation but provides for objection on specified items in the taxation decision which the Interested Parties have not done. The application is, the Counsel submitted, incompetent and an abuse of the court's process and orders sought particularly prayer 4 are/is not capable of being granted.

17. Having read the rival submissions filed by the parties herein, I am of the view that the only issues for determination are: -

**1) Whether Manthi Masika & Co. Advocates are properly on record as is required under Order 9 Rule 9(a) and (b) of the Civil Procedure Rules.**

**2) Whether the Interested Parties were served with the taxation notice, hearing notice and the Taxing Mater's ruling or the executed decree.**

18. I will address the two issues together. It is not in dispute that judgment herein was delivered on 13<sup>th</sup> December, 2017. The firm of J.A Makau & Company Advocates were on record for the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties. That was the law firm that was served by the Exparte Applicant on 20<sup>th</sup> February, 2019 as is shown in the affidavit of service sworn on 26<sup>th</sup> March, 2019 and filed in court on 27<sup>th</sup> March, 2019. The firm of J. A. Makau & Company Advocates are said to have declined service on grounds that they had no instructions even though they accepted to remain with a copy of the taxation notice. In my view even though the said law firm of J.A Makau & Company Advocates indicated that they had no instructions from the Interested Parties herein when they were served with taxation notice, they remained on record for their clients. It was incumbent upon the firm of Manthi Masika & Company Advocates to serve them (Advocates on record) as is required under **Order 9 Rule 9(a) and (b) of the Civil Procedure Rules**. There is no evidence of service of the instant application upon the firm of J. A. Makau & Company Advocates by Ms. Manthi Masika & Company Advocates and I would agree with the Counsel for the Ex-parte Applicant that the latter Advocates never came on record after judgment in this matter and therefore cannot be allowed to prosecute the instant application. As for service of the taxation notice, the aforesaid affidavit of service sworn on 26<sup>th</sup> March, 2019 and filed in court on 27<sup>th</sup> March, 2019 clearly shows that the Interested Parties were served through their Advocates on record. They chose not to respond when the matter came up for taxation on the 27<sup>th</sup> March, 2019.

19. The above being the case, the Interested Parties cannot be heard to say that the Taxing Master's ruling dated 17<sup>th</sup> April, 2019 was irregularly acquired nor can they be heard to say that they were condemned unheard. A party who has been afforded the opportunity to be heard and chooses not to exercise his right to be heard cannot turn around and say that he/she was condemned unheard. Having chosen not to present themselves before the Taxing Master when the Ex-parte Applicant's bill of costs dated 08<sup>th</sup> December, 2018 was taxed, the least they could have done was to exercise their right under Rule 11 of the Advocates (Remuneration) Order.

20. The upshot of the foregoing is that the application is incompetent, an abuse of the court process and thus lacks merit. Same is dismissed with costs to the Ex-parte Applicant.

**Signed, dated and delivered at Makueni via email this 19<sup>th</sup> day of November, 2020.**

**MBOGO C.G.,**

**JUDGE.**

**Court Assistant: Ms. G. Kwemboi**