



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**LAND CASE NO. 33 OF 2015**

**HENRY SHIKUKU BARASA**

**JOASH CHIMUGE WASWA**

**JOHN NYONGESA NGEYWA**

**(Suing as the duly authorized representatives of MATISI OUTREACH CHURCH.....PLAINTIFF**

**VERSUS**

**REUBEN FWAMBA MBITA.....DEFENDANT**

**RULING**

1. This is a ruling on the application dated **13/9/2019** and filed in court on **16/9/2019**. The application has been brought by the plaintiffs and it seeks the following orders:-

**(a)...spent**

**(b)...spent**

**(c) That the orders made by the Deputy Registrar of this court on 9/9/2019 allowing the defendant's bill of costs dated 10/9/2018 as drawn be set aside and plaintiffs' advocates be allowed to make submissions in opposition of the bill and the bill be taxed after considering the plaintiffs' advocates' submissions on the said bill.**

2. The application is brought under **Article 159 (2) (d) of the Constitution; Section 3A of the Civil Procedure Act, Order 51 Rule 1 Civil Procedure Rules 2010.**

3. The application is supported by the affidavit of the Counsel for the plaintiffs sworn on **13/9/2019**.

4. The grounds upon which the application is made are that in the morning of **9/9/2019** the defendant's advocate and the plaintiffs' advocate met in Court No.2 at the Chief Magistrate's Court at Kitale and the two briefly discussed the said bill of costs particularly the hotly contested item on instructions fees and agreed that they would request the Deputy Registrar of this court for fourteen (14) days to file written submissions on contested items in the said bill of costs; that however when the suit was called out by the Deputy Registrar, the plaintiffs' advocate was held up in the hearing of a criminal case in Court No. 3 which hearing became longer than had been anticipated; that the plaintiffs' advocate had hoped that if the matter was called out in his absence the defendant's advocate would inform the Deputy Registrar what the two counsel had discussed earlier that day and request for fourteen (14) days for the two counsels to file written submissions on the said bill of costs; that after the hearing of the said criminal case the plaintiffs' advocate went to the Deputy Registrar's court and found out that the matter had been called out; that upon perusal of the court file he found that the defendant's advocates had informed the Deputy Registrar that he did not intend to file any submissions on the said bill of costs and that the said bill of costs was unopposed and that the said bill of costs should be allowed as drawn hence leading the court to allow the said bill of costs as drawn.

5. In response to the application, the defendant filed a replying affidavit sworn on **23/9/2019**. He deponed that this suit was struck out with costs on 31/1/2019 and a bill of costs was filed which came up several times for mention as borne out by the record; that on 25/8/2019 the court directed that the plaintiff's counsel do file and serve submissions with 7 days and the matter was set for mention on 19/9/2019; that on 19/9/2019 at around 11.30 a.m. when the matter was called out the plaintiff's counsel was neither in court nor represented by any person; that at the same time it was apparent he had not filed any written submissions as earlier ordered by court and no explanation was forthcoming; that to date the applicant's counsel is yet to file an written submissions; that court orders must be complied with; that the applicant's counsel

is represented by a firm that has several advocates and clerks; that the court directed itself to the law and facts and ruled on the matter; that under **Rule 11 (1)** of the Advocates Remuneration Order any person aggrieved by the decision of a taxing officer ought to file a reference before a high court within 14 days of the decision and the lodging of an application for review and stay orders before this court is not merited; that no formal reference has been filed in a court of competent jurisdiction to warrant the exercise of this court discretion in the application at hand and this court lacks jurisdiction; that the application is frivolous, vexatious and an abuse of the process of the court; that the advocates on record are guilty of indolence and defiance of court orders and cannot benefit from equity.

6. The plaintiffs filed their submissions on **23/10/2019**. No submissions were filed on behalf of the respondent but on 28/10/2019 holding brief for Mr. Karani for the respondent indicated to court that Mr. Karani wished to rely only on the documents so far filed in the matter. I have considered the contents of the application and the response including the submissions.

7. Relying on the application and the supporting affidavit only the applicant's counsel sought that they be given a limited time, "*even one day, to submit on the bill.*"

8. On the other hand Mr. Karani filed a list of authorities including **Machira & Co. Advocates -vs- Magugu [2002] 2 EA 428, Keziah Gathoni Supoyo -vs- Yano T/A Yano & Co. Advocates [2019] eKLR** and **Doonholm Rahisi Stores -vs- East Africa Portland Cement [2005] eKLR**.

9. In the **Machira case** the court held as follows:

**"Under Paragraph 11 of the Advocate Remuneration Order objection to a decision of the Registrar should be filed within 14 days of receiving the decision and reference to the High Court should be made within 14 days of receiving the reason for the decision. The Deputy Registrar has no time to extend time under Paragraph 11. The power to extend is vested in the High Court. The advocate's reference was filed out of time and was incompetent.**

**Section 44 and 51 of the Advocates Act and Paragraph 13 (1) of the Advocates (Remuneration) Order did not aid the client in the reference and were misplaced. The Advocates Remuneration Order is a complete code and there is no provision for invocation of the Civil Procedure Rules. The Remuneration Order does not provide for an appeal and only a reference under Paragraph 11 of the Order can ventilate any dissatisfaction."**

10. The position in the **Machira case** (supra) was adopted by the court in the **Keziah case** (supra).

11. In the **Doonholm Rahisi Store case** (supra) the Defendant applied by notice of motion for an order that there be stay of further proceedings and in particular the taxation of the bill of costs. The application was expressed to be brought under **section 3A** of the **Civil Procedure Act, Cap. 21** and also under **Order 50, Rule 1** of the **Civil Procedure Rules**. The court observed as follows:

**"Taxation of costs, whether those costs be between party and party or between advocate and client, is a special jurisdiction reserved to the taxing officer by the Advocates (Remuneration) Order. The court will not be drawn into the arena of taxation except by way of reference (from a decision on taxation) made under Rule 11 of the Advocates (Remuneration) Order. The present application is not such reference. The application seeks an order that would have the effect of interfering with the special jurisdiction of the taxing officer, a jurisdiction that the court cannot take upon itself. The taxing officer does nothing beyond taxation of the bill of costs."**

12. Further down the court in **Donholm Rahisi Store case** (supra) also stated as follows:

**"The present application is not for stay of recovery of taxed costs. To stay taxation of costs that have been duly awarded would be an unacceptable assault upon the special jurisdiction of the taxing officer. No jurisdiction to order such stay has been conferred by the Advocates (Remuneration) Order which is the code of law governing all matters of taxation of costs. In my view the inherent jurisdiction of the court cannot properly be inferred to include the jurisdiction to intervene in the jurisdiction of another judicial officer. Such interventionist jurisdiction must be expressly conferred by law.**

**I am fortified in this view by the decision in the case of SHARMA -vs- UHURU HIGHWAY DEVELOPMENT LTD. (2001) 2 EA 530. In that case the Court of Appeal declared that the proceedings before a judge of the High Court to strike out an application for taxation of an advocate/client bill of costs and the order the judge made to strike out the application for taxation, were a nullity for want of jurisdiction. One of the learned judges of appeal (Akiwumi, J.A.) stated:-**

**"...(the High Court Judge), not being seized of the taxation itself, and there being no appeal or reference to him as provided for by paragraphs 11(1) and (2) and 12 of the Advocates(Remuneration) Order from a decision of the Taxing Officer who was dealing with the taxation, and the taxation not being a suit filed in the High Court for the recovery of costs, simply had no jurisdiction at all, to hear as he did, the Respondent's application to strike out the (application for taxation). This by itself makes his hearing of, and his ruling of 19<sup>th</sup> May, 2000, of the Respondent's application a nullity from the word go..."**

**I therefore hold that the court has no jurisdiction to order stay of the taxation."**

13. In the instant case the application seeks for a setting aside of the orders of the deputy registrar allowing the bill of costs as drawn and that the plaintiff's advocates be subsequently allowed to make submissions in opposition to the bill, and that the bill be taxed after considering such submissions.

14. There is no response to the averments by counsel for the respondent who stated that the applicant's counsel had been granted time to file submissions but failed to do so. In his view no sufficient explanation has been given for the default.

15. The explanation by counsel for the applicant was that he was in another court at the time the taxation was called out before the Deputy Registrar and the bill allowed as prayed. He does not explain why the submissions of the applicant were not in the record by that date as had been earlier ordered by the taxing master. Though it is stated in the supporting affidavit that there has been an agreement to extend time to file submissions, this is not admitted by the counsel for the defendant. I am of the view that though courtesy is expected of counsel in all matters, an excessive measure of it that would, as in the present case make the defendant's counsel seem to be arguing his adversary's case before the Deputy Registrar would be unhealthy for the execution of his duty to his client. On that basis alone the application before me has no merit.

16. In addition to the above it is clear from the reasoning in the case law cited hereinbefore that this court has no jurisdiction to entertain the application dated **13/9/2019** and the same is dismissed with costs.

**Dated, signed and delivered at Kitale on this 21<sup>st</sup> day of November, 2019.**

**MWANGI NJOROGI**

**JUDGE**

**21/11/2019**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Munialo holding brief for Karani for defendant

N/A for the plaintiffs

**COURT**

Ruling read in open court.

**MWANGI NJOROGI**

**JUDGE**

**21/11/2019**