



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**

**CASE NO. 180 OF 2014**

**COLOMBUS OPIO ADETI.....PLAINTIFF/APPLICANT**

**VERSUS**

**ALEXANDER OYIOLO ODONGO**

**T/A ALEMA SERVICE STATION.....DEFENDANT/RESPONDENT**

**RULING**

1. What is before the Court for determination is the Plaintiff's Application dated and filed on 8<sup>th</sup> May 2019. It is brought under sections 1A, 1B and 3A of the Civil Procedure Act and Rule 11 of the Advocates Remuneration Order. The Applicant seeks the following orders:

**a) Spent**

**b) Spent**

**c) That the Court be pleased to set aside the Deputy Registrar's purported ruling on taxation herein delivered on 1<sup>st</sup> March 2019 *ex-debito justitiae***

**d) That in the alternative to (c) above, the Court be pleased to extend time within which the Plaintiff/Applicant may lodge a reference against the purported ruling on taxation delivered on 1<sup>st</sup> March 2019.**

**e) That costs be provided for.**

2. The Application is supported by the affidavit of Francis Omondi, Counsel for the Applicant. He also filed a further affidavit on 12<sup>th</sup> June 2019. Counsel depones that judgment in this suit was delivered on 21<sup>st</sup> February 2018. The Plaintiff's suit was dismissed with costs to the Defendant. The judgment is currently subject to **KISUMU CIVIL APPEAL NO. 44 OF 2018**. Pursuant to the judgment, the Defendant filed and served a Party and Party Bill of Costs dated 20<sup>th</sup> March 2018 for taxation purposes. In response, Counsel for the applicant filed a preliminary objection dated 5<sup>th</sup> April 2018. According to the deponent, the Deputy Registrar directed that the preliminary objection be canvassed by way of written submissions which were duly filed. The ruling on the same was to be delivered on 9<sup>th</sup> January 2019 but was deferred to 27<sup>th</sup> February 2019. On the scheduled date the ruling was once again not ready and Counsel was under the impression that it would be delivered on notice.

3. On 12<sup>th</sup> March 2019, Counsel for the applicant deposed that while on other routine Court business

stumbled upon the Court file. Upon its perusal he was shocked to discover that the ruling had been delivered on 1<sup>st</sup> March 2019. Moreover, the ruling was not on his preliminary objection. Instead, costs had been conclusively taxed at Kshs.6,517,817. He contended that the ruling on the bill of costs being rendered before the determination of his preliminary objection was premature and erroneous. Further, Counsel faulted the Deputy Registrar for proceeding to tax costs without the Plaintiff's input and for failing to notify the Plaintiff of the ruling date. All these concerns were communicated to the Deputy Registrar vide a letter dated 12<sup>th</sup> March 2019 culminating in the application currently before Court. Counsel argues that the bill as taxed is highly excessive as compared to the value of the property concerned and prays that it be set aside and that the Preliminary Objection be determined.

4. The Application is opposed vide the Defendant/Respondent's Grounds of Opposition dated 23<sup>rd</sup> May 2019 enumerated as follows:

*a) That the application is totally defective and incompetent for not being hinged on any procedural law granting the orders sought*

*b) That once costs are taxed they can only be changed by way of reference to court*

*c) That there is no competent appeal filed against the Deputy Registrar's decision on both applications determined by her by either of the parties.*

5. The Respondent also filed a Replying affidavit deponed on 27<sup>th</sup> May 2019 by his advocate, WYCLIFFE OUMA OKUTTA. He states that the Plaintiff filed suit seeking mesne profits of Kshs.400,000 per month from 1<sup>st</sup> August 2004 to the judgment date. The Plaintiff would therefore have been entitled to mesne profits of Kshs.64,000,000 had his claim succeeded. The tax master was therefore correct in granting costs based on the value of the mesne profits claimed. Counsel stated further that the preliminary objection was on a technicality. It was determined simultaneously with the taxation of the bill and the tax master's silence on it was a demonstration that it was unmerited and undeserving. Moreover, the Applicant ought to have filed a reference against disputed items which was not done yet his advocate all along appeared and participated in Court. Since he was aware of the proceedings with respect to the bill for taxation, notice is a non-issue. Counsel also denied that the case was subject to appellate process.

6. Parties canvassed the Application by way of written submissions. The Applicant's were filed on 9<sup>th</sup> August 2019. Counsel for the Applicant rehashed the Applicant's pleadings faulting the Deputy Registrar for disregarding the preliminary objection; making a ruling without the bill having been taxed as it was never fixed for taxation; denying the applicant his opportunity to be heard by making a ruling without his input and proceeding to tax the bill before issuance of a taxation notice in accordance with rule 72 of the Advocates Remuneration Order. The Applicant further contended that the Respondent's bill was highly objectionable as it is inconceivable that a property acquired at less than Kshs.10,000 can attract instruction fees of Kshs.6,000,000. It was submitted that instruction fees are based on the terms of the judgment as opposed to the pleadings. Counsel cited the Court of Appeal case of *Peter Muthoka & Another vs Ochieng & 3 Others (2019) eKLR* in support.

7. The Respondent's submissions were filed on 9<sup>th</sup> October 2019. The Respondent reiterated his stance that the prayers sought in the application are not available to the applicant save for the prayer for extension of time to lodge a reference against the taxed costs. The Respondent also urged that the authority cited on the impugned instruction fees is distinguishable from the application at hand.

8. I have considered the parties' pleadings as filed, their submissions and the applicable law. The first port of call shall be the court record as the parties have conflicting versions on the proceedings pertaining to the Bill of costs. On 27<sup>th</sup> June 2018, Mr. Okutta for the Applicant and Mr. Bogonko holding brief for Mr Omondi for the Respondent appeared before the deputy registrar. Mr. Bogonko requested that the Preliminary Objection be dealt with first by way of written submissions. The matter was then fixed for mention on 11<sup>th</sup> July 2018 whereby the respective parties confirmed that they had filed submissions. On 31<sup>st</sup> October 2018 when the case was scheduled for a further mention, parties categorically sought a

ruling date on the preliminary objection dated 5<sup>th</sup> April 2018.

9. The ruling date issued was 9<sup>th</sup> January 2019. However, it was delivered on 1<sup>st</sup> March 2019 purely on the Application for Taxation of the Bill of costs dated 20<sup>th</sup> March 2018. The tax master applied the Advocates Remuneration Order of 2014 and taxed the costs at Kshs.6,517,817. There is no mention of the preliminary objection in the body of the ruling. It is also not indicated whether it was delivered in the presence or absence of whichever party.

10. From the earlier proceedings, what was for determination was the preliminary objection. The taxing master having proceeded to make a determination on the bill was indeed premature and contravened the rules of natural justice on the right to be heard. It is incorrect for the Defendant/Respondent to state that the Deputy Registrar did not make reference to the preliminary objection in her ruling because she found it had no merit. Order 21 Rule 4 of the Civil Procedure Rules provide that judgements shall contain *inter alia* the points for determination, the decision and the reason for such decision. In this case, the Deputy Registrar was obligated to make the decision on the P.O. and give the reason for such decision.

11. The usual practice where a party wishes to challenge the bill of costs is to make submissions either orally or in writing on the contested items during the hearing. Such a party is not required to file a pleading before-hand to express the objection. In any event the taxing officer having given directions that parties file submissions to the preliminary objection implied that she put the taxation on the bill of costs on hold pending determination of the P.O. To proceed otherwise as she did means she closed the plaintiff from contesting the bill.

12. The Court of Appeal sampled the principles applicable under the rules for setting aside ex parte orders in the cases of Pithon Waweru Maina vs Thuka Mugiria (1982-88) I KAR 171; Patel vs EA Cargo Handling Services Ltd [1974] EA 75; and Mbogo vs Shah [1968] EA 93 thus:

***"(a) Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just ... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. Patel vs EA Cargo Handling Services Ltd [1974] EA 75 at 76 C and E***

***(b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah vs Mbogo [1967] EA 116 at 123B, Shabir Din vs Ram Parkash Anand (1955) 22 EACA***

***(c) Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. Mbogo vs Shah [1968] EA 93."***

13. It is without a doubt that the Applicant has demonstrated that the Deputy Registrar misdirected herself to warrant this court to set aside the orders made on 1<sup>st</sup> March 2019 *ex debito justitiae*. Accordingly, I am satisfied that the prayers sought in the motion dated 8<sup>th</sup> May 2019 is merited. I allow it in terms of prayer C of the application. I direct that the file be returned to the current Deputy Registrar of the Environment & Land Court Busia to make a determination on the pending preliminary objection. The file will be placed before her on 20<sup>th</sup> November 2019 to give the appropriate directions to the Parties. Since the mistake was not occasioned by the Defendant, I order each party to meet their respective costs of this application.

**Dated and signed at BUSIA this 7<sup>th</sup> day of November, 2019.**

**A.OMOLLO**

**JUDGE**