



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.272 OF 2013

DANIEL OGERA OBONYOPLAINTIFF

VERSUS

AKACH OKINDA1^S DEFENDANT

ARTHUR OBONYO2ND DEFENDANT

RULING

1. David Ogera Obonyo, the Plaintiff, filed the notice of motion dated 18th October 2016 seeking to have the decision, ruling and order delivered on 24th February 2016 by this court reviewed and each party to bear their costs on the grounds that;

- Parties are relatives.
- That the Plaintiff has filed **Siaya H.C. P & A Cause No.198** of 2016 in respect of the estate of the late **Paulo Okunda Obonyo** in which the issues in dispute in this matter shall be addressed on merit including the costs payable.
- That this suit was struck due to mistake of counsel for the Plaintiff
- That granting the application will serve the ends of justice.

The application is supported by the Plaintiff's affidavit sworn on the 18th October 2016.

2. The application is opposed by **Akach Okinda** and **Arthur Obonyo**, the Defendants, through their grounds of opposition dated 3rd November 2016 summarized as follows:

- Application is bad in law, misconceived and unmeritorious.
- That the application does not challenge the merit of the judgment and hence cannot be reviewed.
- Application is frivolous, annoying, and abuse of courts process.
- Application does not meet the threshold of **Order 45 of the Civil Procedure Rules**.
- The court's jurisdiction is wrongly and unlawfully invoked for a purpose that is contrary to public policy.
- That there has been inordinate delay in bringing this application and that costs follow the event.

3. The Plaintiff also filed the notice of motion dated 27th October 2016 seeking for stay of execution pending the hearing and determination of this application, varying and or setting aside of the Deputy Registrar's exparte taxation Order on items 1 to 16 of the Bill of Costs dated 16th March 2016, the bill of costs be taxed denovo and costs be born by the Defendants. The application is based on the five grounds marked (a) to (e) on the face of the application summarized as follows:

- That the Deputy Registrar erred in law and fact by permitting the taxation of the bill of costs dated 16th March 2016 to proceed on the 10th October 2016 when it was not cause listed.
- That the award on the items 1 to 16 of the said bill of costs exceeds the sums provided under the advocates Remuneration Order.
- That the Defendants advocate have threatened to execute unless the sum of Ksh.253, 906.60 is paid.
- That the VAT assessed at Ksh.35,021.60 is not available to the Defendant for reasons that the Defendants are not registered for VAT and party to party costs in court proceedings are not taxable income.
- That the granting of the application will serve the ends of justice.

The application is also supported by the affidavit of the Plaintiff sworn on the 27th October 2016.

4. The notice of motion is opposed by the Defendants through the grounds of opposition dated 3rd November 2016 summarized as follows;

- The application is bad in law, misconceived, unmeritorious and utter abuse of the courts process.
- The Deputy Registrar did not employ a wrong principle in dealing with the matter and the taxation cannot be set aside.
- The court's jurisdiction is wrongly and unlawfully invoked.

5. The two applications were heard jointly on the 10th November 2016 when Mr. Jaoko and Mr. Gichaba, learned counsel for the Defendants and Plaintiff respectively made their oral rival submissions.

6. The following are the issues for determination;

- a) Whether the Plaintiff has made a case for review of the 24th February 2016 order for each party to bear its own costs.
- b) Whether the Plaintiff has made a case for setting aside of the Deputy registrar's order on taxation of 10th October 2016.
- c) What orders to issue.
- d) Who pays the costs of each of the applications.

7. The court has considered the grounds on the two notices of motion, the affidavit evidence by the Plaintiff, the grounds of opposition by the Defendants, the record of the court and come to the following conclusions;

- a) That the suit was commenced by the Plaintiff against the two Defendants through the originating summons dated 4th October 2013.
- b) That the Defendants instructed counsel who filed the notice of appointment dated 9th December 2013 and a notice of preliminary objection of the same date.
- c) That the preliminary objection was heard and upheld through this court's ruling of 24th February 2016, in which the court ordered that: "originating summons dated 4th October 2013 is hereby struck out with costs."
- d) The notice of motion dated 18th October 2016 for review refers to **Sections 1A, 1B, 3, 3A 63 (e) and 80 of the Civil Procedure Act and Order 45 Rules 1, 2, and 3 of Civil Procedure Rules.** That having considered the grounds on the application the grounds of opposition, affidavit evidence and submissions by counsel, the court do not find any evidence that was not known to the Plaintiff that has now become known or available on which an order of review can be based. That the

Plaintiff knew the social or family relationship he had with the Defendants by the time he filed the originating summons and family relationship per se cannot be the basis for review.

e) That if the basis for review is the quality of the legal representation the plaintiff got from his advocates then on record, then his recourse should be elsewhere, like a claim against the advocate in question and that cannot be the basis of reviewing the order on costs.

f) That the Defendants incurred costs especially in procuring legal representation as a result of the originating summons taken out by the Plaintiff which was struck out on 24th February 2016. The order on costs follows the events in terms of **Section 27 of the Civil Procedure Act**. The application dated 18th October 2016 has no merit and is dismissed with costs.

g) That in relation to the notice of motion dated 27th October 2016 is brought under **Rule 11(2)** of the Advocates (Remuneration) Order, **Section 1A, 1B, 3, 3A, 63 9c) and € of Civil Procedure Act, Order 40 Rule 1 (9) and Order 51 Rule 1 of Civil Procedure Rules**. The application seeks for stay of execution and an order to tax the bill of costs denovo on the main basis that the bill was taxed on a date that it was not cause listed. The Plaintiff's deposition on the issue that the matter had been taxed on a date it was not in the causelisted has not been challenged as the Defendants did not file any replying affidavit. That this application does not however amount to a reference as it is essentially for stay of execution and taxing the bill of costs denovo. The application should have been made before the Deputy Registrar as the order being sort to be set aside to allow the taxation be done a fresh was made by the Deputy Registrar.

However, as the inherent powers of this court has been invoked through **Section 3A of the Civil Procedure Act**, and so as to further the objective of the court under **Section 1A** of the said Act, the court grants the prayer for fresh taxation of the bill of costs dated 16th March 2016.

8. That flowing from the foregoing, the court orders as follows in respect of the two applications;

a) That the notice of motion dated 18th October 2016 has no merit and is dismissed with costs.

b) That the notice of motion dated 27th October 2016, is allowed by setting aside the Deputy Registrar's taxation order of 10th October 2016 on the bill of costs dated 16th March 2016 to enable the Plaintiff participate in the taxation.

c) That the matter be mentioned before the Deputy Registrar to fix the bill of costs dated 16th March 2016 for taxation denovo.

d) That in respect of the notice of motion dated 27th October 2016, each party to bear their own costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 08TH DAY OF MARCH 2017

In presence of;

Plaintiff Absent

Defendants Absent

Counsel

Mr. Arikho for Jaoko for Plaintiff

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

8/3/2017

8/3/2017

S.M. Kibunja Judge

Oyugi court assistant

Parties absent

Mr. Arikho for Jaoko for Plaintiff/Applicant

Court: Ruling delivered in open court in presence of Mr. Arikho for Jaoko for the Plaintiff/Applicant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

8/3/2017