



**REPUBLIC OF KENYA**

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

**ELC. MISC. APPL NO. 8 OF 2017**

**NYAKINYUA MUGUMU**

**TREE COMPANY LTD.....APPLICANT/PLAINTIFF**

**VERSUS**

**JOSEPH MWANGI GICHUHI.1<sup>ST</sup> .....DEFENDANT/RESPONDENT**

**AARON MIARE NJOROGE.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**JAMES NDUNGU KERO.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**ABED K. MWALWA.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**MAURICE M. LISHENGA T/A**

**MALI SURVEY SERVICE.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**DIRECTOR OF SURVEY.....6<sup>TH</sup> DEFENDANT/RESPONDENT**

**CHIEF LAND REGISTRAR.....7<sup>TH</sup> DEFENDANT/RESPONDENT**

**R U L I N G**

1. By an application dated 11/4/2017 the plaintiff sought among other orders that the defendant Certificate of Costs dated 10/3/2017 be set aside and the said Bill of Costs be assessed afresh *interpartes*.
2. The supporting affidavit attached to the Notice of Motion states that the ground on which the application is brought is that the plaintiff is not satisfied with the amount of costs awarded to the defendant, and that the plaintiff would suffer irreparable loss if the defendants' bill of costs is not reviewed and assessed afresh *interpartes*.
3. It is said that the defendants have attached **LR. No. 1803** measuring approximately **2050 acres** registered in the name of the plaintiff in execution following the taxation.
4. In the submissions the plaintiff avers that they has disputed the bill because it was taxed *ex parte* without inviting the plaintiff or its advocates on record.
5. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed their grounds of opposition on 3/5/2017. They lay out several

grounds namely; that the application is defective for not stating grounds upon which it is brought at its foot; that this court has no jurisdiction to entertain this application in view of **Rule 11(1)** and **Rule 11(4) of the Advocates Remuneration Order**; that the plaintiff has wrongly moved the court by way of a Miscellaneous Cause when the substantive case, that is **Kitale ELC No. 103 of 2015** still exists; that the application has been brought out of time and without leave of court as required by **Rule 11(4) of the Advocates Remuneration Order Rules** and that this court does not have jurisdiction to disturb the certified costs since the mandatory procedure to challenge an order on taxation has not been followed and further that the Registrar has not been demonstrated to have violated any of the principles of taxation.

6. The issues that arise herein are as follows:

- (1) **Whether the application is fatally defective for failing to state grounds as its foot;**
- (2) **Whether the court has jurisdiction to entertain the application;**
- (3) **Whether the application has brought out of time and whether the Deputy Registrar violated any taxation principles.**

7. Those issues are addressed as here under:-

- (1) **Whether the application is defective for failing to state grounds as its foot.**

This is an objection against the application, which objection is based on **Civil Procedure Rules. Order 51 Rule 4** of the Rules states as follows:-

***“Every Notice of Motion shall state in general terms the grounds of the application”.***

However as seen in that rule, provision is made for the filing of a supporting affidavit where the motion is grounded on evidence. In this case a supporting affidavit was filed with the motion. It gives the grounds the plaintiff relies on. It is therefore not a fatal defect for the application does not state grounds. This ground is therefore merely technical and cannot succeed. Besides, **Order 51 Rule 10 (2)** provides that no application shall be defeated on a technicality for want of forum that does not affect the substance of the application. I find the defect complained of by the respondent to be immaterial.

- (2) **Whether the court has jurisdiction to entertain the application.**

8. The issue of jurisdiction is addressed twofold: one, jurisdiction of this court is challenged on the basis that in view of **Rule 11(1)** as read with **Rule 11(4) of the Advocates Remuneration Rules** the court has no jurisdiction to entertain this application. Secondly, it has been averred that the mandatory procedure for challenging an order on taxation has not been followed.

9. **Rule 11(1) of the Advocates Remuneration Order [1962]** states as follows:-

***“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”.***

10. **Regulation 11(4)** states as follows:-

***“The High court shall have power in its discretion by order to enlarge the time fixed by sub-paragraph (1) or sub-paragraph (2) of the taking of any step, application or such an order may be made by chamber summons upon giving to every other interested party not less than three clear days’ notice in writing or as the court may direct and may be so made notwithstanding that time sought to be enlarged may have already expired”.***

11. The instant application is brought not under the Advocates Remuneration Order Rules but under

**Order 45(1) and (2)** of the Civil Procedure Rules which provides for review of decrees and order on the basis of the grounds set out in those provisions.

12. What is the nature of the application at hand? It seeks the following orders:-

(a) .....

**(b) There be a stay of execution pending the hearing and determination of this application *interpartes* (sic).**

**(c) That the defendant's Certificate of Costs dated 10/3/2017 be set aside and the said Bill of Costs be assessed afresh *interpartes*.**

**(d) That such and other relief be granted as this court deems fit and expedient in the circumstances.**

13. A scrutiny of the supporting affidavit shows that though there is expressed dissatisfaction with the amount awarded as costs the additional grievance of the applicant is that the taxation of the bill was conducted *ex-parte*.

14. Review of a decision of the court is allowed by the provisions cited hereinabove as well as **Section 80 of Civil Procedure Act**. However review is allowed under certain conditions only. The person seeking review must demonstrate that there is discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced by him at the time the decree was passed or the order made, or some mistake or error apparent on the fact of the record, or any other sufficient reason.

15. Under **Order 45 Rule (2)** however, review shall be made only to the judge who passed the decree or the order sought to be reviewed. The order made upon completion of taxation in this case was issued by the Deputy registrar.

16. An examination of the supporting affidavit reveals that no new or importance evidence, mistake or error on the fact of the record have been demonstrated by the applicant. As **Order 45 Rule 1** allows the court to consider any other sufficient reason in determining an application for review, a further examination of the supporting affidavit is necessary.

17. However, a search for *any other sufficient reason* to support the review application is quite disappointing because none appears on the face of the supporting affidavit. The failure of the applicant to put forward new evidence or show mistake or error apparent on the fact of the record makes an application under **Order 45 Rule 1 and 2** and **Section 80** of the **Civil Procedure Act** to be unmerited.

18. In the case of **Simon Makili Maluki -vs- David Mutie Musyoki 2004 eKLR** the court stated as follows concerning orders of review:-

**“For an order of review to be made there must be discovery of a new and important matter or evidence, which the court after exercise of due diligence was not within the applicants knowledge or could not be produced by him at the time of the decree or order. The applicant has not demonstrated that there has been discovery of any new matter or evidence which could not be availed at the time of hearing. For an order of review to issue the applicant has to show that there was an error or mistake apparent on the face of the record or show sufficient reason that would warrant the court to grant the order for review. No such error or mistake has been pointed out by the applicant. Neither has he sufficient reasons to warrant the court order review. All the above considered together, the court is satisfied that the applicant has not placed sufficient material before the court to enable the court grant an order of review and the court declines to order review of the dismissal order of 12.3.2003.”**

19. In the *Simon Makili Case Supra*, it was shown that the taxation notice was posted to the wrong address and by reason of that the advocate for the applicant did not attend the taxation. The court therefore set aside the Deputy Registrar's order taxing the bill of costs and the subsequent certificate of costs. In the instant application, no such evidence was availed to justify a setting aside.

20. The provisions of the Civil Procedure Rules are subsidiary legislation, just as the Advocates Remuneration Order Rules. However, the Advocates Remuneration Order Rules are specifically tailored to address issues that arise from and during taxation of bills of costs. No appeal is envisaged in those rules. Only a reference is allowed. It is in the form of a review of the taxing master's decision. The unique feature of the review is that it is not presented before the taxing master; According to *Rule 11(1)* it is supposed to be dealt with by this court.

21. In the case of *Hezekiel Oira T/A Oira Advocate -vs- Kenya Broadcasting Corporation 2015 eKLR* the court stated as follows when confronted with an application made under *Order 45 Rule 1 and 2 of the Civil Procedure Rules 2010, Sections 1A, 1B and 3A and 80 of the Civil Procedure Act:-*

**“In the present case, it is apparent that the respondents were objecting to the validity of the entire bill of costs as filed, by their grounds of opposition and replying affidavit sworn by Waithaka Waihenya the respondent's Managing Director, contending that the advocate was an employee of the corporation at the time as an in house lawyer and that the purported memo by William Ikapel giving him authority to act as an independent contractor was a fraud as it was not authorized by the corporation.**

**In my view, the applicant was required to file a reference to this court to challenge the decision of the taxing officer and not an application for review under Order 45 of the Civil Procedure Rules and Section 80 of the Civil Procedure Act.**

**Further, the advocate would only be so entitled to apply to this court for review or appeal, under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules if he was able to satisfy the court that the decision rendered by the taxing officer was the kind of decision that can be appealed to this court, under Section 79G of the Civil Procedure Act or reviewed as provided by Section 80 and Order 45 of the Civil Procedure Act and Rules respectively.**

**Under the said Paragraph 11, of the Advocates Remuneration Order, an “appeal” against the decision of a taxing officer in a taxation matter is not provided for. The only procedure provided for an “appeal” or “review” against the decision of a taxing officer is by way of a reference.**

**In my view, the applicant cannot invoke the Civil Procedure Act and Rules made there under to circumvent the procedure provided under the Advocates Act and the Advocates Remuneration Order in regard to review of a decision of the taxing officer in an advocate/client bill of costs where the taxing officer exercises the special jurisdiction conferred upon him or her under the Advocates Remuneration Order and NOT in his capacity as the Deputy Registrar of this court.”**

22. It suffices to state here that even if a review was to be undertaken, the proper person to conduct it, if the provisions of the Civil Procedure Rules relied on were to be applied to matters relating to bills of costs, would be the Deputy Registrar. That is not possible in view of the fact that those provisions are not applicable and no other provisions of the law empower her to sit over a review of her orders on the taxation.

23. In the case of *Kinyua Muyaa & Co. Advocates -vs- Kenya Ports Authority Pension Scheme & 8 Others* a preliminary objection was raised contending that the Deputy Registrar of the Employment and Labour Relations Court lacked jurisdiction to tax an advocate/client's bill of costs as that was only a preserve of the Registrar or Deputy Registrar of the High Court. The Registrar dismissed the objection

and ruled that she had jurisdiction. The respondent was dissatisfied and brought a Motion seeking orders that pending the inter-parte hearing, that the taxation of the bill of costs dated 2<sup>nd</sup> July 2015 be stayed, that orders made by the Deputy Registrar of this Honourable court on 18<sup>th</sup> September 2015 be reviewed or set aside and that the client-Advocate bill of costs dated 2<sup>nd</sup> July 2015 be struck out.

24. The court, in the **Kinyua Muyaa** case, disagreeing with the decision in **H.C Misc 527 of 2011 Abincha & Co. Advocates vs Trident Insurance Co Ltd (2013)** eKRL which was cited to show that the court has previously entertained a similar motion and set aside taxation by a Deputy Registrar of the High Court stated as follows:-

***“In this court’s view the court should not determine a bill of costs filed before the taxing officer unless it is referred to it on appeal or through supervisory jurisdiction”.***

25. In the two cases cited immediately hereinabove the basis of the challenge was the alleged lack of jurisdiction on the part of the Deputy Registrar. In the **Kinyua Muyaa** case, the court found that it was being asked to review not its own decision but a decision by the Deputy Registrar and it stated that it does not have such jurisdiction under the relevant provisions of the law or rules.

26. In the current case the applicant’s main grievance is that it was not heard. Though it is a crucial principal in our judicial system that the other side must always be accorded a hearing I find that the overwhelming material before me is not that which tends to support the theme of breach of natural justice but that which tends to remonstrate against the quantum of costs and the lack of explanation as to how the sum awarded was arrived at.

27. The manner of draftsmanship of the instant application brings about total confusion to the scene. Ordinarily, it is this court which, if its jurisdiction was properly invoked, would have jurisdiction to entertain a reference on the bill of costs. In the absence of evidence to support a review of the decision of the Deputy Registrar by this court, this court can only consider the challenge to the merits of the decision.

28. However the applicant prays that the same bill of costs be assessed afresh *interpartes*, by this court not in the body of the application, but in **paragraph 6** of the supporting affidavit. For that reason, I find the application fatally defective, and therefore even if the omission to invoke the Remuneration Order Rules were to be considered a mere technicality that may be overlooked by this court under **Article 159** of the Constitution, it would not be possible to address the merits of the Deputy Registrar’s decision. The additional reason for this inability to address merits is the failure to demonstrate the violation of applicable principles on the part of the Deputy Registrar on the face of the application and in the supporting affidavit.

29. I have already found that there is a specific procedure under the Advocates Remuneration Order, which provides not just for a reference but also for extension of time for late applicants, none of which procedures have been followed to effectively invoke this court’s jurisdiction. I therefore find that there is merit in ground **No. 3** and **6** of the respondent’s grounds of opposition and I uphold them.

**3. Whether the application has been brought out of time and whether the Deputy Registrar violated any principles of taxation.**

30. It has been stated the application has not been brought under **Order 11 Rule 1** and **2** of the **Advocates Remuneration Order Rules** and in addition, there are no principles of taxation that are demonstrated to have been violated. As the application is an amalgam comprised of two challenges, one against the merits and one against the *ex parte* assessment, in the absence of proper invocation of this court’s jurisdiction, it is not possible to rule that it was or was not brought out of time or that any violations of any principles of taxation have been alleged or proved, against the Deputy Registrar.

31. As to the residual issue of whether it was proper for the applicant to bring the proceedings herein by way of a Miscellaneous Cause, I find that it is not a valid objection; other matters relating to taxation have been brought in the same way in the past and this court has upheld some reliefs sought therein.

32. The upshot of the above is that the application dated **11/4/2017** is grossly incompetent and fatally defective. The same is hereby struck out with no orders as to costs.

Dated, signed and delivered at Kitale on this **23<sup>rd</sup>** day of **November, 2017**.

**MWANGI NJOROGE**

**JUDGE**

**23/11/2017**

**Coram**

Before - Mwangi Njoroge – Judge

Court Assistant – Isabellah.

Ms. Mufutu holding brief for Chepkwony for the Applicants

N/A for the Respondents

**COURT**

Ruling read in open court in the presence of the Applicant's Counsel.

**MWANGI NJOROGE**

**JUDGE**

**23/11/2017**