



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAKURU**

**ELRC CAUSE NO. 398 OF 2015**

**GEOFREY ASANYO.....CLAIMANT**

**-VERSUS-**

**COUNTY GOVERNMENT OF NAKURU.....1<sup>ST</sup> RESPONDENT**

**NAKURU WATER AND SANITATION CO.LTD.....2<sup>ND</sup> RESPONDENT**

**RIFT VALLEY WATER SERVICES BOARD.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of the Claimant/applicant's application dated 22<sup>nd</sup> February, 2021 filed under certificate of urgency via the firm of Konosi & Company advocates seeking the following orders;

- 1. That the service of this application be dispensed with in the first instance for reasons to be recorded the matter be certified urgent and be heard exparte.**
- 2. That pending hearing and final determination of this application, this Honourable Court be pleased to stay warrant of arrest issued on 3<sup>rd</sup> December, 2019 against the claimant Geoffrey Makana Asanyo.**
- 3. That this Honourable court be pleased to enlarge time within which the claimant should object to the decision of the taxing officer made on 10<sup>th</sup> October, 2017.**
- 4. That the costs of this application be provided for.**

2. The application is supported by the grounds on the face of the application and the affidavit sworn by the claimant on 22<sup>nd</sup> February, 2021 on the following grounds: -

- a. That, no orders extracted from the ruling of 28<sup>th</sup> October, 2016 are capable of being executed.
- b. That this matter proceeded for taxation and a ruling delivered on the 10<sup>th</sup> October, 2017 allowing the respondent bill of cost dated 24<sup>th</sup> January, 2017 in the sum of Kshs. 552,432 but the taxing officer failed to tabulate how the said figure was arrived at.
- c. That the respondent failed to give Notice of the outcome of the taxation on time to enable him give notice in writing of the items he objects as required under Rule 11(1) of the Advocates Remuneration order.
- d. That the taxing officer failed to consider that the matter was concluded summarily therefore the applicable fees should be 75% of the fees chargeable as provided for under paragraph 1(b) schedule 6 of the advocates remuneration order.
- e. That the taxing officer erred in awarding the respondent Kshs. 66,667/- being getting up fees when the matter did not proceed for full trial.
- f. That the claimant was not served and only served a day before the matter proceeded for Notice to Show cause contrary to procedure.

g. That the affidavits of service sworn by Solomon W. Njoroge on 12<sup>th</sup> November, 2019 and 2<sup>nd</sup> December, 2019 are false and he seeks leave of this court to cross examine the said process server.

h. That the process in which the warrants were executed was against the law since the taxing officer ordered the warrant to be executed by a police officer when the same ought to be executed by a Court Bailiff.

i. That the warrants were issued unprocedurally and therefore seeks the same to be stayed and he be granted leave to object to the items in the Bill of costs.

3. In opposing the application, the Respondents through its advocate on record **C. MBURU KOIGI**, swore a replying affidavit dated 2<sup>nd</sup> March, 2021 and filed in this Court on 4<sup>th</sup> March, 2021 on the following grounds;

i. That the application herein is frivolous, vexatious, forlorn and an abuse of Court process, instituted by the claimant out of selfish and self-serving interest.

ii. That the Bill of costs dated 24<sup>th</sup> January, 2017 came up for hearing on 8<sup>th</sup> March, 2017 when the advocates for both parties agreed to dispose of the application by way of written submission and indeed filed submissions with the ruling reserved for 10<sup>th</sup> October, 2017.

iii. That, by a Notice of Change of Advocate dated 25<sup>th</sup> September, 2017, the claimant appointed the firm of J.M Njoroge to act for him and when the ruling was delivered as scheduled on 10<sup>th</sup> October, 2017, the said advocates sought for stay for 21 days which was granted.

iv. That the claimant failed to take any action during the time sought for stay till 12<sup>th</sup> March, 2018 when he filed an application under certificate of urgency seeking for stay of execution and leave to seek reasons for the taxation and sought to change his advocates now to Wamaasa, Masese, Nyamwange and company advocates which application was never prosecuted only to be withdrawn this year.

v. That the claimant herein only seeks to delay the execution of this matter.

vi. That the allegation that the claimant was not informed of the Notice to Show Cause by his then advocates to act on it is an afterthought.

vii. That the respondent is seeking to execute a certificate of cost after the claimant suit was struck out with costs to them therefore there is not decree but a ruling that culminated to the certificate of costs.

4. The Court directed on 4<sup>th</sup> March, 2021 for the application to be disposed of by way of written submissions with the applicant filing on 20<sup>th</sup> April, 2021 and the respondent filing on 25<sup>th</sup> March, 2021.

#### **Applicant's submissions**

5. The applicant counsel submitted that due execution procedure was not followed in applying for the notice to show cause and subsequent warrant of arrest as No decree or order was extracted by the Respondents contrary to express provision of Rules 31 and 32 of the Employment and Labour relations Court (Procedure) Rules. According to counsel failure to extract the said Order went to the core of execution proceedings and invalidates the whole process. He relied on the case of **Rubo Kimnetich arap cheruiyot -Versus- Peter Kiprop Rotich [ 2006] eklr**.

6. It was submitted that the Notice to show cause was never served to the claimant, however that even if the same was served as indicated in the affidavit of service it was served one day prior to hearing contrary to procedure that require service be conducted at least three days prior to hearing, he buttressed his argument by citing the case of **Elizabeth Kavere and another –v- Lilian Atho and another [ 2020] eklr**.

7. It was submitted that, for the claimant to be committed to civil jail, the respondent had to strictly comply with Section 38 of the civil procedure Act and Order 22 Rule 31(1) of the civil procedure Rules and cited the case of **Solomon muuriithi Gitandu and another –v- Jared Maingi Mburu [2017] eklr**.

8. Counsel took issue with the fact that the taxing officer made an order that the orders be executed by OCS Nakuru Central police station and argues that execution of Court orders are a preserve of Court Bailiffs and the Police officers are normally called upon albeit on rare cases to ensure law and order while the said orders are executed. He buttressed this argument by relying on the cases of **Republic –v-v Chesang Resident Magistrate & 2 others exparte Paul Karanja Kamunge t/a Davisco agencies and 2 others [2017] eklr** and **George Arab Mu;I Mwalabu –v- Senior Resident Magistrate Kangundo and 2 others; Festus Mbai Mbonye (interested party) [2019] eklr**.

9. Counsel submitted that this Court is empowered under Rule 11 (4) of the Advocates Remuneration Order to enlarge time to enable the claimant object to the items in the Bill of Cost. Further that the failure to object to the said items was occasioned by the claimants advocates then on record who failed to inform the claimant the outcome of the said taxation in good time. Accordingly, he submitted that action of an advocate ought not be revisited upon a client and cited the case of **George Kagima Kariuki & 2 others –versus- George M. Gichimu & 2 others [2014] eklr**.

10. Counsel submitted that the claimant seeks to object to the items on the bill of cost as the same were taxed without following the law therefore urged this Court to exercise its discretion and allow the application as prayed with costs as the Respondent failed to follow the rules while seeking to execute the said warrants.

### **Respondents Submissions**

11. The respondents counsel submitted that objections of any items in a Bill of cost ought to be done within 14 days of the said Ruling as stated under paragraph 11 of the Advocates remuneration order 2014 therefore, the claimant is way out of time and the reasons given for the delay is not satisfactory. He cited the supreme court case of **County executive of Kisumu-v- County Government of Kisumu & 8 others [2017] eKlr** and urged this court to dismiss the claimant/ Applicant' application.

12. It was submitted that the applicant herein has sought for stay more than once first when the ruling on the taxation was delivered which he sought for 21days and secondly on their application of 12<sup>th</sup> March, 2018 which he failed to prosecute till 19<sup>th</sup> February, 2021 that he withdrew and filed this current application as such the applicant lack good faith in this application.

13. Counsel submitted that when no good reason is advanced by an applicant, it behooves this Court to decline any prayer to enlarge time to allow the applicant file a reference to the Bill of cost. Counsel cited the case of **Republic –versus- Kenyatta Unoversisty and another Ex parte Wellington Kihato Wamburu [2018] eKlr** where the court faced with a similar Application which the applicant sought extension of time to file a reference to a bill of costs delivered on 19<sup>th</sup> October, 2017 on 14<sup>th</sup> December, 2017 about 2 months later was declined by the court stating that the applicant had to satisfy the court of the reasons for the delay since extension of time is not granted as of right.

16. In conclusion Counsel submitted that timelines provided by statutes have to be followed to the latter to ensure procedural order and certainty within judicial system and cited the court of Appeal case of **Mario Rossi –v- salama beach hotel limited [ 2018] eKlr**.

15. I have examined the averments of the parties herein. From the evidence on record the impugned application proceed inter partes by consent by way of written submissions on 8/3/2013.

16. The matter was later mentioned and a ruling reserved for 10/10/2017. The ruling was actually delivered as scheduled and the Respondent's (applicant) herein sought for stay which was granted for 21 days.

17. The assertion by the applicant that notice was not given to him in time is not therefore true as the ruling was delivered in his presence.

18. The other issues being raised in the ruling refer to what should be subjected to a reference and which reference was never filed since 2017.

19. To avoid a miscarriage of justice, I will direct that the applicant will appear before the Deputy Registrar for a NTSC consideration before further directions are given.

20. The warrant of arrest will be stayed in the meantime.

21. The application to enlarge time to file a reference is denied due to the delay occasioned by the applicant in filing this application since 2017.

22. Costs in the cause.

**RULING DELIVERED VIRTUALLY THIS 3<sup>RD</sup> DAY OF JUNE, 2021**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**

Konosi for claimant – present

Kipkoech for respondent - present

Court Assistant - Fred