



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

PETITION NO.23 OF 2019

JOHN NDUNDA.....PETITIONER

VERSUS

HON. ROBA DUBA GENERAL SECRETARY

KENYA COUNTY GOVERNMENT WORKERS UNION.....1ST RESPONDENT

NATIONAL DELEGATES CONFERENCE

KENYA COUNTY GOVERNMENT WORKERS UNION.....2ND RESPONDENT

NATIONAL ELECTIONS BOARD

KENYA COUNTY GOVERNMENT WORKERS UNION.....3RD RESPONDENT

NATIONAL SECRETARIAT

KENYA COUNTY GOVERNMENT WORKERS UNION....4TH RESPONDENT

RULING

The petitioner filed application and Notice of Motion dated 25th June, 2019 and seeking for orders that there be stay of execution of taxation and decree issued on 23rd May, 2019 pending the hearing and determination of the intended appeal. The petitioner is also seeking for leave to appeal out of time against the taxation and decree of the Deputy Registrar delivered on 23rd May, 2019.

The application is supported by the affidavit of the petitioner and on the grounds that the bill of costs was filed under the wrong provisions of the law and against the wrong parties and thus entirely defective. There was a misjoinder in the bill of costs and the taxation thereof. The petitioner was not involved in the process and subsequent decree thereof against the principles of natural justice and the right to a fair hearing.

Other grounds in support of the application are that the bill of costs does not meet the threshold stipulated under the constitution, the Labour Institutions Act and the Labour Relations Act and the instant appeal has high chances of success.

That in the interests of justice the taxation order and the decree be reviewed set aside and or be dismissed.

In his affidavit, the petitioner avers that judgement was delivered on 22nd September, 2017 in favour of the respondents who then filed a bill of costs and taxation done thereof without his participation. The bill was taxed against him as an individual in error whereas the petition was filed in a representative capacity as the secretary of Nakuru Kenya County Government Workers Union. To proceed with the taxation as done was a misjoinder.

The petitioner also avers that the bill as taxed failed to meet the provisions of the Labour Institutions Act and the Labour Relations Act. He has been personally served with warrants of attachment and execution documents thereof and if the application is not allowed he stands to suffer irreparable loss and damage together with his family and his intended appeal rendered nugatory.

In response, the respondents filed the Replying Affidavit of Brian Otieno, Advocate for the respondents and who avers that he has the personal conduct of the matter herein. There was judgement delivered in favour of the respondents herein on 22nd September, 2017 dismissing the petition with costs to the respondents and upon which there was a bill of costs filed dated 17th September, 2018.

The Notice of taxation together with the party and party bill of costs were served upon the petitioner on 25th September, 2018 indicating the matter was coming up for taxation on 16th October, 2018. Service was effected on 25th September, 2018 and returns filed in this regard.

The petitioners appointed his Advocates to represent him in the taxation vide notice dated 1st October, 2018. A Notice of Preliminary Objections was filed on 16th October, 2018 and on the grounds that the bill of costs had been filed under the wrong provisions of the law, it was defective and there was a misjoinder of the petitioner in the bill of costs. These grounds are similar to what the petitioner has addressed in the instant application. These were addressed by the Deputy Registrar.

Both parties attended taxation by filing written submissions and mention was scheduled for 6th November, 2018 to confirm but the petitioner did not comply. The respondents served the petitioner with their written submissions and filed returns to confirm the same.

On 4th December, 2018 the matter was scheduled for the highlighting of written submissions when the petitioner sought adjournment. No written submissions had been filed but the court rescheduled the matter for 22nd January, 2019 when the petitioner failed to attend court. A ruling was reserved and delivered on 21st May, 2019.

Mr Otieno avers that the petitioner has herein demonstrated lack of diligence and attendances even when invited and served to attend court and urge his case. The Taxing master attended to the bill of costs and rendered ruling and a Certificate of Costs dated 23rd May, 2019 issued in favour of the respondents.

The taxing master properly followed the due process in taxing the bill of costs as under section 14 of the Advocates Remuneration Order. The petitioner having failed to argue and file submissions on the Notice of Preliminary Objections cannot blame the respondents. He cannot claim he was denied audience whereas the court went out of its way to accommodate him.

There are no compelling reasons given to justify the orders sought.

The petitioner filed the current petition in person and not for or on behalf of any other party or entity. The application of Labour Relations Act or the Labour Institution Act to challenge the application of the bill of cost upon the petitioner is not proper as he remains the petitioner herein. There is no misjoinder of any party. Under the Union constitution, Article 6 (2.) only allows the general secretary to represent the union in disputes resolution and not any other party.

Where the petitioner was dissatisfied with the ruling of the Deputy Registrar he ought to have filed a reference within 14 days or with leave of the court which he has not done within the stipulated time. The court cannot interfere with the discretion of the taxing master unless there is or there are sufficient grounds to justify the same and on the grounds that the taxing master was clearly wrong which has not been demonstrated in this instance.

The application as filed lacks merit and should be dismissed with costs.

Both parties were directed to file written submissions.

The respondents filed their written submissions on 23rd July, 2019.

Despite the petitioner being allocated more time, there was no compliance and there are no written submissions.

The petitioner being the applicant in the instant matter, without any written submissions, the court shall address the instant application based on the affidavits, the written submissions by the respondents and the applicable law.

The issues which emerge for determination are;

Whether the court should allow the stay of execution pending the hearing of the intended appeal against the decision of the taxing master;

Whether the court should grant leave to appeal out of time against the taxation and decree of the Deputy Registrar delivered on 23rd May, 2019; and

Who should pay costs?

With regard to stay of execution of the Deputy Registrar decision of 23rd May, 2019 pending the hearing and determination of the intended appeal, for the court to properly address this issue, a determination of the second issue on the application for leave to appeal out of time against the taxation and decree of the Deputy Registrar delivered on 23rd May, 2019 shall well inform on the first issue.

Time extension to file appeal out of time against the decision of a taxing master is well addressed in the case of **Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 6 others [2013] eKLR** that;

... , the appellant did not make even a feeble pretence to explain his default and seek this Court's indulgence whether by application for extension of time or even in answer to the application before us. Instead, the appellant has exhibited uncommon bravado in the face of a serious challenge to the validity of his appeal. He has resorted to a rather intemperate condescending, and unwarranted attack on the applicants for filing this application. ...

Similarly herein, there is no effort by the petitioner as the applicant to explain why he was delayed in the filing of his reference upon the delivery of the ruling of the taxing master. To attack the respondents on the grounds that the bill of costs was frivolous does not explain the delays. To state that there was misjoinder of the parties too does not explain the delay. Equally, the petitioner having fully participated in the process of taxation by being invited, attending or failing to attend despite being served cannot now turn around and alleged he was not involved in the process. He chose to attend as will and opted not to attend out of will. He was well represented by an advocate in the entire process.

A party who is seeking for extension of time has the burden of laying the basis for the same to the satisfaction of the court and upon such a demonstration that there is merit in the reasons and or explanation given for the delay, the court on good basis can allow and extend time for the filing of the appeal.

The alleged delay cannot be left to the court to surmise. The applicant must address to the satisfaction of the court.

There are no good or reasonable grounds established for the extension of time to file appeal out of time.

On this basis, with regard to stay of execution to file an intended appeal, the foundation for time to file appeal lost, the intention expressed with the filing of the Notice of Appeal cannot stand on its own.

Even where stay of execution of the taxing master ruling of 23rd May, 2019 is to be addressed on its own merits, stay orders ought to be issued by the court which issued the impugned orders. In **Labh Singh Harman Singh Ltd versus Attorney General & 2 others [2016] eKLR** the court held that;

... taxation of costs is part of the execution process, complete with its provisions for stay of execution, under the Civil Procedure Rules. ... the provisions of the Civil Procedure Act with regard to stay of execution will apply to proceedings, which are of a civil nature, for the reference of an objection to the Court from the taxation of a Bill of Cost by a Taxing Officer of the Court under the Advocates' Remuneration Order. ...

This position accords with the interests of justice that a party against whom substantial sums of money have been adjudged in the nature of taxed costs should not be required to pay such monies before his challenge on the liability and quantum of the taxed costs is determined through a reference under the Advocates' Remuneration Order, which is the procedure provided for such determination. Otherwise such references would be rendered nugatory, if eventually successful, and become a complete waste of judicial time

The petitioner has not made any effort to address as above. There is no effort to urge the application as filed. There is therefore no good basis for the grant of orders of stay of execution.

The claimant has also addressed the issue of misjoinder in the taxation proceedings on the grounds that this is done contrary to the provisions of the Labour Institutions Act and the Labour Relations Act. he however denies of this court the material behind such assertions. Without his written submissions to support such allegation, the court is left to rely on the filed affidavits and submissions from the respondents.

In the main petition, the petitioner described himself as a male adult and his case was that the respondents violated his rights by denying him the right to participate in the 4th respondents' elections. The petition is filed in a personal capacity and in a representative capacity. Had such been the case, the petitioner did not address such matter by filing the requisite support records to address the alleged filing of the petition in a representative capacity. This is not a matter which can be introduced at this instance to stall execution. The question of joinder or non-joinder of parties ought to have been addressed instantly and before the parties commenced the hearing of the petition.

This is the petitioner's case. He brought the respondents to court. He lost the case and ordered to pay costs. Such is in meeting the ends of justice.

Accordingly, application dated 25th June, 2019 is hereby found without merit and is dismissed. Costs to the respondents.

Delivered at Nakuru this 23rd day of January, 2020.

M. MBAR?

JUDGE

In the presence of: