



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1096 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 28th May, 2019)

JOHN MUNGUTI NZIOKA..... CLAIMANT

VERSUS

M&S LOGISTICS LIMITEDRESPONDENT

RULING

1. The Application before Court is the one dated 30th January, 2019. The Application was filed under a Certificate of Urgency through Chamber Summons filed under Rule 11 and 12 of the Advocates Remuneration Order.

2. The Application seeks the following Orders:-

1. THAT the instant summons be certified as urgent and heard ex-parte in the first instance.

2. THAT pending hearing and determination of this Application this Honourable Court be pleased to stay the Warrant of sale of property in execution of a decree for money issued herein on 26th September, 2018.

3. THAT the decision of the Learned Deputy Registrar dated 17th December, 2019 with respect to items 1, 12, 13, 30, 32, 33, 48, 62, 76, 77, 78, 84, 91, 94, 105, 106, 107 and 117 on instruction fees, Mentions and Hearings itemised in the Bill of Costs dated 17th January, 2019 be set aside and taxed a fresh by this Honourable Court.

4. THAT the Costs of this Application be in the cause.

3. This Application is premised on the grounds that:-

a) By a Ruling dated 17th January, 2019 the Hon. Daisy Mutai DR directed the Applicant to pay the Claimant's Costs in the amount of Kshs. 178,909/=.

b) The Deputy Registrar failed to take into account the scale of fees prescribed under Schedule VI Rule 7 (d) of the Advocates (Remuneration) Order 2014 (herein after referred to as "the Order") in an Employment and Labour Relations Suit where the Claimant sought payment of outstanding terminal benefits. In awarding an amount higher than the minimum, the Learned Deputy Registrar failed to give any justification as prescribed under the said schedule.

c) The Respondent's property is at risk of being sold through auction, that unless the Court intervenes the Respondents property will be unjustly sold rendering the Appeal nugatory.

d) The costs awarded by the impugned Ruling dated 17th January, 2019 is higher than the amount awarded to the Claimant as the Judgment amount.

e) This Honourable Court is bestowed with the powers to grant such orders ex-debito justitiae and to avert an injustice being occasioned.

4. The Application is supported by the Affidavit of **CAIN MINGO** sworn on 30th January, 2019 in which he reiterates the averments made

in the Chamber Summons Application.

5. The Claimant opposed this Application vide a Replying Affidavit filed in Court on 15th February, 2019 deponed by **ALFRED NYABENA**, Counsel on record for the Claimant/Respondent, in which he avers that the instant Application is incompetent, a non-starter, frivolous, scandalous, incurably defective in form, substance and law and is an abuse to the Court process and ought to be struck out or dismissed with costs.

6. The Claimant/Respondent avers that the Applicant has failed to disclose the fact that in its submissions to the Claimant's Party and Party Bill of Costs dated 3rd October, 2018, it submitted that the same be taxed at Kshs. 195,979/= which is an amount higher than the actual amount, the Bill was taxed at which was Kshs. 178,909/=. Counsel further averred that setting aside the amount for fresh taxation would amount to an abuse to the Court Process as the same was taxed at an amount lower than the amount submitted.

7. It is further contended that the instant Application is frivolous as the Counsel who swears the Supporting Affidavit is in fact a stranger to the Claim as he practices for the firm of Amalemba & Associates yet the firm that is on record for the Respondent/Applicant is Conrad Maloba & Associates.

8. The Claimant/Respondent stated that the Respondent/Applicant has not filed a Notice of Objection to the taxed off amount of Kshs. 178,909/= and as such has not raised plausible grounds for interference with the discretion and decision of the Honourable Taxing Officer and further urged the Court to dismiss the instant Application with costs.

9. It is the Claimant/Respondent's contention that the Application has been brought in bad faith and as a tactic to delay and deny the Claimant/Decree Holder from enjoying the fruits of the decree in this favour.

10. The Claimant/Respondent further contended that granting the Orders sought in the Application pending before this Honourable Court will cause him to suffer irreparable damage and that further the Application is only aimed at defeating the cause of justice and is an afterthought

11. In conclusion, the Claimant/Respondent urged the Court to dismiss the Application with costs to the Claimant/Respondent as litigation must come to an end.

12. The Respondent/Applicant filed a Supplementary Affidavit sworn by CAIN MINGO on 11th March, 2019 and filed in Court on 12th March, 2019 in response to the Claimant/Respondent's Replying Affidavit dated 15th February, 2019, in which he avers that the Respondent/Applicant failed to follow the right procedure to obtain a decree by sending a draft copy to the Applicant for approval.

13. He further contends that since the Respondent was not served with the draft decree for approval the decretal amount of Kshs. 178,795/= ought to have been subjected to statutory deductions at 30% as per Section 49 (2) of the Employment Act, 2007 bringing the final payment to Kshs. 125,157/=.

14. The Respondent/Applicant contended that the instant Application be allowed with costs.

15. In disposing of the instant Application, the parties agreed to file written submissions.

Respondent's/Applicant's Submissions

16. It is submitted by the Respondent/Applicant that the terminal benefits as awarded by the Court ought to have been subjected to statutory deductions of 30% as per Section 49 (2) of the Employment Act, 2007 bringing the full payment to the Claimant to Kshs. 125,157/-. For emphasis the Respondent/Applicant cited the Authority of **Kioko Joseph (Suing as the Representative of the estate of Joseph Kilinda Vs Bamburi Cement Limited (2016) eKLR** where Rika J cited with approval and followed the decision in **Cause No. 748 of 2011 Andrew Mukite Saisi Vs Tracker Group of Companies** where it was held:-

"Section 49 of the Employment Act makes any payments made by the Employer under Section 49, subject to statutory deduction.... The Court proceeded to hold that the Claimant had an obligation to pay taxes assessed on the global award".

17. The Respondent/Applicant further submitted that the items listed as Mentions and Hearings have grossly been exaggerated which is contrary to the provisions of Section 7 (d) of the Advocates Remuneration Order.

18. It is further submitted that the correct figure for each of the items ought to be Kshs. 1100/- and not Kshs. 3,000/- as taxed. It was the Respondent's submission that the said amount ought to be taxed off accordingly.

19. The Respondent contended that the decree ought to have been served upon them for approval and is therefore defective. To fortify this submission the Respondent/Applicant relied on the Authority of **Eco Bank Limited Vs Elsek & Elsek (Kenya) Limited & 3 Others eKLR**.

20. The Respondent further contended that the decree is defective as the Claimant's Advocate did not consider the statutory deductions and that further given that the draft decree was not forwarded for approval the Applicant could not amend nor approve the same.

21. In conclusion, the Respondent/Applicant urged the Court to allow the instant Application having duly demonstrated that the decree was

obtained without following due process. They further urged the Court that the excess amount of Kshs. 53,638/- be remitted to the Respondent's account or in the alternative be paid to the Auctioneers.

Claimant/Decree Holder's Submissions

22. It is submitted by the Claimant that the Applicant has not satisfied the requirements for granting of stay of execution as provided under Order 42 Rule 6 of the Civil Procedure Rules.

23. It is further submitted that the instant Application is misleading, had been brought in bad faith and ought to be dismissed with costs. Further, the Applicant has neither indicated to the Court by way of evidence of Appeal attached to their Application nor has it given any reason sufficient for granting of the stay orders as sought.

24. The Claimant contended that the principles of taxation of Courts requires that save in exceptional cases, a judge ought not to interfere with the assessment of what the taxing officer considers as a responsible fee.

25. The Claimant further contended that the Applicant has failed to comply with the provisions of paragraph 11 of the Advocates Remuneration Order on the process of Appeals and the process to be followed thereto. To fortify this argument the Claimant relied on the case of **Thomas K'bahati T/A K'bahati & Co. Advocates Vs Janendra Raichand Shah (2018) eKLR** where Hon. Yano J while quoting the decision in **Gacau Kariuki & Co. Advocates Vs Allan Mbugua Ng'ang'a (2012) eKLR** in which it was stated:-

"I must make it very clear that what is before me is not a reference from taxation but an application seeking to set aside the orders made on 29th day of September 2011 and 27th day of October 2011. The Orders which were made on 29th day of September 2011 were made by the Deputy Registrar in her capacity as the taxing master taxed the Bill as presented. What is the procedure of challenging such a decision? In my view the only available recourse to a person aggrieved by a decision of a taxing officer is to lodge a reference. Where a person discovers the fact of taxation after the time stipulated as it is alleged herein, Paragraph 11 (4) of the Advocates Remuneration Order empowers the Court to extend time. It has been said that time and again that where there is a specific procedure provided for addressing a grievance, that procedure should be strictly complied with."

26. In conclusion, the Claimant urged the Court to dismiss the instant Application with costs to the Claimant/Respondent.

27. I have examined the averments of the parties herein. Under paragraph 11(1) and (2) of the Advocates Remuneration Order provides as follows:-

"Appeals to decision on taxation and appeal to Court of Appeal:-

1) Should any party object to the decision of the Taxing officer, he may within fourteen days after the decision given notice in writing to the Taxing officer of the item of taxation, which he objects.

2) The Taxing officer shall forthwith record and forward to the objection reasons for his decision on those items and the Objector may within fourteen days from the receipt of those reasons apply to the Judge by Chamber Summons, which shall be served on all the parties concerned setting out the grounds of his objection."

28. The wording of 11(2) above are couched in mandatory terms.

29. The ruling on the taxation in this matter was made on 17/1/2019. I have looked at the Court record and I do not see any objection of any taxed item presented to the Deputy Registrar. I also do not see any reference to the objection to the High Court as per paragraph 11(2) above. In my view, the application before Court is irregularly filed.

30. Other than this irregularly filed reference, the main contention by the Respondent/Applicant is that the taxed amount should be subjected to 30% tax. The amount in contention is fees or disbursements paid out. This is not a benefit, which should be subjected to tax. The contention by the Applicant lacks any legal backing in my view and should not be allowed to stand.

31. I do not find the application merited in the circumstances and I dismiss it accordingly with costs.

Dated and delivered in open Court this 28th day of May, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Okoth holding brief Nyabena for Claimant - Present

Respondents – Absent