REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

Coram: N.S. Ndungu, SCJ)

CIVIL APPLICATION NO. 32 OF 2014

JOSEPH AMISI OMUKANDIA... APPLICANT

-VERSUS-

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
OF KENYA (IEBC).................................... ....1ST RESPONDENT

WILSON KIMUTAI KIPCHUMBA
(RETURNING OFFICERNAVAKHOLO CONSTITUENCY) ....2ND RESPONDENT

EMMANUEL WANGWE..3RD RESPONDENT

(An application for Review, from the ruling of the Supreme Court of Kenya dated 29th November, 2016 in Civil Application No. 32 of 2014)

<u>RULING</u>

A. INTRODUCTION.

[1] The current application seeks a review of the ruling by the Deputy Registrar of the Supreme Court of Kenya dated 29th November, 2016 in Civil Application No. 32 of 2014.

[2] This matter originates from a party and party bill of costs filed by the 1st and 2nd Respondents having successfully opposed an Application before this Court seeking for an extension of time to file an appeal dated through a Notice of Motion dated 28th March, 2014. The Applicant's said application was dismissed on 12th March, 2015 and costs of the application were awarded to the Respondents.

[3] The 1st and 2nd Respondents taxed their Bill at Kshs. 7, 018, 425.72, on 3rd November, 2015 and the 3rd Respondent taxed his Bill at Kshs. 2, 100, 800 on 15th December, 2015.

[4] From the proceedings on record, the matter came up for taxation on 19th October, 2016 where Ann Asugah, the taxing officer noted as follows "…… ***there was no indication that the Applicant was served with the taxation Notice…….***" On the same date, it is further observed that there was no indication from the Applicant whether he was opposing the Bills which were served by the 1st, 2nd and 3rd Respondents on 9th November, 2015 and 12th January, 2016 respectively.

[5] At the hearing for taxation 19th October, 2016, the Respondents relied on what was already filed on the record. The taxing officer made orders directing the Applicant to file his opposition to the Bills by 10th November, 2016, while at the same time stating she would make a ruling on the same on 29th November, 2016.

[6] On 29th November, 2016, just before the ruling was read the issue arose as to whether the Bills of costs was ever served upon the Applicant. In response, the 1st and 2nd Respondents confirmed to the Court that their Bill of Costs had been served on 12th January, 2016. However it emerged that the Taxation Notice was not served upon the Applicant. In spite of this, the ruling was issued.

[7] The 1st and 2nd Respondents' Bill of Costs was taxed at Kshs. 433, 578 and the 3rd Respondent's bill was taxed at Kshs. 414, 450 both against the Applicant.

[8] Being aggrieved by the ruling of the Deputy Registrar, the Applicant filed the instant application, seeking a review of the Deputy Registrar's ruling dated 29th November, 2016.

[9] The Application is premised on the grounds that that despite being served with the Bill of Costs, there was no service of a hearing notice and taxation proceeded *ex parte*.

[10] The Applicant avers that he was only served with the ruling date and failure to serve him with the taxation date denied him the right to be heard, consequently, prejudice was occasioned upon him.

B. ISSUES FOR DETERMINATION.

[11] In view of all pleadings, the following are in my view, the relevant issues for determination:

a. *Whether the Applicant was served with a Taxation Notice?*
b. *Whether the Applicant was prejudiced with the taxation proceedings?*
c. *Whether the Applicant is entitled to the costs of this application?*

[12] Pursuant to the proceedings on record the matter came up for taxation on 19th October, 2016 in the absence of the Applicant. From the record, there was no indication whether the Applicant was served with the Taxation notice.

[13] It is not disputed that the Applicant was not aware of the orders directing them to file their response within 7 days from the date of taxation before the ruling could be delivered. Neither of the Respondents has rebutted the Applicant's averments.

[14] As pertains service of Court process the following Supreme Court Rules provide as follows:

> ***"Rule 47. Service of all Court process shall be effected by a designated and/or licensed Court process server in accordance with Rule 10 of the Supreme Court Rules, 2012.***
>
> ***Rule 48. Upon effecting service, the Court process server shall promptly file in Court an affidavit of return of service indicating the following: (i) the date and time when service was effected; (ii) the person(s) upon whom service was effected, and how he/she/it was identified; and (iii) the place where service was effected, and the circumstances of the service.***
>
> ***49. The affidavit of return of service shall have annexed to it the original process served, duly signed by the person served.***
>
> ***50. Where the Court process server is unable to effect service, the Court may grant leave for substituted service on the application by a party***

[15] Rule 6 of the Third Schedule of the Supreme Court Act No.7 of the 2011 provides thus:

> "***when a bill of costs has been lodged, the taxing officer shall issue a notice to all parties concerned or their advocates giving the date, time and place at which the bill will be taxed***".

[16] The conditions under which this court can interfere with the Taxing Officer's exercise of discretion are well settled. The principles as set out in the case of **First American Bank of Kenya vs. Shah & Others Nairobi (Milimani) HCCC No. 2255 of 2000 [2002] 1 EA 64,** were: -

" Firstly, that the Court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle; secondly, it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration Order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, *<u>the general conduct of the proceedings</u>* and any direction by the trial judge; thirdly, if the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high; Fourthly, it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary."

[17] The above stated principles were also re-affirmed by the Court of Appeal in ***<u>Joreth Limited Vs Kigano and Associates</u>*** **[2002] 1 E.A 92** where the Court stated thus:

"We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assets such instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, <u>the interest of the parties</u>, <u>the general conduct of the proceedings,</u> any direction by the trial Judge and all other relevant circumstances. That is what CK Njai Esq did when he said......."

[18] Service of court process and according parties in a Taxation proceeding a right to be heard forms part and parcel of general conduct of the proceedings which the Taxing Officer shall consider before deciding on the Bill of Costs. These vital processes were not complied with before the ruling of 29th November, 2016 could be issued.

[19] There is no affidavit of service on record to show that the Applicant was served with the Taxation Notice. For this reason, I find the Applicant was not served with the Taxation Notice and thereby denied an opportunity to be heard before the Bill of Costs could be taxed.

[20] For the foregoing reasons, I find the applicant was not at fault and is entitled to be given a fresh hearing on the Bills of Costs, and this hearing will not cause the respondents any prejudice that cannot be compensated with costs in the cause. I find that this application has merit.

[21] I accordingly make the following orders:

(a). **The Deputy Registrar's Ruling dated 29th November, 2016 be and is hereby set aside.**

(b). The 1st and 2nd Respondents' Party /Party Bill of Costs as well as the 3rd Respondent's Party/Party Bill of Costs be submitted for fresh taxation before the Deputy Registrar of the Court.

(c). The costs of this application shall be in the cause.

DATED and DELIVERED at NAIROBI this 26th day of February, 2018.

N.S. NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT