Case Number:	Petition 2 of 2014
Date Delivered:	15 Nov 2017
Case Class:	Civil
Court:	High Court at Kericho
Case Action:	Ruling
Judge:	Mumbi Ngugi
Citation:	Henry Belsoi & another v Sololo Investments Limited & 3 others [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Constitutional and Judicial Review
History Magistrates:	-
County:	Kericho
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CONSTITUTION AND JUDICIAL REVIEW DIVISION

PETITION NO. 2 OF 2014

HENRY BELSOI.....1ST PETITONER/APPLICANT

YASANGWAN HOLDINGS LIMITED.....2ND PETITIONER/APPLICANT

VERSUS

SOLOLO INVESTMENTS LIMITED.....1ST RESPONDENT

DR. DAVY KOECH.....2ND RESPONDENT

AND

THE REGISTRAR OF COMPANIES.....1ST INTERESTED PARTY

TEA HOTEL LIMITED.....2ND INTERESTED PARTY

WILLIAM KIPKEMOI KETTIENYA.....3RD INTERESTED PARTY/RESPONDENT

WILLIAM KIMUTAI.....4TH INTERESTED PARTY/RESPONDENT

RULING

1. The applicants/petitioners have filed the application dated 3rd May 2016 in which they seek the following orders:

1. THAT this matter be certified as urgent and that the same be heard and orders given ex-parte in the first instance.

2. THAT pending inter partes hearing of this application, there be a stay of execution against the Applicants.

3. THAT pending the hearing and determination of this application, there be a stay of execution against the applicants

4. THAT ex-parte Ruling delivered on 23.10.2015 be set aside and that the Notice of Motion and Chamber Summons both dated 3.03.2015 be heard de novo.

5. THAT in the alternative and without prejudice to prayer (4) above, the court do make a clear finding on the fate of the Applicant's Notice of Motion and chamber summons both dated 3.03.2015 and thus give the Applicant's leave to put in fresh applications and as the case may be leave to appeal out of time.

6. THAT the costs of this application be borne by the Respondents.

2. The application is supported by an affidavit sworn on 29th April 2016 by the 1st petitioner, Henry Belsoi, and is based on the following grounds:

(a) Costs were never awarded to the interested parties.

(b) Advocates Remuneration Order "Article J Schedule 7" does not exist in the Advocates (Remuneration) (Amendment) order, 2014.

(c) A finding of the court has to be clear, certain, unambiguous, non-technical and enforceable.

(d) It is trite law that the orders of the court cannot be issued in vain.

(e) The Applicants' constitutional right to be heard has been breached.

(f) Constitutional petitions and prerogative orders application do not attract hefty costs such as those awarded to the Respondents.

3. The application was opposed. The 1st and 2nd respondents filed Grounds of Opposition dated 3rd June 2016 in which they raised 7 grounds of opposition which, for reasons that will become obvious later, I need not set out in this ruling.

4. The 3rd interested party, William Kipkemoi Kettienya, filed a replying affidavit sworn on 13th June 2016. He avers in the said affidavit that the present application is intended to delay and embarass the finalization of the matter since the ruling that the applicants impugn was issued after the matter was heard on merit. It is his contention that the application is frivolous and vexatious and an abuse of the court process and urges the court to dismiss it with costs.

5. The present application arises from a taxation of a bill of costs by Hon. Kiniale in which she awarded costs of Kshs 521,659. The costs were awarded following the dismissal of the petitioners/applicants' petition in this matter, in which they had alleged violation of their constitutional rights.

6. At the taxation of the bill of costs, at which there was no representation for the petitioners/applicants, the taxing master noted that there was no appearance for the petitioners and the bill of costs having been drawn to scale as per the Advocates Remuneration Order "Article J" Schedule 7, went ahead to tax each bill as drawn.

7. Following this taxation, the applicants filed an application dated 3rd March 2015 seeking inter alia a stay of any adverse proceeedings pending *interpartes* hearing of the applications as well as a stay of execution against them. The applicants also sought orders setting aside the certificate of costs for a sum of KShs. 521,184/= issued to the respondents on 7th January 2015 and for enlargement of time under Order 11(1) of the Advocates Remuneration (Amendment) Order 2014.

8. After hearing counsel for the parties in the matter, Ongudi J, in her ruling dated 23rd October 2015, declined to issue the orders prayed for. She found that the applications were incompetent and ordered that they be struck out. She also held that the second limb of the applicants' prayer 4 had not been proved and dismissed it with costs.

9. The parties hereto have filed submissions on the present application. In their submissions, the applicants/petitioners contend that the ruling on taxation by the Deputy Registrar is based on a non-existent section of the Advocates (Remuneration) (Amendment) Order, 2014. That Schedule 7 is applicable only to costs of proceedings in the surbodinate courts and not to constitutional petitions. That constitutional petitions and prerogative orders applications based on public interest do not attract costs. The petitioners have relied on decisions from the Constitutional and Human Rights Divison of the High Court to support their contention that costs should not be awarded in constitutional petitions.

10. The petitioners also argue, it would appear in relation to the ruling of Ong'udi J of 23rd October 2015, that a finding of the court has to be clear, certain, unambiguous, non-technical and enforceable. They therefore urge the court to grant the orders that they seek in their application.

11. In submissions in response, the respondents argue that the application dated 3rd May 2016 is incmpetent and should be dismissed. It is their contention, first, that it is incompetent as it fails to comply with Order 9 Rule 2 (c) of the Civil Procedure Rules as there was no resolution of the company authorizing the filing of the applcation. They contend that the 1st petitioner, Henry

Belsoi, did not have the appropriate *locus standi* to institute the present application and it should therefore be struck out with costs.

12. The respondents further argue that the present application is intended to circumvent the hearing of the Notice to Show Cause why the appicant should not be committed to civil jail in default of paying KShs. 531,659/= being taxed costs. It is their case that the application had been filed two days prior to the hearing of the said notice and obtained a stay of execution, thereby circumventing the said notice.

13. They submit, thirdly, that it is incorrect for the petitioners to argue that they were not heard by Ong'udi J. They submit that the learned judge considered the submissions of both parties before arriving at her ruling. The fact that the petitioners were not in court when the ruling was delivered cannot be a basis for arguing that they were not given a hearing. In their view, an order for hearing *de novo* of a matter which has been heard and a ruling given is not efficient use of available judicial adminstrative resources. It is also, in their view, frivolous, vexatious and an abuse of the court process.

14. The respondents further submit that the applicants have not given a reason why they delayed more than 6 months before filing the present application seeking to set aside the ruling of Ong'udi J. They urge the court to be guided by the decision of G.B.M Kariuki J (as he then was) in the case of **Elkana Ifedyha Oberi v Elkana Anayo Oreri & Another [2005] eKLR**.

15. As for the applicants' contention that costs should not have been awarded against them, the respondents submit that the applicants should have appealed to the Court of Appeal in view of the fact that costs are within the discretion of the court. Further, if the applicants were dissatisfied with the ruling of 23rd October 2015, they should have lodged an appeal against it, rather than wait for over six months to lodge the present application.

Analysis and Determination

16. My analysis of the present application and the petitioners' submissions in respect thereof leads to two conclusions. First, that it is aimed at challenging the decision of the taxing master, L. Kinilae, dated 18th February 2014 in which she assessed costs against the petitioners. As a result, the applicants are required to pay Kshs.531,659 or be committed to civil jail. The applicants did not seek to deal with their dissatisfaction over the taxation as contemplated under Pargaraph 11 of the Advocates Remuneration (Amendment) Order 2014. Instead, several months after the taxation, they filed the application dated 3rd May 2015.

17. This application was heard and determined by Ong'udi J, and a decision rendered on 23rd October 2015, in which the court found that the applicants had failed to follow the process outlined in paragraph 11 of the Advocates Remuneration (Amendment) Order 2014 for challenging the decison of the taxing master and dismissed their application, hence the second aspect of the application now before me. As I understand it, the applicants have directed the present application at the ruling of Ong'udi J dated 23rd October 2015 also. It appears to be an attempt to have the application heard *de novo*, the argument being that since the decision of Ong'udi J was delivered in the absence of the parties, it was *ex parte* and should be re-heard.

18. Can the court entertain the application and the two limbs thereof as set out above"First, it must be observed that the court did not make a decision without hearing the parties. What happened in the absence of the parties was the delivery of the ruling. The record indicates that the court heard the parties, but on the day it was delivering its ruling, none of the parties was present.

19. That cannot, by any stretch of the imagination, be deemed a situation in which parties were denied a hearing. Parties are not heard at the delivery of judgment or ruling, and nothing was placed before me to suggest that delivery of a judgment or ruling in the absence of a party or parties amounts to a denial of the right to a hearing. In any event, had that been the case, the option open to the applicants was to appeal againsst the decision, not to file the present application before a judge of concurrent jurisdiction.

20. The applicant has also argued that the ruling should be set aside as no costs are awarded in a public interest petition. First, this is not, in my view, the appropriate forum for challenging the decision of the court that heard the petition to award costs to the respondents. The court that heard and determined the petition, and dismissed it with costs to the respondents, had the discretion to make that decision. A party unhappy about an award of costs cannot seek to argue that point in an application such as the presnet one. The award of costs was by the court that heard the petition. Its execise of discretion in that regard can only be challenged by way of appeal to the appellate court, in this case, the Court of Appeal.

21. In any event, parties must disabuse themselves of the notion that labelling their personal claims constitutional petitions will

somehow shield them from the award of costs should such award be found merited. I can do no better in this regard then quote the words of Lenaola J(as he then was) in **Okiya Omtata Okoiti v Attorney General & Another [2014] eKLR** when he stated:

"…I must state that this Court has the responsibility of ensuring that parties do not file petitions in the guise of public interest for ulterior motives. To countenance such actions would be to promote an abuse of the Court process. A party with a genuine claim must endeavour to make its claim known to the Court for an appropriate redress. However, time has come to guard against parties who make reckless claims and who thus end up wasting judicial time and dragging parties in court in unwarranted litigation. Parties which approach the court in the name of public interest litigation must demonstrate that they are acting bona fide and not for personal gain or private motivation or other oblique considerations.

22. The petitioners' application is accordingly dismissed with costs to the respondents and the interested party.

Dated Delivered and Signed at Kericho this 15th day of November 2017.

MUMBI NGUGI

JUDGE