



REPUBLIC OF KENYA



Bruce Odeny & Company Advocates v Chhabhadia & 2 others (Miscellaneous Civil Application E001 of 2021) [2023] KEHC 19196 (KLR) (27 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19196 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E001 OF 2021**

RE ABURILI, J

JUNE 27, 2023

BETWEEN

BRUCE ODENY & COMPANY ADVOCATES APPLICANT

AND

KANJI DEVJI CHHABHADIA 1ST RESPONDENT

RAVJI DEVJI CHHABHADIA 2ND RESPONDENT

CHANDRAKANT DEVJI CHHABHADIA 3RD RESPONDENT

RULING

Introduction

1. Before me is an application brought pursuant to Rule 13A of the *Advocates Remuneration Order*, in which the applicant seeks the following orders:
 - a. The client/respondent be directed to furnish the court with all the books of accounts and valuation reports of each and every asset owned by the estate of the deceased herein.
 - b. In the alternative, the court to appoint the government valuer to undertake a comprehensive valuation exercise of the estate of the deceased as captured in the rectified certificate of confirmation dated 20-2-2019 for purposes of ascertaining its gross value.
 - c. That the costs of this application be provided for.
2. The application is supported by the grounds on its face as well as the supporting affidavit of Bruce O. Odeny Advocate.



3. It is the applicant's case that he acted for the estate of the deceased in Kisumu HCC Succ 784 of 2015 and ended up filing a Bill of Costs for Kshs 35,004,577 that was taxed at Kshs 91,034 vide a ruling dated 2-2-2021 with the taxing officer noting that the value of the deceased's estate was never ascertained.
4. The applicant further asserts that dissatisfied by the taxing officer's decision, he filed a reference dated 18-3-2021 which was determined on the 26-2-2022 and where the Judge noted that the value of the estate was Kshs 50,000,000 as disclosed in the P&A forms and thus the judge allowed the reference to the extent that the bills be returned for fresh taxation.
5. The applicant further stated that despite the valuation in the P & A forms, the respondent had further instructed him in Kisumu HCC Succ 784 of 2015 to apply for rectification of grant where more properties were introduced thus increasing the value of the subject matter which was not supported by any valuation thus necessitating a valuation of the deceased's estate.
6. In response, the respondents filed a replying affidavit on the 5th October 2022 sworn by one Ravji Devji Chhabhadia. It was the respondents' contention that the applicant via his instant application is relitigating issues that were determined by the learned Judge vide his ruling on the reference on the 26.8.2022 that confirmed that the deceased's estate was valued at Kshs 50,000,000.
7. The respondent further averred that the applicant's request for documents amounts to a fishing expedition in light of the finding by the learned Judge that the applicant failed to provide any proof that the value of the deceased's estate was Kshs 2,000,000,000.
8. It was further contended by the respondents that the instant application was a ruse by the applicant to appeal the Judge's finding on the reference.
9. The parties filed submissions to dispose of the matter.

The Applicant's Submissions

10. It was submitted that to enable the court effectually and conclusively adjudicate and determine the issues in dispute, a valuation of the deceased's estate is necessary as the respondent may have undervalued the deceased's assets and further, that the new included assets of the deceased were not valued.
11. The applicant submitted that empowered by Rule 13A of the *Advocates Remuneration Order*, the taxing officer is within her powers to verify the value of the deceased's estate in light of the applicant's claim of undervaluation and thus the taxing officer can summon and examine the respondents' books including calling for the valuation of the estate.
12. It was submitted that it was in the interest of justice and an aid to further assist the court to effectually and conclusively adjudicate and determine the issues in dispute if the orders sought are granted.

The Respondents' Submissions

13. It was submitted that the applicant was relitigating the same issues that were determined by the learned judge vide the ruling on the reference and that the instant application was disguised as a review of this Honourable Court's ruling on the Advocate – Client Bill of Costs delivered on the 2.2.2021.
14. It was further submitted that whereas the applicant states in his application that the learned judge allowed the reference that the Bill of Costs be returned for fresh taxation, the Judge only held that recalculations of drawings, attendances and disbursements were to be carried out by the taxing officer as contained in paragraph 29 – 33.



15. The respondents submitted that the applicant was seeking review of the judge's ruling but had not complied with section 80 of the Civil Procedure Code and Order 45 Rule 1 of the Civil Procedure Rules that provide for review of a court's decision and the grounds therein.
16. The respondents submitted that a reference was an appeal seeking to either set aside or alter the ruling of the decision of the taxing officer or of the judge to either tax the bill himself or refer it back to the taxing officer with appropriate directions as was held in Kipkorir Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR and thus it was not permissible to pursue an appeal and review concurrently.
17. It was submitted that the Advocates Remuneration Order was a complete code that excludes the application of provisions of the Civil Procedure Rules as held in the case of Doreen Nasieku Pussy, Advocates v Mara Conservancy [2005] eKLR.
18. It was submitted that the applicant's application lacks merit and ought to be dismissed as the applicant is asking the court to sit on appeal of the ruling on the reference it had earlier granted.

Analysis and Determination

19. I have carefully considered the pleadings filed herein by both parties and I find that the issue for determination is whether the applicant merits the orders sought.
20. As I understand it, the applicant seeks a valuation of the deceased's estate either by a government valuer or by the taxing officer exercising her powers under Rule 13A of the Advocates Remuneration Order.
21. The applicant's claim is that he received further instructions to rectify the grant and add new assets that changed the value of the deceased's estate from the previously set of Kshs 50,000,000.
22. On their part, the respondents contend that the applicant is seeking to review the ruling on reference of this court dated 26.8.2022 in which the court addressed itself to the issues raised herein by the applicant.
23. The question to be answered is whether the issues raised herein by the applicant had already been set forth before this court and adjudicated on and determined and if that is the case, then this court would not hazard to down its pen in light of the doctrine of res judicata.
24. The court record shows that on the 26.8.2022, F.A. Ochieng J (as he then was) delivered a ruling on a reference brought by the applicant in which the applicant sought to set aside the ruling of the Taxing officer dated 2.2.2021 on his Advocate – Client Bill of Costs on the grounds that the sum awarded was so excessively low that it constituted a punishment to him.
25. The genesis of the applicant's claim therein, as can be discerned was that the deceased's estate was not as claimed in the P & A forms, Kshs 50,000,000 but Kshs 2,000,000,000 as claimed by the applicant therein and herein due to an inclusion of other assets.
26. Indeed, the applicant herein had invoked the taxing officer's power under Rule 13A to *inter alia*, direct any party to produce books or documents as may be necessary for determination of any matter in dispute. However, the learned Judge found that in spite of Rule 13A, the applicant was still obligated to proof his assertion on the value of the deceased's estate failure to which the taxing officer could not be faulted for declining to calculate instruction fees on the value claimed by the applicant. The Judge



paragraph 34 of his ruling stated that the proved value of the deceased's estate was Kshs 50,000,000. At paragraph 29 of the said ruling, the learned Judge stated as follows:

“As the applicant did not provide proof that the value of the estate was Kshs 2,000,000,000/, I find that the taxing officer cannot be faulted for declining to calculate the instructions fee on the basis of that figure.”

27. Concerning the return of the reference back to the taxing officer, the learned Judge at paragraph 33 had this to say:

“In the result, the reference is successful to the limited extent specified herein. I do therefore order the learned taxing officer to carry out a process of recalculating the taxed costs, based on the specific findings made therein.”

28. The learned Judge did not refer back the matter for re-taxation of the whole bill of costs but a recalculation of specific items which he mentioned including the instructions fees since the taxing officer had been found to have erroneously held that the value of the estate had not been proved contrary to what the Judge found to be kshs 50,000,000 as per the P&A Forms and at paragraph 35 he stated that:

“The taxing officer will, in the presence of the parties, verify the attendances at the registry and in court, and make appropriate provisions.”

29. In the body of that ruling, the Judge was clear that the value of the estate as pleaded in the P&A forms was Kshs 50,000,000 and that there was no evidence adduced of the value of the extra or added assets as per the rectified certificate of confirmation of grant. In my view, the Judge did not grant the applicant the opportunity to go back and ask for valuation of the state property so that he could charge properly, having already found that the applicant had not proved the extra value. Having found as above from the court record, the other question is, can this court now turn after having gone into the details of determining and declaring the value of the deceased's estate to order that a government valuer or in the alternative, the taxing officer, who is subordinate to this court, similarly go into the process of determining the value of the deceased's estate?

30. Section 7 of the *Civil Procedure Act* on res judicata, reads as follows:

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

31. The Court of Appeal in *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR), held that:

For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit.
- b) That former suit was between the same parties or parties under whom they or any of them claim.



- c) Those parties were litigating under the same title.
- d) The issue was heard and finally determined in the former suit.
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

32. The Court went on to state on the role of the doctrine as follows:

The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.

33. In the instant case, the issue of the value of the deceased's estate and the extra assets as were added after confirmation of grant was heard and determined as between the parties herein by Justice F.A.Ochieng as explained above and the ruling in question is as clear as crystal and I reiterate that at paragraph 34 of the ruling dated 26.8.2022 the Judge stated:w

“ The proved value of the estate was Kshs 50,000,000.”

34. If the applicant was dissatisfied with the ruling of 26.8.2022 on reference, then he was free to go further to the Court of Appeal and he did not even require leave of court. He could also have applied for review of that ruling assuming he had grounds which I find do not exist and therefore failure to which the applicant is estopped by the doctrine of res judicata from relitigating an issue already litigated upon and determined. In other words, the applicant wants to have a second bite at the cherry to adduce evidence which he was found not to have adduced during the taxation of the bill of costs between him and his clients, and after the court hearing the reference has already made a finding that there was no such evidence to prove the claim for fees based on the value of the extra assets. The applicant cannot, in my view, come back to this court and say: “now that you found that I had not proved my case, allow me to get evidence from the respondent my adversary so that I can demand more fees.” This is what I hear the applicant to be telling this court at this stage which is unacceptable in law.

35. Paragraph 11 of the *Advocates Remuneration Order* provides that:

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- (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
- (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.



- (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
- (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired."

36. I reiterate that there has been no appeal from this court's ruling of 26.8.2022 and as it stands, the value of the deceased's estate is Kshs 50,000,000. This court cannot grant orders whose aim is to set aside and distort its previous orders without following the correct procedure.

37. The upshot of the above is that I find the application dated 6.9.2022 lacking in merit and I proceed to dismiss the same. In order to avoid escalation of costs after costs, as this was an advocate/ client bill of costs matter and in order to bring litigation to an end, I order that each party do bear their own costs of the application as dismissed.

38. This file is now closed.

39. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 27TH DAY OF JUNE, 2023

R.E. ABURILI

JUDGE

