



**Nduati & Company Advocates v Muiruri & another (Suing as the legal representatives of the Estate of Margaret Wanjiru Kihanya) (Miscellaneous Application E55 of 2021) [2023] KEHC 24972 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 24972 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
MISCELLANEOUS APPLICATION E55 OF 2021  
DO CHEPKWONY, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**NDUATI & COMPANY ADVOCATES ..... ADVOCATE**

**AND**

**PETER KIHANYA MUIRURI ..... 1<sup>ST</sup> APPLICANT**

**LUCY NJOKI KIHANYA ..... 2<sup>ND</sup> APPLICANT**

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF MARGARET  
WANJIRU KIHANYA**

**RULING**

1. This ruling is in respect of two References filed by both the Client and the Advocate, respectively with regard to the decision delivered by the Taxing Master on 12<sup>th</sup> November, 2021.
2. The Client's Reference is the Chamber Summons Application dated 28<sup>th</sup> March, 2022 which seeks the following orders:
  - a. Spent;
  - b. Spent;
  - c. That this Honourable Court be pleased to enlarge the time within which to file a Reference against the decision of the Taxing Master delivered on 12<sup>th</sup> November, 2021.
  - d. That the Reference filed herein be deemed as duly filed.



- e. That the Honourable Court be pleased to set aside the Taxing Master's decision delivered on 12<sup>th</sup> November, 2021 as it relates to the reasoning and determination pertaining to taxation of item No.1 of the Respondent's Bill of Costs dated 3<sup>rd</sup> February, 2021.
  - f. That this Honourable Court be pleased to reassess the fees dues to the Respondent in respect of item No.1 and make a finding on the same.
  - g. That in the alternative, this Honourable Court be pleased to remit the Respondent's Bill of Costs dated 3<sup>rd</sup> February, 2021 for review and re-taxation of the item in dispute by a different Taxing Master.
  - h. That the costs of this application be provided for.
3. The Client's Application is based on the Supporting Affidavit sworn by Lucy Njoki Kihanya sworn on 28<sup>th</sup> March, 2022 and the following grounds:
- a. The Taxing Master erred in disregarding the parties' agreed legal fees of Kshs. 598,400.00 as per the invoice issued by the Respondent and instead taxed off the instruction fees at Kshs. 30,000,000.00.
  - b. The Taxing Master misdirected himself by pegging the instruction fees of Kshs. 30,000,000.00 on a purported valuation report of a 0.25-acre plot within the subject land as a basis for valuing the deceased's estate at Kshs.3,000,000,000.00.
  - c. The Taxing Master erred further in disregarding the record before the court and ignoring the fact that the estimated value of the estate is Kshs. 33,000,000.00 as drawn by the Respondent in the pleadings in Kiambu High Court Succession Cause No. 65 of 2017; In the matter of the Estate of Josphat Muiruri Kihanya, which pleadings form the basis of the Bill of Costs.
  - d. The Taxing Master erred in discounting the Applicant's submission that the Respondent was yet to complete the instructions in Kiambu High Court Succession Cause No. 65 of 2017: In the matter of the Estate of Josphat Muiruri Kihanya, which pleadings form the basis of the Bill of Costs.
  - e. Without prejudice to the foregoing, even based on the said valuation report, the value of the subject land forming the estate is about Kshs. 1,000,000,000,00 and not Kshs. 3,000,000,000.00.
  - f. The Taxing Master purports to have issued the ruling on notice and delivered through email yet no such notice was sent or received by the Applicants and/ or their Advocates.
  - g. The entire decision of the Taxing Master is evidently unreasonable and injudicious.
  - h. The Applicants only discovered that the impugned ruling had been delivered on 16<sup>th</sup> March, 2022 when the Respondent served their Advocates with a purported caveat and a Supporting Affidavit thereof against the estate of Margaret Wanjiru Kihanya which caveat seeks to notify the probate court in Succession Cause Number HCFP&A E1752 of 2021 of pending liabilities



against the Estate of Margaret Wanjiru Kihanya on account of taxed costs in various matters including this matter.

- i. The Applicants obtained a copy of the impugned ruling from the court on 17<sup>th</sup> March, 2022 and immediately filed this reference without any undue or unreasonable delay.
  - j. No prejudice will be suffered by the Respondent if this Application is allowed as prayed.
4. In view of the above grounds, the grounds described the impugned ruling as unreasonable and injudicious and pleads with the court to redirect the ruling for re-taxation.
5. The Client's application is opposed through Replying Affidavit sworn by Stanley Nduati on 8<sup>th</sup> June, 2022 "the Advocate" wherein he avers that the Applicant lacks the requisite locus standi to file and even prosecute the application dated 28<sup>th</sup> March, 2022 unless the order of substitution is granted which has not been the case here.
6. Further, that the Clients moved the Probate Court at Nairobi for grant of Letters of Administration Ad Litem but deliberately deceived the court that the Estate of the late Margaret Kihanya had no liabilities with a view of hiding the taxations at hand.
7. In any event, the Advocate avers that the Clients/Applicants have not tabled a plausible explanation as to why the response was not filed in time. And even assuming that the Applicant learnt of the delivery of ruling on 17<sup>th</sup> March, 2022 as they allege, an explanation has not been advanced for the delay between the 17<sup>th</sup> March, 2022 and 1<sup>st</sup> April, 2022 when the application reference was filed. According to 'the Advocate' the Applicant and or their advocate should have at least tabled evidence to demonstrate the efforts of having perused the court file so as to establish the recent position without which it is evident the parties were never keen in expediting the disposal of the matter.
8. The Advocate avers that the Applicants/Clients have not established any error in principle or misdirection of the Taxing Masters' discretion so as to warrant its setting aside of the Judgment. According to the Advocate, the Clients/Applicants are just unhappy with the quantum in the award and they seek to have a second bite of the cherry vide the reference which in strict sense is a disguised appeal.
9. The above averments provoked the filing of a Supplementary Affidavit sworn by Lucy Njoki Kihanya on 17<sup>th</sup> September, 2022. The Client averred that it would be misleading for the Advocate to allege that the Appellant conceded to the taxation herein from the Probate Court because as at the time the Petitions were filed, no Judgment/ruling on the taxation had been made. That she has also discovered that the Advocate was paid all legal fees duly earned by way of transfer of Six (6) parcels of land valued at Kshs.7,000,000.00 each totalling to Kshs.42,000,000.00 as full and first settlement of the legal fees. Over and above that, the Advocate received Kshs.850,000.00 as part of the legal fees payable to him the same being money the Advocate had received from the purchase on behalf of the Applicants. As such, it is the Clients' prayer that the court finds that the Advocate had sufficiently been remunerated and is not entitled to any other legal fees.
10. The second application is the Notice of Motion application dated 28<sup>th</sup> January, 2022. It seeks the following orders:
  - a. Spent;
  - b. Spent;



- c. That the annexed Certificates of Taxation be deemed to have been duly filed and endorsed.
- d. That the Honourable Court be pleased to enter judgment in favour of the Applicant herein, in terms of the Ruling delivered on the 12<sup>th</sup> November, 2021 by the Hon. Wilson Rading learned Taxing Master and in terms of the Certificate of Taxation dated on even dates in the sum of Kshs. 34,956,431/=.
- e. That subject to prayer Nos.2, 3 &4, the Honourable Court be pleased to issue a decree/judgment above for Kshs. 34,956,431/= plus interest be provided for at 14% per annum from 20<sup>th</sup> March, 2018 until payment in full.
- f. That the costs of the application be provided for.

11. The Advocate's application is supported by the Affidavit of Stanley Nduati sworn on the same date as the application and the following grounds:

- a. That the Applicant filed his Bill of Costs dated 4<sup>th</sup> February, 2021 in the above captioned matter which Bill of Costs has since been taxed.
- b. That sometime in 2021 the Respondent herein died intestate and the intended Respondents have since petitioned and obtained limited grants as litem to the said estate of the Respondent.
- c. That a Certificate of Taxation dated on even dates has since been drawn and filed electronically by way of email sent to highcourtkiambu@gmail.com on the 12<sup>th</sup> January, 2021.
- d. That due to the teething problems and other bottle necks associated with virtual filing we have been unable to obtain the endorsed certificates from the Learned Deputy Registrar at the time of filing this instant application.
- e. That the Respondents estate is on the verge of being sub-divided amongst her beneficiaries and the recovery of funds is in jeopardy as the Administrators have failed to disclose the amounts taxed in our favor as a liability to the estate in their petition for Letters of Administration Intestate.
- f. That the instant application is necessitated by the fact, the financial liquidity of the Respondent's estate is unknown vis- a-vis in question.
- g. That an Advocate is legally entitled to fees duly earned in the course of service line with the *Advocates Remuneration Order*.
- h. That the Respondent does not dispute the fees in any event.
- i. That there is no dispute on retainer or otherwise.
- j. That the instant application is made in the sole interest of justice and in due realization of legal fees earned by the Advocate/Applicant.
- k. That if the court fails to grant the orders sought herein the Applicant is likely to suffer gross prejudice as the financial liquidity of the Respondent estate is in question.



12. The application is opposed vide a Replying Affidavit sworn by Lucy Njoki Kihanya on 19<sup>th</sup> September, 2022. She has deposed that the application by the Advocate has been brought in bad faith and meant to pre-empt the reference filed by the Client. She contends that the Advocate is not entitled to an further legal fees in view of the arrangement between the Advocate and the deceased to transfer Six (6) parcel of land, each valued at Kshs.70,000,000.00 totalling to Kshs.42,000,000.00 in lieu of legal fees for all the legal work done by the advocate. Additionally, the Advocate had retained Kshs.850,000.00 being part of the money received from the purchases of the deceased's properties *in lieu* of legal fees and failed to disclose this to the court. As such, the Advocate proceeded with the taxation of the bill to deliberately and in bad faith unjustifiably enrich himself.
13. The court issued directions that the two applications be canvassed simultaneously by way of written submissions. The record shows that indeed the parties complied with the said directions with the Clients/Applicants filing their written submissions on 14<sup>th</sup> December, 2022 while the Advocate/ Respondent filed his on the 18<sup>th</sup> April, 2023. Upon reading through the said submissions, it is without disparity to point out that the Client has majored her submissions on the doctrine of prior agreements to sale with respect to arising legal fees.
14. More specifically, that the deceased transferred Six (6) parcels of land valued at Kshs.42,000,000.00 in lieu of all legal briefs done by the Advocate in addition to Kshs.850,000.00 which the Advocate was accused of holding as legal fees whereas it was money paid by the purchases in transactions for sale of the deceased's properties. And indeed, the Client annexed the titles showing the parcels of land that had been transferred to the Advocate and communication by the Advocate expressing that he had withheld the said sum of Kshs.850,000.00 as lien to his legal fees.
15. The Client has emphasised that the evidence has not been rebutted and or denied and the court should then consider the same as uncontroverted and the truth. In addition to that, the Client has submitted that the invoice issued by the Advocate for Kshs.598,400.00 was sufficient proof of the legal fees agreed on by the parties and therefore the Taxing Master erred in principle by proceeding to tax that bill.
16. As regards the extension of time to file a reference, it is the Client's argument that the ruling was delivered without notice to the parties.
17. On the other hand, the Advocates' submission first attack the Client's reference for having been filed late in the day without reasonable explanation as the Client's advocate was aware of the ruling date vide a Notice of delivery of the same has been issued by the Deputy Registrar. The Advocate aver that any extension of time would directly prejudice them. They submit that the award and decision of the Taxing Master was sound and consistent with the law. It is their contention that the Taxing Master clearly observed that the instructions to file a Petition for obtaining Letters of Administration was duly executed and there was no error in principle in holding as such.
18. As regards settlement of legal fees, the Advocate has argued that there was no written agreement as dictated under Section 45 of the [Advocates Act](#).

### **Analysis and Determination**

19. This court has given due regard and consideration to the two applications filed by the parties respectively, the affidavits sworn in support of and in opposition of either application, the submissions alongside the authorities relied on by either party and find the following issues undoubtedly crystalized for determination:-
  - a. Whether there was unreasonable delay in filing the reference by the Clients.



- b. Whether there was an error in principle in ascertaining the instruction fees.
  - c. Whether the legal fees payable to the Advocate has been settled, and
  - d. Whether the Certificate of Taxation should be adopted as a Judgment and Decree of this court.
20. As regard the first issue on whether there was unreasonable delay in filing the reference by the Clients, it is worth pointing out that it is common ground that the ruling was delivered in the Client's absence. The Taxing Master directed that the ruling would be delivered on Notice and so far, there is no evidence that such Notice was sent to the Clients' Advocate so as to rebut the claim on lack of Notice. Thus, although the impugned ruling was delivered on 12<sup>th</sup> November, 2021, the court without any evidence of service of Notice for delivery of ruling had no reason to deny that the Clients learnt of the delivery of ruling on 16<sup>th</sup> March, 2022 and then received copies of the same on 17<sup>th</sup> March, 2022.
21. The court record also confirms the foregoing, that on 29<sup>th</sup> June, 2021, the Taxing Master notified the parties that he would deliver the ruling on Notice. He nonetheless delivered the ruling on 12<sup>th</sup> November, 2021 in the absence of the parties with no indication that a Notice had been sent to the parties. The Client then filed the reference on 1<sup>st</sup> April, 2022 which date is within the fourteen (14) days window period for filing a reference from the date they learnt of the impugned ruling. It is therefore this court's finding that the delay in filing the reference is not inordinate given that the reason advanced for the delay was on the court's fault and beyond the Clients'/Applicants' control, hence the delay is excusable.
22. The court will address the second (2<sup>nd</sup>) and third (3<sup>rd</sup>) issues jointly with firstly starting with the major issue in contention being whether there was an agreement to estoppe and or preclude the Advocate from proceeding with taxation pursuant to the provision of Section 45 of the *Advocates' Act*.
23. It must be remembered that the Advocate and Clients shall at all material times be at liberty to agree on legal fees and where the parties willingly and knowingly either into an agreement with regard to payment of legal fees and where the parties are willing and knowingly enter into an agreement in regard to payment of legal fees, they are precluded from rushing to court for taxation. With that understanding, the court has read through the invoice dated 20<sup>th</sup> March, 2018 wherein the Advocate herein allegedly demanded payment of the sum of Kshs.598,400.00 as legal fees for acting for the Clients in Succession No.65 of 2017. The court also confirm that the invoice is unsigned and 'the Client' is yet to pay the fees which is demanded therein. In the court's view, it falls short of being deemed as a contractual document and as such, it cannot be the basis of pegging an alleged agreement on the Advocates' legal fees.
24. The other allegation is with regard to payment of the Advocates' fees, is the Clients discovery of the transfer of Six (5) plots valued at Kshs.42,000,000.00 to the Advocate in lieu of legal fees payable to him for the work done. The Client has further averred that the Advocate is holding lien on Kshs.850,000.00 until his legal fees is paid in full. It will be noted that the Client has adduced exhibits to prove the transfer of the titles was indeed made and correspondence sent to confirm the Advocate held the said Kshs.850,000.00 as lien to his legal fees. These allegations were made on oath and the Advocate chose not to respond to them. A rebuttal presumption would then arise to rebut on the factual matters raised in the Replying Affidavit sworn by Lucy Njoki Kihanya amounts to prove on a balance of probability that indeed the Advocate has been paid all the outstanding legal fees by the Clients. However, appropriate orders will be issued by the court at the end of its ruling on the said subject.



25. The court then proceeds to address the major contention by the parties being whether the Taxing Master erred in assessing the instruction fees and the value of the subject matter. There is no contention that the Firm of M/S Nduati & Company, Advocates was instructed by the Estate of the Late Josphat Muiruri Kihanya to petition for Grant of Letters of Administration vide Succession Cause No.65 of 2017 in Kiambu. The net value of the said estate was indicated in Form P & A 5 as amounting to Kenya Shillings One Million although captured in brackets as (Kshs.33,000,000.00). Subsequently, a Grant of Letters of Administration Intestate was made and issued on 16<sup>th</sup> October, 2017 to Margaret Wanjiru Kihanya (now deceased). The firm of Advocates later filed a Bill of Costs dated 3<sup>rd</sup> February, 2021 which was taxed at Kshs.34,956,431.00 on 12<sup>th</sup> November, 2021.
26. Having read through the Taxing Masters ruling, this court finds that the assessment on the value of the deceased's estate was based on Valuation Report by the Government Valuer dated 1<sup>st</sup> May, 2019. In his opinion, the Government Valuer was more of a realist than the amount stated in the affidavit sworn in support of the Petition.
27. Before saying much on the foregoing, this court wishes to reiterate the guiding principles in determining the value of the subject matter of a suit for purposes of taxation. In the celebrated case of *Joreth Ltd -vs- Kigano and Associates* [2012]eKLR, the Court observed as follows:-
- “We would at this stage point out that the value of the subject matter of a suit for the purpose of taxation of a Bill of Cost ought to be determined from the pleadings, Judgment or settlement, (if such be the case) but if the same is not ascertainable, the Taxing Master is entitled to use his discretion to assess such instruction fees as he considers .....”
28. In borrowing from the above cited excerpt, it is this court's view that the Taxing Master's discretion in determining or ascertaining the value of the subject matter, it is only to be exercised where the same is not discernable from the pleadings then the Taxing Master is bound to apply the value in the pleadings. In the court's humble opinion, in this case, the Taxing Master erred in principle for the following reasons:-
- a. Firstly, by proceeding to exercise discretion in determining the value of the subject matter whereas the same was ascertainable and clearly stated in Form P & A 5 of the Succession Petition No.65 of 2017 as Kshs.33,000,000.00. It was clearly written in black and while that the total estimated value of the property (forming the Estate) is Kshs.33,000,000.00 and the Advocate accepted instructions from the said Estate based on that value.
  - b. Secondly, the Valuation Report which the Taxing Master sought to rely on was made on or about 1<sup>st</sup> May, 2019, which was long after the Succession Cause had been heard and concluded, so that it would be unfair to the Client in purporting to ascertain the value of the subject matter based on a report which was nowhere to be found as at the time the instructions were issued.
29. Having pointed out the above error in principle, it is justifiable to find that the bill be remitted back for re-taxation. That having been said, the Advocates application for adoption of the Certificate of Costs as a Judgment and Decree fails, while the Clients' application dated 28<sup>th</sup> March, 2022 succeeds with the following orders issuing:-
- a. That the time within which the reference dated 28<sup>th</sup> March, 2022 was to be filed is hereby enlarged and the same is deemed as dully filed and served.



- b. That the Taxing Master's decision delivered on 12<sup>th</sup> November, 2022 is hereby set aside and the matter remitted back to a different Taxing Master for re-taxation.
- c. For avoidance of doubt, in the implementation of Order (b) above, the Taxing Master shall apply the value of the subject matter as indicated in Form P & A 5 and or in the affidavit sworn in support of the Petition as Kshs.33,000,000.00.
- d. The Taxing Master shall also take into account the value of the Six (6) parcels of land transferred to the Advocate and Kshs.850,000.00 withheld by the Advocate to set off against any amount.
- e. Costs of the two applications shall be in the main cause.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 28<sup>TH</sup> DAY  
SEPTEMBER, 2023.**

**D.O CHEPKWONY**

**JUDGE**

