



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

MISCELLANEOUS APPLICATION NO. 118 of 2011

OMAR KEMAL AMIN & COMPANY ADVOCATES.....ADVOCATE/APPLICANT

VERSUS

SUSANNA RUBBIOLI aka SUSAN CEMBRAN as Administratrix of the estate of

ALLESANDRO CEMBRAN (deceased).....CLIENT/RESPONDENT

RULING

1. By an Application dated 11.3.21, the Applicant (hereinafter referred to as the Client) seeks, the following orders that:

1. Spent.

2. Spent.

3. Spent.

4. Spent.

5. the Honourable Court be pleased to review and set aside the Ruling of Honourable P. Mbulika on 27th January 2021.

6. the Honourable Court be pleased to order that the Advocate/Applicant owes the Client/Respondent USD being the difference between of the fees paid and that taxed.

7. The cost of this application be provided for.

2. The Client avers that in the ruling of 27.1.21 in respect of 3 cases, Hon. Mbulika (the Hon. DR) taxed fees as follows:

Case No. 70 of 2011 Kshs. 515,786.00

Case No. 118 of 2011 Kshs. 757,500.00

Case No. 119 of 2011 Kshs. 244,371.00

3. It is the Client's case that the Hon. DR failed to take into account the fees of USD 18,000 already paid by the client to the Respondent (hereinafter referred to as the Advocate), thereby occasioning a mathematical error. This being an error on the face of the record, the Hon. DR ought to review the ruling to capture and reflect the said amount in the ruling. The Client averred that if the error is not corrected, the client will suffer irreparable harm and substantial loss as the Advocate has indicated that they will commence execution proceedings against the Client.

4. By an application dated 15.6.21, the Advocate also seeks the review and setting aside of the said ruling of the Hon. DR. The Advocate further prays that this Court do tax the bills of costs as drawn. It is the Advocate's case that the bills of costs were based on the scale fees yet the Hon. DR erroneously taxed off substantial sums therefrom, without justification. The Advocate contended that there are errors apparent

on the face of the record in that the Hon. DR held that the scale fees in Misc 118 of 2011 includes petition for grant *ad colligenda bona* whereas it is manifestly clear that the said bill of costs only related to the petition for full grant of probate; the Hon. DR held that only partial services were rendered in the said cause whereas complete services were rendered; the Hon. DR failed to appreciate that fees for confirmation of grant are to be billed separately under the ARO and used this as a basis for taxing off costs which the Advocate was entitled to as scale fees and disbursements for services rendered.

5. The Advocate further contended that he has for the last 11 years been trying to recover his fees but has been frustrated by the Client, who only paid fees for the caveat and *ad colligenda bona*. The Client appointed her present advocates when the Advocate sent his fee notes for settlement. The Client's Application is therefore intended to delay the matter further. The Advocate urged that the Client's Application dated 11.3.21 be dismissed with costs and that the Application dated 15.6.21 be allowed as prayed.

6. Directions were given on the filing of submissions. Only the Advocate complied and filed submissions, which I have duly considered.

7. It was submitted for the Advocate that the taxing officer made an error apparent on the face of the record in that she held that the Advocate only rendered partial services in regard to the grant of probate whereas it is manifest in the bill of costs that the Advocate rendered complete services in applying for the grant of probate. Additionally, the taxing officer erred in failing to appreciate that fees for confirmation of grant are to be billed separately under the ARO and this error was the basis for taxing off costs which the Advocate was entitled to.

8. I have perused the record. There are 2 deposit request notes dated 25.10.10. The first one is in respect of services rendered in respect of the petition for a grant petition for grant *ad colligenda bona* and the other is for applying for a full grant of probate of written will. In her ruling, the taxing officer stated that the Advocate initiated services but that the client changed advocates before confirmation of grant was effected. The taxing officer directed the new advocates to draw their bill of costs.

9. Schedule 10 provides for the scale fees for application for a grant of representation at paragraph 1(a) while scale fees for applying for confirmation of grant is provided for under paragraph 1(c). It is clear that the 2 services are treated separately in the ARO. Accordingly, I agree with the Advocate that the taxing officer erred in failing to appreciate that fees for confirmation of grant are to be billed separately under the ARO and further erred in her finding that the Advocate only rendered partial services. The basis for taxing off costs to which the Advocate was entitled to, was erroneous.

10. Order 45 Rule 1 of the Civil Procedure Rules 2010, an Application for review of a decree or order of a Court may be made on the ground of an error or mistake on the face of the record of the decree or order issued by the Court.

11. It is a generally accepted principle that a judge will not normally interfere with the exercise of discretion by the Taxation Officer unless it is demonstrated that there was an error in principle, in assessing the costs. In First American Bank of Kenya Ltd v Gulab P. Shah & 2 others [2002] eKLR, Ringera J. (as he then was) stated:

First, I find that on the authorities, this 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 so manifestly excessive as to justify an inference that it was based on an error of principle.

12. While the Court should exercise restraint in interfering with the taxation officer's award, an error in principle will necessitate interference with the exercise of discretion by the taxing officer. This was the holding in the case of Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR where the Court of Appeal stated:

On a reference to a judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer, erred in principle in assessing the costs. In Arthur v Nyeri Electricity Undertaking [1961] EA 497, the predecessor of this Court said at page 492 paragraph I:

"where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases".

13. The Court went on to state:

We have no doubt that if the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA (1), that would be an error in principle. And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see - D'Souza v Ferrao [1960] EA 602). The judge has however a discretion to deal with the matter himself if the justice of the case so requires (see Devshi Dhanji v Kanji Naran Patel (No. 2) (supra).

14. In the present case the taxing officer erred in principle by failing to apply the correct formula for assessing the Advocates costs as specified in Schedule 10. Accordingly, there is need to remit the matter to the taxing officer for reassessment.

15. As indicated stated earlier, the Client did not file submissions as directed. The Court however notes that in her Application, the Client also seeks the review or setting aside of the taxing officer's ruling of 27.1.21. Her reasons as indicated, are however different from those of the Advocate.

16. In view of the foregoing, I find that the Applications dated 11.3.21 and 15.6.21 have merit and are allowed on the following terms:

- a) The ruling on the bills of costs rendered on 27.1.21 is hereby set aside.
- b) The said bills of costs are hereby remitted for taxation before a taxing master other than Hon. P. Mbulikah, Deputy Registrar.
- c) Each Party to bear own costs.

DATED, SIGNED and DELIVERED in NAIROBI this 25th day of February 2022

M. THANDE

JUDGE

In the presence of: -

.....**for the Advocate**

.....**for the Client**

.....**Court Assistant**