In re Estate of Mutetema Itumo (Deceased) (Family Miscellaneous Application 2 of 2019) [2022] KEHC 12310 (KLR) (22 July 2022) (Ruling)

Neutral citation: [2022] KEHC 12310 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

FAMILY MISCELLANEOUS APPLICATION 2 OF 2019

GMA DULU, J

JULY 22, 2022

IN THE MATTER OF THE ESTATE OF THE LATE MUTETEMA ITUMO (DECEASED)

BETWEEN

JOHN MUIA KIMENYE ..... 1ST APPLICANT

SIMEON KIMONDIU NALYUKA ..... 2ND APPLICANT

AND

DORCAS MBELE ..... 1ST RESPONDENT

LABAN MASAI ..... 2ND RESPONDENT

(Originating from Kilungu Law Courts Succession Cause 27 and 28 of 2016)

RULING

1. Before me is an application brought by way of chamber summons filed by the objectors/applicants dated December 11, 2019. This application was filed after this court on November 5, 2019 granted leave to the applicants to file a reference against the taxation done at Kilungu court.

2. The application was filed under section 1A, 1B, 3A and section 63(e) of the *Civil Procedure Act* (cap 21), and article 159 (2) of the *Constitution* of Kenya and paragraph 11(2) of the *Advocates Remuneration Order 2009*, and schedule 10 of the *Advocates Remuneration Order 2014*, and seeks the following orders –

    1) That the court be pleased to set aside the bill of costs dated June 6, 2018 together with the ruling of the taxing master sitting at Kilungu Law Courts In Succession Cause Number 27 and 28 of 2018 (2016) dated the November 15, 2018 as well as the certificate of costs dated November 20, 2018 and all the consequential orders thereof.

2) That this court be pleased to order that a fresh bill of costs be filed in Kilungu Law Courts Succession Cause 27 and 28 of 2018(2016) to be taxed by a different taxing officer of the court.

3) That this court be pleased to extend stay orders against the ruling dated November 5, 2019.

4) That the costs of the application be provided for in any event.

3. The application has grounds on the face of the chamber summons, that the party and party bill of costs dated June 6, 2018 was taxed at Kshs 1,778,825.00 which is contested, and that the applicants herein have been granted leave to file a reference to the High Court, that a notice of objection to the taxation had been filed by the applicants and that thereafter the taxing master gave her reasons for taxing the bill of costs at the above figure and that consequently the applicants filed the present application which should be allowed in the interests of justice as the amount of taxed costs herein is a colossal amount of money, and that the taxing officer did not apply the correct principles applicable in taxation of costs in such matters.

4. The application was filed with an affidavit sworn on December 11, 2019 by John Muia Kimene and Simeon Kimondiu , two of the objectors/applicants herein, which amplifies the grounds of the application and, in which it was further deponed that the taxing master should have been guided by schedule 10 of the *Advocates Act*, and not schedule 7 in taxing the bill of costs as this was a probate & administration matter.

5. The application has been opposed through a replying affidavit sworn on March 29, 2021 by Said Laban Masai the 2nd administrator/respondent herein, in which it was deponed that the application lacked merits, that the taxing master gave reasons for the taxation, that the subject matter was a 29 acres plot situated at Salama market with a permanent building, that the taxed amount of Kshs 1,778,825/= was determined against 41 objectors, and that the application in the lower court was not for revocation and annulment of grant, but a claim for land purchased by the objectors, which application was dismissed by the court.

6. The application was canvassed through filing of written submissions. In this regard, I have perused and considered the submissions filed by Nzilu Nzioka & company advocates for the applicants and the submissions filed by O H Oyugi & company advocates for the respondents. I note that both counsel relied on decided court cases.

7. This application arises from the taxation of party and party costs in succession proceedings, to wit Kilungu SRM P&A No 28 of 2016 in the Estate of Kamene Nzalai, and as admitted by both sides, this matter is related to Kilungu SRM P&A 27 of 2016 – Miscellaneous Application No 1 of 2019 herein. The taxation relates to both cases.

8. The contested taxation was done by E Muiru (SRM) on November 15, 2018 and party and party costs were taxed at Kshs 1,778,825/= and a taxation certificate later signed and issued on November 20, 2018.

9. The jurisdiction of this court to deal with taxation of costs done by a taxing officer is found in the *Advocates Remuneration Rules*, in particular rule 11(2) which provides that an offended party in a taxation of costs may file a chamber summons to the High Court within 14 days. The applicants herein having sought enlargement of time to file a reference to High Court, and same having been granted in a ruling delivered by this court on November 5, 2019, this court has jurisdiction to deal with the present application.

10. The applicants' counsel has argued that the taxing officer did not apply the proper principles in taxing the bill of costs and relied on the case of *Joreth Ltd vs Kigano & Associates* [2002] e KLR.

11. The respondents' counsel, on the other hand, has argued very strongly that the prayers sought herein are not merited, because the respondents' counsel chose not to attend the taxation hearing or oppose the bill of costs, and also because the bill of costs was taxed on the basis of the commercial value of the subject land, and further, because the objectors against whom the costs herein were taxed were 41 in number and only 5 have now come to this court through the present application.

12. In my view, even where many parties are involved in litigation, each one of them can challenge the court's decision, even if all the others do not challenge the same. Thus I find that even if there were 41 persons affected by the taxation herein, any one of them has a right to challenge the taxing officer's decision. Thus the five have a right and capacity to challenge the decision.

13. With regard to the argument of the respondent's counsel that the advocate of the objectors/applicants did not attend court to challenge the notice of taxation, I hold that it is a legal principle that the mistake of counsel does not necessarily have to be imputed on a client, as doing so could cause gross injustice to a litigant or client. It follows that this court will not dismiss the application herein merely because the advocate for the applicants did not challenge or participate in the taxation proceedings.

14. With regard to the argument that the bill of costs was correctly taxed on the basis of the commercial value of the land in question, in my view, this being a succession matter, it cannot be treated strictly as a commercial matter, and costs are determined under schedule x of the *Advocates Remuneration Order*. In my view, the values of assets in succession proceedings have to be determined on the basis of what is disclosed by the petitioner, and unless there was a specific dispute on the value of the assets which was substantively determined by the court, no party or even the court can impose a commercial value, on the assets of an estate, which was not so declared in documents filed in the proceedings.

15. Coming to the present application, and considering the facts and circumstances placed before me, and the submissions of counsel on both sides, I find that the value of the assets used by the taxing officer was not the value declared in the succession proceedings. I thus find merits in the application and order as follows –

    1) That the bill of costs dated June 6, 2018 together with the ruling of the taxing master sitting at Kilungu Law Courts in Succession Cause No 27 and 28 of 2016 dated November 15, 2018 as well as certificate of costs dated November 20, 2018 and all consequential orders thereof are hereby set aside with respect to the applicants herein.

    2) That a fresh bill of costs be filed in Kilungu Law Courts Succession Cause 27 and 28 of 2016 to be taxed by a different taxing officer of the court.

    3) The stay orders issued against execution of the ruling dated November 5, 2019 are hereby extended till the determination of the fresh bill of costs to be filed.

    4) Parties will bear their respective costs of this application.

    5) The above orders herein, will apply to High Court Miscellaneous Application No 1 of 2019, which arose from Kilungu SRM P&A Cause No 27 of 2016.

DATED SIGNED & DELIVERED, THIS 22ND DAY OF JULY 2022, VIRTUALLY IN COURT AT MAKUENI.

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George Dulu

Judge