



Bruce Odeny & Co. Advocates v Chhabhadia & 2 others (Miscellaneous Succession Application E001 of 2021) [2022] KEHC 12741 (KLR) (26 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12741 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS SUCCESSION APPLICATION E001 OF 2021
FA OCHIENG, J
AUGUST 26, 2022**

BETWEEN

BRUCE ODENY & CO. ADVOCATES APPLICANT

AND

RAVJI DEVJI CHHABHADIA 1ST OBJECTOR

KANJI DEVJI CHHABHADIA 2ND OBJECTOR

CHANDRAKANT DEVJI CHHABHADIA 3RD OBJECTOR

RULING

By a ruling delivered on February 2, 2021, the learned taxing officer awarded costs in the sum of Kshs 91,034/=.

1. The Advocate/Applicant was aggrieved by that ruling, as he was convinced that the sum awarded so excessively low that it constituted a punishment to him.
2. He moved to challenge the taxation, because he was of the view that the taxing officer had erred in both law and fact.
3. In particular, he noted that the taxing officer failed to take into account the fact that the value of the subject matter had been clearly disclosed in the Succession Form P & A5, in Kisumu Succession Cause No. 784 of 2015.
4. In that form, it was stated that the Estate of the deceased was worth Kshs 50,000,000/=.
5. Secondly, the Advocate/Applicant pointed out that when the Client/Respondent realized that certain assets belonging to the deceased had been omitted from the list which had been lodged in Court, there was a need to seek a rectification of the Grant.



6. I have verified from the record of the proceedings that the Summons for Rectification of Grant cited the following properties as those which had initially been omitted from the list of assets;
 - (a) 25% share in Kisumu/Municipality Block 3/206;
 - (b) 25% share in Kisumu/Municipality Block 3/205;
 - (c) 25% share in Kisumu/Municipality Block 3/213; and
 - (d) 25% share in Kisumu/Municipality Block 3/214.
7. Those 4 properties were later incorporated into the Rectified Certificate of Confirmation of Grant.
8. There can be no doubt that when the 4 properties were incorporated into the estate of the deceased, the overall value of the said estate increased.
9. It was the Advocate/Applicant's case that the estimated Combined value of the estate was Kshs 2,000,000,000/=.
10. Based on that figure, the Advocate/Applicant calculated the Instruction Fee in the sum of Kshs 20,040,000/=.
11. It was for that reason that the Applicant faulted the taxing officer for taxing the Instruction Fee at Kshs 15,000/=, based on her contention that the value of the properties had not been disclosed.
12. On the other hand, the Client/Respondent noted that there were no Valuation Reports upon which the taxing officer could have derived guidance when assessing the Instruction Fees.
13. The Respondent also noted that whilst L.R. NO. Kisumu/ Kanyawegi/627 had been included in the original list of the assets, that property was subsequently omitted from the assets cited in the Certificate of Confirmation of Grant. Therefore, the Respondent submitted that the exclusion of that asset affected the overall gross capital value of the estate.
14. I have carefully perused the record of the proceedings. On the Form P & A5 dated 21st July 2015, the Petitioner stated that the "Total estimated value" of the 9 listed assets was Kshs 50 Million.
15. One of the said assets was Kisumu/Kanyawegi/627.
16. As the value of the subject matter was expressly stated, I find that the learned taxing officer erred in principle when she held that the value of the properties had not been disclosed.
17. For reasons which I have been unable to establish, the Petitioner excluded Kisumu/Kanyawegi/627 from the list of assets, when he was seeking confirmation of the Grant. And when the Court issued the Certificate of Confirmation of Grant, that property was omitted.
18. Accordingly, the value of the estate must be deemed to have been reduced when one asset ceased to be a part of the estate.
19. However, as the value of the excluded asset was not specified, this Court is unable to ascertain the value of the estate, at the time when the grant was confirmed.
20. At the stage when the Petitioner sought rectification of the grant he listed 4 new properties, (as set out hereinabove).
21. I have failed to trace any document in which the value of the 4 new properties was specified.



22. The Applicant has submitted that the total estimated gross value was Kshs 2,000,000,000/=. However, he has not demonstrated to the Court where the said value was derived from.
23. According to the Applicant;
- “The Taxing Officer ought to have further applied the provision of Rule 13A of the Advocates Remuneration Order and sought Supplementary evidence so as to reach a definite conclusion regarding instruction fees.”
24. To support his case, the Applicant cited the case of *Mereka & Company Advocates vs Tau Katungi* (2019) eKLR.
25. First, it is correct that pursuant to Rule 13A of the *Advocates Remuneration Order*, the taxing officer shall have the power and authority to, inter alia, direct any party to produce books or documents as may be necessary for the determination of any matter in dispute before him.
26. In the case of *Mereka & Company Advocates*, the court held that whereas the taxing officer had the requisite power and authority to call for documents;
- “..... the burden still lies on the Applicant who would lose, in the event that the taxing master, for one reason or the other does not call for such evidence.
- It is trite law that the burden of proof lies on he who would lose if no evidence is adduced by either side (section 108 of the Evidence Act).”
27. The learned Judge went further to expound on the issue in the manner following;
- “39. Although the law obligates the taxing master to call for such evidence, the Taxing Master is not on trial nor is he/she a litigant. A litigant cannot run away from the cardinal responsibility of discharging a noble duty, such as proving his case to the required degree.
- He should not cry foul, blaming the court for not calling for specific evidence when he has failed to discharge his mandate. I cannot blame the taxing master in the circumstances.
- With that holding, the rejection of various claims which were not supported by any proof was justified.”
28. Accordingly, the authority relied upon by the Applicant does not support his case. The said authority actually makes it clear that when the person whose bill of costs was being taxed, fails to provide proof to support his claim, the taxing officer would be entitled to reject such a claim.
29. 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 Instruction Fee on the basis of that figure.
30. As regards the claims for fees on Drawings; Attendances and Disbursements, I find that the Applicant was entitled to the same, subject to proof.
31. Where pleadings are on the court file, the Applicant did not need to produce any other form of proof, to prove that such documents were drawn.



32. And where any document is filed on behalf of the Petitioner, the Applicant must have attended at the Registry to file it. Therefore, there would no need for any further proof that the Applicant attended at the registry to file any such a document.
33. 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 herein.
34. The proved value of the estate was Kshs 50,000,000/=.
35. The taxing officer will, in the presence of the parties, verify the attendances at the registry and in court, and make appropriate provisions.
36. Each party will meet his own costs of the reference; and that is because the said reference has succeeded only to a small degree.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 26TH DAY OF AUGUST 2022

FRED A. OCHIENG

JUDGE

