



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

MISC. APPLICATION NO. 24 OF 2019

TERESIA WANJIKU WAINAINA.....APPLICANT

VERSUS

PAUL P.K KAMAU T/A P.K KAMAU & CO. ADVOCATES.....RESPONDENT

RULING

Teresia Wanjiku Wainaina, the Applicant herein, has filed this Chamber Summons under Paragraph 11(2) of the Advocates (Remunerations) Order, 2009, dated 25th April 2019 seeking the following orders:

1. That an order be and is hereby issued staying execution of the decree and the decision of the taxing master delivered on 8th March, 2018 pending the hearing and determination of this application inter- partes.
2. That an order be and is hereby issued setting aside the entire decision of the taxing master and the certificate of costs herein issued and delivered on 31st March, 2018.
3. In the alternative this honourable Court remit the entire bill of costs dated 6th February, 2018 to another taxing master.
4. That the taxing master erred in taxing the value of the estate while instructions of the counsel were limited to one beneficiary in an estate that has more than 10 beneficiaries.
5. Cost of the reference be provided for.

The Applicant was the Respondent's Client in High Court Succession Cause No. 651 of 2012, Estate of Samuel Wainaina Muiruri. It seems that this relationship fell by the wayside and the Advocate raised a Bill of Costs that was taxed and a Certificate of Taxation issued giving rise to this Application.

The grounds in support of the Chamber Summons are found on the face of the Summons and in the Supporting Affidavit sworn by the Applicant on 25th April 2019. The Applicant argues that she was not accorded a fair hearing by the court; that upon being served with the Advocate/Client Bill by the Respondent, she instructed her advocates on record at the time, M/s J. M Waiganjo & Company Advocates who raised a Preliminary Objection (P.O) in opposition to the Bill of Costs; that the court did not allow the Applicant to prosecute her P.O which ought to have been dispensed with first as required by the law; that she was not notified of the date of taxing the Bill of Costs and was surprised to learn that her advocate had been served with an application seeking to have the decree issued in favour of the Respondent. She argues that upon perusing the court file she realized that a ruling on the Bill of Costs had been delivered in her absence and in the absence of her advocate. She claims that her advocates were equally shocked to learn that the Bill of Costs was taxed without their knowledge. She claims that she was not given the chance to contest the Bill of Costs which was based on the value of the entire estate when it ought to have been based on her instructions only given that she was only one of the 12 beneficiaries in the estate. She claims that she was never notified of the hearing and the delivery of ruling. She states that it is in the interest of justice that the orders sought in this application be granted.

The Application is opposed by the Respondent in his Replying Affidavit sworn on the 13th September 2019. He deposes that the Chamber Summons is drawn by a stranger to this Court as the firm of KMK LAW LLP Advocates is not properly on record and that the Advocates on record for the Applicants are J. M. Waiganjo & Co. Advocates. He deposes that the P.O was addresses accordingly by the court and a Ruling delivered finding no merit in the P.O; that the Advocates on record for the Applicant have always been served with taxation notices and that the Applicant herself has been served with hearing notices and failed to attend court; that the ruling of the court was sound and that the Applicant filed this Summons to frustrate the Respondent as the Bill of Costs was lawfully taxed and due procedure was observed. The Respondent further states that the Applicant and her Advocate on record were indolent and that equity aids the vigilant.

Directions were given to canvass this Summons by way of written submissions. The Applicant's submissions are not dated but they bear a court stamp of 29th October 2019. She reiterated the grounds in support of her application and argues that she was not given a fair hearing for failure by the court to consider her P.O first before the taxation of the Bill of Costs was done as the law requires. She argues that because of the failure of the court to hear her P.O she was not given a chance to oppose the Bill of Costs and therefore the Bill was taxed unopposed. She argues that she was not served with the taxation notice on the date when the ruling was delivered and only came to learn that the Bill had been taxed after the ruling had been delivered.

Submissions by the Respondent are dated 28th October 2019. The Respondent reiterates that the Application herein is drawn by a stranger as the said firm is not properly on record and that the P.O raised by the Applicant was addressed by the court and dismissed; that the Applicant was indolent and never participated in prosecution her P.O despite numerous notices being served on her and her Advocates on record. He submits that the Applicant and her Advocate on record have always been served with taxation notice and hearing notices but neither appeared in court. He submits that the Bill of Costs was lawfully taxed and due procedure was followed and that the P.O and the Chamber Summons filed herein are scandalous, vexatious and an abuse of Court Process as the same was raised as an afterthought and a delaying tactic. The Respondent cited **George Miyare T/A Miyare & Company Advocates v Evans Gor Semelang'o [2019] eKLR** where the court stated that from the court record it was evidently clear, that the Applicant therein had been duly served with relevant documents and hearing notices and that the Applicant had been given sufficient opportunity to take part in the taxation but failed to do so. The court dismissed the application in that case.

I have considered the Chamber Summons and the Supporting Affidavit. I have also considered the Replying Affidavit in opposition to the Chamber Summons as well as rival submissions and cited authorities. On the issue argued by the Respondent that the Chamber Summons is drawn by a firm of advocates who are not properly on record, I am not able to agree with him. Record shows that on 29th March 2019 the firm of KMK LAW LLP Advocates filed Notice of Change of Advocates to the effect that the Teresia Wanjiku Wainaina had appointed that firm to act for her instead of the firm of J. M. Waiganjo & Co. Advocates. Record also shows that at the time of the taxation of the Bill one Mr. Irungu was acting for the Applicant who was the Respondent in respect of the Bill of Costs. Record shows that Mr. Irungu told the court on 5th July 2017 that he had not been served with Bill of Costs. He sought 14 days to put in response and proposed to dispense with the Bill of Costs by way of written submissions. Parties were allowed time to file and serve written submissions. When the matter came up for mention to confirm compliance with those directions on 5th October 2017, Mr. Irungu was absent. He had however filed the P.O which he had served on counsel for the Applicant in the Bill of Costs. Mr. Irungu had been served and an Affidavit of service was filed to that effect. Counsel for the Applicant sought time to file his submissions.

The matter was mentioned on 12th October 2012. Mr. Irungu was absent but there was Affidavit of service on record confirming to the court that he had been served with the Notice. The court gave date of ruling on the Bill of Costs on 2nd November 2017. On that date Ruling was not delivered. Matter was adjourned to 9th November 2017. Record shows that ruling was delivered on 31st May 2018 in the absence of the parties.

It seems from record that the Applicant in the Bill of Costs filed another Application dated 23rd October 2018 seeking to have the Certificate of Costs adopted as judgment of the court. On 31st January 2019, court noted that there was no evidence of service and directed the Applicant to take a date in the Registry. On 11th March 2019 Mr. Irungu was in court for the Respondent, now Applicant. He told the court that the Application had been served on the firm of J. M. Waiganjo & Co Advocates where he used to work and that he still had instructions to act for the Respondent, now Applicant. He sought leave to come on record in the Misc. Application undertaking to liaise with the firm of J.M. Waiganjo & Co. Advocates to obtain a copy of the Application. He sought leave to respond to the Application within 3 days. He was granted leave. Matter was adjourned to 29th March 2019. On that date Mr. Irungu attended. Matter was adjourned to 11th April 2019 to allow counsel for the Applicant time to respond to the Respondents (now Applicant) Replying Affidavit. On 11th April 2019 counsel for the Applicant sought a ruling date. Someone by the name of Wagene was holding brief for Mr. Irungu who sought time to file response. He was granted leave and matter adjourned to 23rd April 2019 on which date Mr. Irungu did not attend court. He had not served the further affidavit. Counsel for Applicant asked the court to give a ruling date. Ruling was scheduled for 17th May 2019. On that date the Application dated 23rd October 2018 was allowed. Both parties were not present.

From the record it is clear to me that the Applicant in the matter before me failed to take matters seriously and attend court to oppose the Bill of Costs. She failed to file any response in opposition to the Bill and written submissions as he had proposed. It is clear to me that even after filing the P.O she did not do anything towards prosecuting the same. Her counsel filed the P.O and served it but failed to attend court to argue it. On the Application dated 23rd October 2018, her counsel sought leave to file further affidavit but he failed to do so and failed to attend court on the date given. The court proceeded to make a ruling on that application.

It is my considered view that the Applicant in the matter before me was not interested in opposing the Bill of Costs or the Application seeking to have the Certificate of Taxation adopted as the judgment of the court. I have noted that the Taxing Master considered the P.O raised by the Applicant. In her Ruling dated 31st May 2018, the Taxing Master stated as follows in respect of the P.O:

"I have considered submissions and the Preliminary Objection. I find no merit in the same as there is no prejudice suffered by the Respondent. The bill was an Advocate/Client Bill of Costs and brought through a miscellaneous application. There was no contention that the Advocate was properly instructed to act for the Respondent herein in the Succession Cause."

On page 5 of the Ruling delivered on 17th May 2019 in respect of the Application dated 23rd October 2018, the court differently constituted stated as follows:

"On 5th October 2017 when the matter came up, despite being served, Mr. Irungu for the Respondent was absent although he had filed and served a Preliminary Objection but not submissions or response to the Bill. The matter was again adjourned and rescheduled for 12th October 2017. Again, despite being prior notified Mr. Irungu was not in attendance. The ruling on the Bill

of Costs was thus reserved for 2nd November, 2017, 12th April 2018, 24th May, 2018 and 31st May, 2018. From the proceedings the taxation ruling was deferred to accommodate the trial judge deliver a ruling in the parent succession cause file which at the time was ongoing. To cut a long story short, going by the stated facts, the Respondent was accorded a fair reasonable opportunity to defend the bill of costs but instead chose to raise a preliminary objection instead.”

The court further considered the decision in **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696 at 700** where the court stated that:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued a point of law may dispose of the suit”

The court further noted observed that the Taxing Master had considered the P.O and concluded that it had no merit. The court therefore concluded that:

“With that determination, I do not thin the Respondent can say that she was never given an opportunity to be heard, yet her only response to the bill of costs was by way of objection which was adequately deliberated upon and resolved by the court.”

My careful reading of the record of the court and specifically the taxation ruling and the ruling on the application dated 23rd October 2018 disclose that the Applicant slept on her rights. The same conclusion was arrived at by court in its ruling dated 17th May 2019 on page 6 of that ruling where the court pronounced itself as follows:

*“I am alive to the decision in **Lee G. Muthoga v Habib Zurich Finance & Another Civil Application 236 of 2009**, where the Court held that a litigant should not suffer because of his advocate. However, the circumstances herein are unique in tat the Respondent or her advocate elected not to defend the Bill of Costs for reasons best known to them. This court has no material before it to determine whether the Respondent raised triable issues so as to resolve this in her favour. It would seem the Respondent waived her right to defend the matter by her conduct. She was well aware that there was a pending taxation of the bill of costs and she should have been more vigilant to appraise herself on the proceedings from the beginning.”*

I think I have said enough to demonstrate that this Application has no merit. 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 manifestly excessive as to justify an interference that it was based on an error of principle (see **First American Bank of Kenya –Vs- Shall & Others [2002] 1EA**). Consequently, the Chamber Summons dated 25th April 2019 is hereby dismissed. Costs are payable by the Applicant to the Respondent. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 29TH DAY OF JUNE 2021.

S. N. MUTUKU

JUDGE