



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

MISCELLANEOUS APPLICATION NO 27 OF 2019

IN THE MATTER OF THE ESTATE OF ELIUD TIMOTHY MWAMUNGA

BETWEEN:

MARLONE KINANGO MWANGOMBE t/a

MWANGOMBE & Co ADVOCATES.....APPLICANT

AND

THE PUBLIC TRUSTEE (MOMBASA).....RESPONDENT

AND

SAMUEL MAZERA MWAMUMGA...APPLICANT/INTENDED 2ND RESPONDENT

SAMUEL MAZERA MWAMUMGA..APPLICANT/INTENDED 3RD RESPONDENT

MISCELLANEOUS APPLICATION No 3 OF 2020

B E T W E E N:

MARLONE KINANGO MWANGOMBE t/a

MWANGOMBE & Co ADVOCATES.....APPLICANT

AND

THE PUBLIC TRUSTEE (MOMBASA).....1ST RESPONDENT

AND

EQUITY BANK (KENYA) LIMITED.....2ND RESPONDENT

KCB BANK (KENYA) LIMITED.....3RD RESPONDENT

R U L I N G

Introduction

1. This matter has been placed before the Judge of the High Court for directions. The issues and disputes contained in the various applications arise from one matter/suit, namely **Succession Cause No. 3 of 2018** relating to the Estate of the Late Eliud Timothy Mwamunga (the Deceased) (the Parent File”) and the taxation of costs thereof. The various applications are contained in two files. The first, **High Court Misc App No 27 of 2019** and secondly **High Court Misc App No. 3 of 2020**. The Taxation is premised on a bill of costs for professional services said to be rendered in relation to the Parent File. The second is for enforcement by garnishee orders.

2. In the taxation file it can be seen that the Bill of Costs was filed on 12th September 2019. Thereafter, Hon Mr F. Nyakundi as the Deputy

Registrar listed the matter for hearing. He is also the only taxing officer in the High Court of Taita Taveta sitting in Voi. The record shows that the hearing date was given ex-parte and the matter proceeded on several dates. On each of those dates the Coram is not recorded but the proceedings show that only the Advocate/Applicant attended. That process has given rise to challenge and criticism by both the Respondent/Administrator as well as the Beneficiaries of the Estate, in particular, in the form of two of the sons of the Deceased who have filed an application to be joined to the proceedings as Respondents or at least as interested parties. In summary their complaint is that they were excluded from the proceedings and the procedure used and the outcome reached was detrimental and prejudicial to their rights including the right to be heard and the right to have their interest in the suit taken into account. The Advocate opposes all the applications filed by all/any the other applicants.

3. The Taxing Officer issued a "Certificate of Taxation" on 23rd December 2020. That was a date for which was designating as High Court Vacation by a Gazette Notice.

4. The various Applicants have asked the Taxing Officer to review and/or stay and/or set aside the Certificate which they allege has been the product of an unfair process, the Advocate has argued that the Taxing Officer has no jurisdiction to make any orders because he is now functus.

5. In the second file ***HC Misc Application No. 3 of 2020***, the Advocate is seeking an order for the Court to adopt the "Certificate of Taxation" as an order of the High Court. In addition, immediately thereon, he seeks a garnishee order against the Bankers of the Deceased. In other words, the Advocate is seeking to be paid out of specific assets from the Estate immediately. It appears that his knowledge of those details and of which he became aware were as a consequence of his Instructions as an Advocate from the beneficiaries as his Clients. The Advocate wishes to be paid the costs as taxed by the Taxing Officer. He objects to the Beneficiaries being joined as Parties as he states they have no locus.

6. The Taxation Matter (***HC Misc 27 of 2019***) came before the High Court on the Directions of the Taxing Officer on the same day as the Court was hearing the garnishee proceedings. The Taxing Officer's request is for this Court to give directions. The Advocate and the various applicants addressed the Court on the issue and the Court gave a date for the Ruling on 16th April 2020. Unfortunately, that date was superseded by the Covid-19 pandemic and the consequent directions on court operations. Thereafter, the Advocate has filed a number of applications and/or complaints seeking to have the file moved to a different Judge/Court. The issue has been addressed by the Principal Judge of the High Court and the Ruling is being delivered as directed and in accordance with the Constitution which guarantees the independence of the Judiciary.

The Background

7. In ***Misc App 3 of 2020*** the applications set out below were filed:

- i. Notice of Motion Application dated 6th January and filed on 14th January 2020 by the Advocate;
- ii. Notice of Motion Application dated 12th February 2020 filed on 13th February 2020 by the Public Trustee;

8. In ***HC Misc 27 of 2019*** the Applications that appear on the file are:

- i. Bill of Costs filed 12th September 2019
- ii. Notice of Motion Application for disclosure (by the Public Trustee) of bank account balances filed by the Advocate.

9. The Notice of Taxation was issued the next day, 13th September and gave a date for Hearing on 17th October 2019. It is unclear whether the information sought, being essential to the valuation of the Estate (and therefore the Bill of Costs) was obtained by that date.

10. The Notice of Motion Application dated 6th January 2020 was brought (*Under Section 80(2) & 83 of the Law of Succession Act, under Section 51(1)(2) of the Advocates Act, Section 3, 3A, 27(2) of the Civil Procedure Act, CAP 21 Order 50 Rule 1, Order 23 Rule 1, Rule 2, Rule 3, Rule 4 of the Civil Procedure Rules, 2010 all other enabling legal provisions of the law*) "for ORDERS:-

1. ***THAT*** the costs certified by the Honourable Deputy Registrar on the 23rd of December, 2019 be adopted as a Judgment of this court.
2. ***THAT*** the Honourable Court do order the Respondent to pay the certified costs with interest at the rate of 14% from 7th August, 2019 when the Applicant's payment became due.
3. ***THAT*** pending the hearing and determination of the instant application Garnishee Order Nisi do issue against EQUITY BANK Kenya Limited, Voi Branch ordering that all monies deposited, lying and being held in deposit in Ksh A/c No.0790161553861 and A/c No.0790377179007 to the credit of (Estate of) Eliud Timothy Mwamunga the Judgment debtor herein be attached to answer the Certificate of Taxation issued on the 23rd December 2019.
4. ***THAT*** pending the hearing and determination of the instant application Garnishee Order Nisi do issue against KCB BANK Kenya Limited, Voi Branch ordering that all monies deposited, lying and being held in deposit in Kshs A/C No 1104841533 to the credit of (Estate of) Eliud Timothy Mwamunga the Judgment Debtor herein be attached to answer the Certificate of Taxation issued on the 23rd December 2019.

5. THAT the 1st and 2nd Garnishee do appear before this court on an appointed date and time to show cause why the Garnishee Order Nisi should not be made absolute and that the sum of Kshs 20,317,314.22/= plus interest be released to the Application/Advocate.

6. THAT costs of this Application be borne by the Respondent.

11. That Application relies on the Supporting Affidavit of the Advocate and the grounds which appear on its face and other such grounds to be adduced at the hearing thereof. The Grounds enumerated are:

a. THAT the Respondent is the duly appointed Personal Representative of the Estate of Eliud Timothy Mwamunga(Deceased)

b. THAT Eliud Timothy Mwamunga(Deceased) operated the referenced bank accounts in the Garnishee Banks which have sufficient funds or so much thereof to satisfy the certified costs.

c. THAT the Applicant's Advocate to Client Bill of Cost dated 9th September,2019 and filed on the 12th September, 2019, was taxed by the Taxing master on the 19th of December,2019 and a certificate of Taxation issued on the 23rd of December, 2019.

d. THAT the certified costs and interest thereon are due and owing to the Applicant, and are deemed to have accrued when services were rendered with regard to filing of the succession Petition No 3 of 2018 on the 26th of July, 2018 and 2 Ad litem Applications one on the 27th of July 2018 and the other in 2019.

e. THAT the law recognizes and prioritizes that the 1st debt that a personal representative should pay out of an Estate of a Deceased are all expenses of obtaining the grant of representation.

f. THAT it is in the interest of justice that this Application is allowed.

12. What would appear that the challenge to that Application was not filed in the Misc No 3 of 2020 but in the Taxation file. The Respondent/Public Trustee filed an Application by Notice of Motion brought under **Order 12 Rules 7 of the Civil Procedure Rules, 2010** (Cap.21 Laws of Kenya) That Application seeks: “**ORDERS:**

1. **That** this application be certified urgent and the same be heard ex-parte in the first instance.

2. **That** there be stay of execution of the certificate of taxation herein dated **23rd December 2019**(bill of costs) pending hearing and determination of this application inter-parties.

3. **That** there be stay of execution of the certificate of taxation herein dated **23rd December 2019** (bill of costs) pending hearing and determination of this application.

4. **That** this Honourable court be pleased to set aside the taxation proceedings and orders of 17th October 2019 giving rise to the certificate of taxation dated **23rd December 2019** together with any incidental and or subsequent proceedings and orders thereafter.

5. **That** the advocate and client bill of cost herein dated **9th September 2019** be heard and determined on merit by involving the participation of the relevant parties to the bill of costs.

6. **That** the costs of this application be provided for

7. The Application is based on the following “**GROUND:-**

1. **That** the Notice of Taxation of the bill of costs herein was served upon the Assistant Public Trustee-Mombasa on **13th September 2019** and it was received under protest as the Assistant Public Trustee had prefixed official engagements on **17th October 2019** when the taxation was to be heard.

2. **That** at the time of service the court had not served the Public Trustee with an order appointing it the legal representative of the estate of the deceased herein and thus unaware of the succession matter herein and a stranger to the bill of cost.

3. **That** the Public Trustee is not the instructing client which issue of instruction is cardinal in taxation and thus the same has to be heard and determined on merit.

4. **That** at the time of service of the bill of costs there was only one state counsel in the station (Public Trustee-Mombasa) and thus unable to attend court on **17th October 2019** at the same time attend a prefixed official duty in Nairobi.

5. **That** the grant of letters of administration was sent to the Public Trustee by the court on **23rd October 2019** long after the date for taxation and thus it was unfair for the court to proceed with the taxation against the Public Trustee when it had not been served it with the order appointing it as the legal representative.

6. **That** the estate of the deceased herein has been condemned unheard as it was not given an opportunity to competently participate in the taxation proceedings herein.

The Application is also “supported by the annexed affidavit of Jafred Erima Maliro Assistant Public Trustee and on further argument to be adduced at the hearing thereof”. It is dated 12th Day of February 2020

13. As stated above, **Misc Application No. 27** is the taxation file where costs for the succession applications were assessed/taxed. The Taxing Officer’s decision was that the Advocate was entitled to exactly what he was asking. The certificate of taxation issued in that file is relied upon to commence the garnishee proceedings. The costs are said to relate to an Advocate and Client Bill of Costs. The Bill of Costs was filed in the High Court at Voi on 12th September 2019. On the same day the Advocate was given a date for hearing on an ex parte basis. There is no indication on the file that any confirmation was given/sought on whether the Bill of Costs had been served on the Respondent/Client before the date for hearing was given by the Registry.

14. The Bill of Costs values the Estate at KShs.1,145,923.919.66. The Bill of Costs sought KShs.20,588,314.22 for the Advocates costs. One would expect the value of the Estate to appear in the Succession File. The gross value of the Estate was not set out in the Petition but appears to have been assessed (by the Advocate) subsequently for the purposes of the Taxation. At the same time the Advocate filed an application for an order for the production of the books and records of the Estate and in particular, seeking orders for the Public Trustee to provide the original title deeds of properties comprising the Estate so as to obtain in order to subject the same to valuation to ascertain the value. Or in the words of the Advocate, the orders are sought “to aid getting the gross value of the Estate”. In his Affidavit the Advocate depones that the gross value used in the Bill of costs “is based on a qualitative analysis of the known assets that constitute Deceased’s Estate as listed...”. The list of assets includes bank accounts including those which are now the subject of the garnishee proceedings.

15. In his Bill of Costs the Advocate is demanding his professional fees from the Public Trustee. In the garnishee proceedings he is arguing that payment must emanate from the Estate of the Deceased. The Public Trustee was appointed the Administrator of the Estate pursuant to an order of the Court suo motto and not pursuant any prayer in the Applications filed by the Advocate. The Bill of Costs was served on the Public Trustee on 13th September 2019. The Notice of Taxation for 17th October 2019 was also served on the same day at the Offices of the Public Trustee in Mombasa. The Notice was “received under protest as Mr. Maliro State Counsel will be attending an official meeting on 17/10/19. Secondly, the Public Trustee has not been served with an order appointing it administrator of the estate in order to enable it come into the matter.”. That protest resulted in the Advocate writing to the Court (under an incorrect reference) seeking a certified copy of “the Grant issued to the Public Trustee”. For the sake of clarity it should be made plain, what was issued was Letters of Administration. The reasons for which were contained in a Judgment.

The Competing Applications

16. On 23rd December 2019 the Deputy Registrar sitting as Taxing Officer having taxed the costs issued a Certificate of Taxation in the sum of Kshs.20,317,314.22 as “allowed in this suit as prayed against the Respondent”. Shortly thereafter, there was an application filed by/on behalf of two intended further respondents to the Taxation/interested parties. The Application was filed on 17th January 2020 under a certificate of urgency. The intended 2nd and 3rd Respondent were named as Samuel Mazera Mwamunga and Josiah Chola Mwamunga respectively. The Certificate of Urgency is signed by the second intended respondent, Samuel Mazera Mwamunga. In it he states that his application is urgent and “should be heard on priority basis on the grounds that the applicant filed Advocate/Client Bill of Costs which he used the wrong party and misled the court into believing that the client in the original Probate and Administration Cause no. 3 of 2018 was the Public Trustee and not the intended 2nd and 3rd respondents who are the original petitioners in the petition for letters of administration with written Will for the Estate of the Deceased who the Applicant was acting for them.”. That is a factual issue that should be easy to resolve by reference to the Parent File (Succession Cause). The Advocate says he was acting for the Estate, namely an inanimate, yet to be defined entity. He relies on **Section 3** of the **Advocates’ Act**. In fact it is **Section 2** where definitions are found. **Section 2** of the **Advocates’ Act Cap 16** which provides: “client” includes any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ an advocate and any person who is or may be liable to pay to an advocate any costs”;

17. It is further alleged that the Applicant Advocate is relying on and irregular and/or illegal Certificate of Costs.

18. The Application seeks the following orders:

“1. THAT this Honourable Court be pleased to enjoin the intended 2nd and 3rd respondents as the 2nd and 3rd respondents in this matter.

2. THAT this Honourable Court be pleased to set aside and/or revoke the Certificate of Costs issued on 23rd December 2019 and consider issuing fresh directions on the same including dismissal;

3. THAT pending hearing and determination of this Application, the Honourable court be pleased to stay the Certificate of costs issued on 23rd December 2019.”.

19. The Grounds relied upon are:

“1. That the applicant herein filed this matter without the knowledge of the original petitioners in the petition for letters of administration with written Will for the Estate of the Deceased.

2. That the applicant herein filed this matter without the knowledge of the beneficiaries of the Estate of the Deceased

3. That the Applicant’s clients in original **Probate and Administration Cause no. 3 of 2018** was the intended 2nd and 3rd respondents and not the Public Trustee.

4. That the Applicant proceeded to file and advocate/client bill of costs application without the knowledge of the clients who are the intended 2nd and 3rd respondents

5. That the Applicant misled the court into believing that the client in the original **Probate and Administration Cause no. 3 of 2018** was the Public Trustee

6. That the Certificate of costs issued to the applicant is irregular and/or illegal, the applicant having sued the wrong party”.

20. The Application is supported by the Affidavit of Samuel Mazera Mwamunga in which he sets out the facts as follows; firstly that he is a beneficiary of the Estate of the Deceased the Late Eliud Timothy Mwamunga. In his Affidavit, he states that he was the First Petitioner in the Voi **High Court Probate and Administration Cause No 3 of 2018**. In that Matter, this Court made an order appointing the Public Trustee as the Administrator of the Estate (the reasons for that decision are contained in the Judgment. Although the Order was made on 18th July 2019, the actual document was not typed until about 20th September 2019 – possibly in response to the Applicant’s request for a copy.

21. The Affidavit goes on to confirm that the Public Trustee was not a Party in **P&A 3 of 2018** nor did he participate in the proceedings. The Deponent says that it was the Petitioners who were the parties and the clients of Marlone Kinango Mwangombe t/a Mwangombe and Company Advocates. In the Bill of Costs Marlone Mwangombe and Company Advocates (“hereinafter referred to as “the Advocate”) is suing the Public Trustee as their client however, the Public Trustee was never the Client of that Advocate’s firm. The Affidavit goes on to say that as a consequence the award of costs by the taxing master was obtained irregularly. On 17th January 2020, the Application was certified as urgent by the Hon DR Nyakundi and fixed for hearing on 23rd January. On 23rd January 2020 Messrs W.G. Wambugu & Co Advocates filed a Notice of Appointment as advocates of the Intended Respondents/Interested Parties.

22. The Advocate responded to the Application by filing a Notice of Preliminary Objection. That Notice is dated 22nd January and was filed on 23rd January 2020. The Notice of Preliminary Objection relies on the following grounds:

“1. THAT the Application is misconceived, bad in law and otherwise an abuse of the due process of the Court.

2. THAT the Honourable Court lacks the requisite jurisdiction to hear, entertain and/or determine the Application dated and filed on 17th January, 2020. In addition, to a preliminary objection, the Advocate also filed a Replying Affidavit dated 22nd January 2020 and filed on 23rd January 2020. Notwithstanding its title, the document deals with very few facts. The majority of the pages are taken up with legal argument, including extensive quotation from legal authorities.”.

23. The facts deponed are as follows:

a. The Advocate filed the Petition in Succession Petition No 3, which resulted in “the Grant” being issued.

b. That the Deponent wrote a Letter to the Public Trustee dated 7th August 2020 (Exhibited as “MK.2”).

c. That the Deponent wrote a Letter to the Public Trustee Mombasa dated 8th August 2020, thus informing him that he had been appointed to be the Administrator of the Estate.

d. The Letter includes a list of “the beneficiaries” (however, that list does not include those beneficiaries who filed objections within the **Probate & Administration/Succession Cause No 3 of 2018**).

e. The Beneficiaries were copied into the correspondence passing from the Advocate to the Public Trustee.

f. The Advocate’s bill of costs with supporting documents was filed 1 month and 4 days from when the Public Trustee was introduced to the named beneficiaries and served the next day together with the Notice of Hearing for 17th October 2019.

g. The Advocate has instructed Advocates in relation to the facts and matters he considers defamatory in line 26 of the Supporting Affidavit to the joinder application.

h. The Letter exhibited (MKM.2) states that the Advocate has put forward two values for the Estate, one for Kshs.980 million and one for KShs.500 million. The first one has been disputed and the second one has not been challenged, he says.

24. The legal arguments put forward in the “Replying Affidavit” are that following its ruling on the taxation matter the Taxing Court has become functus officio, therefore that Court lacks the jurisdiction to “*disturb and/or stay its Certificate of Taxation*”. Secondly, that the two intended Respondents “*lack the requisite locus standi to advance any claim whatsoever and howsoever on behalf of the Estate*”. The Advocate further argues that it falls on the Public Trustee to pay him for services rendered out of the Estate.

25. The Advocate argues furthermore that for the 2nd and 3rd Intended Respondents to state that the Certificate of Taxation is illegal is an affront to the sanctity of this Honourable Court and is defamatory for which he will be seeking the appropriate remedies. For the argument that the Application for joinder is an abuse of process, the Advocate relies on the Court of Appeal authority of **Muchanga Investments Ltd – v- Safaris Unlimited (Africa) Limited & 2 Others [2009] eKLR** for a definition of the concept of abuse of process which appears on page 12 line 11. However, the quotation relied upon relates to a quotation from a Nigerian case (Sarak v Kotoye (1992) NWLR 9pt 264) 156 at 188-189. It is noteworthy that before the Kenyan Court of Appeal proceeded to list various definitions from other sources, including

Wikipedia (p. 11), which said, “a person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process, and that offends justice. In that case, the Court made its finding and decision on the basis of the Applicant company putting forward a case (for adverse possession) which contradicted its director’s case and evidence that there was a contractual arrangement in force.

26. Here it is the beneficiaries who allege that there was a contractual arrangement between the Advocate and themselves. The Advocate argues that as a consequence of the Court Order, that privity of contract passed from the Beneficiaries who instructed him, to the Public Trustee. Also on page 11 of that judgment is a quote from the Chief Justice of South Africa Mohomad CJ in *Beinosi v Wivley* 1973 SA 721 SCA setting out the legal principle on abuse of process thus; “What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of “abuse of process.” It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.”.

27. On 23rd January 2020, the Learned Taxing Master (Hon DR Nyakundi) heard the application for joinder. He heard both Counsel and made the following Order:

“1. **THAT** Mr Mugo be and is hereby allowed time to put in a further replying affidavit on the preliminary objection.

2. **THAT** in view of the fact that there is a preliminary objection which raises issues touching on the bill that was taxed by this court on 19th December 2019 and based on the certificate of urgency dated 22nd January 2020 by Mr. Mugo advocate for the interested parties I do allow prayer number 3, that pending hearing and determination of this application stay of execution to the certificate of cost issued on 2nd December 2019 be and is hereby issued.

The Advocate objects to the phraseology used in that order and seeks its amendment under the “slip rule”.

28. Meanwhile on 13th February 2020, the Public Trustee filed a Notice of Motion Application together with an Affidavit in Support together with a Replying Affidavit. The Application sought the following orders:

“1. That this application be certified urgent and the same be heard *ex-parte* in the first instance.

2. That there be stay of execution of the certificate of taxation herein dated 23rd December, 2019 (bill of costs) pending hearing and determination of this application inter-parties.

3. That there be stay of execution of the certificate of tazation herein dated 23rd December, 2019 (bill of costs) pending hearing and determination of this application.

4. That this Honourable Court be pleased to set aside the taxation proceedings and orders of 17th October, 2019 giving rise to the certificate of taxation dated 23rd December, 2019 together with any incidental and or subsequent proceedings and orders thereafter.

5. That the advocate and client bill of cost herein dated 9th September, 2019 be heard and determined on merit by involving the participation of the relevant parties to the bill of costs.

6. That the costs of this application be provided for.

29. The Application is said to be based on the following grounds:

“1. **That** the Notice of Taxation of the bill of costs herein was served upon the Assistant Public Trustee-Mombasa on 13th September, 2019 and it was received under protest as the Assistant Public trustee had prefixed official engagements on 17th October, 2019 what the taxation was to be heard.

2. **That** at the time of service the court had not served the Public Trustee with an order appointing it the legal representative of the estate of the deceased herein and thus unaware of the succession matter herein and a stranger to the bill of costs.

3. That the Public Trustee is not the instructing client which issue of instruction is cardinal in taxation and thus the same has to be heard and determined on merit.

4. That at the time of service of the bill of costs there was only one state counsel in the station (Public Trustee-Mombasa) and thus unable to attend court on 17th October, 2019 at the same time attend a prefixed official duty in Nairobi.

5. That the grant of letters of administration was sent to the Public Trustee by the court on 23rd October, 2019 long after the date for taxation and thus it was unfair for the court to proceed with the taxation against the Public Trustee when it had not been served it with the order appointing it as the legal representative.

6. That the estate of the deceased herein has been condemned unheard as it was not given an opportunity to competently participate in the taxation proceedings herein.”.

30. The Supporting Affidavit sets out the factual background. In it Mr Muliro, State Counsel says that the Estate of the Deceased has been condemned unheard as it was not given an opportunity to participate in the taxation. He says that when he was served with the Notice of Hearing for 17th October 2019, he had not been served with the order of the High Court appointing the Public Trustee as the Administrator and therefore was a stranger to the Bill of Costs and the proceedings. Further on the date fixed for hearing – 17th October 2019 he had a prior appointment namely a meeting of Regional and Section Heads. The meeting was held in Nairobi and therefore he could not attend the hearing. The Taxing Master therefore was aware he could not attend and therefore it was unfair for him to proceed with the Taxation against the Public Trustee. It was only after the Order (Letters of Appointment) were served that the Public Trustee had the adequate legal authority to deal with the Estate of the Deceased including familiarisation with the Estate and the beneficiaries together with taking instructions as necessary.

31. Mr Maliro also states that he explained to Mr Mwangombe that he was alone in the station as his colleague was on maternity leave and he could not attend the Hearing on 17th October 2019. He says that “*Mr. Mwangombe Advocate and I agreed that we shall pick another date which is convenient to both of us with the involvement of the heirs who allegedly instructed him to act on their behalf*”. At paragraph 9 and 13 of the Affidavit, he states;

‘9. *“That I was shocked when Mr. Mwangombe Advocate served me with the certificate of taxation whereas we had agreed to take another date with a view of giving the court time to service me with the order appointing me the legal representative and thereafter seek proper instructions from the rightful heirs to enable me respond to the bill of costs.*

10. *That the appointed legal representative of the estate of the deceased herein never gave instructions for the advocate to act on behalf of the estate and that it was not privy to the alleged advocate/client agreement giving rise to the bill of cost herein and thus the alleged bill of cost cannot form part of liabilities against the estate of the deceased herein which issue of instructions has to be heard and determined by the court on merit.*

11. *That instructions are cardinal in taxation of bill of costs and since the same is in dispute the issue ought to be heard and determined on merit with the involvement of all relevant parties (instructing clients).*

12. *That the actions of the instructing clients are not binding to the estate as they were acting in their individual capacity and not as administrators of the estate and more so the instructing clients are ready for the bill of cost to be taxed against them on merit. Therefore, the bill of cost against the Public trustee is misconceived.*

13. *That it is in the interest of justice that the proceedings and orders of 17th October, 2019 giving rise to the certificate of costs herein and all incidental and or subsequent proceedings and orders thereafter be set aside and the bill of costs be heard and determined on merit.”.*

32. The Public Trustee also filed a Replying Affidavit to the Application dated 22nd January 2020 filed by the Intended Respondents/Interested Parties. Again the Public Trustee sets out clearly his opposition to the Certificate of Taxation issued by the Taxing Master. They are (1) The Public Trustee was condemned unheard, (2) The Public Trustee never instructed Messrs Mwangombe & Co Advocates to act on behalf of the Estate and therefore the Bill cannot properly form part of the Estate, (3) The Notice of Taxation was received under protest for reasons that were clearly explained. The Public Trustee is asking the Court to set aside the Certification of Taxation and reassess the costs. If that is not done, the Public Trustee states “That the estate of the deceased herein will highly be prejudiced if the certification of taxation is not set aside and the bill of costs heard and determined on merit as the Public trustee was condemned unheard certification of taxation was obtained irregularly the Public Trustee having been condemned unheard and without the involvement of the instructing clients.

33. The Advocate too filed a Replying Affidavit on 13th February 2020. In it he repeats what is said in the Notice of Preliminary Objection, namely that the Intended Respondents/Interested Parties have no locus standi and their Application is an abuse of process. He does make a new point, namely at paragraph 15 and 16 the Advocate says;

“15. *THAT the Intended (Interested) Parties attempt to interpret the Advocates Act (par. 11) in isolation of the Succession Act (section. 83) of is mischievous, erroneous and an abuse of court process.*

16. *THAT thus it being undisputed that I filed Succession Petition No.3 of 2018 which resulted to the Grant that this Honourable Court issued on the 18th of July, 2019, the Personal Representative of the Estate of Eliud Timothy Mwangunga- E.G.H. (Deceased) squarely fits the description of client according to the Advocates Act’s description in Section. 1...”. Following that legal treatise the Advocate states “that I the taxation was against the right party...”.*

34. Having obtained a Certificate of Taxation, the Advocate filed an application in a new file namely **Miscellaneous Application No 3 of 2020** . In that Application he seeks the Orders set out above, namely that the Certificate of Taxation be adopted as an order of the Court and secondly that a garnishee order be made against specific assets of the Estate. That Application was filed on 14th January 2020. Directions given on 15th January. It was subsequently listed for hearing on 20th February 2020 – a date taken ex parte by the Applicant and given in the Registry contrary to the Court’s Order which allowed the Respondent time to respond. Neither that Application nor the Advocate’s Submissions make any reference to the challenge to the Certificate of Taxation being mounted in **High Court Misc No 3 of 2020**. It was State Counsel for the Public Trustee (Mr Maliro) who informed the Court that there was an Application to set aside the taxation in **Misc Application No. 27 of 2019** and there are interested parties (the sons of the Deceased) who have instructed counsel who has travelled from Nairobi. The Intended Garnishees were also represented in Court. After, the Public Trustee informed the Court that there was a challenge, the Advocate changed tack to say that the taxing master had no jurisdiction to hear an application for stay of his own order namely, the Certificate of Taxation. The Taxing Officer has stayed the Certificate (see order above).

35. When the matter went before the Taxing Master/Deputy Registrar, the DR gave directions for the file (*Misc 27 of 2019*) to be placed before the Judge at the same time as when the garnishee proceedings were to be heard. That was 20th February 2020. The Court made the following order:

“Order

1. Hearing in Misc App No 3 of 2020 is adjourned pending directions on this file as well as Misc App No 27 of 2019.
2. The Court will give directions on all the outstanding applications in a single ruling.
3. Ruling date on 16th April 2020.”

REASONING AND DECISION

36. The Application filed on January 2020 firstly seeks an order from the Court adopting the “Certificate of Taxation (Costs) issued by the High Court Taxing Master during the Christmas vacation (23rd December 2019). In those circumstances, the Court has to be satisfied that it should adopt the Certificate as an order of the Court. As a starting point the Court must be satisfied that the Taxation was conducted appropriately and there is no valid challenge. In the normal course of things when a party is dissatisfied with a certificate of taxation, it will request reasons and then make an application for review under **Rule 11 of the Advocates Remuneration Order 2009**. That Order provides:

(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision giving notice in writing to the taxing officer of the items of taxation which he objects

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to the judge by chamber summons, which shall be served on all the parties concerned setting out the grounds of his objection.

37. Since the Certificate of Taxation (Costs) was issued during the vacation, time would not begin to run until after the vacation, namely from 14th January 2020.

38. In this case, the Bill of Costs states that it is an advocate-client bill of costs. **Rule 13(2) of the Remuneration Order 2009** provides that “(2) *Due notice of the date fixed for such taxation shall be given to both parties and both shall be entitled to attend.*”. In this case it is clear from the subsequent applications that the party named as “Client” was not given an appropriate opportunity to attend. Mr Muliro states that when the taxation was fixed for hearing, he had not been served with the Letters of Administrator appointing the Public Trustee as administrator, therefore the Taxing Master should not have treated him as a party and in particular treated him as a Client of the Advocate. Further, the Notice of Hearing was served but Mr Muliro objected. Again, the Taxing Officer did not take that into account and proceeded as if there were no concerns to address. On 13th September 2020. The Grant/Letters of Administration had not been typed. It follows that the Public Trustee was not aware of the Appointment. It is a fundamental aspect of Succession that applications and appointments are published. The Taxing Officer as Deputy Registrar would have been the person responsible for that publication. If it was not done, it could not have been relied upon. It seems to this Court that service on the Public Trustee would have been the first essential step in publication of the Order and the Appointment.

39. The Advocate has Certified a certain value for the Estate in the Bill of Costs. In the course of these proceedings, the Advocate has given the Estate 3 different valuations. It is perhaps not surprising that he used the highest of those values on which to base his Bill of Costs. However, that cannot be the end of the matter because in the application before the High Court contains an application for disclosure on the true value of the Estate. That incorporates an admission that the value stated in the Bill of Costs is not the true value.

40. A further consideration which neither the Advocate, nor the Taxing Officer appear to have considered is the character of the Public Trustee as an office. The Public Trustee is an office and not an individual. It is part of the Attorney General’s Department and is run by State Counsel. It is therefore undeniably part of the Government. The Advocate has not served the appropriate notice under the Government Proceedings Act (Section). That is something that the Taxing Officer should have taken into account before hearing the taxation.

41. The Taxation File was put before the Court by the Taxing Officer on the Application of some (if not all) the Parties. This Court had intended to give directions on how the matter should proceed.

42. Bearing in mind that the ultimate purpose of taxation proceedings is that an advocate should be paid a fair and appropriate fee for work done, the starting point must be whether the Certificate of Taxation (costs) is enforceable. For the reasons set out above, it is the opinion of this Court that the Certificate issued by the Taxing Officer on 23rd December 2019 is a travesty. The process followed to achieve that result is contrary to the rules of natural justice. Further, it does not follow the rules of procedure set out in the Advocates Act and the Remuneration Order. This Court cannot adopt and/or convert that Certificate into an order, nor a decree and therefore it is a nullity. In the circumstances, the taxation must be conducted again with notice to ALL the correct parties.

43. The process of the taxation as well as the certificate issued are challenged by the Intended Respondents/Interested Parties. They assert that they were the Clients for the periods covered by the Bill of Costs they were the physical persons who were giving the Advocate Instructions and he was acting on those Instructions. Further, he repeatedly referred to them as such in Open Court and that appears on the record of **P&A 3 of 2018** (the parent file). Further, they have asked to be joined as parties to the taxation. The Advocate opposes that. He argues that they have no locus and are strangers to the matter. As a matter of logic, they would provide the taxing officer with essential information as to the period and terms of the retainer leading up to the Order.

44. **Section 50** of the Advocates' Act Cap 16 provides; “(1) Where a person other than the person who is the party chargeable with a bill of costs is liable to pay the bill either to the advocate or to the party chargeable with the bill, or where a person is interested in any property in the hands or under the control of a trustee, executor or administrator, out of which property the trustee, executor or administrator has paid or is liable to pay the bill, that person or his administrators, executors or assignees may apply to the Court for an order for the taxation of the bill as if he were the party chargeable therewith, and the Court, having regard to the extent and nature of the interest of the person, may make any order thereon which it would have been competent to make if the application had been made by that party: Provided that no order for taxation of a bill shall be made under this section in any case where— (i) the bill has previously been taxed; or CAP. 16 Advocates [Rev. 2017] 26 (ii) the application is made more than six months after the date on which the bill was rendered to the party chargeable therewith or three months after the date on which the bill was paid, or the date when the party making the application became entitled to do so, whichever is the earliest. (2) If an applicant under subsection (1) pays or has paid any money to the advocate in respect of a bill of costs payable out of property in the hands or under the control, of a trustee, executor or administrator he shall have the same right to be paid that money by the trustee, executor or administrator chargeable with the bill as the advocate had. (3) The Court may, if it orders taxation of the bill under this section, order the advocate to deliver to the applicant a copy of the bill upon payment of the costs of that copy.”.

45. In the circumstances, the Intended Respondents are fully entitled to participate in the taxation. From what is said in the Supporting Affidavit to their Application for joinder, their evidence is a necessary part of the considerations any taxing officer must take into account in exercising his discretion.

46. In the opinion of this Court the facts and matters the Taxing Officer was obliged to take into consider and satisfy himself were:

- a. To satisfy himself that the party named as client was the client in the parent file,
- b. If there was a different client, the reasons for that;
- c. Whether the Instructing Party and the Paying Party were the same or different – and give directions to satisfy himself of that. In this case, he should have considered how and when the Public Trustee became a party – if that is the correct position.
- d. Whether the Bill of Costs was served on the correct parties
- e. That all the Parties entitled to be heard have been given an adequate opportunity to be heard
- f. Whether the Bill of Costs used the correct or most plausible valuation of the Estate.

47. This Court is of the opinion that in failing to take into those parties and advocate client relationships which were apparent on the record, the Taxing Officer failed to exercise his discretion correctly or fully.

48. The Garnishee proceedings too are premature and doomed to failure by reason of Section 55 of the Law of Succession Act which provides, “**No distribution** of capital before confirmation of grant (1) No grant of representation whether or not limited in its terms shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in Section 71...” The Grant has not been confirmed and had not been confirmed at the date of filing the Application by the Advocate. In addition, any disposition (payment) without confirmed grant could amount to intermeddling. **Section 45 of the Law of Succession Act** provides that: “45. No intermeddling with property of deceased person (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person. (2) Any person who contravenes the provisions of this section shall— (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

49. In the circumstances it is directed and declared as follows:

- (1) The Certificate of Taxation (Costs) issued on 23rd December 2019 is a nullity;
- (2) The Application to adopt the Certificate is premature;
- (3) The Application for Garnishee orders is and has always been premature;
- (4) The File to be sent to Mombasa to be placed before the Presiding Judge to re-allocate the matter as he deems fit. This Order is necessary because this is a single judge station and there is only one taxing master in the High Court. The nearest Court where an alternative taxing master will be easily found is Mombasa.

50. This Ruling was at first Scheduled to be delivered on 16th April 2020. Unfortunately, it was adversely affected by the Guidelines consequent on the Covid Pandemic. It was slated a date in September and November 2020 when the Advocate was not available.

51. Subsequent to that the Advocate has filed certain applications stating that he does not wish the Presiding Judge Voi to hear this matter. The Advocate has expressed his concerns about this Court hearing the matter. That is a further reason why this Court as currently constituted cannot adopt the certificate. In the circumstances, all three files are transferred to Mombasa to be placed before the Presiding Judge for directions and appropriate re-allocation.

52. In the circumstances, it is further ordered that once the file is sent to Mombasa it shall remain there and not be returned to Voi until an alternative judge is appointed/allocated to preside over matters in that Court.

Dated 11th September 2020 in Voi

Order accordingly,

FARAH S. M. AMIN

JUDGE

Delivered, Signed and Dated at the High Court in Kakamega this the 17th day of November 2020

In the Presence of:

Court Assistant: Polycarp

ICT Officer: Mathew Rumbwa

Remotely: Mr Mwangombe, Mr Maliro Public Trustee and Mr Mugo

Judgment delivered on-line using the MS-Teams platform and disseminated electronically using email at the request of the Parties in accordance with Corvid-19 Directions prevailing at the time.