



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**MISC. APPLICATION NO. 159 OF 2016 AS CONSOLIDATED WITH MISC. 62 OF 2017**

**S.G. MBAABU & CO. ADVOCATES.....APPLICANT**

**VERSUS**

**JOSEPH MUOKI KAKENYI.....1<sup>ST</sup> RESPONDENT**

**MATHEW MWEU KAKENYI.....2<sup>ND</sup> RESPONDENT**

**ANNOUNCEATAH MARITIA KITETA.....3<sup>RD</sup> RESPONDENT**

**RULING**

**Introduction**

1. Before me are two consolidated applications seeking this court to set aside the taxing officer's (Deputy Registrar's) ruling dated 27<sup>th</sup> October 2016 awarding a sum of Kshs9,635,634/65 to the applicant (Mbaabu & company Advocates) against the respondents . The first application is a reference brought by way of notice of motion dated 17<sup>th</sup> November 2016 and filed on 18<sup>th</sup> November 2016 by Joseph Muoki Kakenyi, Mathew Mweu Kakenyi and Announceatah Maritia Kiteta seeking:

1. That this matter be certified as urgent and the same be heard urgently.

2. That there be a stay of execution of the costs taxed in Nairobi High Court Milimani (Family Division Misc. Application No. 159/2015) S.G. Mbaabu & Co. Advocates vs Joseph Muoki Kakenyi and 2 others pending the hearing and determination hereof or until further orders of the court.

3. That the decision of the Deputy Registrar dated 27<sup>th</sup> October 2016 in the said Nairobi High Court Milimani (Family Division) Misc. Application No. 159/2015 S.G. Mbaabu and Company Advocates versus Joseph Muoki Kakenyi and 2 others and the certificate of taxation arising thereon be set aside-revoked.

4. That the respondent's Advocates/Client bill of costs dated 29<sup>th</sup> October 2015 and filed on 30<sup>th</sup> October 2015 in the said Nairobi High Court Milimani (Family Division) Misc. Application No. 159/2015 be taxed afresh by a differently constituted taxing court.

5. That in the alternative to (4) above, this honourable court be pleased to assess/tax the costs lawfully payable to the respondent on the said bill of costs.

6. That this honourable court do issue such other orders as it may deem fit and just to issue to serve the ends of justice in the circumstances herein.

7. That the costs hereof be borne by the respondent.

2. The application is premised upon grounds set out on the face of it and an affidavit sworn on the 17<sup>th</sup> November 2016 by Joseph Muoki Kakenyi with authority from his co-applicants.

3. Upon service, the respondent (S.G. Mbaabu and Co. Advocates) filed a replying affidavit sworn on 28<sup>th</sup> March 2017 by one Stephen

Gitonga Mbaabu an advocate practicing in the respondent's firm. Subsequently, the applicants filed a supplementary affidavit sworn on 18<sup>th</sup> April 2017 by one Joseph Muoki Kakenyi the 1<sup>st</sup> applicant herein with authority from his co-applicants.

4. On 25<sup>th</sup> April 2017, parties agreed to dispose of the application dated 17<sup>th</sup> November 2016 by way of written submissions. Subsequently, the applicants' counsel filed their submissions on 15<sup>th</sup> May 2017 together with a list of authorities. Unfortunately, the respondents did not file theirs as directed. Instead, the respondents proceeded to file Misc. Appl. No. 62/17 seeking the enlargement of time to file a reference against the decision of taxation on advocates/clients bill of costs by the Deputy Registrar dated 27<sup>th</sup> October 2016. In response to that application, Joseph Muoki Kakenyi (respondent) filed a replying affidavit sworn on 26<sup>th</sup> June 2017 challenging the legality of the application as the taxing master's notice seeking reasons for the bill taxed was not sought.

5. On 20<sup>th</sup> September 2017, Mr. Nderitu appearing for the firm of Mbaabu and Company Advocates urged the court to consolidate the two applications as they arose from the same subject matter considering that they were both challenging the tax master's ruling on the bill of costs under Misc. File No. 159/15.

6. On 4<sup>th</sup> February 2018, the court directed for the two files to be consolidated and the two applications be heard together under file No. Misc 159/2016. Parties agreed to dispose of the two applications by way of written submissions. Mr. Nderitu appearing for the firm of S.G. Mbaabu (respondents) filed submissions touching on the two applications on 18<sup>th</sup> June 2018. The respondents in Misc. application No. 62/17 filed further submissions on 27<sup>th</sup> April 2018 addressing issues raised in that application.

7. Before I proceed to address the issues raised in each application, a brief background will suffice. Sometime the year 2011, the firm of S.G. Mbaabu was instructed by the estate of the late Peter Mwikya Kakenyi to petition for a grant of letters of administration *vides* Succession Cause No. 1657/2011 Nairobi Family Division. The net value of the estate was indicated in Form P & A 5 as amounting to Kshs135,328,656

8. Subsequently, a grant of letters of administration *intestate* was made and issued on 30<sup>th</sup> January 2012 to Joseph Muoki Kakenyi, Mathew Mweu Kakenyi and Announceattah Maritia Kiteta as joint administrators. Luckily, there was no contention from any quarters and a certificate of confirmation of grant was issued and the estate distributed on 5<sup>th</sup> November 2014.

9. On 30<sup>th</sup> October 2015, the firm of S.G. Mbaabu and Company Advocates filed an Advocates/Clients' bill of costs claiming a total of Kshs.87,459,831 as his legal fees in representing the said estate in the aforesaid succession matter. Out of the Kshs.87,459,851, Kshs.56,040,000 was quoted as the instructions fees based on Kshs.3,906,500.00 being the alleged property value as per the valuation report valuing the estate as such during the taxation period i.e 7<sup>th</sup> June 2016.

10. After canvassing the application, the taxing officer taxed the bill on 27<sup>th</sup> October 2016 at a total sum of Kshs.9,635,634.65 based on the property value indicated in Form P & A 5 in the succession cause i.e. Kshs.135,328,656. Aggrieved by that decision, the respondents in the said application being the administrators of the estate filed a reference now Misc. No. 159/16. This was after indicating their objection seeking to be supplied with the reasons for the decision made.

11. It was during the pendency of the application (Misc. 159/16) that the respondents (S.G. Mbaabu Advocates) decided to file their misc. application No. 62/17 seeking leave to enlarge time for them also to file a reference challenging the same ruling. Considering that the two applications are seeking somehow different prayers although arising out of the same suit, I will conveniently determine each separately.

#### **Chamber Summons Misc. Application dated 27<sup>th</sup> April 2017**

12. On 27<sup>th</sup> April 2017, the applicant brought the present application seeking orders that:

- a. the court be pleased to enlarge time within which the applicant should file reference against the decision of the Deputy Registrar dated 27<sup>th</sup> October 2016 in **Nairobi High Court Milimani (Family Division) Misc. Application No. 159 of 2015**;
- b. pursuant to (a)above, the application be deemed as a properly filed reference against the decision of the Deputy Registrar dated 27<sup>th</sup> October 2016 in the said **Nairobi High Court Milimani (Family Division) Misc. Application No. 159 of 2015**;
- c. the decision of the Deputy Registrar dated 27<sup>th</sup> October 2016 in the said **Nairobi High Court Milimani (Family Division) Misc. Application No. 159 of 2015** and the certificate of taxation arising thereon be set aside/vacated;
- d. the applicant's Advocate/Client Bill of costs dated 29<sup>th</sup> October 2015 and filed on 20<sup>th</sup> October 2015 in the said **Nairobi High Court Milimani (Family Division) Misc. Application No. 159 of 2015** be taxed afresh by a differently constituted taxing court;
- e. in the alternative the court be pleased to assess/tax the costs lawfully payable to the applicant on the said Bill of Costs;
- f. the court do issue such other orders as it may deem fit and just to issue to serve the ends of justice in the circumstances herein; and
- g. the costs hereof be borne by the respondent.

13. The application was based on the grounds that; On the 6<sup>th</sup> June 2016, parties agreed to file valuation reports on the property the subject

of the estate for purposes of taxation of the then pending applicant's bill dated 29<sup>th</sup> October 2015; that by a letter dated 7<sup>th</sup> June 2016, the applicant forwarded the various valuation reports on the estate of the respondent where the total value of the estate stood at Kshs.3,906,500,000.00; that it amounts to judicial fallacy to insist on the value of the estate as stated in the petition whereas no objection or indeed any evidence was presented to challenge the valuation reports on the estate; that in the valuation reports submitted by the consent of the parties were evidence before court on the value of the estate and it was not just for the Hon. Deputy Registrar to disregard or indeed refuse to exercise her discretion as she did; and that in all the circumstances of the matter the said decision of the Hon. Deputy Registrar was unreasonable, fallacious, unjust, wrongful and/or without any basis in law.

14. The application was supported by the affidavit of S.G. Mbaabu dated 27<sup>th</sup> April 2017. The summary of his case was that on 27<sup>th</sup> October 2016 the Hon. Deputy Registrar awarded a sum of Kshs. 9,635,634.65 in a taxation of his Advocate/Client Bill of costs filed in **Nairobi High Court Milimani Misc. Application No. 159 of 2015**; that the respondents filed a reference against the said ruling dated 17<sup>th</sup> November 2016; that whereas the respondents complained against the amount awarded to him on various grounds, it remained clear that the said ruling was based on the value of the estate as stated in the petition filed in **High Court Succession Cause No. 1657 of 2011**; that however through the agreement between his advocates and the respondent's advocates on the 6<sup>th</sup> and 7<sup>th</sup> June 2016 the parties agreed to file valuations on the assets of the estate for purposes of the taxation of costs after which the valuations were filed yet the same were ignored by the Deputy Registrar despite there being no evidence or objection to suggest that the value of the estate was not the one given at Kshs.3,906,500,000.00; and that it was in the interest of justice that the decision of the Hon. Deputy Registrar be set aside and the bill re-taxed based on the actual value of the estate as stated in the valuation reports filed by himself.

15. The application was opposed by the respondents through the affidavit of Joseph Muoki Kakenyi dated 26<sup>th</sup> June 2017. It was his case that the application was without any merits and ought to be dismissed as the applicant had not demonstrated to the court good grounds to justify the issuance of the orders sought; that the application was fatally defective and or bad in law for want of compliance with the mandatory requirements of the law upon which the application ought to be premised; that the respondent was guilty of laches and that disentitled him of the orders sought; that it was not true that the parties ever agreed on any valuation of the subject matter in **Nairobi High Court Succession Cause No. 1657 of 2011** which gave rise to **Nairobi High Court Milimani Misc. Application No. 159 of 2015** whose taxation award the applicant was seeking to challenge; that there was no basis for valuation of the subject matter in the said **Nairobi High Court Succession Cause No. 1657 of 2011** as the value had been stated and particularized in the pleadings which had been filed by the applicant; and that the present application was an afterthought.

16. The respondent submitted that the applicant did not present before this court the reasons for failing to file the reference within time for the court to exercise its discretion in his favour despite coming to court six months late. They further submitted that there was no properly filed reference as required by **Rule 11 of the Advocates (Remuneration) Order, 2009**, that the applicant had not given notice to the taxing officer under **Rule 11(i) of the Advocates (Remuneration) Order** within 14 days of the taxation ruling of 27<sup>th</sup> October 2016, and that the applicant had not given this court any reasons why it did not comply with the said mandatory legal requirements. The applicant disputed the value of the estate as per the pleadings drawn and filed by the advocate/applicant on 9<sup>th</sup> August 2011 and submitted that the bill of costs ought to be re-taxed based on the value of the estate as per the open market value of Kshs.3,824,000,000/= indicated in the valuation reports.

**17. Rule 11 of the Advocates' Remuneration Order 2009** is clear that the Court has discretion to extend time for lodging a reference notwithstanding the expiry of the 14 day period prescribed for the reference from the taxing master's decision on costs. Paragraph 11 of the Advocates' Remuneration Order provides as follows:

**"11. Objection to decision on taxation and appeal to Court of Appeal**

- 1. Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to 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 a judge by Chamber Summons, which shall be served on all the parties concerned, setting out the grounds of his objection.**
- 3. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.**
- 4. The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2), [and] may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.**
- 5. The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by Chamber Summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired."**

18. In exercising its discretion in enlarging time, the taxing officer or Judge for that matter, has to be satisfied and indeed convinced that there is a justifiable basis or reasonable grounds to warrant such reliefs( see Kwengu & Company Advocates v Invesco Company LTD [2014] eKLR and Shah & Parekh v Apollo Insurance Co. Ltd [2008] eKLR). I am further guided by the decision in Sound Entertainment Ltd vs Anthony Burungu & Co. Advocates (2014) eKLR where the court found a delay of 3 months in filing a reference as unreasonable and using court's discretion dismissed the application for enlargement of time.

19. In this case, the taxing officer delivered her ruling on the taxation in **Nairobi High Court Milimani Misc. Application No. 159 of 2015**

on 27<sup>th</sup> October 2016. Pursuant to **Rule 11** of the **Advocates' Remuneration Order** the applicant was to give notice in writing to the taxing officer of the items of taxation to which he objected within fourteen days after the decision. Within fourteen days from the receipt of the reasons, he was to apply to a judge by Chamber Summons, setting out the grounds of his objection. In this case, none of the above requirements was complied with.

20. The applicant did not explain the failure to comply with the above mentioned requisite steps or the delay of six months in bringing the present application. This court finds that the delay was inordinate and amounts to indolence on the applicant's part. At most, I find the application filed in bad faith especially after having agreed to submit on the Misc. Application no.159/16 in which they strongly supported the Taxing officer's decision. Accordingly, Misc. Application no. 62/2017 dated the 27<sup>th</sup> April 2017 is hereby dismissed with costs to the respondents. I will now turn to the main reference for determination.

#### **Notice of Motion Application dated 17<sup>th</sup> November 2016**

21. The motion dated 17<sup>th</sup> November 2016 is supported by an affidavit of Joseph Muoki Kakenyi sworn on 17<sup>th</sup> November 2016 which is a replica of the grounds set out on the face of the application. It is the applicant's case that the ruling of the Deputy Registrar dated 27<sup>th</sup> October 2016 taxing and awarding against the applicants herein a sum of Kshs.9,635,634/65 in a taxation of an advocate/client bill of costs filed in Nairobi High Court (Family Division) Misc Appl. No. 159/2015 where the applicants herein were the respondents was erroneous and based on wrong legal principles.

22. The applicants averred that the bill of costs arose out of proceedings in Nairobi High Court Succession Case No. 1657/2011 whose estate value was estimated at Kshs.135,328,656. That the award of the taxing officer on the respondent's bill of costs was manifestly excessive and oppressive in the circumstances.

23. The applicants averred that there is an error in principle and in law in the decision of the taxing officer in the following respects.

**i. That the taxing officer misapprehended the applicable law and failed to apply correctly the formula provided for in schedule X of the Advocates Remuneration Order 2006 for assessing the instruction fee.**

**ii. The taxing officer erred in law and in fact in calculating the instruction fees on the amount of the value of the subject matter in excess of Kshs.1,000,000 at Kshs.5,052,232/37 by applying the rate of 3.75% instead of the rate provided for by the law applicable of the three quarters  $\frac{3}{4}$  of 0.75%.**

**iii. That the taxing officer misdirected herself and erred in law and in fact by applying schedule 10(b) of the Advocates Remuneration Order to increase the costs that she had allowed by one half ( $\frac{1}{2}$ ) hence awarding the sum of Kshs.2,766,425/1875 when the petition was not contested.**

**iv. That the taxing officer did not apply her mind properly on the bill of costs and the oral and written submissions by counsel for the applicants and as a result thereof arrived at an erroneous decision.**

**v. That the taxing officer allowed amounts in the bill of costs which are not provided for in the law applicable.**

24. The applicants therefore prayed that the ruling, consequential orders/certificates thereon be vacated and the bill of costs be re-taxed by a different taxing officer or by this honourable court.

25. In her submissions, Mrs. Mwangangi appearing for the applicants relied entirely on her written submissions filed on 15<sup>th</sup> November 2017 which is a replica of the grounds and affidavit in support of the application. Learned counsel submitted that although a taxing officer has the powers to exercise discretion in taxing a bill of costs, the high court has powers to interfere with such discretion by an inferior court if it is satisfied that its (inferior court) decision is clearly wrong because it misdirected itself or because it has acted on matters which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong decision. In support of that legal principle counsel referred the court to the case of **Mbogo and Another vs Shah (1968) EA 93**.

26. Mrs. Mwangangi further submitted that the succession cause having been filed the year 2011, the Advocates Remuneration Order applicable is the one of 2009 being an amendment of the 2006 remuneration order. Learned counsel opined that taxation of instruction fees is determined on the basis of the value of the subject matter set out in the pleadings, or judgment or any settlement by the parties. To buttress on this submission, she referred the court to the case of **Joreth Ltd vs Kigano and Associates (2002 eKLR in Civil Appeal No. 66 of 1999 (Nairobi) (UR)**.

27. Mrs. Mwangangi submitted that the value of the estate was clearly indicated in the succession petition at the point of initiating the suit. That the allegation of having the property valued at the time of filing a bill of costs (the year 2016) could not form the basis of taxation.

#### **Respondent's Reply**

28. In response to this application, the respondent filed a replying affidavit through Stephen Gitonga Mbaabu sworn on 28<sup>th</sup> March 2017 who averred that the decision of the taxing officer was made based on all relevant applicable laws and that the same was made relying on the amount petitioned in the succession cause hence should not be set aside.

29. The respondent admitted that the applicable remuneration orders for instructions rendered 2011 is that of 2009 and any subsequent appearance or steps taken after 2014, the 2014 Remuneration order shall be applicable. They asserted that by consent of both parties, the property in question (estate) was valued on 7<sup>th</sup> June 2016 at Kshs.3,906,500 yet the taxing officer undervalued the estate when she relied on the figure quoted in the succession petition.

30. The respondent urged the court to uphold the decision of the taxing officer and should the court set it aside, then the same should be re-taxed using the mutually agreed valuation report. Finally, they submitted that, the application is filed in bad faith with the sole purpose of defrauding them their well earned fees by undervaluing the property.

### **Analysis and Determination**

31. I have considered the application herein, affidavit in support, replying affidavit and submissions by both counsel; issues that arise for determination are:

- a. Whether the taxing officer properly applied the applicable Advocates Remuneration Order in taxing the Bill of Costs.**
- b. Whether the taxing officer applied the correct principles in determining the correct value of the subject matter.**
- c. Whether the court properly calculated the amount of legal fees payable to the respondents in view of the applicable law.**

32. Through her ruling dated 27<sup>th</sup> October 2016, Hon. Kendagor the then Deputy Registrar Family Division awarded Kshs.9,635,634.65 to the respondents in settlement of legal services rendered to the applicants being the joint administrators in the estate of Peter Mwikya Kakenyi in Succ. No. 1657/11. In her ruling, the learned Deputy Registrar said that the succession petition was not contested. She then applied the Advocates Remuneration Order of 2009 which in her words is a replica of Remuneration Order of 2006 in so far as Schedule X on Probate and Administration matters is concerned. Relying on the court of appeal decision in **Joreth Ltd vs Kigamo and Associates (Supra)** which sets out guidelines in determining the value of a subject matter, Hon. Kendagor found that the value of the estate was indicated as Kshs 135,328,656 hence the value of the subject matter in determination of instructions fees.

33. She therefore assessed the first Kshs 1,000,000/= at 1.5% at 15,000/= in compliance with Schedule 10 (a). The Hon. Deputy Registrar went further to assess the  $\frac{3}{4}$  % over the value of Kshs.1,000,000/= i.e. Kshs.134,328,656 at Kshs.5,037,324.37 based on 3.75%. Consequently she went further to add  $\frac{1}{2}$  increment for the advocate/ client costs under Schedule 10 (B) thus awarding Kshs.2,766,425.1875 under that item. As a consequence, she added 16% V.A.T. at Kshs.1,327,884 based on the total costs awarded.

34. According to the applicants, the value of the subject matter is Kshs. 135,328,656 being the value indicated in the succession petition. The applicant is opposed to the application of 3.75% for a sum over Kshs 1,000,000/= instead of 0.75% being  $\frac{3}{4}$  of % of the amount in excess of Kshs1,000,000/=. Further, the applicants expressed themselves that the matter being an uncontested one, the one half increment under Schedule 10 (B) is not applicable. That the net effect is a wrongful calculation of VAT based on the total sum assessed by applying 3.75% and adding one half increment. I will now consider each issue separately.

#### **a. Whether the taxing officer properly applied the relevant advocates remuneration order in taxing the bill of costs**

35. There is no dispute that the respondents were instructed to file a succession cause in question in July 2011. The value of the estate in succession cause No. 1657/2011 the genesis of the subject matter was quoted as Kshs.135,328,656. The court found that the applicable law is the Advocate's Remuneration Order 2009 being the product of the amended remuneration order 2006. The applicants are in agreement with the taxing officer in that finding. The respondents having supported the finding of the taxing officer are therefore in agreement with the decision made. It is clear that vide legal notice No. 50/2009, the Advocates Remuneration Order 2006 was amended thus affecting schedules on fees relating to sales, mortgages and charges of land. The rest of the schedules are as reflected in the advocates remuneration order 2006. I am therefore satisfied that the applicable law in taxing the Advocates/Clients bill of costs in this case is remuneration Order 2009. To that extent, the taxing officer properly applied the applicable law in taxing the bill save for claims or services rendered after the advocates remuneration order of 2014 which items shall be taxed under that order.

#### **b. Whether the taxing officer applied the correct principles in determining the correct value of the subject matter**

36. The guiding principles in determining the value of a subject were succinctly set out in the case of **Joreth Ltd vs Kigamo and Associates (Supra)** as follows:

**“we would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings judgment or settlement (if such be the case) but if the same is not so ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers first, taking into account, amongst other matters, the nature and importance of the cause, or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances”.**

37. In the instant case, the value of the subject is clearly stated in form P & A 5 of Succession Petition No.1657/2011 at Kshs.135,328,656. It does not require any magic to ascertain what is clearly written in black and white. The argument by the respondents that the figure quoted was a mere estimate and that the correct value applicable is Kshs.3,906,500 which was arrived at after a valuation exercise and report done on 7<sup>th</sup> June 2016 is fallacy. The material date is 2011 when instructions were given and therefore the applicable value of the estate as at that time and not 2016. The correct value whether an estimate or not is the amount quoted in the succession petition and that is

Kshs.135,238,650/=. The Deputy Registrar was therefore correct and did not misdirect herself in arriving at that conclusion.

**c. Whether the taxing officer properly calculated the correct amount of legal fees payable to the respondents in view of the applicable law**

38. Schedule X Part A of the 2009 Advocates and Remuneration Amendment Order provides as follows:1-

a. To apply for grant of probate of written will or proof of oral will, or letters of administration with or without will annexed, the proceedings not being contested; where the gross capital value of property comprised of in the grant at 1.5 percent of the value on the first Kshs.1,000,000/=. Under this item, the taxing officer taxed the first 1,000,000/= at 15000/=. This was arrived at as follows;  $1.5/100 \times 1,000,000 = 15000$ .

None of the parties is disputing this amount. I will have nothing use full to add or minus.

39. The next claim which is very contentious is the calculation of  $\frac{3}{4}$  percent over Kshs 1,000,000/- sum. The taxing officer applied 3.75% of Kshs.134,328,656 being the balance after removing the first Kshs1,000,000/=. It is not clear on how the taxing officer arrived at 3.75%. Awarding to the applicants  $\frac{3}{4}$  of percent over Kshs1,000,000/= is equivalent to 0.75%. What does  $\frac{3}{4}$  of per cent mean? The  $\frac{3}{4}$  of % is equivalent to  $\frac{3}{4} \times 1\text{percent} = 0.75\%$ . The correct percent therefore applicable is 0.75% of the sum over and above 1,000,000 which in this case is  $0.75/100 \times \text{Kshs.134,328,656}$ . To that extent, I do agree with M/s Mwangangi that the taxing officer misdirected herself and wrongly calculated the amount of instruction fees payable to the respondent in respect to the sum of Kshs134,328,656 being the balance out of the total value of the suit (succession case) at Kshs,135,388,656). For the above reasons stated, the amount of Kshs.5,052,237/37 is set aside as the same was erroneously arrived at.

40. Regarding the additional increment of  $\frac{1}{2}$  under Schedule 10(B), the law is very clear. For avoidance of doubt, I will reproduce that provision as follows:

In contested matter under the Law of Succession Act, the fees as between advocate and client shall be:

**a. The fees presented in A above increased by one half; or**

**b. the fees ordered by the court, increased by one half; or**

**c. ....**

Under this provision, where the matter is not contested, the amount payable is as per part A of schedule 10 which is party to party costs. It is only when the matter is contested that the fees prescribed under A is increased by one half.

41. In the instant case, its common ground that the succession cause was not contested. That means, that the respondents cannot claim one half fees increase. By the Taxing Officer awarding one half increase in fees on a matter she had already found in her ruling as not being contested was an error and amounts to gross misdirection. Accordingly, the sum of Kshs.2,266,425/9875 was wrongly awarded and the same is set aside.

42. Concerning VAT to the tune of Kshs.1,327,884/09, this is a product of the total sum awarded . Once the instruction fees awarded is affected downwards, the 16% VAT shall automatically follow suit by reducing. In this case, it shall reduce immediately proper taxation or assessment is done.

43. Having held as above, can this court assess and tax the bill of costs. On a matter of principle, I do find that the taxing officer misdirected herself in arriving at the decision she made. I am alive to the fact that a Judge presiding over a reference such as this one has the discretion to assess and tax the bill of costs. However, this is only applicable where errors are made. As a matter of practice, save for corrections, the high court should remit the file to the same taxing officer or another to do proper assessment and taxation (**See D Souza vs Ferao (1960) EA 602**).

44. In the circumstances of this case and having highlighted on the errors committed by the taxing officer, and in the spirit of upholding justice, the only recourse available is to set aside the ruling of Hon. Kendagor dated 27<sup>th</sup> October 2016 and all consequential orders which I hereby do, and direct that the Bill of Costs be re-taxed afresh based on the above directions by another Deputy Registrar/Taxing Officer within the Family Division other than Kendagor. Regarding costs the same is awarded to the applicants.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30<sup>TH</sup> DAY OF JANUARY, 2019.**

**J.N. ONYIEGO**

**JUDGE**