



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

MISC. APPLICATION NO. 145 OF 2017

MEREKA & COMPANY ADVOCATESADVOCATE/APPLICANT

VERSUS

TAU KATUNGI CLIENT/RESPONDENT

RULING

Introduction

1. Vide High Court Succession cause No. 1040/1991 Margarethe Thorning Katungi alias Gitte Katungi and Peter David Belford Walker petitioned for grant of representation in respect of the estate of Charles Kakuru Katungi who died on 4th August 1991 while domiciled in Uganda leaving behind properties both in Kenya and Uganda. Although there is no copy of the main petition in the court file, the petition appears to have been lodged on 4th September 1991 and estate gazetted on 11th October 1991. On 20th October 1991, Edith Byanyima a mother to the deceased's minor son Tau Katungi born out of wedlock filed an answer to petition and petition by way of cross petition. She claimed that the petitioner had failed to include other beneficiaries and dependants of the deceased in the petition inter alia; Tau Katungi a son then aged 1½ years born to the deceased and Edith Byanyima out of wedlock, Florence Kabandize mother to the deceased and Erina Karurango Katungi deceased's sister.

2. Consequently, a consent order was negotiated by Peter David Belford Walker counsel for the petitioner then and the firm of Congo G.W. & Co. Advocates also then acting for Edith Byanyima on behalf of the minor Tau Katungi. The said consent dated 23rd June 1997 recognized Tau Katungi as a son to the deceased and that he was entitled to an equal 1/3 share of the deceased's property in Kenya jointly and as tenants in common with Camilla Ann Katungi and Nina Caroline Katungi also children to the deceased. The said consent also made provision for the petitioner Margarethe Thorning Katungi and her two children at any time to be at liberty to purchase Tau Katungi's share of the immovable property in Kenya at a value to be agreed.

3. Having agreed on those crucial items, the objection lodged by Edith was withdrawn and grant of letters of administration intestate made to the original petitioners on the same day the consent was recorded and adopted. The same was confirmed and land ref. 7583/17 Mwituu Estate Karen shared out 100% to the 3 children of the deceased as tenants in common in equal shares absolutely and the widow (Margarethe Thorning) to hold life interest.

4. On 10th December 2013, the firm of Mereka Advocates filed a notice of change of advocates replacing the firm of Congo Advocates as advocates for Tau Katungi. At the same time, Mereka filed a chamber summons seeking that the value of the applicant's (Tau's) 1/3 share in L.R. No. 7583/17 Mwituu Estate Karen be ascertained by way of valuation and the amount due be paid to him in full. On 27th January 2015, the respondents filed a replying affidavit sworn by David Belford Walker opposing the application of 10th December 2013 on grounds that the option to purchase 1/3 share of Tau Katungi by Margarethe was not mandatory.

5. After hearing the application, J. Musyoka dismissed the application on 14th August 2014 as lacking in merit. Consequently, on 21st May 2015 the firm of Mereka again filed an application dated 19th May 2015 seeking revocation of the grant on grounds that the confirmed grant was inconsistent with the terms of the consent and that it was obtained fraudulently as Tau who was an adult by the date of confirmation was not served

6. That application was however compromised on 30th May 2017 by the court adopting a consent order dated 29th May 2017 and amended the same day. Although that consent does not seem to be in the court file nor the extracted order, proceedings show that it was adopted with orders to sell the property and share proceeds thus terminating life interest. Apprehensive that the property was likely to be undervalued, Mereka filed an application dated 3rd May 2017 seeking an injunction against the sale and also to enable his client participate in the exercise.

Unfortunately, Mereka's instructions were withdrawn before prosecuting the application.

7. Subsequently, on 16th October 2017 the firm of Mereka filed a client's bill of costs dated 10th October 2017 against his client Tau Katungi seeking the bill to be taxed at Kshs16,529,401. The bill which was heavily contested, was finally taxed at Kshs 581,695 vide a ruling dated 16th April 2018.

8. Aggrieved with the said ruling, the firm of Mereka filed a reference vide chamber summons dated 13th June 2018 and filed the same day pursuant to Paragraph 11 (2) of the Advocates Remuneration Order and all other enabling provisions seeking orders as follows:

- 1. That the decision of the taxing officer delivered on 26th April 2018 as far as the same relates to the entire bill of costs herein be set aside.**
- 2. That the honourable court be pleased to refer back the matter to another taxing officer for the taxation of the entire bill of costs herein and with proper directions thereof.**
- 3. That in the alternative to paragraph 2 above, the honourable court be pleased to retax the said bill of costs herein.**
- 4. That the costs of this application be borne by the respondent.**

9. The application is premised on grounds that:

a. The instructions fees awarded under Item 1 of the Bill of costs at Kshs.300,000/= is manifestly low as to represent an inference that the taxing officer committed an error of principle.

b. That in taxing Item 1 of the Bill of costs at the amount of Kshs.300,000/= the taxing officer erred in law and principle in failing to appreciate the fact that:

i. The value of the subject matter is Kshs.300,000,000/=.

ii. The advocate is entitled to full fees upon instructions.

iii. The complexity of the matter as it involves matters outside the jurisdiction of Kenya and involved complex points of law from foreign jurisdiction.

c. That the taxing officer erred in holding she had considered factors of taxation but failed to make a decision on the following:

i. The nature of the brief.

ii. The responsibility of the advocates and skills deployed; and

iii. Importance, nature and complexity of the matter.

d. That the taxing master erred in principle in failing to consider the volume of documents perused and the interest of the parties in the matter.

e. The taxing master erred in failing to take into account the fact that the application was an omnibus and dealt with other matters other than revocation only.

f. The taxing master erred in principle in failing to apply the correct schedule of the Advocates Remuneration Order despite the undisputed email correspondence reproduced in submissions and in the alternative, the taxing master erred in failing to exercise the powers under Rule 13A of the Advocates Remuneration Order and direct for production of the original sent email and in any event the said email was not disputed by the client/respondent.

g. That the taxing master erred in principle in failing to consider the urgency of the matter as a relevant factor in increasing the instruction fees, in addition to the fact that the client was out of jurisdiction.

h. That the taxing master erred in failing to provide reasons for the increase of the instruction fees to Kshs.300,000/= hence giving an indication she minimally increased the amount arbitrary.

i. That the taxing master erred in disallowing item 15, 17, 20, 28, 74, 78 and other items drawn as per the schedule.

j. That the taxing master erred in principle in failing to take into account the effect of inflation on the minimum instruction fees owing to the fact that the Advocates Remuneration Order was passed way back in 2006.

k. That the taxing master erred in principle in ignoring the effect of Section 112 of the Evidence Act since the Notice of

Election was information within the knowledge of the client.

I. That the taxing master erred in principle in ignoring the research undertaken by counsel in this matter.

10. In response to the application, the respondent filed a replying affidavit sworn on 9th August 2018 by Olando Olembo counsel representing the respondent. In their rejoinder, the applicant filed what is titled as 'supporting affidavit' sworn on 5th September 2018 and filed on 6th September 2018. When the matter came up for hearing on 19th July 2018, parties agreed to dispose the same by way of written submissions. Consequently, the applicant filed their submissions on 14th September 2018.

Applicant's Case

11. In support of the application, the applicant raised various grounds to challenge the ruling. Firstly, the applicant stated that the tax master under item 1 of the bill of costs awarded Kshs 300,000/- as instructions fee a figure he termed as manifestly too low considering that the value of the subject property was Kshs.300,000,000/=. Counsel submitted that vide an e-mail dated 6th August 2017 addressed to the respondent he served him with a notice of election which he did not object to. He therefore contended that Schedule X of the Advocates Act was not applicable and instead applied Schedule V (5) of the Advocates Remuneration order. It is the applicant's contention that the taxing master abused or used her discretion whimsically by applying Schedule X (1) (f) which provides for minimum figure of 4,500/=. To support this position, counsel referred the court to the case of **KTK Advocates vs Baringo County Government (2017) eKLR 14**.

12. Learned counsel opined that the taxing master relied on Schedule X (1) (f) to determine the value of the subject matter which is not provided for. The court was referred to the case of **Joreth Ltd vs Kigano and Associates (2001) eKLR** where the court of appeal held that the value of the subject matter in a suit is determined from pleadings, judgment or settlement and if not available taxing master to use some discretion to assess such instruction fee as he/she considers fit, taking into account the nature and importance of the matter, interest of parties, general conduct of proceedings or any other relevant factors.

13. Secondly, the applicant submitted that the taxing master did not apply the correct principle inter alia, the complexity of the dispute, the nature of the subject matter, the amount in dispute and length of the trial and other factors that may affect fairness in the award. To support this submission counsel referred to the case of **R vs Kenyatta University & another ex parte Wellington Kihato Wamburu (2018) eKLR**.

14. Thirdly, that the taxing master failed to take into account value of documents, research undertaken and urgency of the matter. Reliance was placed on the case of **Mutuli & Apopo Advocates vs Jironngo (2010) eKLR**. Concerning the type of research done, counsel referred to written submissions dated 20th April 2014, list of authorities dated 29th April 2014, submissions dated 3rd May 2017 and bundle of authorities. He opined that all this justified use of schedule V.

15. Fourthly, that the taxing master applied a wrong remuneration order being remunerator order of 2006 instead of 2014 in calculating fees for revocation of grant yet instructions were executed the year 2015. That the applicable order is that of 2014 which provides for Kshs 10,000/= as instruction fees hence an error of principle. To support this position, counsel quoted the case of **Pyramid Motors Ltd vs Langata Gardens Ltd (2015) eKLR** where the court stated that it was an error to use a wrong remuneration order.

16. Fifthly, the applicant opined that, the taxing master erred in applying the wrong schedule and item of the remuneration order. According to him the applicable schedule is schedule V (5) since the advocate had elected to apply that schedule vide email communication dated 6th August 2017 pursuant to clause 22 (1) of the Advocates remuneration order. That according to Clause 22 (1), notification could be done before or contemporaneously with rendering a bill of costs drawn as between advocate and client. He therefore claimed to have done that before and at the time of filing the bill of costs as reflected in item 1.

17. That the use of schedule 10 (x) instead of 5 (v) was a fundamental error on the taxing master's part. Counsel referred the court to the case of **Nyamogo and Nyamogo vs Protex (Kenya) EPZ Ltd, HCC No. 176/2007 where J. Ochieng** held that:

“it is not open to the taxing officer to make an election to apply schedule V. The right to make an election vest in the advocate”.

That it was the duty of the taxing master to call for proof of such notification or any other evidence as required under Clause 13 A of the Advocates Remuneration order. Counsel relied on the case of **Muema Kitulu and 6 Advocates vs Kenya Deposit Insurance Corporation (20017) eKLR** to support his argument.

18. Sixthly, that the taxing master erred in disallowing items 3, 7, 14, 15, 17 arguing that the taxing master was enjoined to call for receipts or documentary evidence to prove their existence. This position was supported by reference to the case of **Muthoga Gaturu & Co. Advocates vs Naciti Engineers Ltd Misc. Case No. 51/2001** and **Muri Mwaniki & Wamiti Advocates vs Bercen Co. Ltd and Another (2017) eKLR**.

Respondent's Case

19. Through his replying affidavit sworn by Olembo Advocate on 15th May 2015, the respondent opposed the application urging that the applicant's chamber summons is not supported by any affidavit. He averred that, where documents are attached to the application without an

affidavit they should be struck out for being worthless. Further, that the said attached documents purporting to prove various correspondences via email which is new evidence should be struck out as they were not produced before the taxing master.

20. It was Olembo's averment that the taxing master did properly execute her discretion by applying schedule x of the advocates remuneration order in taxing the bill citing reasons as required in the law.

21. He further averred that the applicant had not shown or proved the basis for arriving at a value of Kshs.300,000,000/= and or without prejudice basis, if there is any value to be attached as the subject matter, then it should be 1/3 of Kshs 300,000,000/=. The deponent stated that, the tax master did cite reasons for taxing the bill at Kshs 300,000/= and that she properly applied proper advocates' remunerations for 2006 and 2014. He however corrected the tabulation of the total bill of costs to be Kshs 581,695 and not Kshs 581,695.00.

Determination

22. I have considered the application herein, replying affidavit, affidavit in response to the replying affidavit titled "supporting affidavit" and written submissions by the applicant. Issues that crystallize for determination are:

- a. Whether the tax master erred in failing to consider the value of the subject matter.**
- b. Whether the applicant did issue election notice to the respondent indicating his intention in applying schedule 5 of the advocates' remuneration order.**
- c. Whether the taxing master applied wrong principles in taxing the bill.**
- d. Whether the taxing master failed to take into account the volume of the work done.**
- e. Whether the taxing master erred in applying the wrong remuneration order and schedule.**
- f. Whether the taxing master erred in failing to exercise her powers under Paragraph 13 A of the Advocates Remuneration Order.**
- g. Whether the taxing master erred in disallowing items 3, 7, 14, 15, 17, 20, 28, 38, 41, 74 and 78.**

a. Whether the taxing master erred in failing to consider the value of the subject matter

23. As summarized herein above, the applicant was instructed on 10th December 2013 to file an application seeking to ascertain the value of the respondent's share. This application was however dismissed. The 2nd application was on 19th May 2015 when the firm of Mereka filed an application seeking revocation of the confirmed grant. This was settled through a consent order allowing the property in question to be sold after valuation to enable the respondent get his 1/3 share. The 3rd instruction was on 3rd May 2017 when the applicant filed an application for injunction which is still pending. Instructions were withdrawn however before prosecution.

24. According to the taxing master's ruling, the amount awarded is determined under Schedule X (1) (f) since the instructions were based on applications and not institution nor objection to the petition for a grant of letters of administration.

25. As correctly stated in the case of **Joreth Ltd vs Kigano and Associates (Supra)** the value of the subject matter is determined by pleadings, judgment, settlement if any or discretion of the taxing master. In succession cause No. 1040/1991 original instructions both for the petitioner and objector were given to different advocates who ceased acting before the current lawyers came on board. The firm of Mereka came on board after the grant had been confirmed while the firm of Congo was appearing for the respondent. Basically, Mereka Advocate's instructions were based on institution of interlocutory applications. Which of these instructions or interlocutory applications will attract instructions fees based on the value of the subject matter alleged to be Kshs300m?

26. The role played by Mereka's firm was not that of instituting or defending a substantive suit in this case lodgment of a petition for grant of representation or filing an objection to petition. I have no doubt in my mind that each set of instructions in filing each application should attract its award or fees. That is to say, application to terminate life interest and to ascertain value of the respondent's share, application for revocation and application for injunction. Unfortunately, the applicant has lumped up all this duties/ instructions together as though it was a single instruction.

27. The value of the subject matter would only arise and be ascertainable from the value of the estate which is normally indicated in form P & A 5 which unfortunately in this file is missing. The application of Kshs.300,000,000/= value to determine instructions fees in the circumstances of this case is not applicable. It is no wonder that the applicant did not want to separate the activities or instructions as they are distinct and therefore independently awardable. The taxing master was correct in not assigning the value of the subject matter in determining the amount costs to award as fees.

28. However, in a situation where there is no election, schedule x (1) (f) would have been more ideal under the 2006 remuneration order and schedule 10 of the 2014 remuneration order. This is because it is the only provision applicable in so far as assessment of fees under probate proceedings is concerned. The allegation that the provision of a minimum of 4500/= under Schedule X (1) (f) as being a joke is a misplaced comment. Schedule 10 (1) (f) is the law and still applicable and until repealed. Though unrealistic in terms of implementation parliament on its own wisdom passed that law after intense consultation with Law Society of Kenya and other stake holders. If an advocate finds a

provision in the Advocates Remuneration order is too low, the law provides for signing an agreement on the appropriate fees or elect on the schedule to apply.

29. Having held that the fees payable to Mereka is not based on the value of the subject matter, I will now turn to the issue of election to determine whether schedule 5 is applicable.

b. Whether the taxing master erred in failing to appreciate the notice of election

30. Clause 22 (1) of the Advocates Remuneration order provides:

“In all cases in which any other schedule applies, an advocate may before or contemporaneously with rendering a bill of costs draw as between advocate and client, signifying to the client his election that, instead of charging under such schedule, his remuneration shall be according to schedule 5 but if no election is made his remuneration shall be according to the scale applicable under the other schedule”.

31. Indeed under item 1 of the bill of costs, the applicant did indicate that he had notified his client of his intention to apply Clause 22 of the Advocates Remuneration Order. He referred to an email which unfortunately was not produced before the taxing master. However, what is material is the knowledge on the client’s part either before institution of the bill of costs or during the filing. From the wording of Clause 22, I am convinced that there was sufficient notification made to the respondent and more particularly at the point of filing the bill as reflected in item 1.

32. Having held that the applicant properly exercised the right of election to apply schedule (5) of the order, schedule 10 (x) is then automatically ousted. The wording of clause 22 implies that a client has no room not to comply and he or she is automatically bound by his advocate’s option (See Nyamogo and Nyamogo(Supra). To that extent I do agree with Mr. Mereka that he did properly exercise his right of election.

c. Whether the taxing master applied wrong principles in taxing the Bill

33. It is the applicant’s argument that the taxing master did not apply proper legal principles in assessing the bill. That she did not give any reasonable explanation on how she arrived at the payment of Kshs 300,000/=. Although the taxing master exercised her discretion under Schedule 10 (1) (f) of the order, she did not give reasons why she awarded that amount.

34. To that extent I agree with Mereka that the taxing master ought to have stated with specific reference to the points of reference to justify exercise of such discretion. She nevertheless in passing made reference to submissions of Mr. Mereka inter alia; amount of the time spent and importance of the suit. However, discretion again is subjective and relative. It varies from Judge to Judge or person to person. In calculating or assessing costs while applying discretion, the result is not definite. It cannot be done with mathematical precision. What is material in such a situation is fairness and or reasonableness in determining the appropriate amount to award. **(See Republic vs Ministry of Agriculture & 2 others Exparte Muchiri W. Njuguna & 6 others (2006) eKLR).**

35. For purposes of this case and on account of the said election, schedule 5 of the Advocates remuneration order is applicable. Part I of this schedule provides that:

“fees falling to be assessed under this schedule may either be charged in accordance with paragraph 2 of this part or assessed in accordance with Part II”.

Paragraph 2 – **An advocate may charge his fees at such hourly rate or rates, as may be agreed with his client from time to time.**

Part II- provides for alternative method as:

“Such fee for instructions as having regard to the case or importance of the matter, the amount or value of the subject matter involved, the interest of the parties, complexity of the matter and all other circumstances of the case may be fair and reasonable, but so that due allowances shall be given in instruction fee for other charges raised under this schedule”.

The principles set out above ought to be applied with specific reference to the extent applicable say; value of the subject matter, the length of the trial, complexity of the matter, time spent and any other reasonable consideration. For those reasons that grounds succeeds.

d. Whether taxing master applied the wrong order and schedule

36. Having held that the proper schedule ought to have been schedule V for services rendered before 11th April 2014 when the new order came to force and Schedule 5 for services rendered after and the taxing master having rejected the element of election and proceeded to assess the bill under Schedule X (1) (f) (order 2006) and schedule 10 (Order 2014), she is deemed to have erred in principal. For those reasons, proper and fresh assessment will be necessary to apply the proper schedule. Basically, the award herein cuts across two

remuneration orders i.e. 2006 as amended in 2009 and 2014. The taxing master then should assess each service rendered in accordance with the applicable remuneration order at the material time.

e. Whether the Taxing Master erred in exercising powers conferred under Paragraph 13A of Remuneration Order

37. It is Mr. Mereka's admission that they did not introduce or furnish any supporting documents to prove various claims which the taxing master taxed off for lack of proof. Mr. Mereka argued that under Paragraph 13A of the Advocates Remuneration Order the taxing master ought to have called for that information. Several authorities referred herein above were advanced. However, there are conflicting authorities in this area as well. In Nairobi High Court Commercial Division Misc. appl. No. 3/2013 Desai **Sarvia and Pollen advocates vs Jambo biscuits (Kenya) Ltd** J. Kimondo held that:

“taxation of a bill of costs like all other aspects of litigation is based on evidence. It is an adversarial process. As the bill was contested, it behoved the applicant to present to the taxing master all documents and material in support of the law”.

38. Whereas Paragraph 13A enjoins a taxing master to ask for supplementary documents in situations where evidence is necessary, the burden still lies on the applicant who would lose in the event the tax master for one reason or the other does not call for such evidence. It is trite law that the burden of proof lies on he who would lose if no evidence is adduced by either side (Section 108 of the Evidence Act).

39. Although the law obligates the tax master to call for such evidence, Taxing Master is not on trial nor is he/she a litigant. A litigant can not run away from his cardinal responsibility of discharging a noble duty such as proving his case to the required degree. He should not cry foul blaming the court for not calling for specific evidence when he has failed to discharge his mandate. I cannot blame the taxing master in the circumstances. With that holding, the rejection of various claims which were not supported by any proof was justified.

40. Lastly, the respondent raised the issue of lack of an affidavit in support of the bill of costs. Assessment of the bill of costs has no provision for supporting affidavit to be attached. Taxation is a matter of law which is anchored on specific legal requirements. A supporting affidavit is not mandatory.

41. For the above reasons stated, the application herein dated 13th June 2018 succeeds to the extent that the ruling of Hon. Kendagor delivered on 26th April 2018 is set aside and the file shall be placed before another taxing master for fresh taxation based on the directions given above. The taxing master shall be at liberty to call for any supporting documents to prove some items pursuant to paragraph 13A of the Advocates Remuneration Order.

Order accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15th DAY APRIL 2019.

J.N. ONYIEGO

(JUDGE)