REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISC. APPLICATION NO. 174 OF 2015

HENRY ATHIMBU KURAUKA.....ADVOCATE/RESPONDENT

VERSUS

RICHARD CHOMBA NJAGI.....RESPONDENT

PAULINE NJERI NJAGI.....RESPONDENT

CELESTINE MWENDA MUNENE....APPLICANT/RESPONDENT

RULING

Introduction

1. Henry Athimbu Kurauka is an advocate of the high court of Kenya practising in the name and style of Kurauka and Co. Advocates. Sometime 2013, he was instructed by Richard Chomba Njagi, Pauline Njeri Njagi and Celestine Mwenda Munene (herein referred to as the 1st ,2nd and 3rd administrators respectively) to represent them in petitioning for a grant of representation in Succession Cause No. 659/13 Milimani relating to the estate of Margaret Muthoni Njagi.

2. Upon completion of the said succession proceedings, the said law firm lodged a bill of costs dated 20th November 2015 and filed on 23rd November 2015 for taxation. A notice of taxation dated 11th February 2016 with a copy of the bill of costs attached was forwarded to the respondents (administrators of the estate).

3. In response, the administrators (respondents) filed a notice of motion dated 9th June 2016 seeking to strike out or expunge from the court's records the application for taxation of the bill of costs. The application was anchored on the ground that, there was a pending complaint being disciplinary case No. 41/2014 pending before Law Society of Kenya disciplinary committee wherein the administrators had raised several professional misconduct and mishandling of their succession case No. 659/13 by the law firm of Kurauka and that the bill of costs was meant to frustrate, cover up and intimidate the administrators not to follow up the said complaint. However, on 2nd June 2016, Mr. Kurauka withdrew his application against the 3rd administrator. Parties then agreed to dispose of the bill of costs application by way of written submissions. Highlighting was then set for 23rd June 2016. However parties did not comply with the time lines.

4. On 27th October 2016, the firm of Kurauka filed their submissions to the bill of costs and grounds of opposition to the administrator's application and submissions urging the court to tax the bill as drawn given that there was no objection lodged challenging the same.

5. Prior to the filing of Kurauka's submissions, the administrators through the firm of T.T. Nganga and Associates filed their submissions of even date on 26th October 2016 challenging the bill of costs. They urged that the bill of costs was an attempt to extort money and to get exaggerated overpayments from the respondent's for recklessness, ineptitude, incompetence and unscrupulousness in filing and mishandling succession cause No. 659/13. Further, that the application was malicious and blackmail with the intention of coercing the administrators to drop their complaint against Kurauka Advocate vide disciplinary Cause No. 41/2014.

6. Basically, they objected to each and every item as drawn on grounds that, they were exaggerated thereby including services they never instructed him to render. They therefore prayed for the bill of costs to be stayed and remain in abeyance pending the outcome of disciplinary case No. 41/14 before the Advocates Complaints Commission. Lastly, they submitted that they had agreed on legal fees of Kshs.45,000/= to which they paid Kshs.40,000/= upfront and then remained with a balance of Kshs.5,000/= which according to them is the only amount due and owing.

7. Subsequently, the Deputy Registrar delivered her ruling on 17th November 2016 taxing the bill of costs at Kshs.164,715/=. She directed

that the already paid fees was to be subtracted from the taxed amount. A certificate of taxation was drawn to that effect. The Hon. Deputy Registrar struck out the administrators' application seeking to stay taxation of the bill of costs holding that the disciplinary case pending before the tribunal was not a bar to taxation.

8. Subsequently, the firm of Kurauka lodged a notice of motion dated 24th October 2017 and filed on 1st November 2017 seeking entry of judgment against the administrators to the tune of Kshs.164,750/=. On 7th May 2018. Kurauka Advocates took out a notice to show cause against Celestine Mwenda (1st administrator) alone claiming a total of Kshs.214,175/= inclusive of interest. On 16th August 2018, notice to show cause was scheduled for hearing. However, through the firm of Ogwe and Associates, Celestine (1st administrator/respondent) sought more time to file a response. They were then allowed to file a replying affidavit within 7 days. On 30th August 2018, the court granted application for notice to show cause and issued warrant of arrest against the respondent who had failed to file a response to the notice to show cause.

9. Subsequently, Mr. Ogwe moved and filed an application dated 10th September 2018 seeking stay of execution of the warrants of arrest issued on 30th August 2018. The court directed for the application to be served and mention fixed for 3rd October 2018. Unfortunately, there was no stay order hence the applicant to that application one Celestine was arrested by a court bailiff. When he was arraigned before court, he pleaded with the court arguing that he had filed another application dated 19th September 2018 where he was seeking stay of execution and consolidation of this matter with ELRC No. 2365/12 and that the amount due and owing be paid by the three administrators and not him alone.

10. The trial court on 17th September 2018 directed that the application dated 19th September 2018 although not filed by then be served upon the respondents and then appear before the Judge for directions. On 21st September 2018, the said application dated 19th September 2018 was filed. The 1st administrator (applicant) was then released on cash bail of Kshs.50,000/= pending further directions. It is therefore the application dated 19th September 2018 which is before me for determination.

Application dated 19th September 2018

11. The application dated 19th September 2018 and filed on 21st September 2018 pursuant to order XXII rule 6, 22(1), Order 10 rule 11, Section 1A, 1B and 3A of the Civil Procedure Rules seeks orders as follows:

> **(1) Spent**
>
> **(2) That warrant of arrest of 31st August 2018 and all consequential orders entered by this court against the applicant be stayed, set aside and he be given an opportunity to defend the bill of costs.**
>
> **(3) That this matter be consolidated with the application in ELRC No. 2365/2012 as they are related.**
>
> **(4) That it is discriminative and unfair to charge the respondent entire decretal amount at the exclusion of other administrators of the estate of Margaret Muthoni Njagi.**
>
> **(5) That costs of this application be provided.**

12. The application is predicated upon grounds set out on the face of it and an affidavit sworn the same day by the applicant herein Celestine Mwenda Munene. However, the application despite being served is not challenged hence the same proceeded exparte.

13. The applicant's case is to the effect that the respondent/advocate irregularly and illegally obtained a warrant of arrest against him alone demanding full payment of the decretal sum (Kshs164,756) instead of the 3 administrators who instructed him. He termed the demand as discriminatory hence should be set aside.

14. Further, the applicant averred that the respondent (advocate) has already filed garnishee proceedings against him seeking to attach payment due to him from Royal Media Services Ltd to answer a decree certificate of costs which amounts to Kshs.405,270/= in satisfaction of the claim of Kshs.164,750/= herein and the balance of Kshs.240,520/= being costs arising out of ELRC Case No. 2365/2012 Milimani.

15. The applicant went further to state that the amount of Kshs.40,000/= paid as advance fees has not been factored into the bill of costs as per the ruling of the Taxing Master. He contended that the respondent will not suffer any prejudice as there is a pending application covering the same over the same decretal amount. To prove that garnishee proceedings have already been filed, he attached a copy of a notice of motion dated 5th July 2018 filed on 13th July 2018 before Employment and Labour relations court at Milimani Cause No. 2365/12.

16. He went further to state that the bill of costs was not served on him and that the same was taxed without his knowledge. He filed written submissions on 17th June 2018 which is a replica of the affidavit in support.

17. As stated earlier, the application herein is not opposed. A date for the hearing of the same application was given in open court on 22nd November 2018. The respondent/advocate having not appeared hearing proceeded exparte.

18. I have considered the application herein, affidavit in support and written submissions filed by the applicant in person on 17th June 2018. Issues that arise for determination are:

(a) Whether the applicant was served with application for taxation of the bill of costs.

(b) Whether execution of decree against the applicant alone instead of the three respondents/administrators is discriminatory.

(c) Whether the three administrators should share the costs.

(d) Whether the fees of Kshs.40,000/= paid in advance should be deducted from the sum of Kshs.164,570.

(a) Whether the applicant was served with the bill of costs giving rise to the ruling on the bill of costs

19. As summarized herein above, the bill of costs in question was served upon the applicant who in turn filed an application dated 9th June 2016 seeking to strike it out. Subsequently, on 26th October 2016 they filed submissions challenging the bill of costs. After the ruling was delivered, no reference was filed to challenge the same. From this chain of events, the applicant cannot purport not to have been served or being aware of the bill of costs. To that extent, that ground is dismissed.

(b) Whether stay of execution of a decree of costs can issue

20. In the case of **Francis Kabara vs Nancy Wambui and Another (1996) e KLR** the court of appeal held that:

"we do not think that stay can be granted in respect of costs".

21. In the absence of a reference and stay challenging the ruling which was delivered sometime 2016, this court cannot stay execution. In any event under Order 42 rule 6, it is incumbent upon the applicant to show that he will suffer substantial loss if payment of the decretal sum is made and that if the appeal by way of reference succeeds the respondent/advocate will not be able to refund. **(See Labh Sing Harman Singh Ltd vs A.G. and 2 others (2016) e KLR).** I therefore do not see any substantial loss the applicant will suffer in case the decretal sum is paid. In any event, the Advocate will not have any difficult in refunding should such an order arise.

22. However, in this case, there is a unique scenario. In seeking to recover the decretal sum herein Kshs164,570-, the Advocate did file garnishee proceedings in Employment and Labour Relations Court at Milimani where he has another decree for a sum of Kshs.240,520/= against the applicant herein. The application is still pending.

23. With the garnishee proceedings pending, the applicant is seeking to apply two modes of execution at the same time. Why cann.t he exhaust one mode of execution first ? If there is recovery by way of garnishee proceedings already instituted, then the respondent should wait for its outcome. If the garnishee order does not satisfy the claim in full, then he will request for committal to civil jail. For the reasons stated, I am convinced that it will amount to double jeopardy against the applicant for the respondent seeking recovery of the decretal sum through garnishee proceedings and at the same time apply for committal to civil jail. To that extent, I find it necessary to stay execution of the warrant of arrest herein pending the outcome of the notice of motion dated 5th July 2018 before ELRC Milimani.

(c) Whether execution against the applicant alone instead of the three of administrators is discriminatory

24. In the case of **Oasis Park Self Help Group petitioning through John Mutinda and 2 others vs Joinven Investments Ltd and 2 others (2016)** the court held that:

"…the ordinary and natural meaning once judgment for costs is awarded against several defendants in a single cause, is that they are jointly and severally responsible for the costs, unless the court specifically apportions the costs as between the several defendants… I also find that the omission by the Court to state the proportion of costs to be paid by the respondents cannot therefore be said to be an accident slip or omission, and this is not one of the cases where the court can amend a judgment in this respect. The respondents' liability to the petitioner is therefore joint and several in the amount of the decree, and the issue of apportionment can only be as between the respondents themselves".

25. From the above holding, it is apparent that when judgment is entered against more than one person in a suit jointly and severally, and, unless specified that costs will be apportioned equally, the decree holder shall be at liberty to execute against one or both. In this case the ruling did not apportion the payment of costs. That means that, the respondent is at liberty to execute against one or the three of them. The only remedy available to the party who pays alone, is to recover from the other co- defendants(co-administrators) the amount paid. Accordingly, there is nothing discriminatory in the execution process in this case.

(d) Whether fees of Kshs.40,000/= paid in advance should be deducted from the taxed bill

26. In the impugned ruling, the registrar directed that fees paid in advance be deducted from the taxed bill. The respondent does not deny receiving Kshs.40,000/= from the administrators as advance fees. He only claimed in his grounds of opposition filed on 27th October 2016 that he had paid the administrators Kshs.50,000/= which offset the fees paid of Kshs.40,000/=. I do not find the respondents explanation logical. That he was paid his fees of Kshs.40,000/= and instead refunded it with excess of Kshs.10,000/= and that he acted for the administrators in Succession Cause No. 659/13 for free is totally untenable.

27. Since there is no dispute over the fees paid at Kshs.40,000/=, the same should be subtracted from Kshs.164,750/= as the decretal sum due and owing to the respondent/advocate. Therefore, the only money recoverable from the applicant or administrators exclusive of interest is

Kshs.144,570/=.

28. In a nutshell, the application herein is allowed with orders that:

(a) Execution of warrant of arrest herein issued on 31st August 2018 against the applicant herein be and is hereby stayed pending the outcome of the notice of motion dated 5th July 2018 before ELRC Milimani.

(b) That a sum of Kshs.40,000/= paid as advance advocate's fees be subtracted from Kshs.164,570/= leaving a balance of Kshs.144,570/= plus accruing interest for recovery through garnishee proceedings or any other mode of execution.

(c) That each party to bear own costs.

Order accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY APRIL 2019.

J.N. ONYIEGO

(JUDGE)