



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

MISCELLANEOUS CAUSE NO. 119 OF 2015

J. M. NJENGA &

CO. ADVOCATES.....RESPONDENT/ADVOCATE

VERSUS

FRANCIS CHEGE MAINA.....1ST APPLICANT

JOSEPH MACHARIA MAINA.....2ND APPLICANT

JAMES KIHARA MAINA.....3RD APPLICANT

DEDAN MUTHAIGA MAINA.....4TH APPLICANT

THE ADMINISTRATORS, ESTATE OF SAMUEL MAINA

GATONGA alias SAMUEL MAINA alias MAINA GATONGA

RULING

1. Francis Chege Maina (1st applicant), Joseph Macharia Maina (2nd applicant) and James Kihara Maina (3rd applicant) were the administrators/beneficiaries in the estate of Samuel Maina Gitonga alias Samuel Maina Maina alias Maina Gatonga in **High Court Succession Cause No. 361 of 2001 at Nairobi**. They were represented by the respondent J. M. Njenga & Co. Advocates. When instructions were withdrawn the firm filed a Bill of Costs against the applicants. The Bill was taxed on 6th October 2016. It had 231 items. The advocates, being aggrieved by the taxation, filed a reference in respect of item 1 which dealt with instruction fees. Kshs. 1,000,000/- had been allowed on the item. This court allowed the reference and agreed that the Bill on the item be retaxed by another taxing officer.

2. Retaxation was done by Hon. Mukabi Kimani on 28th August, 2018. The item was taxed at Kshs. 10,000,000/-. He issued a Certificate of Taxation dated 30th August 2018 in the sum of Kshs. 17,773,394.96. On 5th September 2018 the advocates applied to have entry of judgment against the applicants on the basis of the Certificate. On 22nd October 2018 the Motion went before Hon. Mukabi Kimani who proceeded to enter judgment. He issued a decree dated 23rd October 2018. Pursuant to the decree, warrants of attachment were issued on 30th October 2018 which led to the attachment of the properties of the applicants by M/s Daystar Auctioneers in satisfaction of the decree.

3. The 1st applicant and the 2nd applicant are represented by P.W. Wena & Co. Advocates. They filed Motions dated 13th December 2018 and 22nd January 2019, respectively, seeking that the decree judgment, decree and warrants that were issued be set aside on the basis that they were null and void because the taxing officer had no jurisdiction under **Section 51 (2) of the Advocates Act (Cap. 16)** to enter the judgment that became the basis of the decree and warrants; that such entry could only have been done by the Judge. The 3rd applicant's application dated 13th December 2018 and filed through Muchoki, Kangata Njenga Advocates had similar complaint and prayers.

4. The applicants were all being represented by Gitobu Imanyara & Co. Advocates at the time of the taxation, judgment and decree. They each seek to have time extended to enable them file reference to challenge the retaxation. Their case is that their advocate did not attend the retaxation and all the subsequent processes, although served. They were not aware of these until they were each confronted with the attachment.

5. The respondents opposed the application through a Preliminary Objection dated 23rd January 2019 and a replying affidavit dated the same day. It was their case the entry of judgment by the taxing officer was regular and procedural and the subsequent processes were therefore lawful. They stated that the applicants were then represented by Gitobu Imanyara & Co. Advocates. If the advocates did not represent them during the applications, and did not inform them, they had recourse against them in professional negligence.

6. **Section 51(2)** of the **Advocates Act** provides as follows:-

“The Certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the court, be final as to the amount of the costs covered thereby, and the court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that the judgment be entered for the sum certified to be due with costs.”

7. There is no dispute that the Certificate was not set aside or altered. The retainer was not disputed. The **Section** makes a distinction between the “taxing officer” and the “court”. This dispute was before the High Court. It was therefore only the Judge who could be requested to make any order in regard to the certificate. The order included entry of judgment (**LUBULELLAH & ASSOCIATES v. N. K. BROTHERS LIMITED [2015]eKLR**). In **M/S BEHAN & OKEYO ADVOCATES V. NATIONAL BANK OF KENYA [2008]eKLR** it was held that the jurisdiction to enter a judgment and issue a decree for certified costs lies under **Section 5(1) (2)** of the **Act** with the Judge, and not the Deputy Registrar.

8. It follows that the entry of judgment of certified costs and the issuance of the decree, both by Hon. Mukabi Kimani, were done without jurisdiction, and were therefore null and void. The warrants of attachment that followed the decree were irregularly issued. The attachments were also not regularly done.

9. Before dealing with the request for leave to extend time to file a reference against the retaxation, there was the complaint that the attachment had issued against the applicants when Hon. Mukabi Kimani had ordered that the certified costs were to be paid by the estate. I agree with the applicants that the taxing officer had asked that the Kshs. 10,000,000/- should be paid from the estate. It was therefore wrong for the respondents to attach the personal properties of the applicants.

10. It is appreciated that the sins of the advocate are not usually visited on the client. However, when a client instructs an advocate it is expected that he will be diligent in following up the matter by asking the advocate and/or visiting his offices to inquire. I consider that the Motion dated 26th October 2016 by the respondents was a reference filed to challenge the initial taxation done on 6th October 2016 by Hon. Kendagor. This is the Motion that was allowed that led to the retaxation now subject of the present applications. The Motion was not opposed by the applicants. They (the applicants) do appear to have done nothing between then and the time of the present applications. For about two years they were not following up their matters. It took them until the attachments to realize that their advocate was doing nothing. In short, the applicants have not been diligent in dealing with their advocates and the matters in court. I will not exercise my discretion to extend time for them to file a reference.

11. In conclusion, the judgment entered on 22nd October 2018 and decree issued on 23rd October 2018 by Hon. Mukabi Kimani are hereby set aside, and the warrants recalled. Any monies paid pursuant to the warrants shall be refunded to the applicants.

12. The costs of the applicants shall be borne by the respondents.

DATED and DELIVERED at NAIROBI this 20TH day of JUNE, 2019.

A.O. MUCHELULE

JUDGE