



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (FAMILY DIVISION)

MISC APPLICATIONS 70,118 & 119 OF 2011

IN THE MATTER OF TAXATION OF ADVOCATE AND CLIENTS BILL OF COSTS

AND

IN THE MATTER OF SUCCESSION CAUSE NO 2278 OF 2009

AND

IN THE MATTER OF THE ESTATE OF ALESSANDRO CEMBRAN ALIAS ALEXANDER CEMBRAN ALIAS ALEX CEMBRA)

(DECEASED)

BETWEEN

OMAR KEMAL AMIN & COMPANY.....ADVOCATE/RESPONDENT

AND

SUSANNA RUBBIOLI aka SUSANNA CEMBRAN AS ADMINISTRATRIX OF

THE ESTATE ALESSANDRO CEMBRAN (DECEASED)CLIENT/APPLICANT

R U L I N G

1. The Client/Applicant filed three applications in this matter all dated 12th April 2017 being **Misc. Application Nos. 70 of 2011, 118 of 2011 and 119 of 2011**. All the three applications arise from the matter of the Estate of Alessandro Cembran (deceased).
2. The applications seek to set aside the Taxing Officer's decisions dated 1st September 2016 where awards were made following the taxations of bill of costs by the Advocate/Respondent; striking out and/or resubmission of the said bills for taxation before a different taxing officer. They also seek costs.
3. It is the applicant's case that **Application No. 70 of 2011** was premised on an erroneous grounds that the Advocate /Respondent had been retained to manage the estate of the deceased which assumption had no basis in fact and in law; further there is no evidence to prove that any such services were rendered; that the bill of cost was as a result of the Advocate/Respondent failing to correctly interpret a previous court ruling; and on her part the Taxing Officer failed to give sufficient weight to relevant facts on record when apportioning quantum thus misdirecting herself, at the same time failing to consider the Applicants/client's submissions.
4. The application in **Misc. Application 118 of 2011**, is predicated on grounds that; the award is not justifiable as the Respondent/advocate did not discharge the instructions given to obtain a full grant of probate of the will of the deceased; and that though the Advocate/ Respondent had been paid a retainer, he refused to render services; further the taxing officer failed to consider the Applicant's submission dated 25th March 2013.
5. The grounds of the application in **Misc. No. 119 of 2011** are that; the Taxing Officers decision that the advocate /Respondent had been retained to prepare, settle and complete a tenancy agreement for 'Palm House' No. 14, Lone Tree Estate had no basis in law and in fact and the amount awarded was not justifiable; further there was no evidence that any services were rendered as alleged; and as the Taxing Officer had no basis of determining the value of the subject matter she proceeded to tax the bill on the basis of wrong principles; and further ignored the Applicant's submissions.

6. The advocate /Respondent has opposed the applications on various grounds. One ground that runs through all his replying affidavits is that all applications were filed 7 months late and are therefore time barred.

7. In objecting to the application in **Misc. Application No. 70 of 2011** the Advocate/Respondent urges that the taxing officer taxed off the sum of Kshs.904,392 and allowed Kshs.524,705.20 having concluded that services were rendered, further that the advocate/ Respondent correctly interpreted the ruling of in his Njagi J who found that there existed no agreement between the parties regarding fees and as a result directed the Advocate/Respondent to proceed and tax his bill.

8. In **Misc. Cause No. 118 of 2011**, the application is opposed on the basis that the bill of costs did not relate to the grant of letters *Ad Colligenda Bona*, but instructions to obtain Grant of Probate of the written will of the deceased herein which grant was petitioned for and issued on 22nd June 2010. Further that the bill of costs did not include the application for confirmation as the Client/Applicant withdrew instructions before the application for confirmation was filed.

9. As relates to **Misc. Application No. 119 of 2011** the Advocate/Respondent objects to the same on grounds that the bill of costs did not relate either to the application for *Grant ad Colligenda Bona* but to matters relating to the drawing of Tenancy agreements. It is urged that the Taxing Officer having satisfied herself that the Advocate/Respondent had such instructions allowed the bill as drawn as she was of the view that the bill was based on scale under schedule 11 of the Advocates Remuneration, Order 2009.

10. The parties consolidated their submissions on the three applications. In line with the submissions I will give one ruling as I consider each of the applications distinctly and where necessary together.

11. Having considered the applications, responses, submissions and authorities cited I form the opinion that there are three issues for consideration as follows:

i. Whether the applications before court were filed out of time and ought to be struck out.

ii. Whether or not to set aside the awards.

iii. If ii above is in the affirmative, whether to remit the files for fresh taxation before another taxing officer?

12. Are the References time barred? And if so, should they be struck off?

It is not in dispute that the decisions of the Taxing officer were delivered on the 1st of September 2016 and the Client/ applicant raised an objection on the 14th of September 2016. Further it is not disputed that the Taxing officer provided her reasons for the decisions on the 27th of March 2017, which reasons are said to have been received on the 30th of March 2017.

13. The client /applicant contends that the decisions of the Taxing officer did contain sufficient reasons for the said decisions hence she raised objections and sought for reasons that would aid her in arriving at a decision whether or not to file references. She further contends that time within which she was required to file the references began ticking from the date of receipt of the Taxing Officer's reasons. She admits though that though the law requires a reference be filed within 14 days she filed hers on the 16th day from the 27th of March 2017 and was therefore within time for the reason set above. Reference was made to the case **of Nairobi Home Economics vs. African Heritage (1982-88) 1 KAR 1024** where the court of appeal had this to say on notices from the registries; -

“time starts to run from the date of receipt of the notice from the court or such date when, in the usual course of postage, the notice should be expected to be received by the appellant.”

14. The Advocate/ Respondent on his part contends that the reference should have been filed 14 days after the decision of the Taxing Officer sufficient reasons were contained in the said decision that was delivered on the 1st of September 2011. In this regard reference was made to the case of **Evans Thiga Gaturu v. Kenya Commercial Bank Limited (2012) eKLR.**

15. Section 11 of the Advocates (Remuneration) Order requires Reference to be filed 14 days of receipt of the Taxing Officer's reasons. And therefore from the facts of this case, reasons were issued by the taxing officer on the 27th March 2017 and were received by the Applicant/client 3 days after the same were issued. Time in my view should start ticking from the date of receipt which was a mere 3 days from the date of issuance of the reasons. Even if the date to be considered was to be the 27th the delay of 3 days is not inordinate to have the reference struck off.

Therefore, based on facts and law this ground does not hold and must fail.

16. Should the awards be set aside?

The deceased herein **Allessandro Cembran** alias Alex **Combran** died on the 10th of October 2009 in Trenso Italy. Prior to his death he was domiciled in Nairobi.

17. At the time of filing for the Grant of Probate the Pleadings on record placed the value of the assets at Kshs.102,350,000 and liability estimated at Kshs.446,000/-. The Applicant/Client signed the petition and the accompanying affidavit and was aware of the declared value on the assets and cannot be seen to negate the same when the Advocate/ Respondent relies on the said value.

18. The Client /Applicant is the widow of the deceased and from various correspondences from the 24th October 2009 she engaged the Advocate /Respondent to represent her in matters touching on the estate and matters incidental thereto terminating the services in October 2010.

19. In a handwritten letter dated 24th October 2009 the Client/Applicant communicated to the Advocate/Client as follows:

“Re: Estate of Alessandro Cembra (deceased)

I hereby appoint you to act for me in the administration of the above estate in consultation with me and upon receiving my instructions and for me as a beneficiary in all matters related to.”

Signed,

Susan Cembran “

20. In subsequent letters to and from the Parties they discussed various issues related to obtaining of probate, tenancy, management and other matters incident thereto.

21. Further in an affidavit sworn by Salah El-din Amin advocate on behalf of the Advocate /Respondent he admits that his firm was instructed to generally represent the client/Applicant **“.....in the administration of the above estate”** further he deposes that on receipt of the Client/ Applicant’s instructions the Advocate/ Respondent proceeded to take urgent steps on behalf of the Client/Applicant to safeguard and consolidate the estate.

22. From the pleadings clearly the steps taken by the Advocate/ Respondent comprised preparing tenancy agreements of, petitioning the court for grant of letters of *Ad corrigenda Bona*, engaging the tenants and finally petitioning for Probate and undertaking all other matters incidental thereto.

23. What is clear also is that an agreement for fees payable prepared by the Advocate /Respondent was never signed by the Applicant/Client.

24. From the above facts the Advocate/ Respondent received instructions that required him to undertake the services he rendered to the point where his services were terminated and therefore he ought to be remunerated for the same, as an account is made of the initial amount of USD1,800 initially paid.

25. I therefore find that the bills of cost filed before the Taxing officer were properly before court and to the extent the decision of the Taxing officer to consider and determine the same was sound.

26. Having stated the above I find that in taxing the bill the taxing officer failed to observe the necessary elements in rating the alleged complexity of the matters undertaken by the Advocate/client, the volume of work done, and allowed a multiplicity of bills yet the steps undertaken by the Advocate/ Respondent arose from one matter, thus the Taxing Office based the taxation exercise on wrong premise. I therefore agree with the Client/ Applicant’s assertion that the fees awarded manifest an error in principle.

27. For the reasons above it is necessary to set aside all the three awards. Refer the bills back for fresh consideration by a different Taxing officer who will consolidate the three bills and proceed to tax them afresh as one bill as the services undertaken by the Advocate/Client arose from one single instruction.

28. Each party to meet its own costs.

Dated and Delivered in Nairobi on this 26th day of September, 2019.

.....

ALI-ARONI

JUDGE

In the presence of; -

Counsel for the Applicant.....

Counsel for the Respondent