



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

MISC. CAUSE NO. 119 OF 2015

J.M. NJENGA & CO. ADVOCATES.....ADVOCATE/APPLICANT

VERSUS

FRANCIS CHEGE MAINA.....1ST RESPONDENT/CLIENT

JOSEPH MACHARIA MAINA.....2ND RESPONDENT/CLIENT

JAMES KIHARA MAINA.....3RD RESPONDENT/CLIENT

DEDAN MUTHAIGA MAINA.....2ND RESPONDENT/CLIENT

THE ADMINISTRATORS, ESTATE OF SAMUEL MAINA GATONGA ALIAS

SAMUEL MAINA ALIAS MAINA GITONGA.....5TH RESPONDENT/CLIENT

RULING

1. When the bill of costs by J.M. Njenga & Company Advocates(applicant) was taxed by Hon. Kendagor on 6th October 2016 at Kshs.1,000,000/= on instruction fees, one of the issues was whether it was his clients Francis Chege Maina (1st respondent), Joseph Macharia Maina (2nd respondent), James Kihara Maina (3rd respondent) and Dedan Muthaiga Maina (4th respondent) to pay, or it was the administrators of the estate of the deceased Samuel Maina Gitonga alias Samuel main alias Maina Gitonga (5th respondent) to pay. The taxing officer found that it was the 1st to 4th respondents to pay, and not the estate of the deceased. The applicant filed a reference before this court. The reference was heard and the court allowed it and asked for a fresh taxation before another taxing officer. However, on the issue who was to pay the taxed bill, it confirmed the position taken by Hon Kendagor. It was the 1st to 4th respondents, and not the 5th respondent, who had instructed the applicant and who were therefore liable to pay.

2. The bill of costs was re-taxed by Hon. Mukabi Kimani at 10,000,000/= on instruction fees. The taxing officer issued a certificate of costs for Kshs.17,773,394/96 in total. He found that the amount was to be paid by all the respondents jointly and severally. On application by the applicant, the taxing officer entered a judgment on 22nd October 2018 on the certificate of costs. On 23rd October 2018 a decree was issued. On 20th June 2019 this court found that the taxing officer had no jurisdiction to enter the judgment on the certificate of costs; that the jurisdiction belonged to this court. The judgment and decree were set aside.

3. The applicant had proceeded to attach the goods of the 1st, 2nd and 3rd respondents, based on the judgment and the decree issued by the taxing officer. The consequence was that the attachment was irregular, as it was based on an irregular judgment and decree. The attachment is hereby lifted.

4. On 20th December 2018, following the entry of the judgment and issuance of decree on costs, and the attachment of the properties of the 1st, 2nd and 3rd respondents, there was, by consent, a stay of execution of the decree on condition that each of the two respondents pays Kshs.1.25 million to the applicant. Their goods had been attached by Peter M. Gathogo t/a Daystar Auctioneers on the instructions of the applicant. The stay was to await the hearing and determination of the application that the respondents had filed to challenge the judgment and decree. The challenge, as shown above, was successful.

5. The applicant's application dated 4th September 2018 sought that the certificate of costs in the sum of Kshs.17,773,294/96 issued by Hon. Mukabi Kimani be entered as judgment, and this be with interest at 14% per annum from 28th August 2018 until payment in full. The judgment was sought against the respondents/clients jointly and severally. The issue regarding who was to pay was determined by Hon. Kendagor, and confirmed by this court on 17th May 2018. Payment was to be by the 1st to 4th respondents. Considering the total of Kshs.3.75 million that has so far been paid to the applicant, I will enter judgment for it (the applicant) against the 1st to 4th respondents, jointly and severally, in the sum of Kshs.14,023,394.96 with costs at court rates from today till payment in full.

6. In view of this finding in regard to the application dated 4th September 2018, the consideration of the application dated 21st June 2019 would be an exercise in futility, and therefore will not deal with it.

7. Similarly, after giving credit to the monies that were paid by the respondents to the applicant following the consent recorded on 20th December 2018, I find that there is nothing outstanding regarding the application dated 4th July 2019 by the 1st respondent. He will, however, be paid costs of his application.

DATED and DELIVERED at NAIROBI this 28TH NOVEMBER 2019.

A.O. MUCHELULE

JUDGE