



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

MISC. CIVIL SUIT NO. 61 OF 2017

(SUCCESSION CAUSE NO. 361 of 2017)

SWALEH, MWANGI & CO. ADVOCATES.....ADVOCATE/APPLICANT

VERSUS

JOHN KAGUMA MAINA.....1ST RESPONDENT/CLIENT

STANLEY KARIUKI MAINA.....2ND RESPONDENT/CLIENT

CHARLES KANYUGA MAINA.....3RD RESPONDENT/CLIENT

RULING

FACTS

The applicant herein, Swaleh, Mwangi & Co. Advocates, filed Advocate/Client Bill of Costs dated 24th April 2017 in relation to instructions given to them to defend the respondents in a dispute concerning distribution of assets due to the house of Bilha Njoki Maina pursuant to the certificate of confirmation of grant issued on 3rd July 2008. The bill of costs was opposed by the respondents through the replying affidavit dated 8th September 2017 on the grounds that it was excessive and unreasonable. Through the ruling dated 31st October 2017, the court found that the applicant having come on record sometime in 2012, the **Advocates (Remuneration) Order 2006** was applicable and instructions fees were determined based on Schedule X Part 1 (f) where the minimum provided for is Kshs.4,500/=. The court further held that based on the amount of labour, non-complexity of the matter, general conduct of proceedings and all the surrounding circumstances, Kshs.150,000/= was awarded for instruction fees.

PLEADINGS

The applicant filed the present application seeking the following orders:

- a) that the taxing master's decision to allow Kshs.150,000/= as basic instructions fees in respect of item (1) of the Advocate/Client bill of costs dated 24th April 2017 in the ruling delivered on 31st October 2017 be varied and/or set aside;
- b) that the court be at liberty to re-tax the said Bill of Costs in its entirety with a view of enhancing the fees payable under the said item (1) together with other items wrongly taxed off and/or in the alternative, the matter be referred back for re-taxation before another Taxing Master on such guidelines that the court may deem just and appropriate to issue; and
- c) that the costs of this application be provided for.

The application was based on the grounds that the taxing master in his ruling delivered on 31st October 2017 misdirected himself in both law and fact in arriving at a basic instructions fees of Kshs.150,000/= in respect of item (1) of the bill of costs that was manifestly too low due to failure to take into account the nature of the dispute handled by the advocate in the parent file (Nairobi High Court Succession Cause No. 361 of 2001) leading to the taxation and failing to appreciate the value of the suit properties yet there were valuation reports to help guide the value thereof; that the taxing master misdirected himself in both law and in fact in that despite being live to the fact that the value of the subject property was a criteria to be considered in arriving at the basic instructions fees, he nevertheless failed to consider the value of the properties in dispute, and by so doing failed to exercise his discretion judiciously and thereby arrived at a wrong decision; that the taxing master erred in both law and fact in applying the 2006 remuneration order globally even for services that were rendered after the said order was revised; that the taxing master acted on wrong principles and arrived at a figure on the basic instructions fees that was manifestly too low

and which was a failure on his part to exercise his discretion judiciously; and that the taxing master erred in both law and fact by ignoring the submissions by the respondents who opined that, using their own calculation, the applicant was entitled to no less than Kshs.2,969,274.00 basic instruction fees.

The application was supported by affidavit of Mwangi Gathuri dated 16th January 2018. His case was that in a ruling delivered on 31st October 2017 the taxing master taxed the applicant's said bill in the sum of Kshs.536, 659.28 out of the claimed sum of Kshs.87,939,448.00; that although the matter started as an application for revocation of grant in the succession cause, it eventually mutated into a highly contested issue of distribution of a portion of the estate of the deceased with an estimated value of Kshs.5,000,000,000/=; that the applicant under the instructions of the respondents filed the respondent's preferred mode of distribution and served the same upon the advocates for the other contesting parties; that they received and perused various distribution proposals filed by other beneficiaries and subsequently filed written submissions in justification of the respondent's case; that in view of the foregoing the finding that the applicant did not participate in the distribution of the estate of the deceased was erroneous; that although he came on record after the grant had been issued and confirmed, the real issue for determination for the 5 years they were on record for the respondents was the distribution of some assets initially allocated to Ambassador Investments Limited, a family company owned equally by the deceased's first family; that through the initiative of some of the beneficiaries, some of the said assets were valued and valuation reports filed in court and the amount of the subject value of the properties ought to have been considered in taxation of the bill of cost; and that although between the time of instructions and withdrawal the **Advocates (Remuneration) Order** had been revised thrice, the taxing master erroneously applied the 2006 edition to tax items whose services were rendered long after the said order had been revised hence denying the applicant full and adequate remuneration under item 1 of the Bill of Costs.

The application was opposed by the respondent through the 1st respondent's replying affidavit dated 14th March 2018. It was their case that the application for distribution of the estate of the late Maina Gatonga was filed an orders issued to the advocates in conduct of the matter being Messrs. Kirundi & Co. Advocates, who were properly seized of the matter; that the applicant first came on record at the interlocutory stage of the proceedings to oppose an application dated 22nd March, 2012; that the applicant is not justified in raising interlocutory fees against the respondents as they only took conduct of the matter at the interlocutory stage hence was only entitled to fees for actual work done; that the supplementary distribution matter arose from the death of the beneficiary Veronica Wangari Maina whose assets reverted to Bilha Njoki Maina's family; that subsequently, the 1st, 2nd and 3rd respondents drew the initial supplementary distribution schedule and that the two amendments thereto themselves and hence the impression created in paragraph 1 of the Bill of Costs dated 25th April 2017 is misleading and erroneous; that the matter was not of a complex nature as the applicant attended court mainly for mentions, additionally, the pleadings filed were not voluminous and hence the amount as contained in the Bill of Costs is not proportionate to the actual work done; and that the decision of the taxing master was correct and legally sound and the taxing master properly directed himself in assessing item 1 of the applicant's Bill of Cost at the sum of Kshs.150,000/= as this was the amount of the actual work done by the applicant.

DETERMINATION

I have looked at the Bill of Costs delivered on 6th October 2016, the affidavit on record, the written submissions, and the authorities referred to by Learned Counsel, which I have considered.

In the Court of Appeal decision in **Premchand Raichand –v- Quarry Services (No. 3) [1992] E.A 162** it was held that the court will not interfere with the award of the taxing officer merely because it thinks the award was somewhat too high or too low. It will only interfere if it thinks the award was so high or so low as to amount to an injustice to one party or the other. In **First America Bank of Kenya –v- Shah & Others [2002] E.A.L.R. 64**, the High Court noted that the applicant has to show that the award of the taxing officer was based on an error of principle, or the award made was so manifestly excessive as to justify an influence that it was based on the error of principle.

It is also trite that the taxing officer should consider that:

- (a) costs should not be allowed to rise to such level as to confine access to the courts to the wealthy;
 - (b) a successful litigant ought to be fairly reimbursed for the costs he has incurred;
 - (c) the general level of remuneration of advocates must be such as to attract recruits to the profession; and
- so as practicable, there should be consistency in the award made.

What has to be emphasised, however, is that the taxing officer should be allowed to exercise his discretion in determining the amount to be awarded in a Bill of Costs. In exercising this discretion, he should bear in mind the value of the subject matter and, in doing so, he should not adopt a figure that is not based on a pleading, judgment or settlement **Mereka and Company Advocates –v- National Bank of Kenya Ltd, HC Misc. Appl. No. 391 of 2002 at Milimani**.

On the other hand the Taxing Master in the Ruling of 31st October 2017; ably outlined principles of taxing bills of Costs as laid down in **Nyangito & Co Advocates vs Doinyo Lessos Creameries Ltd Misc Cause 843 of 2013 & Republic vs Ministry of Agriculture & 2 Others exparte Muchiri W'Njuguna & 6 Others** as follows

Nature and importance of subject matter, amount and value of subject matter involved, interest of parties, general conduct of the proceedings and any direction of Trial Judge.....not all of the above factors may exist in any given case...A Taxing Master does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved.

During oral submissions, the Applicants summarized grounds of the Notice of Motion filed on 17th January 2018 as follows;

That the value of suit properties in question as indicated in filed valuation reports which is one of the principles to be taken into account in Taxing a Bill of Costs were not taken into account, hence the amount of Ksh 150,000/- was /is manifestly low.

The items 1 -149 are contested because the scale used is disputed on the basis that the Advocates Remuneration Order was amended 3 times during the period the Applicants were representing the Respondents in the instant matter.

The Applicants represented the Respondents from 2012- 2015, the Advocates Remuneration Order was amended in 2006, 2009 and 2014. According to the Respondents only the Advocates Remuneration Order of 2006 applied throughout taxation of the instant Bill of Costs. Hence the application for taxation of the Bill of Costs again.

It is the applicant's allegation that item 1 of the Bill of Costs was manifestly too low. It was his case that when determining the issue of instruction fees, the taxing officer ought to appreciate that an advocate is entitled to full instruction fees irrespective of the stage at which the said advocate either left the matter or joined the matter, and consider the value of the subject matter. He also submitted that the scope of the work done was not as narrow as put by the taxing officer but entailed the initial instructions to have the grant revoked which mutated to distribution of the estate which involved valuation of the assets of the estate.

The respondent however insisted that the applicant was not justified in raising interlocutory fees against the respondents as they only took conduct of the matter at the interlocutory stage hence was only entitled to fees for actual work done. It was his case that the matter was not of a complex nature as the applicant attended court mainly for mentions, and that the pleadings filed were not voluminous and hence the amount as contained in the Bill of Costs is not proportionate to the actual work done.

I note that in the Bill of Costs, the applicant, who had been instructed by the respondents, asked for Kshs.37,515,000/=. The instructions were to pursue distribution of the assets due to the Beneficiaries; defend the Respondents in a dispute concerning the distribution of assets due to the house of Bilha Njoki Maina pursuant to the certificate of confirmation of the grant issued on 3rd July 2008 amongst the beneficiaries of the said house who included the 1st, 2nd and 3rd respondents and to also pursue their shares in respect of Ambassador Investment Co. Ltd. According to the record the grant that was issued shared out quite a substantial number of assets of the estate of the deceased. There were assets that had not been allocated and which were registered under the umbrella of Ambassador Investment Co. Ltd that were the subject of the dispute that the applicant was instructed to help resolve. A valuation was done of the assets under the company. The value was

Kshs.1,190,710,000/=. When the applicant stated that the value of the estate was Kshs.5,000,000,000/= he was referring to the entire estate, including what was distributed and not distributed. When the taxing officer indicated that he considered the value of the estate to reach the figure of Kshs.150,000/= in Item I of Bill of Costs it is not clear what value he was working with in light of the 2 Valuation reports.

It follows that, if one were to accept their argument, then where the value of the subject matter was Kshs.1,190,710,000/= the instructions fees awardable in item 1 should have been well in excess of Kshs.150,000/-

When the taxing officer awarded Ksh.150,000/= being instructions fees in item 1 that was not a proper exercise of discretion. This led to a figure that was too low that it amounted to an injustice on the part of the applicant. There was no evidence that indeed the value of the subject matter was considered as one of the criteria to Taxing a Bill of Costs in arriving at the figure of Ksh 150,000/- *vis a vis* the outlined assets that comprise the estate of the deceased and valuation reports.

In the case of **Steel Construction and Petroleum Engineering (EA) Ltd –v- Uganda Sugar Factory Ltd [1970] EA 141**, it was observed that it is not in the province of a judge to re-tax the Bill. If the judge comes to the conclusion that the taxing officer has erred in principle he should refer the Bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done.

DISPOSITION

- 1. The application filed on 17th January 2018 is granted**
- 2. The reference on the issue of quantum on Item 1 -149 of the Bill of Costs, and remit the same for fresh taxation before another taxing officer.**
- 3. The applicant shall have the costs of the application.**

DELIVERED DATED & SIGNED IN OPEN COURT ON 20TH DECEMBER 2018.

M.W.MUIGAI

JUDGE –FAMILY DIVISION –HIGH COURT

IN THE PRESENCE OF:

MR MWANGI FOR APPLICANTS

MR.MUCHEMI & CO FOR RESPONDENTS.