



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
MISCELLANEOUS APPLICATION NO.89 OF 2016
MONICA NYAKINYUA GEITANGI.....1st APPLICANT
PETER NGUNJIRI KAMUNDE.....2ND APPLICANT
VERSUS
WAMBUGU MOTENDE & CO. ADVOCATES.....RESPONDENT
RULING

FACTS

The respondents herein, Wambugu Motende & Co. Advocates, filed Advocate/Client Bill of Costs dated 11th July 2013 before the Civil Division of the High Court as Miscellaneous Application No. 732 of 2016. The matter was referred to the Family Division for disposal. The Bill of Costs was in relation to instructions given to them by the Applicants to petition the High Court for letters of administration intestate in the estate of Livingstone Geitangi Karuri (deceased).

In response to the Bill of Costs, the applicants filed a Notice of Preliminary Objection dated 28th January 2016 after which the respondents filed their grounds of opposition on 18th February 2016. The parties filed their written submissions on the Preliminary Objection. On 13th October 2016 when the matter came up for mention before the Family Division Deputy Registrar, the matter was fixed for ruling on 17th November 2016. The ruling in the matter was however delivered on 16th December 2016.

PLEADINGS

The firm of Nderitu & Partners filed the present application dated 26th January 2017 on behalf of the applicants herein and under **Paragraph 11(2)** of the **Advocates (Remuneration) Order 2014**, and **Section 1A, 1B and 3A** of the **Civil Procedure Act Cap 21 Laws of Kenya**. The applicant sought for the following orders:

a) (*Spent*)

b) That the decision of the Honourable taxing master made on the 16th December 2016 dismissing the applicant's Notice of Preliminary Objection dated 28th January 2016 and taxing the

respondent's Bill of Costs dated 13th July 2013 be referred to another taxing master for taxation.

c) That the costs of the application be provided for.

The application was based on the following grounds: that the taxing master erred in principle in proceeding to tax the Respondent's Advocate/Client Bill of Costs without affording an opportunity for the applicants to make such submissions on the Bill of Costs and to present any evidence; that the learned taxing master erred in principle by proceeding to taxing the respondent's Advocate/Client Bill of Costs in the ruling dated 16th January 2016 whereas the proceedings related to the applicants' Notice of Preliminary Objection dated 28th January 2016; that the learned taxing master erred in principle by disallowing the applicant's Notice of Preliminary Objection whereas the respondent's Advocate/Client Bill of Costs relates to matters which arose more than six years before commencement of proceedings; that the learned taxing master erred in principle by failing to call for the court file in **Succession Cause No. 2784 of 1995** for the purposes of determining whether the respondent's Advocate/Client Bill of Costs was time barred under the Limitations of Actions Act; and that no Notice of delivery of Ruling was served on the applicant prior to delivery of the ruling by the learned taxing master.

The application was supported by the affidavit of Brian Omondi Ondego dated 26th January 2017 and by the applicants' submissions. The following is the summary of the applicant's case:

a) That on 13th October 2016 when the matter came up for mention before the Family Division Deputy Registrar, the parties informed the court that they would wish to rely on the pleadings already on record for purposes of determining the Notice of Preliminary Objection.

b) That the court fixed the matter for ruling on 17th November 2016.

c) That on 17th November 2016, the matter was not listed for ruling on the cause list and counsel for the applicants personally visited the Deputy Registrar in her chambers to inquire about the status of the pending ruling.

d) That the Deputy Registrar informed him that the ruling was not ready and that the Court would send out a notice of delivery of the rulings.

e) That on 28th November 2016 and 11th January 2017 counsel for the applicants wrote to the Deputy Registrar to inquire about when the ruling would be delivered.

f) That on 23rd January 2017, they received a letter dated 16th January 2017 from the Deputy Registrar informing them that the ruling in the matter had already been delivered.

g) That they immediately applied to the court to be allowed to peruse the court file only to discover that the ruling had been delivered on 16th December 2016 dismissing the Preliminary Objection and taxing the respondents' Advocate/Client Bill of Costs hence awarding the respondents a sum of Kshs. 159,053.72/=.

h) That the Deputy Registrar erred in proceeding to tax the Respondents' Advocate/Client Bill of Costs since the proceedings as at the date of delivery of the ruling only related to the applicants' Notice of Preliminary Objection and not the actual taxation of the Bill of Costs.

i) That the exercise of proper judicial discretion after the dismissal of the applicants' Notice of Preliminary Objection would have required the matter to be fixed for actual taxation of the respondents' Advocate/Client Bill of Costs where the parties would be afforded an opportunity to make submissions on the Bill of Costs and present any documentary evidence.

j) That it is improper and unfair for the tax master to tax the respondents' Advocate/Client Bill of

Costs in absence of the applicants' counsel since the applicants were entitled to be heard by way of arguments and that the applicants' right to a fair hearing was denied and violated by the taxing officer's failure to summon or notify the applicants of the taxation proceedings.

k) That upon further perusal of the court file they discovered that no notices were sent out to the parties prior to the delivery of the ruling.

l) That it was improper for the taxing officer to dismiss the applicants' Preliminary objection in a ruling that was delivered without notice.

m) That the taxing officer ought to have first delivered the ruling on the Preliminary Objection then thereafter have the matter fixed for taxation where the parties would be afforded the opportunity to prosecute or defend their respective positions on the bill.

n) That it is in the interest of justice, fairness, equity and respect for the court process and the rule of law that orders sought herein be granted.

Peter Ngunjiri Kamunde also swore an affidavit dated 24th April 2017 in support of the applicant's case in which he stated that his advocate was not aware of the ruling date of 16th December 2016 and that had they known of the ruling date, they had no reason to fail to attend court. He further stated that there was procedural impropriety occasioned to him when the taxing officer failed to dedicate a day for purposes of conducting taxation of the Bill of Costs after dismissing the Preliminary Objection, and that it was in the interest of justice, fairness and equity that the Preliminary Objection and the Bill of Costs be referred back to another taxing officer for purposes of fresh consideration of issues.

The application was opposed by the respondent through the replying affidavit of Kimani Mwangi dated 11th April 2017 and through the respondent's submissions. The following is the summary of the respondent's case:

a) That contrary to what was alleged by the applicants, he appeared together with Brian Omondi Ondego before the Deputy Registrar in her chambers to inquire about the status of the pending ruling whereupon parties were informed that the ruling was to be delivered on 16th December 2016.

b) That on 16th December 2016, he sent an advocate to attend the delivery of the ruling as scheduled.

c) That the matter was listed as number 4 on the cause list and the ruling was delivered in the presence of counsel for the respondent and in the absence of the applicants.

d) That despite having full knowledge of the date of delivery of the said ruling and despite the same appearing on the Kenya Law Reports website, the applicants never sent a representative and the same ought not be enough reason to set aside the learned taxing officer's decision.

e) That the taxing officer in her ruling delivered on 16th December 2016 arrived at a sound conclusion that the Respondents' Advocate/Client Bill of Costs was properly on record for reasons that time begun to run upon termination of the respondent's firms services in the year 2013.

f) That the applicants failed to file a response to the items listed as 1-36 on the said bill of costs and instead elected to file a Notice of Preliminary Objection.

g) That no item listed as from number 1-36 of the said Advocate/Client bill of costs was opposed to or contested to and that there was overwhelming proof of services rendered to the applicants in succession cause number 2784 of 1995.

h) That the applicant filed a Notice of Preliminary Objection on 28th January 2016, close to three

years from the date of filing the Advocate/Client Bill of Costs.

i) That at the time of filing the Notice of Preliminary Objection, the applicant never took any further steps by way of affidavit or otherwise of opposing any item as serialised in the Bill of costs.

j) That the applicants never contended to the fact that the respondent received instructions from the applicants to render legal services in the succession matter and the respondent provided those services faithfully until the year of 2013 when the instructions were terminated.

k) That no error of principle was committed by the taxing master.

ISSUES

From the pleadings the parties in this case, this Court finds that the following are the issues for determination to which the Court will focus its legal analysis:

i. Whether parties were informed of the date of the ruling on the Preliminary Objection?

ii. Whether the applicants filed a response to the respondent's Bill of Costs?

iii. Whether the Deputy Registrar made a finding on the Advocate/Client Bill of costs without considering the evidence of the applicants?

DETERMINATION

What is challenged is not the outcome of the ruling but the fact that the Deputy Registrar went ahead to tax the Bill of Costs when the matter came up for ruling on the Preliminary Objection. The applicants stated that when the matter came up for ruling on 17th November 2016 and was not listed, he went to the Deputy Registrar's chambers to follow up on the progress of the ruling. Counsel for the respondent on the other hand stated that when the matter first came up for hearing and was not listed, he appeared together with Brian Omondi Ondego before the Deputy Registrar in her chambers to inquire about the status of the pending ruling whereupon parties were informed that the ruling was to be delivered on 16th December 2016. From the record it is undisputed that both parties presented written submissions to the Court on the Preliminary Objection. On 14th April 2016 the Court agreed that the Preliminary objection would be disposed of by written submissions. On 9th June 2016 both parties filed the said submissions. On 16th June 2016, the matter was transferred from Civil Division to the Family Division. The matter was mentioned in the Family Division on 13th October 2016 and scheduled for Ruling on 17th November 2016 and was delivered on 16th December 2016. The fact of deferring the ruling and delivering the same in the absence of a party /parties or Counsel is not illegal, irregular or unlawful as long as some form of notice was issued and/or the matter listed on the Cause List. Therefore the fact that the Applicant herein learnt of the Ruling later, it did not prejudice his or client's rights as the determination was available and any legal timelines required going forward shall factor in that the applicant was not aware the Ruling was delivered.

On the issue of Preliminary Objection that the Bill of Costs was filed after the limitation period, I agree with the Ruling by Taxing Officer relying on the following case of **Abincha & Co Advocates vs Trident Insurance Co Ltd [2013]** it was held by Justice Hatari Waweru;

An Advocates's claim for costs would be based on the contract for professional services between him and his client. It would be a claim founded on contract. An action to recover such costs would be subject to the limitation period set out in section 4(1) (a) of the Limitation of Actions Act. In this connection Halsbury's Laws of England, 4th Edition, Volume 28 paragraphs 879

Solicitor's Costs: In relation to continuous work by a solicitor, such as the bringing and prosecuting or defending an action;

1. If a solicitor sues for his costs in an action, the statute of limitation only begins to run from the date of termination of the action or of the lawful ending of the retainer of the solicitor.

The date of termination of services was in 2013 as per the application to cease acting filed on 25th July 2013.

To the 2nd limb of the appeal which is that the Applicants received Ruling of 16th December 2016 which not only included the determination of the Preliminary objection but also the determination on taxation of the Bill of Costs and had not been heard.

The Applicants submitted that their written submissions filed addressed only the question of Preliminary objection and not taxation of Bill of Costs. Secondly, a Preliminary Objection addresses only questions of law and not facts as enunciated by case of **Mukisa Biscuit Manufacturing Company vs Westend Distributors [1969] E.A. 696**. So, the Ruling should not have dealt with the taxation of Bill of Costs. Thirdly, the Court determined the issue of taxing the Bill of Costs without according the Applicants a hearing on the same. The applicants relied on **Section 14 of Advocates Remuneration Order** that provides; the Taxing Officer may proceed *ex parte* with taxation proceedings when an advocate without a reasonable excuse fails to appear for taxation despite due notice having been served upon such advocate. The applicants were not given an opportunity to be heard on the

taxation of Bill of Costs on merit.

Article 50 (1) of COK 2010; which provides;

Every person has the right to have any dispute that can be resolved by the application of law in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body

The Respondents alluded to the fact that the Applicants did not file pleadings in reply to Bill of Costs and therefore the Taxing officer was right in proceeding with taxation. This not procedurally correct , the Court ought to have dealt with the preliminary Objection first to its logical conclusion, then ensure all parties are informed on the hearing of the taxation of Bill of Costs.

CONCLUSION

In view of the foregoing, I partly decline the application on the Ruling of the Preliminary Objection and uphold the present application on the fact that the Applicants were not heard and/or filed written submissions on taxation of the Bill of Costs.

The matter shall be placed before any other Taxing Master to serve parties and conduct taxation of Bill of Costs proceedings

Each party to bear own the costs.

DELIVERED, SIGNED & DATED IN OPEN COURT IN NAIROBI ON 20TH NOVEMBER 2017.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

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