



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
MISCELLANOUS APPLICATION NO.3 OF 2014

RODAH CHEPKURUI TARE.....1ST APPLICANT

RACHEL CHEPKORIR TARE.....2ND APPLICANT

VERSUS

WHELDON NGETICH T/A

WELDON NGETICH & CO. ADVOCATES.....RESPONDENT

RULING

1. This application arises out of a taxation of an advocate-client bill of costs dated 7th April 2014. The respondent was acting for the applicants in **Kericho High Court Succession Cause No.25 of 2004- In the Matter of the Estate of the Late Kipkurgat Arap Tare**. The applicants are the widows of the deceased and the petitioners in the Succession Cause.

2. In his bill of costs, the respondent had charged a total of Kshs.5, 573,800/-. Following taxation by the Deputy Registrar in respect of which the parties filed written submissions, the bill was taxed at Kshs.463,000/- by Hon. S. M. S. Soita in a ruling delivered on his behalf on 16th February 2016 by Hon. Ndururi. From the record of proceedings before Hon. Ndururi, none of the parties was present when the ruling was delivered.

3. It appears that thereafter the respondent sought to execute for the costs against the applicants, which precipitated the filing of this application which is dated 20th June 2016 and in which the applicants seek the following orders:

1. That this application be certified as urgent and be heard ex-parte in the first instance.

2. That the application be granted leave to file the reference out of time and serve.

3. That there is a stay of execution by the respondent pending the hearing and determination of the reference by this honourable court as the applicants could be sent to jail anytime now in default.

4. The application is based on the following grounds:

1. That the applicants have not been served with a copy of the taxing officer's reasons as required by the rule 11 of the Advocates (Remuneration) Order within the statutory period.

2. That the taxing officer had based his taxation on a wrong principle of the law.

3. That the issues are hotly contested as the taxing officer had drawn himself into the arena of the dispute and clearly lost the judicious role in the matter.

4. That the failure of the advocate on record to make submissions was not within the knowledge of the applicants nor was the determination in taxation process.

5. That for a taxing officer to tax instructions fees for kshs.463,000/- is not provided for in the schedules nor pleaded anywhere in the pleadings and the same is manifestly excessive.

6. That the applicants are threatened with arrest and civil jail or their family property may be sold by auctioneers in default any time now.

5. The application is supported by the affidavits of the applicants, Rodah Chepkurui Tare and Rachel Chepkorir Tare which are the same in content, sworn on 30th June 2016. I will therefore make reference to the affidavit of the 1st applicant, Ms. Rodah Chepkurui Tare.

6. The application was filed under a certificate of urgency on 30th June 2016. When it came up for hearing on 13th July 2016, the respondent requested for time to file a reply, which was granted. The Court also directed that there should be no further proceedings with the execution until further orders of the Court.

7. On 27th July 2016, the parties were directed to file submissions on the application, and it was fixed for mention on 27th September 2016. Parties then requested the Court for a ruling date. This ruling is based on the application, the affidavits in support, and the written submissions of the parties.

8. In the affidavit sworn in support of the application, Ms. Tare deposes that she seeks protection against a flawed and highly inflated taxed bill which was taxed outside the provisions of the Advocates (Remuneration) Order.

9. It is also her deposition that she was not aware of the taxation of the bill until she was served with a ruling dated 16th February 2016. She was also served with a certificate of costs dated 18th February 2016 in which the instructions fees has been taxed at kshs.463,000/-. She asserts that this is not provided for under the schedule.

10. According to Ms. Tare, in a statement that is somewhat unclear and which I find best to set out verbatim, *“the details in respect of the said bill of costs arises from parties appealing against the estate of a deceased person when indeed they have no letters of administration for the estate nor did the administrator of the estate give instructions to institute the proceedings.”*

11. It is also her averment that the value of the subject matter was never pleaded nor established by the Honourable Court, yet the taxing officer arbitrarily taxed items that are not provided for in the Advocates' Remuneration Order without assigning reasons for such taxation. She asserts that she shall demonstrate that the taxing officer applied the wrong principles in the taxation, and she prays for time to file her reference out of time and for a temporary stay of execution.

12. The applicants filed a further affidavit sworn in reply to the respondent's affidavit in opposition to the application. The 2nd applicant avers that they were not aware of the contents of the ruling delivered on the 16th February 2016. She asserts that they were aware of the consequences of not responding to the bill of costs and would not have waited for the actions of the auctioneers to trigger their application. She deposes that the applicants are both advanced in age and in ill health and may not be adequately informed of the matters at hand.

13. The applicants allege that the respondent may have incurred more expenses than anticipated, hence

their proposal to pay an additional sum of Kshs.62, 500/-. They also allege that the respondent was paid his fees in full, citing a receipt dated 10th May 2012. They also question the nature of work done by the respondent arguing that the respondent must have been aware that conversion of titles from lease hold to freehold is done in Nairobi and not in Kericho.

14. The respondent, Mr. Weldon Ngetich, opposes the application and has filed an affidavit sworn on 18th July 2016. In his reply, the respondent contends that the application before the Court is frivolous, vexatious and an abuse of the Court process meant to deny him justice. According to the respondent, the application violates the provisions of the Advocates Remuneration Order with respect to the taxation of his bill of costs which was properly taxed and there was no error of principle in respect thereto.

15. The respondent deposes that the bill of costs was to be taxed on the basis of written submissions, which both parties filed, and that the Deputy Registrar intimated to the parties the date when he was to deliver his ruling. Mr. Ngetich deposes that both he and the applicants attended court when the ruling was delivered on 16th February 2016.

16. The respondent contends that neither the applicants nor their Advocates did anything, within the stipulated time frame, to challenge the taxation, and their application was triggered by the execution proceedings undertaken by the respondent. He prays that the application be dismissed with costs.

17. I have considered the application before me and the respective averments and submissions of the parties. I note that the parties have gone into some detail regarding their respective positions on the taxation, and the process leading to the taxation of the bill of costs. I have also noted the authorities filed in Court along with the submissions, though the parties have not deigned to show the Court how the authorities filed are relevant to the present proceedings.

18. Having considered the matter before me, I believe that the determination of this application turns on one fairly narrow point that can be discerned from the Court record: whether the applicants were aware of the delivery of the ruling on taxation, and therefore ought to have filed their objection thereto within the time period allowed under rule 11 of the Advocates Remuneration Order.

19. The record indicates that the parties were directed on 16th October 2014 to file submissions on the bill of costs, and there is no dispute that they both did. The record further indicates that the ruling was ***“delivered on behalf of Hon. S. Soita by J. R. Ndururi PM on 16.22.2016. N/A for the parties.”***

20. It is evident therefore that, contrary to the deposition by Mr. Ngetich, neither the applicants nor the respondent appeared before the Deputy Registrar when the ruling was read. There is also nothing before the Court that indicates that a notice with respect to the date of the ruling on the taxation of the respondent’s bill of costs was served on the parties.

21. That being the case, the contention by the applicants that they only came to know that the ruling had been delivered when execution was levied against them has merit. The last appearance on the matter before the Deputy Registrar, Hon. Soita, having been on 16th October 2014, it is possible that there was no communication from the applicants’ Counsel, assuming he had notice of the date of the ruling.

22. In the circumstances, I am satisfied that it is in the interests of justice to allow the orders sought in the application, and I therefore grant the following orders:

- 1. That the applicants be and are hereby granted leave to file a reference against the decision of the taxing master made on 16th February 2016 out of time;***
- 2. That the said reference be filed and served within 14 days hereof;***
- 3. That there be a stay of execution by the respondent pending the hearing and determination of the reference;***

4. That in default of the applicants filing the reference within the time stipulated herein, these orders shall lapse and the respondent be at liberty to execute.

Dated, Delivered and Signed at Kericho this 30th day of November 2016.

MUMBI NGUGI

JUDGE