



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**MISCELLANEOUS APPLICATION NO 150 OF 2001**

MACHIRA & CO ADVOCATES.....ADVOCATE

VERSUS

ARTHUR K. MAGUGU.....CLIENT

**RULING**

**INTRODUCTION**

1. The Advocates' Notice of Motion application dated 5<sup>th</sup> April 2012 and filed on 18<sup>th</sup> February 2013 was brought pursuant to the provisions of Section 51(2) of the Advocate Act Cap 16 Laws of Kenya, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 3A and 26 of the Civil Procedure Act Cap 21 Laws of Kenya and all other enabling provisions of the law. It sought the following orders:-
  1. **THAT Judgment be entered for the Advocate/Applicant against the Client/Respondent in the sum of Kshs 1,500,000/= being the costs certified by the Deputy Registrar as costs on 1<sup>st</sup> August, 2001.**
  2. **THAT the said sum of Kshs 1,500,000/= be paid with interest at the rate of 14% per annum from 4<sup>th</sup> April 2001 i.e. the date of filing the Bill of Costs, until payment in full pursuant to Rule 7 of the Advocates Remuneration Order.**
  3. **THAT the costs of this Application be awarded to the Advocates.**

**THE ADVOCATES' CASE**

2. The application was supported by the Affidavit of John Patrick Machira that was sworn on 5<sup>th</sup> April 2012. The Advocates' List of Authorities were dated and filed on 19<sup>th</sup> April 2013. Their Supplementary List of Authorities were dated 19<sup>th</sup> November 2014 and filed on 27<sup>th</sup> November 2014 while the Further Supplementary List of Authorities and Written Submissions were both dated 9<sup>th</sup> March 2015 and filed on 10<sup>th</sup> March 2015.
3. The Advocates stated that the Client retained them to act for him in **HCCC No 2800 of 1994 Milimani Commercial Courts International Finance Co Ltd ( In Liquidation) vs Arthur K.**

- Magugu.** After they ceased acting for the Client, they filed their Bill of Costs on 4<sup>th</sup> April 2001 for a sum of Kshs 1,500,000/=. The same was taxed for the said amount on 30<sup>th</sup> July 2001. Subsequently, a Certificate of Taxation for the said sum was issued on 1<sup>st</sup> August 2001.
4. They stated that the Respondent filed a reference challenging the decision of the Taxing Master and the same was upheld by the High Court on 7<sup>th</sup> February 2002. However, the same was overturned by the Court of Appeal on 2<sup>nd</sup> March 2012, the effect of which was that the sum that was taxed by the Taxing Master in the sum of Kshs. 1,500,000/= was restored.
  5. As the said sum was undisputed, the Advocates therefore urged the court to allow their application as prayed.

### **THE CLIENT'S CASE**

6. There was no Replying Affidavit that was filed in opposition to the said application as the Client was deceased. However, on 12<sup>th</sup> April 2013, the deceased's advocates on record filed Grounds of Opposition dated 11<sup>th</sup> April 2013 which was as follows:-

**THAT the Respondent Arthur Kinyanjui Magugu had already passed on and an Application for substitution with the legal representative of the deceased estate had to be filed first before the Applicant could proceed with its Application.**

7. The said Client's advocates therefore urged the court to dismiss the Advocates' present application.

### **LEGAL ANALYSIS**

8. It was not in dispute that the Certificate of Taxation dated 1<sup>st</sup> August 2001 by the Taxing Master remained unaltered following the aforesaid Court of Appeal decision and that the Advocates were thus entitled to the said sum of Kshs 1,500,000/=. The court was in agreement with the holdings in the several cases that were relied upon by the Advocates to buttress their argument in this regard- **See Muri Mwaniki Muriuki & Wamiti Advocates vs Wilson Kinyanjui Kuria [2011] eKLR, Ogonji & Tiego Advocates vs Samuel Kinyua Mutugi & Another [2006] eKLR** amongst other cases.
9. What was in dispute, however, was whether or not the Advocates' application could be allowed in view of the fact that the Client had since passed away. It did therefore appear to the court that the issues for determination by the court were as follows:-

- a. **Had the Advocates' cause of action against the Client abated?**
- b. **Could judgment for taxed costs be entered against a deceased Client?**

10. The Advocates were emphatic that the cause of action did not abate and that the same survived against the surviving Respondent who was the deceased's wife. They relied on the provisions of Order 24 Rule 1 of the Civil Procedure Rules, 2010 that provides as follows:-

**“The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.”**

11. In the case of **Said Marlo Mungai & 2 Others vs Jane Richter & Another [2002] eKLR** that the said Advocates relied upon, Hayanga J (as he then was) had the following to say regarding abatement and surviving of a cause of action:-

**“...The term “survives” in Order 23 Rule (1) has been said to include not only cases or survivorship in a strict sense but also cases of devolution by succession and inheritance...”**

12. On the other hand, the Client's Advocates were categorical that as the Client died on 15<sup>th</sup> September 2012 and two (2) years had passed since his death and letters of administration had not

been issued, the suit herein had abated. They referred the court to the provisions of Order 24 Rule 4(3) of the Civil Procedure Rules that stipulates as follows:-

**“Where within one year no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.”**

13. The said Client’s advocates averred that since no application to revive the suit had been made under Order 24 Rule 7 (2), the suit herein was dead and non-existent. They referred the court to the case of John Chege Mwangi & 3 Others vs Obadiah Kiritu Methu [2012] eKLR to buttress their argument in this respect.
14. The court was not in agreement with the Advocates’ contentions that the application herein was execution proceedings against the Client herein for the reason that, execution proceedings can only commence once judgment is entered. Indeed, the Certificate of Taxation could not be executed in its own right until after entry of judgment in accordance with Section 51 (2) of the Advocates Act Cap 16 (Laws of Kenya).
15. Having said so, the said Certificate of Taxation conclusively determined the rights of Advocates as against the Client long before he passed away and all that was pending was the entry of judgment as aforesaid. It could therefore be deemed to have been a preliminary decree within the meaning of a “decree” under Section 2 of the Civil Procedure Act. The explanation in Section 2 is clear that a decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of.
16. The Certificate of Taxation was thus an order to execution proceedings within the meaning of Order 24 Rule 10 of the Civil Procedure Rules for which the provisions relating to abatement of suits were not applicable. The same provides as follows:-

**“Nothing in rules 3, 4 and 7 shall apply to proceedings in execution of a decree or order.”**

17. Be that as it may, it was the view of this court that the provisions for execution proceedings under the Civil Procedure Rules are not applicable until such time that judgment has been entered. In the case of Lubulleh & Associates Advocates vs N.K. Brothers [2015] eKLR, this very court held as follows:-

**“For the reason that the procedure of advocates costs is well captured in the Advocates Act and the Advocates Remuneration Order which is a complete code in itself and the Civil Procedure Rules would not be applicable unless as had been provided therein and for purposes of enforcement of judgment..”**

18. It therefore follows that once a reference is determined under Paragraph 11 of the Advocates Remuneration Order and the certificate of taxation is not set aside and/or altered, the next step is for the court to enter judgment under the provisions of Section 51 (2) of the Advocates Act. The same provides as follows:-

**“The certificate of the taxing officer by whom any bill has been taxed, shall unless it is set aside or altered by the Court, be final as to the taxed amount of the costs recovered thereby, and the Court may make such order in relation thereto as it thinks fit, including in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”**

19. As the Certificate of Taxation in this matter remained unaltered when the Court of Appeal upheld the taxation of the Advocates’ Bill of Costs in the sum of Kshs 1,500,000/=, judgment could be entered as aforesaid
20. However, the court could not ignore the fact that the Client passed away before the said judgment was entered herein. Once the Client died, his estate had to be administered under the provisions of the Law of Succession Act. Hence, an administrator had to be appointed as all his property had to vest in his personal representative.
21. As was rightly pointed out by the Client’s advocates, except as expressly provided under the Law

- of Succession or by any other written law or by a grant of representation under the said Act, no person shall take possession or dispose of any free property of a deceased person. If a person does so, he would be acting contrary to the provisions of Section 45 of the Law of Succession Act Cap 160 (Laws of Kenya). The holding in the case of **Rebecca Nyanganyi Odoti vs Alloys Nyerere Omari & 5 Others [2013] eKLR** that was relied upon by the Client's advocates thus elucidated the correct position of the law.
22. The court noted the case of **Mwangi M' Mabuanga vs Festus Muriungi [1994] eKLR** that was relied upon by the Advocates but found that the same was distinguishable from the facts of this case in that the dispute therein was whether the person who had been appointed as a legal representative of the deceased's estate therein could receive the proceeds of the decree instead of the deceased's wife who was still alive and ought to have been appointed as the legal representative.
23. Similarly, the case of **Julius M. Mugo Muchiri vs Wanjoka Njagi [2009] eKLR** that the said Advocates also relied upon by the Advocates was also not relevant as Makhandia J (as he then was) declined to allow an application for substitution on the ground that there was in place, an order for stay of execution pending appeal.
24. In this case, it appeared that the Client's property had not vested in any person as no personal administrator had been appointed for the administration of his estate. No reason was advanced why this had not been done since 2012. That did not, however, mean that the Advocates were helpless in this situation.
25. Under Section 54 of the Law of Succession Act, it is provided that a court may according to the circumstances of the case limit any grant of representation it has jurisdiction to make in the Forms provided in the Fifth Schedule. The Fifth Schedule of the Law of Succession Act provides that:-

**14. When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act (emphasis court), letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in other cause or suit which may be commenced in the same or in any other court between the parties, or any other, touching the matters at issue in the cause or suit, until a final decree shall be made therein, and carried into complete execution.**

**16. When it appears to the court to be necessary or convenient to appoint some person to administer an estate or any part thereof other than the person who would in ordinary circumstances be entitled to a grant of representation, (emphasis court) the court may, in its discretion and having regard to all the circumstances of the case, appoint such other person to be administrator and grant letters of administration whether limited or otherwise, as it shall think fit."**

26. Section 66 of the Law of Succession Act also does provide that creditors could also be appointed to administer the estate of a deceased person. The Advocates did not demonstrate that they had made any application to have an administrator to the Client's estate appointed in line with the Fifth Schedule of the Law of Succession Act.
27. Entering judgment under Section 51 (2) of the Advocates Act would be futile as there is no legal person against whom the judgment can be entered and/or enforced against. Indeed, Section 2 (1) of the Law Reform Act Cap 26 (Laws of Kenya) provides that all causes of action subsisting against or vested in a deceased person shall survive against or the case may be, for the benefit of his estate.
28. Notably, for all purposes and intent, the Advocates' present application was actually unopposed. The advocates who purported to respond to the Advocates' present application had no *locus standi* to do so as there was no personal administrator to the Client's estate who would have given them instructions so to act. The court nonetheless considered the legal issues on its own motion and merely set out the Client's submissions as they had been filed herein and remained on the court record.
29. Accordingly, having considered the pleadings, the affidavit evidence, the written submissions and case law in support of the parties' pleadings, the court was of the view that the Advocates' present application could not proceed until the deceased Client was substituted by a representative of his

estate.

**DISPOSITION**

30. For the aforesaid reasons, the court found that the Advocates' Notice of Motion application dated 5<sup>th</sup> April 2012 and filed on 18<sup>th</sup> February 2013 was not merited as it was filed prematurely. In the circumstances, the same is hereby dismissed. There will therefore be no order as to costs as the Client herein was not represented by a personal administrator.

31. It is so ordered.

**DATED and DELIVERED at NAIROBI this 26<sup>th</sup> day of May 2015**

**J. KAMAU**

**JUDGE**