REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 364 OF 2009

AND

IN THE MATTER OF THE ADVOCATES ACT (REMUNERATION ORDER)

AND

IN THE MATTER OF HIGH COURT SUCCESSION CAUSE NO. 1830 OF 1999

(IN THE MATTER OF THE ESTATE OF JOHN NGUGI KIMANI)

RULING

1. There are two applications for the court's determination. The first in time is a Chamber Summons dated 18th June 2012 and taken out under Rule 11(2) of the Advocates (Remuneration) Order and Section 3A of the Civil Procedure Act and all other enabling provisions of law, while the second in time is a Chamber Summons dated 20th June 2012 and brought under the same provisions of the law as the earlier application.

2. The applicant prays that the order made on 6th June, 2012 by the Deputy Registrar in relation to the advocate-client Bill of Costs dated 12th May 2009 be set aside, and that the said advocate-client Bill of Costs be struck out for failure to disclose the date of instructions for item number 1 in relation to each of the respondents/clients named in the bill, that an order be made for the filing of a fresh and separate Bill of Costs for each individual client named in Item number 1 of the said Bill of Costs with the instructions fees based only on the amount granted to each beneficiary in the orders of made on 5th August 2003 in the HCSC No. 1830 of 1999 in the matter of the estate of John Ngugi Kimani following the Summons for Accounts filed by Njiiri Kanyiri & Co. Advocates on 9th June 2003 for subsequent, proper and lawful taxation before a different Deputy Registrar. It is prayed in the alternative there be a stay of taxation of the advocate-client Bill of Costs by Njiiri Kanyiri & Co. Advocates against the applicant until HCSC No. 1830 of 1999 is heard and determined and that the estate therein is distributed to the respective beneficiaries.

3. The application is premised on the grounds on the face of it as well as the facts deposed to in the affidavit of Paul Njoroge Ngugi, the applicant herein, sworn on 18th June 2012. He avers that he is a beneficiary of the estate of John Ngugi Kimani, who died on 23rd July 1998. He states that the three administrators of the estate applied for a grant of letters of administration intestate in respect of the said estate in 1999 through advocates other than those who have filed the instant advocate-client Bill of Costs. He avers that the said estate is yet to be distributed as the succession cause is still pending at the High Court of Nairobi. He states further that he had given instructions to Njiiri Kanyiri & Co. Advocates to file Summons for Accounts of the estate and for his unpaid arrears as against the administrators, and the said

firm of advocates filed the Summons for Accounts on 9th June 2003 when the cause had already been pending in court for four (4) years. The said firm has since ceased acting on their behalf. He avers that they never gave instructions to Njiiri Kanyiri & Thuku Co. Advocates, the applicant in the advocate-client Bill of Costs in question, but Njiiri Kanyiri & Co Advocates, a different entity and law firm.

4. The application is opposed. Bernard Muriuki Kanyiri swore an affidavit on 1st October 2012 in that behalf. The respondent has also filed grounds of opposition, dated 1st October 2012. It is averred on behalf of the respondent that this court has no jurisdiction to hear this matter as the mandatory provisions of Rule 11(1) and (2) of the Advocates (Remuneration) Order have not been complied with and that no notice of objection was issued to the Taxing Officer. It is averred that the issues sought to be raised by the application herein are *res judicata* having been raised previously in the Notice of Preliminary Objection dated 3rd July 2009 and canvassed before the Deputy Registrar on the 21st July 2009. It is argued that the applicant never raised the issue of retainer. It is the respondent's averment that the Taxing Officer dealt with the issue of retainer and established that the respondent had indeed been instructed in writing and that the applicants acquiesced in the process of taxation of costs by the applicant by attending court, filing written skeleton submissions and making oral submissions before the taxation of costs was done.

5. The application was canvassed by way of written submissions. The applicant's written submissions were filed on 28th August 2013 while those by the respondent were filed on 11th September 2013.

6. The applicant's case is that there was no retainer between the respondent and the applicant herein and as such no taxation could be instituted by the advocate against the applicants. It is their submission that no Notice of Change of Advocates was ever filed by the advocate/respondent herein, Njiiri Kanyiri & Thuku Advocates, to effect change of representation from the prior advocates, Njiiri Kanyiri & Co Advocates. It is submitted that the respondent has failed to, or cannot possibly prove that they came on record for the applicant. Further, it was submitted that it is trite law that issues of retainer cannot be canvassed before a taxing master and that a taxing master's jurisdiction is limited to just that, taxing bill of costs.

7. On their part, the respondent submitted that the applicants in both the application dated 18th June 2012 and the one dated 20th June 2012 properly instructed them to act for the all the applicants and the references herein is an attempt to avoid paying for services duly rendered. It is contended that the respondent law firm was given instructions by the beneficiaries of the estate of the late John Ngugi Kimani to act against the administrators of the estate to oppose their application for grant of letters of administration intestate, to seek leave to replace the administrators, to seek for accounts of the estate from July 1998, among other things that the applicants wanted done.

8. It is the respondent's case that their law firm was previously known as Njiiri Kanyiri & Co. Advocates but changed its name to Njiiri Kanyiri & Thuku Advocates, which change was made after an associate who was working for the law firm was made a partner in the firm. It is further submitted that all the partners of the law firm were known to the applicants since they held joint meetings with them to strategize on how to tackle the problems facing them as the beneficiaries of the estate.

9. It is submitted that the applicants acquiesced to the entire taxation process, which included several court attendances and hearings over a period of three years, and both were duly represented by competent counsel at all times. It is the respondent's submission therefore that it would be grossly prejudicial to the law firm and extremely unjust for the applicants to rehash issues that ought to have been raised or canvassed before the taxation or during the taxation. They submit that the applicants were well aware of the change of names of the law firm from Njiiri Kanyiri & Co. Advocates to Njiiri Kanyiri & Thuku Advocates, and that the applicants instructed them to file an application in the new name of the firm, that is Njiiri Kanyiri & Thuku Advocates.

10. I note from the record that the two applications relate to the said estate and seek substantially the same orders. The issues raised in the applications are essentially the same. I will therefore consider them concurrently.

11. I have considered the grounds set out on the face of the applications and the facts deposed in the affidavits filed in support and the grounds of opposition by the respondent against the applications. I have further considered the written submissions filed herein.

12. The principles under which this court can interfere with the Taxing Officer's exercise of discretion are well settled. The principles as set out in the case of *First American Bank of Kenya vs. Shah & Others* [2002] 1 EA 64, were that the court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle; that it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration Order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge; that, if the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high; and that, it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary.

13. It has also been pointed out that the court should interfere with the decision of the Taxing Officer where there has been an error in principle but should not do so on questions solely of quantum as that is an area where the Taxing Officer is more experienced and therefore more apt to the job. The Judge will intervene only in exceptional cases and multiplication factors should not be considered when assessing costs by the Taxing Officer or even the Judge on appeal; the costs should not be allowed to rise to such level as to confine access to court to the wealthy. a successful litigant ought to be fairly reimbursed for the costs he had to incur in the case; the general level of remuneration of Advocates must be such as to attract recruits to the profession; so far as practicable there should be consistency in the awards made; every case must be decided on its own merit and in every variable degree, the value of the suit property may be taken into account; the instructions fees ought to take into account the amount of work done by the advocate, and where relevant, the subject matter of the suit as well as the prevailing economic conditions. one must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel of pre-eminent reputation; then one must know that what fee this hypothetical character would be content to take on the brief. Clearly it is important that advocates should be well motivated but it is also in the public interest that cost be kept to a reasonable level so that justice is not put beyond the reach of poor litigants.

14. The circumstances of this case are such that the retainer is disputed. The applicants have vehemently denied that they instructed the firm of Njiiri Kanyiri & Thuku Advocates. A perusal of the record reveals that the respondent rendered services to the applicants and therefore it is obvious that the respondent is entitled to payment for the said services offered. I find the respondent's explanation that the law firm was previously known as Njiiri Kanyiri & Co. advocates but changed its name to Njiiri Kanyiri & Thuku Advocates, and that the change was made after an associate who was working for the law firm was admitted to the partnership plausible.

15. This court does not consider the argument advanced by the applicants that there was no retainer simply because of the change of business name candid. The respondent has stated that all the partners of the said law firm were known to the applicants, which statement has not been controverted. I also find it interesting that the applicants did not raise any objections with regard to the items of taxation. There is no evidence that notice was given to the taxing master as is required by the provisions of the Advocates (Remuneration) Order, 2009 Rule 11 (1) (2). What the applicants have done is to dismiss the taxation on mere technicalities. The Rules were made in vain and therefore parties would ignore them at their impulse and dismiss them as mere technicalities. These rules provide the order in which courts operate.

16. In *Masumbuko Mohamed Omar vs. Gunda Benedict Fondo & 2 Others* Election Petition No. 4 of 2008, Njagi J said:

> "...in the course of administering justice, the courts have been provided with an orderly system which includes a road map through statutes and subsidiary legislation. These constitute the radar which guides the courts to justice. In the event of any lacuna, the omnibus provision of the court's inherent powers automatically comes into play. This power is invoked in order to enable the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court..."

17. Similarly, in *Alicen J.R. Chelaite vs. David Manyara Njuki & 2 Others* Civil Appeal No. 150 of 1998, it was observed that the mandatory provisions of legislation cannot be ignored. They are not mere technicalities and failure to comply, particularly with the time schedules given in these provisions, renders the relevant pleading fatally defective.

18. The applicants have not given any reasonable excuse as to why they did not comply with the mandatory provisions of the law governing the matter. They have failed to place before the court material that would make this court rule in their favour. I am not convinced that there is merit in the applications dated 18th June 2012 and 20th June 2012. Consequently, the same are hereby dismissed with costs to the respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 31ST DAY OF JULY, 2015.

W MUSYOKA

JUDGE