



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISCELLANEOUS CAUSE NO. 76 OF 2013
IN THE MATTER OF RULE 13 OF THE ADVOCATES REMUNERATION ORDER

AND

IN THE MATTER OF THE ADVOCATE AND CLIENT BILL OF COSTS

BETWEEN

EKURU KABAGE NYAMATHWE & CO. ADVOCATES ...ADVOCATE

VERSUS

ROSE WANJIRU KIBECLIENT/OBJECTOR

R U L I N G

1. Before this Court for determination is a Chamber Summons dated 27th January, 2015 and taken out under Paragraph **11 Rule 2** of the **Advocates (Remuneration) Order**.

It seeks orders that:

1.(Spent)
 2.(Spent)
 3. **That the Ruling and Costs allowed by the Taxing Officer, the Deputy Registrar of the High Court, Honourable Ms. Mutai on the 12th November, 2014 be set aside in its entirety.**
 4. **That this Honourable Court be pleased to grant stay of execution until hearing and determination of this application.**
 5. **That in the alternative, this Court do order the Advocates to refund any sums overpaid to them by the Client.**
 6. **That costs of this application be provided for.**
2. The application is premised on the grounds to be found in the face of the application. It is further supported by the annexed affidavit of ROSE WANJIRU KIBE, the Objector/Applicant herein, sworn on even date. The Deponent has made several averments, salient among them are that the Estate of the late David Kibe Waweru has not been distributed and the matter is still under litigation; that a consent has recently been reached but M/s Ekuru Kabage Nyamwathe & Co. Advocates were not involved in the litigation or the consent. It is averred that although the Objector’s Advocates P.K. Mureithi Advocates attended the Taxation, they were never served

with a Notice of Taxation at all, and that they only learnt that the Ruling on Taxation of the Advocates Bill of Costs had been given by letter addressed to them by the Advocates dated 26th November, 2014; and that she immediately instructed her advocates to file an objection to the decision on taxation.

3. It is further her averment that her Advocate has informed her that they and Mr. Kabage held a meeting on 15th January, 2015, where Mr. Kabage informed Mr. Mureithi that he was in the process of executing to recover the taxed costs from her, and that unless an order for stay is granted by this Honourable Court, the said Advocates will carry out their threat and her objection to taxation will be rendered useless.
4. She avers that the said Advocates only represented her in the matter of negotiations with her mother, who agreed to give her and her sister Nancy Nyokabi an additional 4 acres each, and that her mother had earlier proposed to give her and her sister 6 acres each without any participation or contribution of the Advocates; that their late mother Irene Mumbi Waweru gave to her and her sister Nancy Nyokabi Kibe each a sum of Kshs. 25,000,000 from her own money without any involvement or contribution by the said Advocates. She therefore avers that the said Advocates cannot and should not claim credit for the said gift and the Taxing Officer should not have included this amount as part of the subject matter and the ward in the taxation.
5. Further, that the said Advocates failed to disclose to the Court and to give her credit for the total sum of Kshs. 1, 285,600 which she had paid to them as their legal fees; that she has never been issued with a VAT receipt or invoice by the said Firm nor have they ever indicated their VAT number and therefore should not be awarded any VAT. She averred that from the Ruling of the Deputy Registrar, the said Advocates only gained four acres for her, and they are entitled to only be paid costs on the value of those four acres once she has received the benefit of the same. That the amount of Kshs. 1,285,600 already paid should be taken into account and taxed off.
6. Opposing the Objector's application herein, the Respondent/Advocate filed a Replying Affidavit on 20th March, 2015, sworn by MERCY MUTHEE. It is averred among other averments that the scope of the retainer was to negotiate an amicable distribution of the Estate of the Objector's father in order to avoid protracted litigation, and that it led to an agreement amongst the living beneficiaries of the deceased as to what the Objector would receive, as more particularized in Item 1 of the Bill.
7. She deponed that they were not retained to act for the Objector in the Succession proceedings and they have never asserted any such retainer, and that their fees were due on completion of their mandate and it is therefore not true that the Bill was premature and that whatever is outside the scope of the retainer, including the succession proceedings, is not relevant to the Bill in question.
8. Further, that the Objector is seeking to rehash matters that were before the Taxing Officer, that the Objector squandered the opportunity to make submissions before the Taxing Officer, and that there is no error in principle to warrant the orders sought.
9. The matter was disposed of by way of written submissions. The Client/Objector's submissions were filed on 27th May, 2015, while the Advocate/Respondent's were filed on 8th June, 2015.
10. It is the Objector's case that she was not served with Ruling on Taxation Notice for the Ruling that was delivered on 12th November, 2014, and that the Objector and her Advocates knew of the delivery of the Ruling upon receipt of the Applicant's letter dated 26th November, 2014. They contend that having not been made aware of the reasons for taxation, the Objector's Advocate immediately requested for the said reasons vide their letter dated 26th November, 2014 within the stipulated 14 days. Further, that the certified copy of the Ruling was availed on 26th January, 2015 and the application under Certificate of Urgency was filed the next day. They therefore submit that the application was filed in time and urge the court to enlarge the time for filing application

and that the application herein be deemed as properly filed.

11. On setting aside, review or revision of the Taxation, they contend that the bill of costs in this case related to instructions by the Objector to the Advocate to assist the Objector in a dispute with her mother and brother over property to be inherited. It is their case that diverse meetings were held, and that there was no formal or other arbitration, that there were no court proceedings, no pleadings, drawings, submissions, rulings or judgments filed or delivered. They contend that the entire dispute was handled over a series of meetings with the Objector, her family and her family's Advocates, and that the nature of the case was a family dispute.
12. They submit that the Objector, gained a further potential 4 acres of land in Kiambu from the said discussions and that the gain/impact on the Objector is Kshs. 120, 000, 000. It is further submitted that the Taxing Officer totally misdirected herself at page 3 of the Ruling, in assuming the Objector received a further 10 acres valued at Kshs. 30,000,000 each.
13. It is submitted that it would be unconscionable to equate the instruction fees payable to an Advocate, who handles a heated contested litigation in a Probate and Administration matter on behalf of an estate that normally takes years to conclude, to those of an Advocate who provides advice and is involved in a number of meetings and discussions on behalf of one beneficiary in his Chambers.
14. Relying on the case of **REV. JEREMIAH MUKA -VS- METHODIST CHURCH AND ANOTHER (2015) eKLR**, where Makau J observed that there is the question of principle, namely, that discretion ought to be exercised with reason, fairly and judiciously. That the Taxing Officer ought to have taken into account care and labour or industry and time put in the matter. They therefore submit that the instruction fees would have been 0.5% of Kshs. 120,000,000.
15. They submit that there was failure to indicate which schedule the Bill of Costs was drawn or taxed under.
16. Finally, it is their submission that the Taxing Officer failed to take into account the sum of Kshs. 1,285,000 that the Objector had paid, and that the said amount has not been disputed by the Advocate, and as such the said amount must be taken into account when taxing the bill.
17. On their part, the Advocate/Respondent submit that the Applicant's Advocates were served but they ignored the hearing notice and failed to attend court. They cited the decision in **NEW KENYA CO-OP CREMARIES LTD -VS- NEW KENYA CO-OP CREAMERIS LTD (2010) eKLR**, in which it was held thus:

“What is curious about this application is the fact that the Applicant did not attend Court when the Bill of Costs that they are now challenging was taxed. No representation was made to urge the Taxing Officer to consider there was no sale agreement. The Applicant squandered the opportunity to make the submissions they are now making before this court. A party should not be allowed to abuse the court process. The Applicant failed to make their representations before the Deputy Registrar, which was the right forum; they cannot now make the same submissions in the High Court. I see no error in principle in the way the taxing officer assessed the instructions fees.....the applicants can only blame themselves for failing to represent their case.”
18. It is contended that the Applicant filed numerous documents in opposition to the Bill, including submissions, and it is noteworthy that the Applicant did not raise any of the issues which she is now raising in any of the documents, and they submit that there is no bona fides in this application.
19. It is submitted that the Applicant has not established that the Taxing Officer was influenced by an

error in principle. They cited the decision in **M/S LUBULELLAH & ASSOCIATES V. N K BROTHERS LIMITED (2014) Eklr**, in which the Court held that:

“It is trite law that the High Court should not upset a taxation by the Taxing Master merely because it would have awarded a higher or lower amount unless the Taxing Master’s decision was based on an error in principle”.

20. They submit that the Applicant is misleading the court in alleging that the Respondent failed to indicate the applicable Schedule whereas it is clear from the Ruling of the Taxing Officer that the Respondent relied on Schedule V and the award was based on Schedule V.
21. On the value of the subject matter, the Respondent submits that the Applicant cannot, on the one hand, accept the computation of the instruction fees using the rate of 1% of the value of the estate (as accepted at Ground n (i) of the Application) and, on the other hand, oppose the same as has been done in the Applicant’s submissions.
22. This Court has considered the grounds set out on the face of the application and the facts deponed in the affidavits filed in support and the Respondent’s Replying Affidavits. The Court has further considered the written submissions filed herein. The circumstances 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 Nairobi (Milimani) HCCC No. 2255 of 2000 [2002] 1 EA 64**, were:-

Firstly, 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; secondly, 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; thirdly, 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; Fourthly, 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.

23. The Court should also interfere with the decision of the Taxing Officer where there has been an error in principle but should not do so in questions solely of quantum as that is an area where the Taxing Officer is more experienced and therefore more apt to the job; the court 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.
24. 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;
25. 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 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.

26. The above stated principles were also re-affirmed by the Court of Appeal in Joreth Limited Vs Kigano and Associates [2002] 1 E.A 92 where the Court stated thus:

“We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial Judge and all other relevant circumstances. That is what CK Njai Esq did when he said:

‘As we do not know the capital value of the property in dispute; one I believe is left to determine the matter on the general discretion donated to the taxing officer to tax a bill, based on the importance of the matter to the parties, complexity and the responsibility placed on shoulders of Counsel.’

There is thus a general caveat on judicial review of quantum of taxation *unless* there is a clear error of principle or the sums awarded are either *manifestly* high or low as to lead to an injustice. In James v Nyeri Electricity [1961] 492, it was stated at pages 492 – 293 as follows:-

“Where there has been an error in principle the court will interfere but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will intervene only in exceptional cases. An example of such an exceptional case is that of Haiders Bin Mohamed Elmandry and Others v Khadija Binti Ali Bin Salim (4) 1956, 23 E.A.C.A. 313, in which an instructions fees of the 9,000/= was considered so excessive as to indicate that it must have been arrived at unjudicially or on erroneous principles,”

27. This court is of the view that the Applicant has not given any reasonable excuse as to why they did not raise the issues she is now raising before this court with the Taxing Officer. Patently, she has simply failed to bring any material before this court that would make this court to disturb the Tax Officer’s discretion and rule in her favour. There are no exceptional circumstances in this case that would invite this Court’s intervention. I am in agreement with the Respondent’s contention that the Objector is seeking to rehash matters that were before the Taxing Officer, and that the Objector squandered her opportunity to make submissions before the Taxing Officer, and that there is no error in principle to warrant the orders sought.

28. Indeed, there is no dispute that the Respondent/Advocate was instructed by the Applicant. The Applicant has pointed to the fact that the Respondent was involved in a number of meetings and discussions which led into peaceful settlement and successful signing of the confirmation of grant.

29. A perusal of the record reveals that the Taxing Master pegged the bill under Schedule V and stated thus:

“I have looked at Schedule V, the same provides for fees in respect of business the remuneration for which is not otherwise prescribed. The question is whether the fees for business herein is prescribed. The matter involved herein concerns negotiation on settlement of dispute resulting to signing of the confirmation of grant. Schedule X of the Advocates Remuneration covers matters of Probate and administration. However, it did not provide for fees for matters negotiated out of court, therefore, I find Schedule V as submitted by the Applicant to be applicable.”

30. Therefore, I find Applicant's contention that there was failure to indicate which Schedule the Bill of Costs was drawn or taxed under wanting. In my view the Applicant has made a deliberate attempt to mislead this court.

In view of the above, this Court finds that the application is not merited and the same is hereby dismissed.

SIGNED DATED and **DELIVERED** in open court this **29th** day of **July 2015**.

L. A. ACHODE

JUDGE