



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**P&A NO. 124 OF 1997**

SAID SALIM KARAMA.....PLAINTIFF

VERSUS

IN THE ESTATE OF SALIM KARAMA AWADHI.....DECEASED

**RULING**

Before court is the chamber summons dated 7<sup>th</sup> May, 2012 seeking *inter alia* the following orders

**“2. THAT there be a stay of further proceedings regarding the taxed costs against the applicant herein SAID SALIM KARAMA pending the hearing and determination of this application *inter partes*.**

**3. THAT the court be pleased to set aside the *ex-parte* taxation made on 27<sup>th</sup> May, 2011 and order the same be taxed a fresh upon granting further directions herein.”**

The application was opposed by way of a replying affidavit sworn by **ELIJAH WAITHERA** on 25<sup>th</sup> June, 2012. The application was disposed of by way of written submissions and both parties duly filed their submissions by 30<sup>th</sup> July, 2013.

At the outset as a court I wish to apologize for the delay in rendering this ruling. This was occasioned by the shortage of Judges, the heavy workload in the Mombasa High Court, the hearing of Election Petitions by this court and the Service Week as well as other exigencies of duty. The delay is sincerely regretted.

A brief history of this matter is as follows. The respondent firm of **Fadhil & Kilonzo Advocates** (hereinafter referred to as ‘*the firm*’) acted for the applicant **Said Salim Karama** who was one of the beneficiaries of the estate of the **late Salim Karama Awadhi**. The firm received instructions to act on 11<sup>th</sup> December, 2003. The succession cause was concluded on 5<sup>th</sup> September, 2008 by the filing of a consent which directed that each party was to bear its own costs. Thereafter the firm sent to their clients (the applicants) a fee note for Kshs. 636,744/= payable within 14 days failing which the bills would be taxed. No payment was made pursuant to the fee note and a Bill of Costs was filed on 21<sup>st</sup> February, 2011 in which the firm claimed a total of Kshs. 1,438,281/=. The date for taxation was given as 25<sup>th</sup> March, 2011. The notice of taxation was served on the applicant as evidenced by the affidavit of service sworn by one Alex Phillip Nzuki on 28<sup>th</sup> February, 2011.

On the hearing date the record indicates that the Bill of Costs was placed before Hon. J. Gandani

Principal Magistrate who by then was the Deputy Registrar for the Family Division. The applicant (client) was absent and upon satisfying herself that he had been properly served the Deputy Registrar reserved the matter for ruling in default of appearance on 29<sup>th</sup> April, 2011. She delivered her ruling on 27<sup>th</sup> May, 2011 in which she taxed the bill at Kshs. 889,976/=. The certificate of costs was issued on 16<sup>th</sup> April, 2012. The firm sent a demand letter to the applicant claiming a total of Kshs. 1,127,722.16 (inclusive of interest). Thereafter prompted by the threat of execution the applicant filed this present application seeking a stay as well as the setting aside of the taxation.

It appears that the applicant does not dispute service of the hearing notice for the taxation. He however argues that the matter was not listed before any of the taxing masters of the day being **Hon. Gesora** and **Hon. Kirui**. He claims that his lawyer **Mr. Akanga** who filed a Notice of Appointment on that day decided with the clerk of the firm one **Daniel Musyoki Mutua** to fix another date for hearing.

The firm through the affidavit of Elijah Waithera argues that the matter was listed before Hon. Gandani who at the time was the Deputy Registrar for the Probate Division. He argues that the fact that Mr. Akanga who handled the matter had left the firm did not preclude the firm from claiming and collecting unpaid fees due to it. The client has not denied having instructed the said firm to act for him.

I have carefully perused the chamber summons, the Replying Affidavit as well as the submissions on record. I find that no convincing and/or persuasive reason has been advanced for the failure of the applicant and/or his lawyer to appear in court for the taxation. The fact that they were properly served with a hearing notice is not denied. By stating that the matter was not listed the applicant is in other words accusing the Deputy Registrar Hon. Gandani of proceeding to hear a matter which was not listed. This is a serious allegation which must be accompanied by solid proof. The cause lists annexed to the chamber summons relate to only two of the Taxing Masters. No cause list for the day for the Family Division Taxing Master is annexed. This was a probate matter and thus would ordinarily be listed before the Deputy Registrar of the Probate Division. Nothing would have been easier than to annex a copy of the cause list for Hon. Gandani as proof that indeed the matter was not listed as alleged. Failure to do this convinces me that the matter was infact listed and that is why the Deputy Registrar proceeded to hear it. I find no excuse for failure of the applicant or his lawyer to be in court to oppose the taxation. I find that in the circumstances the taxing master was right to proceed in the absence of the applicant.

The applicant has not denied instructing the firm or owing them money. His only dispute is with the amount awarded. I note that the taxing master did infact reduce the amount claimed from Kshs. 1,438,281/= to Kshs. 889,976/=. The applicant claims that part-payment has been made. A fee note dated 21<sup>st</sup> October, 2010 reveals that only Kshs. 10,000/= had been paid. No other receipts have been annexed as proof of payment. The applicant must pay for services rendered. In my view this application is just a delaying tactic. It has no proper basis. This is a very old matter which needs to be put to rest. I decline to grant the prayers sought. I hereby dismiss the chamber summons dated 7<sup>th</sup> May, 2012 with costs to the respondent law firm.

**Dated and delivered in Mombasa this 28<sup>th</sup> day of April, 2014.**

**M. ODERO**

**JUDGE**

In the presence of:

Mr. Waithera h/b Fadhil & Kilonzo for Respondent

No appearance by Applicant

Court Clerk Mutisya