



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
SUCCESSION CAUSE NO. 693 OF 2008

IN THE MATTER OF THE ESTATE OF KHURSHID BUTT (DECEASED)

COL (RTD) FAROOQ ASIF BUTT.....DECREE HOLDER/RESPONDENT

VERSUS

JAMSHED AHMED BUTT.....1ST JUDGMENT DEBTOR/APPLICANT

FEHMIDA BEGUM BUTT.....2ND JUDGMENT DEBTOR/APPLICANT

RULING

1. This was a reference from the taxing officer's taxation on the applicant's bill of costs. The ruling was delivered on 18th August 2013 on the bill of costs dated 4th October 2012. In the Court of Appeal decision in **PREMCHAND RAICHAND V QUARRY SERVICES (NO 3) [1992]EA 162**, it was held that the Court will only interfere with the award of the taxing officer if it is so high or so low as to amount to an injustice to one party; if the bill taxed is comparable with previous taxations, except that consideration be had of inflation. In reaching the figure, the Court should consider the following principles:

- (a) that costs should not be allowed to rise to such level as to confine access to the courts to the wealthy;
- (b) that a successful litigant ought to be fairly reimbursed for the costs he has had to incur;
- (c) that the general level of remuneration of Advocates must be such as to attract recruits to the profession; and
- (d) that so far as practicable there should be consistency in the award made.

2. This Cause was begun in 2009 in respect of the deceased KHURSHID AHMED BUTT who died on 4th March 2009 at Kwa Shibu Road in Mombasa. The deceased left a will in which he had appointed ABDUL QAYYUM BUTT and TAIMUR ASIF BUTT as the executors. They moved to court for a grant. On 23rd June 2009 a consent was filed by ATKINSON CLEASBY & SATCHU ADVOCATES on behalf of JAMSHED AHMED BUTT and FEHMIDA BEGUM BUTT as caveators.

The caveators said they were creditors of the deceased's estate having sued him (the deceased) during his lifetime in **HCCC No. 196 of 2008** at Mombasa. They were challenging the grant of probate. They filed summons for the revocation of the grant that had been issued to the executors on 8th September 2009. They challenged the will, among other things. The application was dismissed on 5th March 2012. The Certificate of Confirmation was issued on 18th April 2012. The executors had granted a Power of Attorney to the respondent COL (RTD) FAROOQ ASIF BUTT to proceed with the Cause.

3. The respondent filed a bill of costs dated 5th October 2012 against the creditors/applicants. The same was taxed on 18th February 2012 at Kshs.3,339,837/30. The total bill was Kshs.7,696,253/=. This reference was filed against the taxation, but mainly in respect of items 1, 2, 4, 46 and 62. The prayers were that:-

“2) THAT the ruling on the taxation delivered on 18th February 2013 be set aside and the Honourable Court be pleased to re-assess the fees awarded in items 1, 2, 4, 46 and 62 of the said Bill of Costs.

3) THAT alternatively the said items number 1, 2, 4, 46 and 62 be remitted to another Deputy Registrar for re-taxation.”

4. The grounds and the supporting affidavit on which the reference was founded alleged that the taxing officer erred in law in failing to give judicial reasons based on principles of taxation in taxing the bill; the taxing officer failed to direct herself to the fact that the subject matter herein was an objection to a confirmation of grant of probate; the taxing officer did not appreciate that the claim was not for the entire sum in the bank but monies owed by the deceased payable out of his estate, a figure much less than 22 million in the account; the taxing officer failed to appreciate the nature of the claim; and that, the amount taxed was so manifestly and unjustifiably high in the circumstances.

5. In the replying affidavit, it was contended that the reference had no merit since the taxing officer took into account the nature of the claim, the value of the estate, the amount asked for and the work done by the respondent. Counsel for the respondent filed written submissions to support his client's case.

6. Both parties agree that the taxation was governed by **Schedule X(f) of the Advocates (Remuneration)(Amendment) Order 2006** as it relates to party and party costs, which provides that:

“(f) To lodge an objection to grant, or a citation or other application or proceedings under any provision of the Law of Succession Act not otherwise provided for in this Schedule, such sum as the taxing officer shall consider reasonable, but not less than 4,500.00.”

7. I bear in mind that during taxation the taxing officer exercises a wide discretion. His decision should not be disturbed by the judge determining a reference unless it is demonstrated that a wrong approach was taken in the taxation. In **STEEL AND PETROLEUM (EA). V. UGANDA SUGAR FACTORY LTD [1970] E.A. 141** it was observed that, the Court should not interfere with the decision of the taxing officer where there has been an error in principle but should not be so in questions solely of quantum as that is an area where the taxing officer is more experienced and therefore more apt for the job. Further, in **MEREKA AND COMPANY ADVOCATES V NATIONAL BANK OF KENYA LTD, NAIROBI (MILIMANI) HC MISC. APPLICATION NO. 391 OF 2002**, it was held that the taxing officer should bear in mind the value of the subject matter and, in doing so, he should not adopt a sum that was not based on a pleading, judgment or settlement. Lastly, the taxing officer is duty bound to consider the nature and importance of the matter, the interest of the parties, the general conduct of the proceedings and all other relevant factors (**ALLIANCE DEVELOPMENT LTD t/a JADINI BEACH HOTEL AND SAFARIS BEACH HOTEL V NATIONAL INDUSTRIAL CREDIT BANK. HCCC NO. 54 OF 2006 at MOMBASA**).

8. Back to the facts of this case. The executor (respondent) petitioned the Court on the basis of a written will. The estate was indicated to be worth Ksh.22 million. They obtained a grant of probate. The applicants filed a caveat and later opposed the confirmation of the grant. They claimed that they were creditors of the deceased. They challenged the will on the basis:-

“1. THAT the will is not wholly executed in that the deceased testator and the attesting witness did not all sign the will at the same time and in the presence of each other, as required by the Law of Succession Act, Laws of Kenya.

2. THAT the will is not valid as the deceased testator, being of Muslim faith had provided in his will that the provisions of the Muslim Law, shall not apply to his will, Succession and inheritance.

3. THAT the petition does not state where it was signed and is not dated.”

In fact, the applicants alleged that the grant of probate was defective in substance and that the will on which it was based was not valid. It was therefore not open to the applicants to later claim that the claim was not for the entire sum in the bank but monies owed to the deceased which was less than Kshs.22 million. I find that the taxing officer was correct to base the taxation on the value of the estate, which was the Kshs.22 million that the deceased had left at DIAMOND TRUST BANK LTD.

9. Further, there is nothing in the grounds and affidavit supporting the reference that points to any issue or principle that the taxing officer failed to consider during the taxation. Instead, it is clear from the ruling of taxation that the taxing officer took into consideration;

“the documents filed and the value of the estate of the deceased, the complexity of the matter and the interest exhibited by the parties in the matter.”

She also considered:

“the work done by the applicant.”

She reduced the instructions fees from Kshs.5 million (which she found excessive) to Kshs.1.5 million, for instance.

10. In all, I have looked at items 1, 2, 4, 46 and 62 of the Bill of costs that the respondent filed against the principles that guide taxation and the reasons given by the taxing officer in reaching the amounts in question, and do find that this reference lacks any merits. It is therefore dismissed with costs.

DATED and DELIVERED at NAIROBI this 28th November, 2014.

A.O. MUCHELULE

JUDGE