



REPUBLIC OF KENYA
IN THE HIGH COURT AT MILIMANI LAW COURTS, NAIROBI
FAMILY DIVISION
SUCC CAUSE NO.926 OF 1997
IN THE ESTATE OF EUNICE WANJERI KIBIAS (DECEASED)

SAMUEL GATHAIYA KIBIA **APPLICANT**

VERSUS

MARY KANINI KIBIA **1ST RESPONDENT**

GRACE MWIHAKI NDUNGU **2ND RESPONDENT**

LOISE WANJIRU NDUGIRE **3RD RESPONDENT**

JOHN NJAU KIBIA **4TH RESPONDENT**

RULING

1. The applicant, Samuel Gathaiya Kibia, filed in this cause on 4th May 2006 an application dated by way of summons objecting to taxation of the Bill of costs and named as respondents in the application Messrs Mary Kanini, Grace Mwhaki Ndungu, Loise Wanjiku Ndugire and John Njau Kihia.
2. The grounds given for the making of the application were stated to be, inter alia, that the Party & Party Bill of costs was wrongly taxed under schedule VI of the Advocates Remuneration Order instead of schedule X and further, that valuation was never ordered by the Court and that items 75 & 77 of the Bill of Costs both relating to payment of valuation fees said to be paid to Wamae Mureithi & Associates Valuers, should be expunged from the Bill because the valuation “*was done with taxation in mind, hence the highly exaggerated value.*” Moreover, it was averred as a further ground for making the application that the land valued by Wamae Mureithi & Associates in relation to the fees raised in item 75 did not belong to the estate of the deceased in the cause but rather, to John Njau Kibia. The application was supported by an affidavit sworn on 3rd May 2006 by the applicant containing averments on the same lines as the grounds for making the application.
3. The respondents did not file a replying affidavit.
4. The background to the application is not complicated. Eunice Wanjeri Kibia died intestate domiciled in Kenya on 20th March 1980 and a Grant of Letters of Administration intestate was issued to Samuel Gathaiya Kibia in this cause.
5. The Estate of the said deceased comprised parcels of land and the beneficiaries were the deceased’s sons and daughters. The Grant of Letters of Administration was confirmed on 12th February 1996 and the Estate was distributed in accordance with the Certificate of Confirmation of the Grant dated 12th February 1996. The distribution was subsequently amended through court orders. It seems the distribution of the Estate was preceded by protracted and acrimonious legal battles in Court that calumniated in costs

being awarded to the respondents against the applicant. The record shows that costs were taxed in the sum of Shs.124,837/= following a Party and Party Bill of Costs filed by the respondents.

6. Learned counsel Mr. Mwicigi Kinuthia who is on record for the respondents proceeded to take steps to recover the costs from the applicant and on 10th November 2005 he applied for execution seeking issuance of a notice to show cause why the applicant as a judgment debtor should not be jailed for not paying the costs. A notice to show cause was issued on 30th March 2006 which triggered the filing by the applicant by summons dated 3rd May 2006 objecting to the taxation of Bill of Costs.

7. When the said summons came up for hearing before me on 13.3.2012 and again on 18.7.2012, Mr. N. K. Njau, the learned counsel for the applicant and Mr. Mwicigi Kinuthia, the learned counsel for the respondents agreed by consent that the application be determined on the basis of affidavit evidence and written submissions to be filed.

8. Although the respondents did not file a replying affidavit to the application, they filed on 5.7.2012 submissions dated 2nd July 2012. The applicant did not.

9. The applicant's contention in his application as evidenced by the supporting evidence is that the Bill of Costs should have been taxed under Schedule X and not under Schedule VI of the Advocates (Remuneration) Order. The reasons assigned for this proposition are the same as the aforesaid grounds for making the application.

10. The respondents on the other hand submitted in their written submissions that the applicant did not comply with Order II Rules 1 and 2 of the Advocates Remuneration Order which required the applicant to give notice in writing within 14 days after taxation to the Taxing Officer of the items in the Bill of Costs to which he objected. Further, that as the taxation was done on 24.07.2003 and as no notice was ever given as required by the Advocates Remuneration Order, it is not now open to the applicant to question the taxed Bill of Costs or any item therein.

11. If the notice had been given by the applicant in accordance with the Advocates Remuneration Order, the Taxing Officer would have been required to furnish reasons for the taxation of the two items No. 75 and 79 and if not satisfied by the reasons, the applicant would have been entitled to apply to a Judge in Chambers within 14 days of receipt of the reasons. Effectively, such application to a Judge in Chambers would have been an appeal against the decision of the Taxing Officer.

12. It was submitted by counsel for the respondents that the failure by the applicant to comply with the provisions of the Advocates Remuneration order rendered the application "premature". The respondents urge the Court to dismiss the application.

13. No written submissions were filed on behalf of the applicant.

14. I have given due consideration to the application and the affidavit in its support as well as the respondents' written submissions.

15. The issue involved in the application and on which it turns is one of law and perhaps this is why learned counsel, Mr. Mwicigi Kinuthia, opted to file only the submissions. Execution was applied for on 10.11.2005 after the taxation. Summons to show cause why the applicant should not be put in civil jail for failure to pay the taxed costs was issued on 30th March 2006. The applicant filed the application, the subject of this ruling, on 4.5.2006. Clearly, it is the respondents' pursuit for the recovery of the taxed costs from the applicant that jolted the latter into action.

16. The provisions of the Advocates Remuneration Order, specifically Rule II (1) required the applicant to give notice if he objected to the decision of the taxing officer. The applicant did not. The Taxing Officer would have been required, if notice was given, to give reasons for the decision on taxation. The applicant's failure to comply with rule II(I) resulted in absence of the Taxing Officer's reasons for the taxation. The applicant has now come directly to this Court to seek intervention. He has side-stepped a mandatory legal provision, to wit, rule II (1) of the Advocates Remuneration Order. The rules in the Advocates Remuneration Order are not without purpose. They set the procedure to be followed by a party aggrieved by taxation. As the applicant has failed to conform with the procedure laid down in the Advocates Remuneration Order, his application is clearly premature and Mr. Mwicigi Kinuthia was correct in his submission in this regard. What the applicant is in effect seeking without following the procedure laid down in the Remuneration Order is review of the taxation. The applicant bases his application on rule II(1) of the Advocates Remuneration Order which he failed to comply with. That rule does not provide for a direct application to this Court save where notice has first been given and the taxing officer has had an opportunity to assign reasons for his decision. For this reason, the application is bad in law.

17. For these reasons, I hereby dismiss the application with costs to be paid by the applicant to the respondents.

G.B.M. KARIUKI, SC

JUDGE

Delivered at Milimani Law Courts, Nairobi, on this 19th day of December 2014 by the Honourable Justice W. Musyoka on behalf of Justice G.B.M. Kariuki.

JUDGE

COUNSEL APPEARING

Mr. Mwicigi Kinuthia of Mwicigi Kinuthia & Co. Advocates, for the Respondents Mr. Kiania Njau of Kiania Njau & Co. Advocates, for the Applicant

Mr. Wahinya Kugwa – Court Clerk