



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Miscellaneous Application 234 of 2006

MAKHECHA & CO. ADVOCATES.....APPLICANT

VERSUS

MIDCO INTERNATIONAL (K) LIMITED..... RESPONDENT

RULING

This is an application for entry of judgment on costs taxed by the Deputy Registrar. The application has been brought under section 51(2) of the Advocate Act, and order L rule 1 of the Civil Procedure rules. It seeks to have the sum of Kshs.4,399,042/59 taxed and certified by the Taxing Officer, entered as the judgment of the court. There are four grounds cited on the face of the application in support thereof. The application is also supported by an affidavit sworn by Wambugu Gitonga, an Advocate practicing as such in the firm of Makhecha & Co. Advocates, the Applicant herein. I have considered the contents of the affidavit.

The application is opposed. James Gitau Singh has sworn an affidavit in reply to the instant application. I have considered the contents of the affidavit.

The Bill of Costs herein is dated 14th March, 2006 and was filed in court on 22nd March,, 2006 by the Advocate/Applicant with the Bill. The Bill of Costs was eventually taxed on 2nd October, 2006 and the sum of kshs.4,399,042/59 taxed in favour of the Advocate.

After the Bill of Costs was filed and before it could be taxed, the Advocate, Mr. Hasmukh Pranjivan Makhecha passed on. This happened on the 17th June, 2006. The Applicant firm had initially on 7th December, 2006 filed a Notice of Motion application seeking judgment on taxed costs. That application was withdrawn on 25th March, 2009 by the firm of Messrs. Ransley, McVicker and Shaw Advocates, after the current application was filed.

The thing to note in this matter is that the Bill of Costs was taxed on 21st September, 2006 and a ruling on the taxation delivered on 25th October, 2006. No reference has to date been taken on the taxation. The Advocates are now seeking judgment on the taxed amounts as against the Client.

Mr. Gitau for the Client has challenged the *locus standi* of the Bill of Costs and the current application. Mr. Gitau's contention is that after the Advocate, Mr. Makhecha, died before the taxation was done, an application ought to have been filed under Order XXIII rule 3(3) (1) of the Civil Procedure Rules substituting the Advocate within one year of his death. Counsel observed that no such substitution had been done to date. Mr. Gitau submitted that Wambugu Gitonga Advocate could not practice in the name and style of Makhecha & Co. Advocates as the latter was a single practitioner. Mr. Gitau urged that

under section 45 of the Law of Succession Act, only Pradeep Makhecha, as the personal representative of the deceased could file suit. Counsel urged further that under section 74 (d) of the Law of Succession Act, the Grant of Letters of Administration stood revoked by operation of the law within a year. Counsel urged that in the circumstances the current suit has already abated.

Mr. Gitau submitted that Azangalala, J. was not informed of the Court of Appeal decision of Ombogo vs. Standard Chartered Bank of Kenya Limited [2000] 2 EA 475 and of their ruling that Legal Notice No. 279 of 1995 was inconsistent with the provisions of section 45(1) of the law of Succession Act when he decided a similar case i.e. Milimani Misc. App. No. 393 of 2007 Makhecha & Co. Advocates vs. Delphis Bank Limited. I will get to this later.

Mrs. Shaw for the Advocate did not agree with Mr. Gitau. Counsel submitted that Order XXIII of the Civil Procedure Rules did not apply to the current case since the procedure applicable in this matter is governed by the Advocates (Remuneration) Order. Counsel urged that the Bill of Costs was filed within the lifetime of the Advocate and was taxed after Limited Grant Ad Litem was issued and was therefore competent.

Mrs. Shaw urged that the Administrator of the deceased Advocate's estate Pradeep Makhecha, appointed Mr. Wambugu Gitonga Advocate to wind up the deceased's Advocates firm and that by a letter dated 20th March 2007, the Law Society of Kenya was informed. The Limited Grant Ad Litem and the letter to the Law Society of Kenya are both annexed. Counsel relied on the ruling of Azangalala, J. in Makhecha v. Delphis Bank, supra where the learned judge observed:

"In my view "to make such agreement or arrangement as are necessary for the proper and continued running of the affairs of the firm of Makhecha & Co. Advocates" is sufficiently wide enough to include agreeing and arranging to recover costs due to the firm. For that purpose Pradeem Ian Makhecha as personal representative of the estate of Hasमुख Pranjivan Makhecha is entitled to appoint counsel. It is not suggested that M/S Ransley McVicker & Shaw have not been lawfully appointed by the said Personal Representative...."

Back at home, I find and hold that armed with the grant of representation ad colligenda bona of all the estate of the deceased advocate Pradeep Ian Makhecha was entitled to seek recovery of costs due to the firm pursuant to his obligation to enter into and/or make such agreement or arrangement as are necessary for the proper and continued running of the affairs of the firm, Makhecha & Co. Advocates. That obligation is in consonance with Section 67(1) of the Law of Succession Act Cap. 160 as read with Rule 136 of the Probate and Administration Rules which provide that a limited grant shall be issued for the purposes only of collecting and getting in receiving and preservation of the deceased's estate and/or assets."

In the ruling of Azangalala, J. in Makhecha vs. Delphis Bank, the learned Judge considered the judgment of the Court of Appeal in Ombogo v Standard Chartered Bank, supra. The learned judge even noted the Court of Appeal finding that the L.N. No. 279 of 1995 was inconsistent with section 45(1) of the Law of Succession Act and in no way contradicted it, or sought to distinguish its application to the case at hand. The case is however neither applicable to the instant case nor helpful to the Applicant. It is easily distinguishable from the instant case. In the cited case the Bill was drawn by *M/S Ransley McVicker & Shaw*. That is not true of the Bill in this case.

Getting back to the instant case, Mr. Wambugu Gitonga was appointed to wind up the deceased advocate's law firm by Pradeep Ian Makhecha, the Administrator of the estate of the deceased Advocate. That appointment was lawful as long as it was brought in at the right time. Unfortunately it was not. The appointment ought to have been introduced the moment the Advocate passed on, before any step was taken in the matter. That means that the moment he passed on, which was before the Bill was taxed, the entire process ought to have begun afresh. The mistake which has occurred in this case is that Wambugu Gitonga proceeded with the taxation as if Makhecha Advocate was still alive. As correctly observed by Mr. Gitau, that firm was a single practitioner's firm which means that the firm died with the death of the proprietor. The appointment by Pradeep Ian Makhecha did not cure the defect as the taxation took place

after the death of the Advocate and before the said appointment. Being a single practitioner it is also my view that under section 45 of the Law of Succession Act, the deceased Advocate ought to have been substituted before the Bill was taxed. In the circumstances the entire proceedings from the date the deceased Advocate passed on to current date are defective and cannot be sustained.

Even if I may be wrong concerning the substitution of the deceased Advocate upon his death before any further step was taken in the case, considering that Wambugu Gitonga had the Bill taxed before he was appointed by the Administrator of the deceased estate, and long after the death of the Advocate, the appointment was late. The appointment could not operate retrospectively and therefore the taxation of the Bill was incurably so defective. The application for judgment on taxed costs being based on the defective act cannot be sustainable in the circumstances.

It is sad that the issues raised by the Respondent in this matter were raised so late in the day. However I noted that they did not participate in the taxation, their explanation being they were unaware of it.

The proper order to make is to strike out the application for Judgment on taxed costs together with the taxation and the entire ruling on the taxation by the Deputy Registrar done on the 2nd October, 2006 with costs to the Respondent. Those are the orders of the court.

Dated at Nairobi this 12th day of June, 2009.

LESIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. A. Khaminwa holding brief Mrs. Shaw for Applicant

Mr. Gitau for Respondent

LESIT, J.

JUDGE