



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 1191 OF 1999

N. KIAGUYU & CO. ADVOCATES.....APPLICANT

Versus

CHARITY MARINE NDERI.....1ST RESPONDENT

DOROTHY WANJIKU NDERI.....2ND RESPONDENT

JUDGMENT

The applicant in the Summons dated 17th October 2003 is Edward Nderi Marine. He was appointed a co-administrator of the estate of the late Alfred Marine Nderi who died on 4th December, 1995, on 4th March 2003. The applicant was appointed as a substitute of his late mother Charity Waithira Marine who passed away on 22nd November 2002.

The Letters of Administration of the deceased estate were granted to Charity Waithira Marine and Doroty Wangari Marine jointly pursuant to a ruling by Hon. Githinji J (as he then was) in May 1999.

According to that ruling the learned judge ordered and I quote **“It is just that the costs of each successful party in these proceeding, be paid from the estate and so I make no orders in respect of the costs of unsuccessful parties.”**

The firm of M/s N. Kiagayu & Co. Advocates represented the cross-petitioners namely Agnes Gathoni Nderi and Jane Wanjiku Nderi. This cross petition was dismissed.

It would appear that the firm of the respondent obtained the certificate of taxation according to which a sum of Kshs.3,040,000/= being legal fees, which was pursuant to a consent order recorded on 13th May 2000, was payable.

The applicant now seeks for orders that;

- 1) The court be pleased to stay execution arising from the taxation herein
- 2) That the applicant be enjoined to the suit as a respondent
- 3) That the honourable court be pleased to enlarge time herein for lodging this objection and reference.
- 4) That this Honourable court be pleased to determine this matter without reference for taxing officer.

The application is premised on the grounds that

- a) There is an error apparent on the record that was relied upon
- b) The lawyer herein ought not to have taxed their bill against the estate
- c) That the consent entered into by the lawyer is oppressive, unjustified, unconceivable and with no basis
- d) That the estate will suffer irreparable loss and damage

The application is supported by the affidavit of the applicant.

According to the applicant the parties in the Succession Cause No. 212 of 1996 were as follows:

- 1) Charity Waithera Marine as petitioner
- 2) Dorothy Wangari Nderi – Objector/petitioner
- 3) Agnes Gathoni Nderi - Objector
- 4) Jane Wanjiku Nderi - Objector
- 5) Mary Wanjiku Nderi – Objector

According to the ruling delivered by Hon. Githinji (as he then was), the cross-petition by Agnes Gathoni and Jane Wanjiku Nderi were dismissed and the only successful party was Dorothy Wangari nderi. The judge named the beneficiaries of the estate but they were not parties to the suit. M/s N. Kiagayu Advocates were representing the unsuccessful parties and all the lawyers who were acting in the Succession Cause, agreed to tax their bills based on the sum of Kshs.150,000,000/= being the value of the estate, and consented to the instruction fees of about Kshs.2,000,000/=

According to counsel for the applicant the 1st co-administrator appointed their present counsel on 2nd June 2000 and the taxation of the bill of costs had been done on 21st March 2000 by consent of lawyers who were all interested parties. This taxation was not based on any valuation report and it is oppressive, unjustified and unconceivable. The applicant has now provided valuation reports which shows that the lawyers in the matter will be entitled to benefit even more than the beneficiaries should the order of taxation be left to stand unchallenged. Not only is the consented bill of costs oppressive, as it is also irregular and not based on law as the provisions of schedule 10 of the Advocates Remuneration Order as amended in 1979, instruction fee payable in a probate and administration matters provides that the basic fee is Kshs.4,500/=, and the taxing master should therefore have accessed the basic fees where some parties were not represented and there was no valuation. Counsel referred to an authority in the case of **Applegate vs Moi, 1967 A No. 793** she argued that in the present case there was material non disclosure, which was tantamount to fraud, as the advocates concealed the value of the estate. The **case of Flora W. Wasike vs Destimo Wamboko Civil Appeal No. 81 of 1984** was also referred to especially the passage that provides:

“A court cannot interfere with a consent judgment except in such circumstances as would offer good ground for varying or rescinding a contract between the parties.”

Due to the fact that counsel for Jane Wanjiku and Agnes Njeri were not successful parties. They ought not to have been entitled to costs against the estate and therefore the consent order against the estate is wrong and fraudulent.

This application was strenuously opposed by the respondent.

According to the respondent's very detailed replying affidavit, the applicant herein is fully aware of H.C.C. 1131 of 2000 at Milimani Commercial Court which suit was filed against the co-administrators.

However the nature of the suit or its outcome is not disclosed in the replying affidavit I am not able to comprehend its relevance to this matter. The respondent contend that they were entitled to costs because it was through their petition the court made a finding in favour of both Anthony Marine Nderi and Lucy Wanjiru Marine after a very protracted hearing. Counsel for the respondent relied on the copy of the objection to making of the grant that was filed on 13th March 1996. According to the respondent the two children were successful litigants and therefore they should be entitled to the fees.

In any event the applicant had agreed to settle the bill, he obtained leave to sell some of the properties in order to settle lawyers fees and the present application is clearly an after thought. According to the respondent the applicants predecessor, in title, the late Charity Marine Nderi was fully aware of the taxation and she was represented by the same firm of Advocates when the bill of costs was agreed upon. The respondent therefore argued that this application is belated, and the application is not brought in good faith as there is no consent by the co-administrator, the applicant has also withheld material facts by omitting to exhibit valuation reports to the majority of the deceased assets.

I have given due considerations to all the material presented before me and all the affidavits that have been filed by both parties.

When this matter came up for hearing before Hon. Waweru J. the respondent raised a preliminary point of law. By a ruling dated 20th May 2004 the learned judge upheld the preliminary objection only in respect to prayer No. 5 of the application which was struck out for being res – judicata but directed that prayers Nos 2, 3, 4 and 6 to proceed to hearing.

The respondent filed this miscellaneous Civil application and cited Lucy Wanjiru Nderi and Anthony Nderi as the 1st and second respondents respectively. The notice of taxation that was issued on 20th January 2000 notifying the respondents that the Bill of Costs would be taxed on 13th March 2000 was directed to Lucy Wanjiru Nderi and Anthony Nderi. The certificate of taxation clearly shows that the respondents are Lucy Wanjiru Nderi and Anthony Nderi, whereas the consent order recorded before the Principal Deputy Registrar reads as follows:

“Mrs Kahunyo for the applicant Mrs. Ngugi and Mr. Okoth for the administrators order by consent

The advocates' bill of costs against the clients is taxed at Shs.3,040,000/= all inclusive Shs.1,380,129/= is taxed off”

The order is duly signed by N. Kiagayu – Kihunyu J.A. Okoth for the 1st administrator and Mrs. Ngugi for the 2nd administrator.

The clients against whom the bill of costs was directed are Lucy Wanjiru Nderi and Anthony Nderi. They were not present in court during the taxation and no notice was issued to the Administrators.

There is no indication or mention of the estate of the deceased as a party. Some issues arise from the said order, was the advocate J.A. Okoth representing the 1st administrator, secondly is the order misleading in that there is no mention that the bill of costs was against the administrators of the deceased estate? In view of the fact that the application to review the taxation by consent has been determined, what is the applicant going to do about the taxation order by consent? The court has already declined to review the consent order. I am persuaded that there are certain grey areas in this matter namely, an interpretation of whether the respondent's firm who represented the unsuccessful cross-petitioner's would be entitled to costs against the estate. If they are entitled to cost was it not necessary for the respondent to file their bill of costs therefore directly against the estate so that the deceased estate was the named party? Could a bill of costs that was taxed against the beneficiaries then be executed against the estate? Since the certificate of taxation was issued against the clients, how come the respondent has proceeded to execute against the

estate? In view of these unresolved issues it is clear in my mind that there is an error in the face of the record. I am therefore inclined to grant the prayers sought in Nos 2, 3 and 4 of the Chamber Summons dated 17th October 2003. I decline to grant prayer No 6 which in my opinion is ambiguous as the law is quite clear on the procedure to be followed when a party is contesting the order of taxation. In any case the court had already declined to review the order of costs by consent.

I will direct that the costs of this application be in the cause. It is so ordered. **Ruling read and signed on 30th July 2004**

MARTHA KOOME

JUDGE