



REPUBLIC OF KENYA



**Ashioya p/a Ashioya & Company Advocates v Odaka (Miscellaneous Application
E029 of 2022) [2024] KEHC 1329 (KLR) (16 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1329 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
MISCELLANEOUS APPLICATION E029 OF 2022
WM MUSYOKA, J
FEBRUARY 16, 2024**

BETWEEN

OYE ASHIOYA P/A ASHIOYA & COMPANY ADVOCATES APPLICANT

AND

JOSEPH BARASA ODAKA RESPONDENT

RULING

1. The application for determination is dated 8th March 2023, seeking the setting aside of the taxation on 28th February 2023, of the Advocate and Client Bill of Costs, dated 27th June 2022, and remission of the said bill to the taxing officer for fresh taxation. The principal complaint is that the taxing officer, Hon. TA Madowo, Deputy Registrar, had arrived at the wrong figure, on instruction fees, and on the value of the property in question, and that Schedule 10B was overlooked
2. The respondent filed grounds of opposition, essentially saying that the bill was properly taxed.
3. The applicant filed a rejoinder to the grounds of opposition. He avers that the respondent was not denying that he had instructed him to act in the matter. He states that at the completion of the succession cause, he was privy to a sale of the land in question, Bukhayo/Matayos/293, which measured 280 acres, to Busia Sugar Company Limited, for Kshs. 40,500,000.00. He avers that the taxing officer had based the taxation on a value of Kshs. 800,000.00, obtained from the petition. He asserts that the sale agreement provided concrete evidence of the value of the property. The sale agreement, dated 29th March 2022, between Busia Sugar Industries Limited and Armstrong Freddie Kasuku. The respondent signed the sale agreement as a witness for the vendor. According to the agreement, the family of the respondent was entitled to just 25 acres out of the total acreage of 280.
4. Directions were given on 13th July 2023, for canvassing of the reference, by way of written submissions. Both sides complied, by filing their respective written submissions. The applicant submits that he only



has issue with the instructions fees, and is satisfied with the way the taxing officer handled the rest of the items. The written submissions by the respondent largely support the taxation.

5. The taxation was in respect of legal services that the appellant had offered, with regard to conduct of succession proceedings in Busia HCSC No. 77 of 2015, on the instructions of the respondent. The estate in question was that of the father of the respondent. It is common ground that instruction fees are based on the value of the subject matter. The subject matter, in that cause, was the estate of the deceased father of the respondent. It comprised of only one property, Bukhayo/Matayos/293. The petition of 26th February 2015, drawn by the applicant, estimated the value of the estate at Kshs. 800,000.00, as at that date. The taxing officer worked with that figure in her taxation. The applicant is aggrieved, as he, appears, to say that the court should have based the taxation on the value given to that property on 29th March 2022, when it was sold for Kshs. 40,500,000.00, which appears not to have been an estimated value.
6. Should taxation have been based on Kshs. 800,000.00 or Kshs. 40,500,000.00? Kshs. 800,000.00 was an estimate, the latter figure was closer to the actual value. The taxing officer relied on the former as that was the value of the property when instructions were given. I doubt whether that would be a correct consideration. Instructions fees should be based on the value at the time the taxation is being done, to the extent that that value can be ascertained. Kshs. 40,500,000.00 should have been the proper figure to work with in the circumstances.
7. However, the applicant should contend with the ruling of Kiarie J, delivered on 30th September 2020, in Busia HCSC No. 77 of 2015. My understanding of that ruling is that Bukhayo/Matayos/293 had been charged for a loan of Kshs. 30,000.00, by the respondent. When he was unable to repay the loan, the property was foreclosed and sold by the bank in 1995, to Armstrong Kasuku, Apollo Ndongi and Athanas Wanyama, and a title deed was issued on 5th June 1996. So, when the deceased, whose estate was the subject of the instructions in question, was dying in 2010, the said property did not belong to him, and did not form part of his estate, and there was, therefore, no estate to be administered through the succession proceedings that the applicant was being instructed to initiate. It was concluded that the grant had been obtained by fraudulent means, and it was revoked and annulled. That would then mean that the value of Bukhayo/Matayos/293, whether in 2015 or 2022, could not be a basis for assessing the instruction fees herein, as it did not belong to the estate, and as that was the only asset alleged to form that estate, the estate had no value.
8. For avoidance of doubt, Kiarie J wrote, at paragraph 10 of that ruling:

“ Three important facts emerge from these facts:

 - a. That at the time of the death of Odaka Adiye Abwocha alias Meshack Odaka Adiye in 2010, land parcel number Bukhayo/Matayos/293 was no longer registered in his name.
 - b. At the time of filing the present succession cause, Joseph Barasa Odaka was aware that of this fact but proceeded as if this was not the case.
 - c. ...”
9. I am surprised that none of the parties referred to or mentioned that all important ruling. Anyhow, the sale agreement of 29th March 2022 confirmed the findings and holdings of Kiarie J, for the vendor, according to that agreement, was Armstrong Kasuku, one of the men who bought the land in 1995, and in whose name it was presumably transferred in 1996. The respondent, Joseph Odaka, signed on



that agreement, not as a co-vendor with Armstrong Kasuku, but as a witness to the transaction. He could not be a vendor, as the property did not vest in him in 2022.

10. In view of the above, I do not see the basis upon which the taxing officer would have based her assessment of costs on the figure of Kshs. 40,500,000.00. Indeed, given that the property did not vest in the estate at all, there was no foundation for working with the estimated value of Kshs. 800,000.00. That was an estimated value of an asset that did not belong to the deceased.
11. Consequently, I find no merit in the Motion, dated 8th March 2023, and I hereby dismiss the same. There shall be no order on costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 16TH DAY OF FEBRUARY 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Oye Ashioya, the applicant.

Mr. Joseph Barasa Odaka, the respondent

