



George Miyare t/a Miyare & Co. Advocates v Munge & 2 others (Miscellaneous Case E090 of 2022) [2024] KEHC 4772 (KLR) (12 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4772 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS CASE E090 OF 2022
DO CHEPKWONY, J
APRIL 12, 2024**

BETWEEN

GEORGE MIYARE T/A MIYARE & CO. ADVOCATES ADVOCATE

AND

JANE WAIRIMU MUNGE 1ST CLIENT

ANDREW MWANGI MAINA 2ND CLIENT

DEBBIE KARUGI MAINA 3RD CLIENT

RULING

1. This ruling determines the notice of motion application dated January 23, 2024 filed by the client/ applicants in which they have sought for leave to produce and file additional documentary evidence in the form of a Valuation Report dated December 15, 2023 so as to shed light on the real value of Deceased's Estate in this case and to enable the court to effectually address the issues pending in this matter.
2. According to the applicants, the advocate/respondent's bill of costs was taxed based on the supposition that the deceased's Estate was estimated in the value of 1 Billion (Kshs.1,000,000,000/=) and the taxing master then awarded the Advocate Costs at Kshs.6,307,944.40. The Applicants aver that they were not in a position to obtain the valuation of the estate in time and the taxation proceeded without a full valuation being done. That since the valuation report is now available, it is easier for the court to ascertain on the real value of the deceased's estate before addressing the reference before this court.
3. The applicants have averred that the deceased's estate has now been valued at Kshs.100 Million and their share will be about Kshs.1.6 Million or less, thus it would be unfair for the Applicants to pay the taxed costs at Kshs.6,307,944.40 which is way above the share of the Deceased's Estate which they are entitled to.



4. The respondent/advocate has opposed the application *vide* the replying affidavit of Diana Achieng sworn on the 25th January, 2024. In her view, the application is misconceived and seeks to introduce further evidence as if there was an appeal before the court whereas what is pending before the court is a mere reference. The Advocate also avers that in any event, provided the value of the Deceased's Estate as Kshs.1,000,000,000/= in in an affidavit in support of Petition by way of cross-application for a Grant Intestate *vide* the High Court Succession Cause No.97 of 2017 and as such they are bound by their pleadings and hence estopped from denying their earlier dispositions.
5. Be that as it may, the deponent averred that the valuation reports provided to this court have committed other properties listed in the Succession Cause including a property forming the deceased's matrimonial home at Lavington Nairobi, monies at Bank and various Shares in Blue-chipped Companies held by the deceased so as to under-value the estate.
6. Thus, the Advocates/Respondent's view is that the valuation report does not reflect the whole estate owned by the deceased hence the application is merely meant to mislead the court into defeating the enjoyment of a lawfully earned Judgment. The application is also faulted for having been filed after an inordinate delay of more than ten (10) months after the ruling on Taxation of costs had been delivered, thus it is only intended to delay the conclusion of this matter.
7. Pursuant to the directions issued by this court on January 24, 2024, the application was canvassed by both oral and written submissions. In their submissions, the Client/Applicants have argued that although they had stated in their Cross-Petition that the value of the Deceased's Estate is I Billion (Kshs.1,000,000,000/=) this was before the true value could be estimated through a Valuation exercise and Report. It is their argument that it is a practice, that at the time of Petitioning court for letters of Administration, parties are Petitioners are allowed to include any property believed to belong to the Estate before the correct value is ascertained at confirmation of grant. It is thus their contention that in this matter the true value of Estate has been established through the Valuation Report which is now sought to be introduced and none of the other parties concerned is in a place to establish and or prove that indeed all the properties listed in the Cross-Petition belonged to the deceased.
8. It is further submitted that the Applicants could not file the valuation in the Cross-Petition because they had not been appointed as Administrators of the Estate and any act to pursue valuation would amount to intermeddling. But now, since the valuation has been availed through the Administrators of the Deceased's Estate, it satisfies all the requirements for admitting additional evidence as were set out in the case of *Mohammed Abdi Mohamed v Ahmed Abdulahi Mohamed & 3 others*.
9. To rebut the above submissions by the Client, the Advocate/Respondent submitted that additional evidence in the form of a Valuation Report would only be admitted on appeal but not on application for reference after taxation. That therefore what should be subject for consideration in an application for reference would be matters on whether the Taxing Master made an error in principle but not on issues regarding admission of further evidence. In support of this line of argument, reliance has been placed on among other cases, the case of *Vijay Kumar Devalji Kanji Gobil v Suresh Mohanlal Fatania & 8 others* [2016]eKLR, *Lenna Catherine Koinange v Majanja Luseno & Co. Advocate* [2014]eKLR and lastly, the case of *Joreth Limited v Kigano & Associates* [2003]eKLR.
10. The Advocate further submitted that the subject matter for purposes of taxation can only be determined in the parties pleadings as per Schedule 10 paragraph 1(a) of the *Advocates (Remuneration) (Amendment) Order, 2014*. That there being an affidavit sworn by George Miyare as regards the assets of the deceased's Estate, the Valuation report sought to be introduced is misconceived and misplaced.



11. Lastly, it was submitted that the valuation does not amount to new evidence which could not have been obtained by the Applicants as at the time of filing the Cross-Petition. It is argued by the the Advocate/ Respondent that it was the duty of the Client/Applicant to ascertain the value of the estate before issuing the instructions to file the Cross-Petition.

Analysis and Determination

12. I have given due consideration to the application at hand, the affidavit sworn in support and rebuttal of the same as well as the submissions filed by the parties and find only one issue stands out for consideration, which is whether the Valuation Report dated December 15, 2023 can be admitted as additional evidence for consideration in the reference pending before this court.
13. However, I will begin by addressing the submissions by the Advocate/ Respondent that a party cannot seek to adduce additional evidence upon filing a reference against the decision of a Taxing Master as opposed to an instance of a pending appeal. According to the Advocate/Respondent, a reference only requires the High court to consider whether the Taxing Master committed any error in principle but not an extended application as leave for introduction of new.
14. This Court is of the considered contrary view to that of the Advocate/ Respondent's for the following reasons: Rule 11 of the *Advocates Remuneration Order* makes a provision for the procedure which a party aggrieved by the decision of the Taxing Master must adopt. That is to first give a Notice of Objection within fourteen (14) days of the decision and after receiving the reasons for taxation, to file a reference by way of a Chamber Summons to a High Court Judge. If further aggrieved, the party to file an appeal before the Court of Appeal with the leave of the High Court Judge.
15. In this court's humble opinion, a reference is always in the nature an appeal of a taxation decision to a High Court Judge and there exists no other mode for challenging such a decision other than the procedure stipulated under rule 11 of the *Advocates Remuneration Order*. Therefore, all general rules applicable in considering an ordinary appeal, are extended to a reference application unless otherwise specifically provided in the relevant statutes. In the circumstances, this Court invokes its inherent jurisdiction as provided under section 3 of the *Civil Procedure Act* and find the Client/Applicant was right in filing an application for leave to introduce further evidence as it did.
16. In arriving at the above conclusion, this court seeks to distinguish this case with the case of *Vijay Kumar Davalji Kanji Gobil –vs- Suresh Mohanlal Fatania Case* (Supra) which has been relied on by the Advocate/ Respondent on account that the facts surrounding the two cases differ. Whereas in the instant case the Client/Applicant is seeking leave to adduce additional evidence in form of a Valuation Report, the court in the Vijay Kumar Davalji Case rejected the introduction of a Valuation Report in evidence after taxation had been concluded on the ground that no leave had been sought to introduce the additional evidence in the Valuation Report given that the said Valuation Report did not form part of the taxation proceedings record.
17. Therefore, this court now proceeds to consider whether the application for leave to introduce the additional evidence is merited. In matters arising from an appeal from the decision of a subordinate court including a reference against a Taxing Officer's decision, section 78(1) of the *Civil Procedure Act* affords this court the discretion to take additional evidence. A number of decisions that have been rendered by this court and other superior courts including the Supreme Court in the case of *Mohamed Abdi Mohamed –vs- Ahmed Abdulabi Mohamed & 3 others* [2018]eKLR, points out that additional evidence ought to be admitted if it is directly relevant to the matter before court and it would indeed influence the determination and or impact on the final verdict.



18. In the case at hand, the Applicants seek to produce the Valuation Report on the Deceased's Estate after taxation had proceeded based on a value which was merely declared but not ascertained. The Applicant submitted that they could not obtain the valuations previously because they were not the Administrators of the Deceased's Estate and they cross-petitioned to be appointed as such and were unsuccessful. In this court's view, the Applicants were only required to show a sufficient reason as to why they could not access to and or produce the Valuation Report on to the Deceased's Estate. The fact that they had limited access to the Deceased Estate is sufficient and meets the threshold re required in such application. Likewise, the court is persuaded that the Valuation Report dated 15th December, 2023 is likely to shed more light on the net-worth of the Deceased's Estate unless the contrary is shown. And in all these, the Advocate/Respondent be accorded adequate opportunity to respond to that extent during the hearing of the reference. The mere indication that some of the assets of Deceased's Estate were omitted from the Valuation Report without any viable supporting evidence is not sufficient to persuading the court to reject the Valuation Report which would per se affect the verdict on the legal fees owing to the Advocate/Respondent.
19. That being the case, this court is inclined to allow the Client/Applicant's application dated 23rd January, 2024 and consequently, leave is hereby granted to the Clients/Applicant's to file the additional evidence in form of a Summary Valuation Report dated 15th December, 2023. Howsoever, the same is subject to the following:-
- a. The valuation report dated December 15, 2023 be filed within three (3) days of this order.
 - b. The advocate/respondent is granted seven (7) days to file a response on the credibility of the said Valuation.
 - c. Mention on April 29, 2024 for further directions on the pending applications.

It is so ordered.

RULING DATED AND SIGNED AT KIAMBU THIS 12TH DAY OF APRIL, 2024.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Miyare counsel for the Applicants

No appearance for and by the Respondents

Court Assistant - Martin

