



**REPUBLIC OF KENYA**

**IN THE ENVIROMENT & LAND COURT**

**AT MACHAKOS**

**ELC NO. 151 OF 2018**

**HAWA MOHAMED ABDALLA (Suing as the administrator of the estate of**

**Mohamed Hussein Absura (Deceased).....PLAINTIFF**

**VERSUS**

**UNITED CARE LIMITED.....1<sup>ST</sup> DEFENDANT**

**AMIR FAUD AHMED.....2<sup>ND</sup> DEFENDANT**

**ASHA ABDULKADIR.....3<sup>RD</sup> DEFENDANT**

**ADVOCATES-CLIENT BILL OF COSTS**

**BETWEEN**

**LAWRENCE OIGORO NYAGITO T/A NYAGITO AND ASSOCIATES.....ADVOCATES**

**VERSUS**

**HAWA MOHAMMED ABDALLA.....CLIENT**

**RULING**

1. This Ruling is in respect to the Advocate's Application dated 16<sup>th</sup> October, 2020 and the Client's Chamber Summons dated 30<sup>th</sup> December, 2020. In the Advocate's Application dated 16<sup>th</sup> October, 2020, the Advocate is seeking for Judgment to be entered against the Respondent for the sum of Kshs. 7,094,870 as taxed by the Taxing Officer. On the other hand, in his Application dated 30<sup>th</sup> December, 2020, the Client has sought for an order setting aside the Ruling of the Taxing Officer dated 25<sup>th</sup> June, 2020.

2. The Application dated 16<sup>th</sup> October, 2020 is therefore predicated on the outcome of the Application dated 30<sup>th</sup> December, 2020. In support of the Application dated 30<sup>th</sup> December, 2020, the Client swore an Affidavit in which he deponed that while taxing item number 1, the Taxing Officer erred in law and fact by applying the wrong schedule to tax the Bill of Costs including the nature of the matter, the length of the trial and the general conduct of the proceedings.

3. The Client deponed that while taxing items numbers 4, 5, 6, 10, 11, 12, 13, 14 and 15, the Taxing Officer erred by allowing the said items as drawn; that the Taxing Officer calculated VAT at 16% which was an error because as at September, the applicable VAT rate was calculated at 14% and that the Bill of Costs as taxed is excessive, unrealistic and a serious impediment to justice.

4. In response to the Application dated 30<sup>th</sup> December, 2020, the advocate deponed that the Chamber Summons filed herein is fatally defective, bad in law, and unmeritorious; and that during the court attendances before the court on 4<sup>th</sup> November 2020, the parties filed an oral consent in court on how they wished to have the matter disposed.

5. It was deponed that the consent was in respect to the Advocate's Notice of Motion dated 16<sup>th</sup> October 2020 in which the Advocate is seeking for an order for adoption of the Certificate of Taxation issued on 1<sup>st</sup> October 2020 by the Taxing Master to be adopted as judgement and an order for the transfer of the subject property being Nairobi/Block 60/485 whose title deed is in the custody of the Advocate and kept

as lien for his fees.

6. It was deponed by the Advocate that pursuant to the consent order recorded orally in court, the pleadings were closed since the parties had agreed on the way forward on how to dispose of the Application filed by the Advocate and that the Respondent/Client through his Advocates did not in any way notify the court that it intends to file a reference application to challenge the Certificate of Taxation.

7. It was deponed by the Advocate that the reference filed in court by the Respondent/Client is an abuse of the court process since the same was filed without seeking leave of the Honourable Court; that the reference application filed herein together with the Supporting Affidavit is defective and amounts to abuse of the court process; that when the Client, through his advocate, applied for a certified copy of the Ruling, he did not request for the reasons for taxation.

8. It was deponed that in matters of taxation, a Ruling captures the reasons for taxation; that a Ruling when available can be used to file a reference application in court without necessarily asking for the reasons of taxation and that despite the Respondent/Client having been issued with an order to extract a copy of the Ruling, she did not bother to extract the same from court upon paying the requisite fees.

9. The advocate deponed that he made efforts and extracted a copy of the Ruling on 1<sup>st</sup> October 2020 which he served upon the Respondent's Advocates on 9<sup>th</sup> October 2020 and that despite doing so, the Respondents kept sleeping on their rights and did not bother to file the reference application to challenge the Certificate of Taxation of Bill of

Costs as taxed.

10. The Advocate deponed that in any event, the reference Application together with the Supporting Affidavit filed herein by the Respondent does not disclose sufficient grounds as to why the court should interfere with the Bill of Costs as taxed by the Taxing Master; that the superior court is not allowed to interfere with the discretion vested upon the Taxing Master when taxing the Advocate-Client bill of Costs and that the sole responsibility of the superior court is to consider if the Taxing Master did invoke the right principles when taxing Bills of Costs.

11. It was deponed that the Taxing Master applied the right principles while taxing the Advocate-Client Bill of Costs dated 25<sup>th</sup> July 2020; that the subject value of the property in question was Kshs 175,000,000 as per the valuation report dated 17<sup>th</sup> May 2019 and filed in court on 6<sup>th</sup> June 2019 and that therefore the subject value of the property is not in dispute or controverted as the same is clearly stated.

12. It was deponed by the Advocate that the 14% tax relief was temporarily granted by the Treasury purposely to cushion members of the public against Corona pandemic; that the tax reduction was not permanent as it was to be operational for a short period of time; that the Taxing Master granted the 16% as tax applicable knowing that the rate will be adjusted from 14% to 16% and that no prejudice of any form has been subjected to the Respondent/Client, since the rates have already been adjusted from 14% to the initial applicable rate of 16%.

13. It was deponed by the Advocate that the Taxing Master rightly exercised her discretion by increasing the Advocate-Client Bill of Costs by 50% on top of the instruction fees as provided for in the relevant provisions of the Advocates Remuneration Order and that the Chamber Summons Application dated 30<sup>th</sup> December, 2020 should be dismissed.

14. While responding to the Application dated 16<sup>th</sup> October, 2020, the Client deponed that he was dissatisfied with the Ruling of the Taxing Master; that his advocate had written to the Taxing Master asking for reasons for the taxation of the Bill of Costs and that his letters have not been responded to.

15. The Client deponed that if the suit property were to be transferred to the Advocate, it would be unfair and prejudicial to the beneficiaries of the deceased as they would be divested of their rightful inheritance and that the advocate can still recover his fees in other ways.

16. The two Applications proceeded by way of submissions which I have considered. As I stated at the beginning of this Ruling, the orders being sought for in the Application dated 16<sup>th</sup> October, 2020 can only be denied if the Client's Application dated 30<sup>th</sup> December, 2020 seeking to set aside the Ruling of the Taxing Master is allowed.

17. Before going into the merits of the Application dated 30<sup>th</sup> December, 2020, which, if allowed, would stall the Application dated 16<sup>th</sup> October, 2020, I should consider if the said Application was filed within the requisite time. The applicable law in respect to the current Applications is the Advocates Remuneration Order. **Clause 11 of the Advocates Remuneration Order** provides as follows:

**“11. Objection to decision on taxation and appeal to Court of Appeal**

**(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.**

**(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.**

**(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.**

**4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired."**

18. It is not in dispute that the Taxing Officer delivered her Ruling in respect of the Advocates/Client's Bill of Costs on 10<sup>th</sup> September, 2020. On the date the Ruling was delivered, the advocates for both parties were present. The Taxing Master, upon delivery of the Ruling, directed that the parties should be supplied with a copy of the Ruling.

19. According to **Clause 11** of the **Advocates Remuneration Order**, the Client was required to file his reference challenging the decision of the Taxing Master within 14 days from the date when the reasons for the Ruling were given. If for any reason the party aggrieved by the reasons does not file the reference within 14 days, then he must seek the leave of the court to file the reference out of time.

20. The Ruling of the Taxing Officer, as pointed above, was given on 10<sup>th</sup> September, 2020. The court directed that the parties be availed the Ruling. That is the same Ruling that has been annexed on the Client's Application dated 30<sup>th</sup> December, 2020, meaning that no other reasons for the Ruling of 10<sup>th</sup> September, 2020 exist. Having based his Application on the Ruling dated 10<sup>th</sup> September, 2020, the Client should have filed the reference by 24<sup>th</sup> September, 2020, or sought for the leave of the court to file the reference out of time.

21. Having filed the reference out of time, and without the leave of the court, it is my finding that the Application dated 30<sup>th</sup> December, 2020 is unmeritorious, and the same is struck out. In any event, the filing of a reference does not amount to a stay of execution for costs, or a denial for the grant of Judgment based on a Certificate of Taxation. In the case of ***In re Estate of Alice Kahaki Njoka [2016] eKLR***, the court held as follows:

**"Section 51 (2) of the Advocates Act provides that the certificate of costs issued is valid and binding until it is set aside or altered by the court. It follows therefore, that an execution premised on this certificate, which has not been set aside or altered, is lawful. The filing of a reference or the written letter for reasons under Order 11 (1) of the Advocate Remuneration Order does not accord a party an automatic stay of execution."**

22. That being the case, the mere fact that the Client filed a reference, or requested for reasons to enable him file a reference cannot defeat the Application for the entry of Judgment pursuant to a valid certificate of costs.

23. For those reasons, it is my finding that the Application dated 16<sup>th</sup> October, 2020 filed by the advocate is meritorious. However, considering that the Application dated 30<sup>th</sup> December, 2020 by the Client was filed out of time and without the leave of the court, the same is found to be bad in law. The final orders of the court are therefore as follows:

**a. The Application dated 16<sup>th</sup> October, 2020 is allowed as prayed.**

**b. The Application dated 30<sup>th</sup> December, 2020 is struck out with costs.**

**DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 15<sup>TH</sup> DAY OF OCTOBER, 2021**

**O. A. ANGOTE**

**JUDGE**

**In the presence of:**

Mrs Kemunto for the Advocate

Mrs Njiiru for the Client

Court Assistant – John Okumu