



**Gatheru Gathema & Company Advocates v Ngatunyi & another (As co-administrators and beneficiaries of the Estate of the Late Simon Ngatunyi Chabi) (Miscellaneous Application E020 of 2020) [2023] KEHC 21586 (KLR) (Family) (21 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21586 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**FAMILY**  
**MISCELLANEOUS APPLICATION E020 OF 2020**  
**MA ODERO, J**  
**JULY 21, 2023**  
**IN THE MATTER OF THE ADVOCATES ACT (CAP 16)**  
**LAWS OF KENYA**  
**AND**  
**IN THE MATTER OF TAXATION BETWEEN THE**  
**ADVOCATE AND CLIENT**

**BETWEEN**

**GATHERU GATHEMA & COMPANY ADVOCATES ..... APPLICANT**

**AND**

**FELIX MUTHORA NGATUNYI ..... 1<sup>ST</sup> RESPONDENT**

**LILIAN MUTHONI NGATUNYI ..... 2<sup>ND</sup> RESPONDENT**

**AS CO-ADMINISTRATORS AND BENEFICIARIES OF THE ESTATE OF THE LATE SIMON NGATUNYI CHABI**

**RULING**

1. Before this court is the Notice of Motion filed by Lillian Muthoni Ngatunyi and Felix Muthora Ngatunyi (the Client/Advocate) dated July 26, 2021 seeking the following orders:-

“1. Spent.



2. That the Honourable Court be pleased to issue a temporary stay of taxation of the Advocate-Client Bill of Costs dated August 18, 2020 pending the hearing and determination of this Application
  3. The Honourable Court be pleased to declare that the Advocate-Client Bill of Costs dated August 18, 2020 as presented is incompetent, bad in law, incurably defective, vexatious and an abuse of the court process and ought to be struck out.
  4. The Honourable Court be pleased to declare that the Honourable Deputy Registrar lacks jurisdiction to tax the Advocate-Client Bill of Costs
  5. The Honourable court be pleased to make any such order and/or orders as it may deem just and appropriate in the circumstances.
  6. The costs of this Application and the suit awarded to the Respondent Clients.
  7. The costs of this Application be provided for.
2. The Summons was premised upon Section 1A, 1B and 3A of the *Civil Procedure Act*, 2010, Order 2 Rule 15, Order 51 Rule 1 *Civil Procedure Rules*, 2010 and all other enabling provisions of the law and was supported by the Affidavit of even date and a supplementary affidavit dated January 30, 2023 both sworn by Lilian Muthoni Ngatunyi the Co-Administrator of the estate of the late Simon Ngatunyi Chabi.
  3. The Applicant/Advocate Gatheru Gathemia & Company Advocates opposed the reference through the Reprising Affidavit dated 9<sup>th</sup> September 2021.
  4. The application was canvassed by way of written submissions. The Applicant/Advocate filed written submissions dated January 30, 2023 whilst the Client did not file any written submissions.

### **Background**

5. The Applicant's firm acted for the Respondents in Nairobi High Court Succession Cause No 1239 of 2010. The Advocates thereafter filed an Advocate/Client Bill of Costs dated August 18, 2020. The Clients have challenged the bill of costs for various reasons. They have challenged the valuation report used to assess the value of the estate. They also argued that the bill is incompetent for want of compliance with the provisions of the *Advocates Act*, Chapter 16 of the Laws of Kenya.

### **Analysis and Determination**

6. I have considered the application, the supporting affidavit, the response, submissions before me and the authorities cited by both sides. The issues for determination are as follows:
  - i) Whether this court has jurisdiction to entertain the Application as presented by the Client before this court?
  - ii) Whether the court can stay the Taxation of the Bill of Costs?



**i) Whether this court has jurisdiction to entertain the Application as presented by the Client before this court?**

7. For a court to entertain any matter it must have requisite jurisdiction to do so. In the celebrated case of *carriers of the motor vessel "Lilians" Vs. Caltex Oil Kenya Ltd* (1989) KLR 1 Court of Appeal held as follows:-

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction." [own emphasis]

8. Paragraph 10 of the *Advocates (Remuneration) order* 2009 provides:-

"The taxing officer for the taxation of bills under this Order shall be the Registrar or a district or Deputy Registrar of the High Court or, in the absence of a Registrar, such other qualified officer as the Chief Justice may in writing appoint; except that in respect of bills under Schedule 4 of the order the Taxing Officer shall be the Registrar of trade marks or any Deputy or Assistant Registrar of trade marks."

9. The High Court's jurisdiction to deal with a taxation related matter in my view is provided for under paragraph 11 (1) (2) (3) of the *Advocates (Remuneration) order* as follows:-

"Paragraph 11 (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 this 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."

10. The Clients contend that the Deputy Registrar lacks jurisdiction to tax the Bill of Costs as presented because it has been filed under Schedule 10 of the *Advocates (Remuneration) Order*, 2014 as opposed to schedule X (B) *Advocates (Remuneration) Order*, 2009 since the succession cause was filed in 2010. That the bill is incompetent due to want of compliance with the provisions of the *Advocates Act*, Chapter 16 Laws of Kenya and the *Advocates (Remuneration) Order*. The clients also challenged the instructions fees and argue that an amount has already been paid to the Advocates.

11. The clients challenged the issue of retainer. It was their contention that at some point, they stopped the services of the Advocates firm but the Advocates continued representing other beneficiaries of the estate and that they had been charged for the services rendered to them.



12. Paragraph 62 of the *Advocates (Remuneration) order* 2009 provides:-

“Where the same advocate is employed for two or more plaintiffs or defendants, and separate pleadings are delivered or other proceedings had by or for two or more such plaintiffs or defendants separately, the taxing officer shall consider in the taxation of such advocate’s bill of costs, either between party and party or between advocate and client, whether such separate pleadings or other proceedings were necessary or proper, and if he is of opinion that any part of the costs occasioned thereby have been unnecessarily or improperly incurred, the same shall be disallowed.”

13. Paragraph 13 of the *Advocates (Remuneration) order* clearly provides the taxing officer may tax costs as between advocate and client without any order for the purpose upon application of the advocate or upon the application of the client. The paragraph specifically states:-

“ 13 (1) The taxing officer may tax costs as between advocate and client without any order for the purpose upon the application of the advocate or upon the application of the client, but where a client applies for taxation of a bill which has been rendered in summarized or block form the taxing officer shall give the advocate an opportunity to submit an itemized bill of costs before proceeding with such taxation, and in such event the advocate shall not be bound by or limited to the amount of the bill rendered in summarized or block form.

(2) Due notice of the date fixed for such taxation shall be given to both parties and both shall be entitled to attend and be heard.

(3) The bill of costs shall be filed in a miscellaneous cause in which notice of taxation may issue, but no advocate shall be entitled to an instruction fee in respect thereof.”

14. In view of the above paragraph the taxing of Bill of Costs as between the advocate and clients vests with the Deputy Registrar.

15. I have considered the of objections raised before this court. I am of the view that these are all matters that can be raised before and be dealt with by the Deputy Registrar, as these are all matters which falls squarely within the jurisdiction of the Deputy Registrar. The Deputy Registrar is yet to hear and determine the issues raised in this application. I therefore find this application to be premature. Let the matter proceed before the Deputy Registrar as no party will be prejudiced since any aggrieved party will have an opportunity to file a reference before the High Court.

16. In *Republic Vs Jubilee Party & Another Ex parte Wanjiku Mubia & another* (2017) eKLR, Hon Justice Odunga held:-

“Once jurisdiction has been conferred on a particular body, the said body should be allowed to handle and determine the matter before it being taken before any other forum.”

17. This court cannot interfere with the exercise of Deputy Registrar’s jurisdiction for no apparent reason.

18. I am satisfied that the court has no jurisdiction to entertain the application presented by the clients before this court. The matter is a matter for Deputy Registrar who has jurisdiction by virtue of paragraph 10 of the *Advocates (Remuneration) order* 2009.



**ii) Whether the court can stay the Taxation of Bill of Costs?**

19. Before granting orders of stay of taxation of Bill of Costs, the Court must be guided by laid down principles and more specifically has to consider whether it is just and equitable to grant an order of stay. In doing so the court must weigh the competing interest of each party and make orders that meet, the ends of justice.
20. In the case of *Oraro and Rachier Advocates Vs Co-operative Bank of Kenya* EALR (1999) 1 EA 236 it was held:-  
  
“We note that at no point did the applicant allege that should it pay the costs demanded by the respondents, then the money could not be refunded should the intended appeal succeed. In addition, the applicant has not described the hardship or loss that it would suffer if it were to be forced to settle the costs before the intended appeal is heard. The onus to demonstrate this principle also falls squarely on the applicant; it has not done so and in the premises, the application herein is devoid of merit and we hereby order it dismissed.”
21. In an application for stay, the Applicant is always required to satisfy the conditions set out under Order 42 Rule 6 (a) and (b) of *Civil Procedure Rules* before he can be granted orders for stay. The clients have not demonstrated or shown what substantial loss that they stand to suffer nor shown consequences they are likely to suffer if orders for stay of taxation of the Bill of Costs is not granted.
22. In *Daniel Chebutul Rotich & 2 others Vs Emirates Airlines* Civil Case No 368 of 2001 as cited in:-  
  
“Vista Holdings International Limited Vs Span Image (K) Limited [2014] eKLR”...  
substantial loss” is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted [emphasis added] and that applicant is therefore forced to pay the decretal sum.”
23. Having considered the submissions by the Applicant and the Respondents, I am not satisfied that the Respondents have proved the substantial loss that they stand to suffer if the application for stay is denied. They have a recourse to file a reference to the High Court once all matters in issue have been ventilated and Deputy Registrar makes her determination. This court cannot either dismiss a Bill of Costs as this is a duty of the Taxing master to evaluate all the issues before her after considering all the evidence and submissions presented by the parties.
24. The upshot is that the application is without merit and the same is dismissed in its entirety with costs to the Advocate.

Dated in **Nairobi** this **21<sup>st</sup>** day of **July, 2023**.

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**MAUREEN A. ODERO**

**JUDGE**

**MISC APPLICATION NO. E020 OF 2020 RULING Page 4 of 4**

