



Gituma Otieno & Company Advocates v Nderito (Miscellaneous Application E124 of 2023) [2023] KEHC 23264 (KLR) (Family) (22 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23264 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MISCELLANEOUS APPLICATION E124 OF 2023
PM NYAUNDI, J
SEPTEMBER 22, 2023**

BETWEEN

GITUMA OTIENO & COMPANY ADVOCATES APPLICANT

AND

ANGELA WAMBUI NDERITO RESPONDENT

RULING

1. This ruling relates to an application dated May 29, 2023 filed by the Applicant, Gituma Otieno & Company Advocates seeking for Orders That:
 - a. This Honorable Court be pleased to set aside and/ or vacate the certificate of taxation issued/ dated May 29, 2023 by Hon. Catherine Ng'ang'a taxing the Advocate – Client Bill of Costs dated January 26, 2023 at Kshs. 151, 825. 54/=.
 - b. In the interest of justice the Advocate -n Client Bill of Costs dated January 26, 2023 with respect to items 1, 3, 6, 11, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39 and 40 be set aside and taxed afresh by this honorable court.
 - c. In the alternative to (2) above, this Court be pleased to order that the Advocate – Client Bill of Costs dated January 26, 2023 in terms of items 1, 3, 6, 11, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39 and 40 be taxed afresh by another taxing master as per this Honorable Court's directions.
2. The application is based on the Grounds set out under paragraphs 1 – 62 of the said application.
3. The Respondent, Angela Wambui Nderito, opposed the application and filed grounds of opposition dated June 27, 2023, an affidavit sworn on June 29, 2023 and written submissions dated July 7, 2023.



4. The applicant filed written submissions dated June 26, 2023 and further written submissions dated July 17, 2023.
5. Parties highlighted their respective submissions on July 26, 2023.
6. At the outset, I wish to place on record the Courts disapproval of the choice of language and tone by the Applicant in the statements imputing improper conduct by the taxing master. I consider this unfortunate and would urge counsel to desist from taking this approach in the future. Counsel is within his rights to disagree with the decision but at all times due decorum and respect for the Court and its officers must be observed.

Background

7. This matter relates to instructions issued by the Respondent via email on 15th December, 2021 as follows:

“Dear Mr. Otieno,

Thank you for spending an entire morning to have very fruitful discussion with me. Your degree of professionalism is outstanding.

I hereby instruct you to act on my behalf in respect of the following two (2) estates;

- a. Estate of Peter Charles Nderito P & A Cause No. 307 of 2006 of which I am the appointed Administrator since 2015.
- b. Estate of Elizabeth Wariara Nderito Cause No. E2321 of 2021 of which I have recently applied for letters of administration.

You will be taking over from Wandabwa advocates who have failed to act upon several acts of instructions that I have issued to them since 1st December, 2021.

Kind regards,

Angela Nderito.”

8. The bone of contention is whether Applicant is entitled to instruction fees with respect to the Petition for Grant of letters of Administration in the Estate of Elizabeth Wariara Nderito Probate and Administration Cause No. E2321 of 2021 as provided for under Schedule 10(1)(a)
9. It is the Respondents contention that the Applicant can only claim fees for work done and the Applicant only lodged an Application seeking a grant ad Colligenda Bona and that therefore the Applicable scale is Schedule 10(1)(f). The respondent relies on the decisions in *M/S Abuodha & Omino Associates Advocates v Jane Gathoni Muraya Kanyotu* [2019] eKLR and *Kipkorir Titoo and Kiara Advocates v Jane Nduta Kinyua and Another* [2012] eKLR.
10. It is further contended that the Applicant is only entitled to a reasonable fee based on the work done. For this the Respondent relies on the decision in *Ratemo Oira & Co. Advocates v Magereza Sacco Society Limited*.
11. The Applicant on the other hand contends that he had instructions to Petition for Grant and that he did act on those instructions and is therefore entitled to instruction fees based on the value of the estate and that therefore the applicable scale is Schedule 10(1)(a) and relies on the decisions in Nairobi Petition No. 177 OF 2015 – *Mombasa Cement Limited v Speaker, National Assembly & Another*



Analysis and determination

12. Having considered the pleadings herein, submissions filed along with authorities cited and the relevant law I discern the following as the issues for determination
- a. Whether the Applicant has met the threshold for this court to set aside the decision of the taxing master delivered on 12th May 2023.
 - b. Who should pay costs
 1. The principles for setting aside the decisions of Taxing Master were well established by the Court of Appeal in the case of [Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board](#) [2005] eKLR that:

“On reference to a Judge from the Taxation by the Taxing Officer, the Judge will not normally interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer, erred in principle in assessing the costs.”
14. The proper exercise of discretion by the Taxing Officers was restated in the case of [Kamunyori & Company Advocates v Development Bank of Kenya Limited](#) [2015] Civil Appeal 206 of 2006, where it was held that
- “...Failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle. Authorities on taxation show that a Judge will normally not interfere with the Taxing Officer’s decision on taxation unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instructions fee is arrived at on the wrong principles, it will be set aside.”
15. At paragraph 4 of the impugned ruling the taxing master stated-
- With regard to the first issue of determination, the advocate/ client costs under the [Law of Succession Act](#), is calculated under Schedule X, Clause 1 (a) of Part (A) – Party & Party Costs of the Advocates Remuneration Order, I will use the remuneration order for 2014 as instructions in this matter were given in 2021. In this case I note that the Respondent (sic) instructed by the Respondent on 15th December 2021 on filing an application dated 28th December 2021 seeking a grant ad colligenda bona. I also note that the Petitioning for grant in this matter commenced on 16th November 2021 and the firm given instructions to Petition for Grant was Wandabwa Advocates.....
- From the above, the Applicants firm did not petition for Grant for the Estate of Elizabeth Wariara Nderito. If anything, the Applicants only came to the picture in this matter on lodging an application for Ad colligenda bona which in my humble view falls under schedule 10(f) which prescribes for a fee of not less than Kshs 10,000. Hence the Applicant reliance on the value of the deceased estate has no basis. (Emphasis mine)
16. The first question for determination therefore is whether the taxing master identified the correct subject matter for the purpose of taxation. As stated in paragraph 6 above instructions were given vide email on 15th December 2021. This fact is not disputed. Neither is it disputed that the Applicants took



over from the firm of Wandabwa & Co Advocates and the active matter was a Petition for letters for Administration.

17. It is not in dispute that at the time the Applicants took over the matter, the previous firm was yet to finalise the filing of the Petition. It is not contested that the Applicants filed an application seeking a grant Ad Colligenda Bona which was later withdrawn. It is also not disputed that the process of finalizing the cause leading to issuance of confirmed Grant was undertaken by a 3rd firm of advocates appointed by the Respondent.
18. In Affidavit sworn on 29th June 2023, the Respondent depones inter alia-
 9. Part of my instructions to the Applicant herein was to complete the process of the Application of the main grant for letters of Administration.
 11. The Applicant was required to attend to this by filing the certificate of title showing my late mother's last known place of residence but this was not done. I therefore appointed the firm of Shilunya Abutika Advocates, who filed a notice of change of Advocates on 26th April 2022 (page 80 of the exhibit) to file an affidavit showing my mother's last known place of residence.
 14. The Applicant only paid for the gazettelement on 10th January 2022 (Page 79 of the exhibit) as far as the Application main petition for grant of letters of administration is concerned.
 19. From the foregoing it is evident that both the Applicant and Respondent were agreed that the Applicant did have instructions to Apply for grant of letters of administration. It is also evident that the Applicant did act on the instructions and the consensus is that he did pay for the gazettelement of the Petition.
 20. I am not persuaded by the Respondent's assertion that Applying should be limited to the lodging of the Petition. In any event the definition relied upon relates to its application in the Matrimonial Proceedings and Property Act 1970. A consideration of Schedule 10 (1)(a) of the Advocates Remuneration Order it is evident that Apply for grant encompasses the entire process that leads to finalizing the succession cause.
 21. Based on the foregoing I find that the taxing master erred in principle in finding that the Applicant was only entitled to fees for filing the Application for the grant Ad Colligenda Bona. I find that the Applicant was entitled to have his fees for work done with regard to the application for grant of letters of Administration assessed and that the proper scale is schedule 10 (1) (a) along with the work that he had done with respect to the Application for the grant Ad Colligenda Bona under Schedule 10(1)(f).
22. In *DK Law Advocates v Zhong Gang Building Material Co. Ltd & another* [2021] eKLR, Odunga J (as he then was) laid out the following guidelines for taxing master when determining costs
[26]..... the costs should not be allowed to rise to such level as to confine access to court to the wealthy; a successful litigant ought to be fairly reimbursed for the costs he had to incur in the case; the general level of remuneration of Advocates must be such as to attract recruits to the profession; so far as practicable there should be consistency in the awards made; every case must be decided on its own merit and in every variable degree, the value of the suit property may be taken into account; the instructions fees ought to take into account the amount of work done by the advocate, and where relevant, the subject matter of the suit as well as the prevailing economic conditions; one must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel of pre-eminent reputation; then one must know that what fee this hypothetical character would be content to take on the brief; clearly it is important



that advocates should be well motivated but it is also in the public interest that cost be kept to a reasonable level so that justice is not put beyond the reach of poor litigants.

23. The Respondent took issue with the fact that another Counsel had initiated the Petition and a subsequent firm finalized the process leading to the confirmation of the grant. In finding that the Applicant is entitled to instruction fee I am persuaded by the observation of Odunga J (as he then was) in *DK Law Advocates v Zhong Gang Building Material Co. Ltd & another* (cited above)

In principle the instruction fee is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached

24. Based on the foregoing I find that the taxing master erred in principle, I allow the Application dated 29th May 2023 and make the following orders-

- a. The decision of the taxing Master, Hon. Catherine Nganga delivered on 12th May 2023 and certificate of taxation dated 29th May 2023 are set aside.
- b. The Bill of Costs is remitted back to another Taxing Master for fresh taxation considering the guidelines enumerated in paragraph 20 above.
- c. The Applicant shall have the costs of this Application assessed at Kshs 20,000 payable within 21 days.

It is so ordered

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.

.....

P. NYAUNDI

JUDGE

In the presence of:

Otieno h/b for Muite SC for the Applicant

Ochieng for the Respondent

