



REPUBLIC OF KENYA



KENYA LAW
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**FA Badia & Company Advocates v Malambu & another (Miscellaneous Application
E039 of 2020) [2024] KEHC 16672 (KLR) (17 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16672 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
MISCELLANEOUS APPLICATION E039 OF 2020**

JL TAMAR, J

DECEMBER 17, 2024

BETWEEN

FA BADIA & COMPANY ADVOCATES APPLICANT

AND

LUCY KASSIM MALAMBU 1ST RESPONDENT

FATUMA KASSIM MALAMBU 2ND RESPONDENT

***(ARISING FROM KAJIADO HC SUCCESSION CAUSE NO E024 OF 2021 FORMERLY
KAJIADO CHIEF MAGISTRATES COURT SUCCESSION CAUSE NO 20 OF 2017)***

RULING

Background:

1. The Applicant/Advocate represented the Respondents/Clients/Beneficiaries in succession cause no 20 of 2017 at Kajiado Magistrate's court which was transferred to the High Court Succession Cause no. E024 of 2021. Mirriam Wangare Kassim and Hassan Iddi Malambu were the 1st and 2nd Administrators respectively whereas the Respondents/Clients herein Lucy Kassim Malambu and Fatuma Kassim Malambu were beneficiaries. Subsequently, parties fell out leading to the advocate filing a bill of costs dated 17.04.2021 filed on 26.04.2021. The said bill of costs was determined and taxed at Kshs 201,851.45/=.
2. Consequently, dissatisfied the Applicant/Advocate filed a chamber summons dated 13th September 2021 seeking;
 - a. That the Honourable Court be pleased to set aside in its entirety the Ruling dated and delivered at Kajiado this 25th day of August 2021 as rendered by Edwin Mulochi; Deputy Registrar; Kajiado High Court; as far as it touches on items 1, 6, 12, 21, 35, 36, 37, 43, 47 and 51 of



the Applicants/Former Advocates itemized Advocate/Client bill of costs dated 17th April 2021 and filed in court on 26th April 2021.

- b. That the Honourable Court be and is hereby pleased to give directions to the Deputy Registrar; Kajiado High Court to the effect that the item 1 of the Applicants/Former Advocates itemized Advocate/Client bill of costs dated 17th April 2021 and filed in court on 26th April 2021 be taxed under Schedule 10 Item 1 (f) of Legal Notice No 35 having regard to the care and labour required. The number and length of the papers to be perused, the nature or importance of the matter, the amount or value of the subject matter involved, the interest of the parties, complexity of the matter and all other circumstances of the case.
 - c. That the Honourable Court be and is hereby pleased to give directions to the Deputy Registrar; Kajiado High Court to the effect that items 6, 12, 21, 35, 36, 37, and 43 of the Applicants/Former Advocates itemized Advocate/Client bill of costs dated 17th April 2021 and filed in court on 26th April 2021 be taxed under Schedule 7 item 10 (i) of Legal Notice No. 35.
 - d. That the Honourable Court be and is hereby pleased to give directions to the Deputy Registrar; Kajiado High Court to the effect that items 47 and 51 of the Applicants/Former Advocates itemized Advocate/Client bill of costs dated 17th April 2021 and filed in court on 26th April 2021 be taxed under schedule 6 Item 9 (a) of Legal Notice No. 35.
 - e. That the Respondents do pay the costs of this Application.
3. The Applicant/Advocate's grounds are that the ruling of the taxation officer has no basis in law and that the taxing officer acted contrary to well-settled principles of law. The Applicant/Advocate filed a supporting affidavit sworn on 13th September 2021. She deponed that the taxing officer delivered a ruling dated 25th August 2021 in a taxation of a bill of costs dated 17th April 2021 and filed on 26th April 2021. A request via email dated 28th August 2021 was made to the taxing officer seeking reasons for the taxation of specific items in the ruling. The taxing officer responded on 30th August 2021 supplying the reasons behind the specific items contained in her request. Dissatisfied, the Applicant/Advocate objected to item 1 which was taxed under the wrong item Schedule 10 of Legal Notice No. 35 and that the taxing officer failed to exercise his discretion judiciously. The taxing officer taxed the said item under schedule 10 paragraph 1 (a), the sole property land parcel Nging/Ngong/347 had been valued as at 7th June 2018 by F.B. Muyoti of Horizon Valuers Limited at Kshs 40,000,000/=. The estate had a total nineteen (19) beneficiaries. Each beneficiary was thus entitled to a share of 2,105,263.1579 of the valued property. Therefore, in representing the two beneficiaries above, the value dealt with by the Applicant/Advocate of the estate herein was 4,210,526.3158 which instruction fees ought to be taxed at Kshs 500,000/=.
 4. The Applicant/Advocate also faults the decision of the taxing master for failing to consider Rule 16 of the Advocates (Remuneration) Order which mandates the taxing officer to allow all such costs, charges, and expenses as authorized in this order as appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party.
 5. The Applicant/Advocate deponed that by taxing item 1 instruction fees under Schedule 10 (1) (a) instead of Schedule 10 (1) (f) of Legal Notice No 35, the taxing officer awarded an inordinately low amount which caused an injustice to the Applicant/Advocate.
 6. The Applicant/Advocate faulted the taxing officer for taxing off items 6, 12, 21, 35, 36, 37, 43, 47, and 51 for not being provided under Schedule 10 of the 2014 Advocates Remuneration Order contrary to Rule 16 of the Advocates (Remuneration) Order. The value of the estate exceeded Kshs 20,000,000/



= giving jurisdiction over the matter to the High Court. That when the matter was filed, Schedule 7 applied for items 6, 12, 21, 35, 36, 37 and 43 while the matter was pending at the Magistrate's court and Schedule 7 paragraph 10 (i) provided for service within three kilometres of the subordinate court or district registry a fee of Kshs 1,400/=. When the file was transferred to the High Court, the schedule 6 paragraph 9 (a) applied to items 47 and 51 and the fee applicable for service was Kshs 1,400/=. By taxing off the said items, the taxing officer occasioned an injustice to the Applicant/Advocate.

7. The 1st Respondent Lucy Kassim Malambu filed a Replying Affidavit sworn 18th April 2023 and filed in court on 26th April 2023. A perusal of the court record, the Respondents were granted 14 days leave to respond on 27th April 2022. The Replying Affidavit having been filed on 26th April 2023 was done out of time and without the leave of the court. As such, the same is disregarded.

8. The issues for determination as correctly identified are two;

i. Whether the Taxing Officer erred in awarding under the wrong schedule under item 1?

ii. Whether the Taxing Officer erred in taxing off items 6, 12, 21, 35, 36, 37, 43, 47, and 51?

9. In matters reference from a taxation ruling of a Taxing Officer, the Court of Appeal has held severally and in *Lusasi (Suing as the Legal Representative of the Estate of Samuel Lusasi Deceased)-vs-APA Insurance Limited (Civil Application 18 of 2018) (2024) KECA 831 (KLR) (19 July 2024)* Ruling that:

“

“ 14.In *Kipkorir, Titoo &?/ Kiara-vs-Deposit Protection Fund Board (2005)* eKLR, this Court held:

“On a 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. In *Arthur-vs-Nyeri Electricity Undertaking (1961) EA 497*, the predecessor of this Court at page 492 paragraph I:

“where there has been an error in principle the court will interfere, but questions solely of quantum are regarded as matters with which the Taxing Officers are particularly fitted to deal and the court will interfere only in exceptional cases.”

10. On issue (i), Schedule 10 of the Advocate remuneration order applies to proceedings relating to an application for grant of probate of written will or letters of administration. The Applicant/Advocate herein was acting for the Respondents/beneficiaries as the succession cause had already been filed. The Applicant/Advocate faults the Taxing Officer for using Schedule 10 (1) (a) instead of Schedule 10 (1) (f). That being the case, would schedule 10 1 (a) or schedule 10 1 (f) of the advocate remuneration order then apply herein?

11. The Advocates Remuneration Order 2014 provides as follows:

Schedule 10 1 (a)- “To apply for grant of probate of written will, or proof or oral will, or letters of administration with or without will annexed, the proceedings not being contested where the gross capital value of property comprised in the grant –“

Schedule 10 1 (f)- “To lodge an objection to grant, or a citation or other application or proceedings under the law not otherwise provided for in this schedule; such as the taxing officer shall consider reasonable, but not less than Kshs 10,000/=.”



12. The succession cause was commenced in the year 2017 as cause no. 20 of 2017 way before the Applicant/Advocate herein came on record through a notice of appointment dated 13.06.2018 for the Respondents/Beneficiaries. Therefore, the Petition and accompanying documents had been filed.
13. The Taxing Officer applied Schedule 10 (1)(a) using the subject value given by the Applicant/Advocate of Kshs 4,201,526.3158/=. It flows for the first 1,000,000/= fee applicable is 5% at Kshs 50,000/=. 1% is applicable for the amount over Kshs 1,000,000/=. The balance is 3,201,526.3158 at 1% is Kshs 32,015.26/=. The fee chargeable is Kshs 82,015.26/=. The award by the Taxing Officer was Kshs 82,000/= which is an undervalue. The Taxing Officer has no discretion to award less than what the Advocates Remuneration Order provides.
14. The Applicant/Advocate cannot base its charges under Schedule 10 (1) (a) under a tiered table whose calculation is based on the estate's value. Further, the Applicant/Advocate under the description given under item 1 of the bill of costs dated 17.04.2021 the service rendered is described as hereunder;

“Such fee for instructions as having regard to the case and labour required, the number and length of the papers to be perused. The nature or importance of the matter, the amount or value of the subject matter involved, the interest of the parties, complexity of the matter and all other circumstances the case;

Declared value of sole property Ngong/Ngong/347 as at 7th June 2018 valuation as conducted by F.B. Muyoti of Horizon Valuers Ltd; Kshs 40,000,000/=

Total number of beneficiaries; 5+2+8+4=19;

Workings;

a. $40,000,000/19 = 2,105,263.1579$

b. $2,105,263.1579 \times 2 = 4,210,526.3158$

Total Instructions Fees for 2 clients @ 4,210,526.3158 (500,000.00)”

15. The Applicant/Advocate does not state the actual nature of instructions given to her by the Respondents/Beneficiaries. When determining which schedule to apply the Taxing Officer has to make a careful examination of the legal services rendered. The Applicant/Advocate fails to describe under Item 1 the services rendered to the Respondents/Beneficiaries/Clients. It begs, then how did the Taxing officer reach his award? I agree with the Applicant/Advocate that the proper Schedule applicable herein is Schedule 10 (1) (f) as the Applicant/Advocate was not involved in the filing of the Petition. The Applicant/Advocate claims Kshs 500,000/= but does not explain how the figure is arrived at? In using schedule 10 (1) (a), the instruction fees would be Kshs 82,015/= and not Kshs 500,000/= as sought by the Applicant/Advocate. Schedule provides that a fee of not less than Kshs 10,000/=. Again the discretion to award higher than the Kshs 10,000/= is upon the Taxing Officer. A perusal of the succession file the Applicant/Advocate filed a preliminary objection dated..... on the jurisdiction of the magistrate's court to determine the matter as it lacked pecuniary jurisdiction. This is the only application filed by the Applicant/Advocate. The Applicant/Advocate has not provided a justification for charging Kshs 500,000/=. In the case of Republic v Minister for Agriculture & 2 Others Ex Parte Samuel Muchiri W'Njuguna & 6 others [2006] eKLR where the court held that a party claiming complexity must specify the complex elements in the proceedings, including the nature of forensic responsibility placed on counsel and if there is novelty in the proceedings, it must be conscientiously identified and where there was deployment of considerable inordinately time-consuming industry, the details of such circumstances must be clearly described. Herein, there is



nothing complex or novel in filing a preliminary objection on the grounds of pecuniary jurisdiction. As such I find the appropriate award would be and I substitute the award with Kshs 20,000/=.

16. On issue (ii), items 6, 12, 21, 35, 37, 43, 47 and 51 were all for service of various pleadings/documents under Schedule 7 when the file was in the subordinate court and Schedule 6 while at the High Court. Rightly put by the Taxing Officer, Schedule 10 does not provide for such services. The Advocates Remuneration Order paragraph 22 provides as follows:

“(1) In all cases in which any other Schedule applies, an advocate may, before or contemporaneously with rendering a bill of costs drawn as between advocate and client, signify to the client his election that, instead of charging under such Schedule, his remuneration shall be according to Schedule 5, but if no election is made his remuneration shall be according to the scale applicable under the other Schedule.”

17. In the case of Aldrin Ojiambo t/a Ojiambo & Co. Advocates-vs-Mohamedraza Hussein Jagani & Razco Limited (320 of 2005) (2006) KECH 900 (KLR) (12 October 2006), Ochieng J. (as he was then) held on paragraph 22:

“The paragraph speaks for itself. Clearly therefore, it is open to the taxing officer to make an election to apply Schedule V. The right to make an election vests in the advocate. Therefore, by opting to apply Schedule 5, whilst the advocate had not so elected, was an error in principle.”

18. I concur with the finding of Ochieng, J. if the Applicant/Advocate wanted to charge for services not provided under Schedule 10, there was an option to elect to use Schedule 5 which has to be communicated to the client in writing. The Applicant/Advocate did not elect to use Schedule 5 and is, therefore, not entitled to an award under those items.
19. Consequently, I order that the reference only succeeds under item 1 setting aside the award of Kshs 82,000/= and substituting with Kshs 20,000/=.
20. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 17TH DAY OF DECEMBER 2024

JOHN T. LOLWATAN

JUDGE

