



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

MISC. APPLICATION REF. NO. 3 OF 2018

KEZIAH GATHONI SUPEYO.....APPLICANT

-VERSUS-

YANO T/A YANO & CO. ADVOCATES.....RESPONDENT

RULING

Before me is a Chamber summons filed in court by **Keziah Gathoni Supeyo** hereinafter referred as the applicant against **Yano & Co. Advocates** hereinafter referred as the respondent where the applicant objects to the Certificate of Taxation of the bill of costs by the taxing master on 31/10/2018.

Background

From the record on 21/3/2018 Yano and Co. Advocates filed Advocate-client bill of costs seeking costs against the applicant for instructions received and acted upon in a matter whose value was stated to be Ksh. 1.4 billion. In the filed bill of costs Yano and Co. Advocates on the specific item referred to as instructions fees she demanded to be paid Ksh. 21,200,000. In addition, the bill instituted in court had also other various items bringing the total costs due and owing to Ksh. 37,098,950. The Miscellaneous Application was heard by Hon. Kasera who on 31/10/2018 granted the respondents law firm Ksh. 33,294,305 less the amount paid by the client of Ksh. 4,000,000.

Following the decision of the taxing master the applicant-client filed a reference objecting to the whole bill of costs and the taxation arising thereto on the following grounds:

That the Advocate-client bill of costs is drawn in the name of the litigating parties in aspect that is pending disposal and is thus (a) party and party bill of costs (b) the amount charged on each item is not supported by production of the documents prepaid, receipts or any supporting document thereof, which ordinarily should be annexed for the purposes of guiding the taxing master. (c) there are no records for time spent to justify the amount charged for each item and or attendances (d) the haphazard arrangements of the dates, items and corresponding amounts charged by the respondent, compounds the defects of the said bill of costs as one is unable to correlate the components.

The Applicant's Submissions

The applicant's counsel Ms. Mellyne Ogonjo filed a further affidavit in support of the reference alluding to the material facts and background of the case which makes the bill of costs as taxed untenable. The significant parts of witness's affidavit filed in court on 21/12/2018 relate to the status of the main suit referred as Kajiado ELC 615 of 2017 which pertains to the taxation before Hon. Kasera. The applicant counsel disputed that the suit in question is yet to commence for trial. There are other advocates who also have handled the issues tackling on the suit property. That the role of Yano & Co. Advocates was limited to filing a chamber summons to deal with interlocutory orders before the main trial inter-partes. It was counsel's dispensation that given the custody and background of the claim an award of Ksh. 33,294,205 to the respondent would be opportunist, punitive and unjust in the circumstances. The applicant's counsel in his written submissions filed in court on 1/2/2019 pointed out that the preliminary objection dated 23/1/2019 to the chamber summons did not meet the legal threshold of opportunity objection as known in law. It was argued by counsel that there are no parts of law raised in the preliminary objection as articulated in the case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors 1969 EA**. For this court to entertain and decide in favour of the respondent.

Further, on the issues of facts disputed in the affidavit by counsel for the applicant it was contended that the subject in issue has been dealt with in the case of **Regina Waithira Musengi Gitau v Boniface Nthige 2015 eKLR**. Counsel urged this court to follow the decision to the ruling on whether an advocate can swear an affidavit on behalf of the client.

In respect to the benefits the applicant's counsel argument that despite absence of grant of letters of administration to the Estate of the deceased the matter required a letter from the advocates on record. Armed with the facts and procedures from other superior courts learned counsel urged this court to dismiss the preliminary objection for lack of merit.

The Respondent's Submissions

The respondent's counsel relying on the proceedings before ELC Case No. 615 of 2017 submitted that the avenue in the advocate-client bill of costs is due and owing as taxed by the taxing master on 31/10/2018. That in that respect learned counsel argued and contended that the taxing master had the opportunity to consider the various affidavits and documentation in order to draft the ruling on taxed costs. In respect to the preliminary objection learned counsel states that the application is defective for lack of an apprehended administrator to the Estate of the deceased as stipulated in order 24 rule 7(2) of the Civil Procedure Rules. On *locus standi* learned counsel submitted that under section 45(2) of the Advocates Act the aggrieved party is the client who is required to file an objection to the Advocate-client bill of costs. With regard to the bill of costs learned counsel submitted that the amount being impugned by the applicant counsel was taxed in accordance with Schedule VI of the Advocates Remuneration Order 2014. She cited various authorities in her submissions to support the preliminary objection and the relevant parts of the bill of costs that is being challenged by the applicant.

I have considered both the applicant's and respondent's case with the corresponding submissions on the various issues raised in connection with the taxed bill of costs.

Issues for Determination

- (a) Whether or not the applicant has availed preliminary objection on pure points of law
- (b) Whether or not the deceased applicant's Advocate has the *locus standi*/capacity to file a chamber summons/motion on behalf of the deceased applicant without taking out the letters of administration.
- (c) Whether or not the taxing master in proceeding to consider the Advocate-client bill of costs dated 21/3/2018 erred in fact and law in coming to the conclusion that the respondent was entitled to taxed costs of Ksh. 33,294,305.

Issue No. 1 on Preliminary Objection

Ms. Yano's preliminary argument on this ground was that the proceedings which gave rise to the bill of costs were commenced before the Environment and Land court. That therefore according to learned counsel precludes the applicant from filing a reference or review of her fees incurred in the High Court which lacks jurisdiction as stipulated under Article 162(1) (2) (b) of the Constitution. Further learned counsel contended that section 13 of the Environment and Land Act No. 19 of 2011 provides for the jurisdiction of the court in respect of any of claims as they relate to Land and Environment. She further went on to submit that any disputes arising from the subordinate court contemplated under Article 162 (2) and section 13(2) (4) and (7) of the Act shall be appealed to the court Environment and Land court. Ms. Yano queried why the applicant counsel proceeded to file a dispute on taxation of costs before the High Court whose jurisdiction is ousted by the constitution on Land and Environment matters.

The central issue on the part of the respondent's counsel is that the High Court cannot sit over a matter of a taxing master arising out of a Land claim as defined in section 13(1) of the Environment and Land Court Act.

It seems to me that the test of materiality in this context is whether the preliminary objection meets the threshold issue on jurisdiction.

The general principle of law on preliminary objections is giving notice to the court and the opponent that there is a legal problem in the claim as filed which renders the court not to decide the case on the merits.

As a matter of principle if the preliminary objection contains points on the jurisdiction of the courts there is no dispute but the life span of the case terminates by the court downing the tools (See the principles in the case of **Owners of the Motor Vessel Lillian v Caltex Oil (Kenya) Civil Appeal No. 50 (1989)**). Therefore, any objection by a defendant/respondent to the suit to the jurisdiction of the court or to the admissibility of the dispute must be dealt with without going to the merits.

Under the Civil Procedure Act and Rules 2010 a number of pre-requisites are to be fulfilled for a plea on lack of jurisdiction to stand.

- (a) Failure of a pleading to conform to law or rule of the court
- (b) Subject matter of the action, venue or improper form of service
- (c) A pleading which is scandalous, vexatious or an abuse of the court process
- (d) Geographical jurisdiction
- (e) Legal insufficiency of a pleading often described as a demurrer
- (f) Res judicata
- (g) Lack of capacity to sue given the above background.

The inquiry for this court is to establish whether or not the respondent preliminary objection passed the test of a true preliminary objection as known in law. Thus, in the star case of **Mukisa Biscuit Manufacturing Company Ltd v West end Distributors Ltd 1969 EA 696** the court stated in part and captured the principles as follows:

“so far as I am aware a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose the suit. Examples are an objection to jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. Further the court held: “A preliminary objection is in the nature of what used to be a demure. it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or of what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion confuse the issues. This improper practice must stop.”

The conclusion to be drawn from the above decision is that a preliminary objection to the proceedings should be primarily centred on a pure point of law.

In the present case the respondent’s counsel submitted that the court is ousted of jurisdiction to hear and determine the chamber summons from the decision of taxing master. Having considered the submissions, it is obvious that the respondent’s counsel has got it all wrong. On the application of Article 162(1) (2) of the constitution and section 13(1) of the Environment and Land Court Act on the subject matter jurisdiction of this court.

The ruling on the advocate-client bill of costs taxed by the Deputy registrar of the High Court was not premised on a declaration that the plaintiff is the allottee of the Land, subject matter of the taxation. It is obvious from the laid down facts as deduced from the bill of costs, parties were seeking a determination for the award of costs based on professional services rendered to the applicant. In light of the above the issues being canvassed on reference or review of taxing master ruling has nothing to do with disputes between the parties in ELC Case No. 615 of 2017.

I have examined all fronts of the preliminary objection and its supporting grounds in respect of the bill of costs between the applicant and her legal counsel. I am fortified by the principles in **Mukisa case (Supra)** which articulates the guiding principles on what constitutes a preliminary objection in any judicial proceedings. The preliminary objection in the instant case as advanced by the respondent’s counsel cannot be brought within the scope of Articles 162(1) (2) as read with 165 (3) of the Constitution and section 13(1) of the ELC Act. To counsel that presents a narrow interpretation of the law on subject matter jurisdiction of Deputy Registrars.

On this ground the jurisdiction of the court has been properly invoked by the applicant under rule 11(1) of the advocate Remuneration Order the preliminary objection therefore fails.

Issue No. 2

Whether the application as filed is defective for want of grant of letters of administration.

According to the submissions by counsel for the respondent it’s apparent that the applicant Keziah Gathoni Supeyo is now deceased one should note that the applicant’s counsel has not disputed the fact of the death of the applicant in both the ELC proceedings and the taxation.

Having considered the submissions, it is trite law under section 45 of the law of succession Act that any dealings with the estate of the deceased without grant of letters of administration amounts to intermeddling, alteration, disposal and wastage of the estate. Further support of this view is to be found in the court’s decision in the matter of the estate of **Veronica Njoki Wakagoto (Deceased) 2013 eKLR** which considered the principles of section 45 of the Act and held as follows:

“The effect of this is that the property of a dead person cannot be lawfully dealt with by anybody unless such person is authorized to do so by the law. Such authority emanates from a grant of representation of any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”

The 4th schedule of the law of succession provides for the making of special grant of letters of administration to deal with prosecution or defence of suits affecting the rights and property of the estate of the deceased. It states as follows:

“when it is necessary that the representation of a deceased person be made a party to a pleading suit and the execution or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such a suit limited for the purpose of representing the deceased in the said suit in any other cause or suit which may be commenced in the same or any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made thereafter and carried into complete execution.”

Section 67 of the law of succession and rule 36 of the Probate and Administration Rules allows for the making of special grant of letters referred to as Grant Ad Colligenda bona limited for collection and preservation of assets of the deceased estate. Given these legal provisions for the counsel to have a right of entry to preserve the estate of the deceased, there shall be a nominee duly issued with grant of letters of administration Ad Colligenda bona under section 67 or grant of letters of administration Ad litem obtained for purposes of this suit as provided for in Section 54 of the Act.

Furthermore, there are no reasons given why it was right to prosecute or defend the claim involving an estate of the deceased person while overlooking the provisions of section 54 and 67 of the law of successions Act on special grant of letters of administration.

The problem arises in two ways; the first deals with retainer of professional legal services to the firm of Kemboy Advocates to pursue the

interest of the estate of the deceased. How were instructions received to either persecute or defend taxation proceedings for that matter. Secondly, the essence of the advocate-client bill of costs lies in the generality of it being enforced as a court judgement. It is easily pointed out that the administrator would be a party to the proceedings before the subordinate court or any such other applications on appeal or review filed at the High Court.

In my view what the applicant's counsel action meant in filing the suit papers was to do such things as may be necessary for the preservation of the estate. However, I must express regret that he took such steps without first the making of grant of letters of administration of the estate of the deceased. It is well settled that a right to seek a remedy to the estate of the deceased by any party does not exist unless it's conferred with grant of letters of administration appointing an administrator under section 83 of the Act. Accordingly, there is a fatal defect in the current proceedings filed by both counsels.

Issue No. 3

Whether the disputed Advocate-client bill of costs merits maintenance by this court

The Law applicable

The Advocate-Client bill of costs is governed by Schedule VI Part (b) of the Advocates Remuneration Order. The schedule sets out the parameters to be considered by the taxing master in determining costs payable to the Advocate for professional legal services rendered to a client. The law in these kind of matters places the jurisdiction on taxation of costs upon the Registrars or Deputy Registrars of the High Court. That definition can be found in paragraph 10 of the Advocates Remuneration Order and Section 7 of Schedule six of the Constitution 2010.

Both the High court and the Environment and Land Court Act provides for the duties and functions of a Registrar/Deputy Registrar of the respective courts. The bills of cost in respect of services rendered in any of the subject matter before the High Court or Environment and Land Court are taxable by the Registrars or Deputy Registrars as the case may be under Schedule VI of the Advocates Remuneration Order (a) and (b).

When an Advocate fixes his or her bill of costs before a registrar or Deputy Registrar it matters not whether the officer occupies the office and carries his work at the High court or Environment and Land Court. The jurisdiction to be exercised by the Registrar or Deputy Registrar are clearly spelt out in the Advocates Remuneration Order. The respective High court and ELC statutes and Order 49 of the Civil Procedure Rules. The Advocates Remuneration Order provides for the scale of fees chargeable for the various services attributable to the advocate on both contentious and non-contentious matters.

A certificate of taxation issued by the Registrar or Deputy registrar of the court is appealable to the High court by way of reference as provided for under rule 11(1) of the Advocate Remuneration Order.

This legal proposition was discussed in the case of **Machira and Company Advocates v Magugu 2002 2EA 248** where Ringera J held as follows:

“Secondly as I understood the practice relating to taxation of bills of costs, any decision of the taxing officer whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the bill of costs is ventilated by way of a reference to the Judge in accordance with paragraph 11 of the Advocates Remuneration Rules”. and further in **Donholm Rahisi Stores (Firm) v EA Portland Cement Ltd 2005 eKLR** the court held:

“Taxation of costs whether those costs be between party and party or between Advocate-client is a special jurisdiction reserved to the taxing officer by the Advocates Remuneration Order. The court will not be drawn into arena of taxation except by way of a reference from a decision on taxation, made under rule 11 of the Advocates Remuneration Order. The present application is not a reference. The application seeks an order that would have the effect of interfering with the special jurisdiction of the taxing officer, a jurisdiction that the court cannot take upon itself.”

In the instant case learned counsel Yano & Advocates objected to the chambers summons by the applicant challenging the taxed bill of costs. In the aforesaid application, it is contended that the taxing master erred in fact and law in exercising discretion to award exorbitant instructions fees contrary to the established legal principles on taxation.

The applicant's counsel further argued and submitted that in taxing the bill the taxing officer ignored an earlier consent on fees of Ksh. 9,000,000 payable to the respondents. It was the applicant's counsel contention that the taxing officer therefore erred in law while arriving at a decision of Ksh. 33,294,305.

On her part learned counsel for the respondent maintained that the applicant has filed to demonstrate that the taxing officer erred in addressing all the materials pertaining to the professional legal services and for work done justifying the award of costs.

Having considered all these there is no dispute that taxation of costs rests on the principles stated in the case of **Premchand Raichand Ltd and another v Quarry Services of East Africa Ltd and Others No.3 (1972 EA 162** where the court stated as follows on the principles on taxation: ***(a) successful litigant ought to be fairly reimbursed for costs he has had to incur (b) That costs be, not allowed to rise to such level as to confine access to justice to the wealthy. (c) that the general level of remuneration of advocates must be such as to attract recruits to the profession and (d) that as far as practicable there should be consistency in the awards made. (e) that there are no mathematical formulae to be used by the taxing master to arrive at the precise figure. Each case has to be decided on its merits and circumstances (f) the taxing officer has discretion in the matter of taxation but he must exercise the discretion judiciously and not***

whimsically (g) the court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party.”

From the above principles the duty of a taxing officer is to assess the fair and reasonable remuneration under the Advocates Remuneration Order that a party or an advocate is entitled to pay to the other party who is said to have won the legal contest. On perusal of the submissions I am concerned with an issue as to whether the taxing officer decision in exercising discretion applied the settled principles on various cases in assessing counsels’ bill of cost. It is also clear that item one on instruction fee was allowed as drawn by the respondent counsel.

As was said in the case of **Republic v Ministry of Agriculture & 2 Others Exparte Muchiri 2006 eKLR**, the jurisdiction by the High court to interfere with the decision of a taxing officer must only be on the basis that there were mis-directions amounting to errors of law in the findings of the certificate of costs in respect of the material issues and evidence placed before the taxing officer. That the misdirection and error entitles the court to upset the finding of fact and law by the taxing officer. I adhere to these principles which have already been laid down. The remuneration of advocates in connection with non-contentious and contentious matters is regulated by the Advocates Remuneration Order. It prescribes and regulates various fees chargeable on any business, transaction in court or in their chambers. Combining with the above observation Advocate-Clients can also enter into agreements to govern payment of their fees.

The information in question must be furnished to the taxing officer in the event a bill of costs is filed for consideration by the court. If having regard to the evidence, nature of the claim and its complexity, its importance to the party or parties, the time and resources expended by the advocate in research, communication, attendances, a taxing officer decision must give reasons for the cost permitted in the taxation.

The law in Kenya provides for considerable guidance regarding instructions fees that should be charged in non-contentious matter. According to schedule VIA(a) of the Advocates Remuneration Order the underlying factors on instructions fees clearly spelt out. To give meaning to the provisions the taxing officer is clothed with wide discretion to make an inquiry as to the suitability on instructions fees in order to enhance or reduce it altogether. The approach to be adopted in taxing instruction fees lies in the principles in the case of **Jorerth Ltd v Kigano Advocates 2002 IEA 92** where the court held interalia that:

“The instructions fee is an independent and static item it is charged once only and it is not affected or determined by the stage the suit has reached.”

The facts of the application according to the outcome narrated by the applicant’s counsel it appears to me that more than one advocate has acted for the party in the ELC proceedings. On the issue of instructions fees the taxing officer is bound to consider that services rendered involved more than one counsel who has filed the bill of costs. The applicant in this respect was awarded instructions fees of Ksh. 21,200,000 which she claimed under item 1.

Bearing in mind the decisions in **Kipkorir T. Too & Kiara Advocates v Deposit Protection Fund eKLR 2004 Premichand Raichand Ltd (Supra)**, the costs taxed at the conclusion of the bill of costs paint a picture where the taxing officer ignored and failed to apply the principles of taxation established by the above cases and others not specifically referred to in this matter. There should be always a principle to consider in all taxation that no advocate or litigant should profit from a litigation.

In this application I have come to the clearest conclusion that the assessment and taxation carried out by the taxing officer cannot be left to stand. The taxation took place as provided for under the Advocates Remuneration Order when the taxing officer came to deliver her ruling she gave no reasons for her decision as required under the Advocates Remuneration Order and Article 10 of the Constitution.

As such this is one of the grounds which impugns the certificate of costs by the taxing officer. From the record the aggrieved party demanded to be provided reasons for the decisions by the taxing officer but at the time of filing the reference no such reasons had been provided for in compliance with the law.

In those circumstances and in view of the clear provisions of the Advocates Remuneration Order and case law cited in support of this application the bill of cost cannot be allowed to stand. It is for these reasons I would therefore allow this notice of motion by setting aside the taxed bill of cost and in its place order for a re-taxation to be carried out by another Deputy Registrar besides Hon. Kasera.

Dated, delivered and signed in open court at Kajiado this 13th February, 2019.

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R. NYAKUNDI

JUDGE

Representation

Mr. Ogonjo for the Applicant - present

Mr. Omwaka for the Respondent - present