



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**MISCELLANEOUS APPLICATION NO. 24 OF 2018**

**IN THE MATTER OF JAVAN KITOGHO MWAKIO (DECEASED)**

**JANE WAWUDA KITOGO.....1<sup>ST</sup> APPLICANT**

**ESTHER SARU KITOGHO.....2<sup>nd</sup> APPLICANT**

**VERSUS**

**JOSEPH GATHUKU & CO. ADVOCATES.....RESPONDENT**

**RULING**

1. The Applicants Jane Wawuda Kitogo and Esther Saru Kitogho filed the Application before me dated 13.12.18 seeking the following orders:

**1. Spent.**

**2. THAT the Execution of the Taxing Officer's decision dated 30<sup>th</sup> November 2018 be stayed pending the hearing of this application.**

**3. THAT the execution of the Taxing Officer's decision dated 30<sup>th</sup> November 2018 be reviewed, quashed and/or set aside.**

**4. THAT the decision of the Taxing Officer's dated 30<sup>th</sup> November 2018 be substituted with the decision of this Honorable Court or in the alternative, the Bill of Costs dated 9<sup>th</sup> August 2018 be remitted back to another Taxing Officer for reassessment and re-taxation.**

**5. THAT costs in this application be provided for.**

2. The Applicants state in their affidavit sworn on 13.12.18 that as the administrators of the estate of their late father Javan Kitogho Mwakio, they had instructed the firm of Joseph Gathuku & Co. Advocates, the Respondent, to file an application for rectification of grant act in respect thereof. They paid to the Respondent legal fees in the sum of Kshs. 214,500/=. The Respondent filed a Bill of Costs which was taxed at Kshs. 835,388.40. The Applicants are dissatisfied with the decision of the taxing officer and have filed this Application. According to them, the instruction fee and other costs/fees awarded are excessive. The taxing officer failed to give due consideration to the issues raised in the Applicants' affidavit and submissions. The taxing officer failed to consider the public policy on the need to keep advocates' fees affordable just and fair. The amount taxed is excessive, unfair and unjust and not commensurate to the services rendered by the Respondent. It is therefore only fair and just that the taxing officer's decision is stayed, as it will occasion the Applicants to suffer irreparable loss and damage.

3. The Respondent filed a preliminary objection sated 17.12.18. The ground raised is that the Application is incurably defective in that the Applicants have misapplied and/or ignored the law relating to objections to taxation decisions. The prayers sought are incapable of being granted. In his Grounds of opposition dated 17.12.18 and replying affidavit sworn on 18.12.18, the Respondent states that no appeal or reference has been filed to warrant the grant of the orders sought. He filed the bill of costs having obtained the leave of the Court to cease acting for the Applicants. The bill of costs was duly taxed and a ruling delivered. The Respondent argues that this Court has no jurisdiction to review the decision of a taxing officer. The Applicants have failed to comply with the provisions of the Advocates Remuneration Order (ARO). The Applicants have not notified the taxing officer of any item they object to as required by law. The Application is brought in bad faith to delay justice and to deny the Respondent the fruit of his award. He urged that the Application be dismissed with costs.

4. The Applicants case is that the taxing officer erred in awarding a manifestly high amount *vis a vis* the work done in respect of an estate worth not more than Kshs. 2,000,000/=. To the Applicants, the amount of Kshs. 214,500/= paid to the Respondent was adequate. The Respondent on the other hand contends that the Applicants have not followed the procedure laid out in the ARO for challenging the award.

5. In the celebrated case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696 in which Sir Charles Newbold had this to say on a preliminary objection:

***A preliminary objection is in the nature of what used to be a demurrer. 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 if what is sought is the exercise of judicial discretion.***

6. The question this Court has to consider is whether the objection raised is a pure point of law. The Respondent contends that the application is incurably defective in that the Applicants have failed to comply with the provisions of paragraph 11 of the ARO relating to objection to a taxing officer's award.

7. The procedure to be followed by a party dissatisfied with an award by a taxing officer is set out in the ARO. Paragraph 11 provides:

**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.***

8. The available recourse for the Applicants as set out in the ARO was to notify the taxing officer in writing that they object to the instruction fee and other costs/fees. This ought to have been done within 14 days from 30.11.18 when the decision was made. It is not clear why the Applicants chose to move to this Court seeking a review or setting aside of the award of the taxing officer in total disregard of the procedure set out in the ARO. In the matter herein, there are no contested facts nor is the exercise of judicial discretion called for. This in my view is a pure point of law which if determined in the favour of the Respondent will conclude the matter.

9. Our Courts have consistently that where an established statutory procedure for redress of any grievance exists, a party must strictly follow the same in order to be deserving of any relief sought. This was the holding in Speaker of the National Assembly v James Njenga Karume [1992] eKLR where the Court of Appeal stated:

***In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.***

10. The Applicants, being aggrieved by the decision of the taxing officer ought to have strictly followed the laid down mechanism provided under the Advocates Remuneration Order. Having disregarded the prescribed procedure, the Application was dead on arrival. Accordingly, I uphold the preliminary objection and strike out the Application dated 13.12.18 for being incompetent. The Respondent shall have costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 17<sup>th</sup> day of May 2019**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Applicants**

..... **for the Respondents**

..... **Court Assistant**