



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**MISC. CIVIL SUIT NO. 119 OF 2015**

**ARISING FROM NAIROBI SUCCESSION CAUSE NO. 361 OF 2001**

**J.M. NJENGA & CO. ADVOCATES.....ADVOCATE/APPLICANT**

**VERSUS**

**FRANCIS CHEGE MAINA.....1<sup>ST</sup> RESPONDENT/CLIENT**

**JOSEPH MACHARIA MAINA.....2<sup>ND</sup> RESPONDENT/CLIENT**

**JAMES KIHARA MAINA.....3<sup>RD</sup> RESPONDENT/CLIENT**

**DEDAN MUTHAIGA MAINA.....4<sup>TH</sup> RESPONDENT/CLIENT**

**THE ADMINISTRATORS,**

**ESTATE OF SAMUEL MAINA GATONGA ALIAS**

**SAMUEL MAINA, ALIAS**

**MAINA GATONGA.....5<sup>TH</sup> RESPONDENT/CLIENT**

**RULING**

1. This was a reference from the taxing officer's taxation on the applicant's Bill of Costs. The ruling was delivered on 6<sup>th</sup> October 2016 on the Bill of Costs dated 13<sup>th</sup> August 2015. In her ruling, the taxing officer found that the 5<sup>th</sup> respondent was improperly enjoined as the taxation was between the clients who instructed the advocate and not as against the estate of Samuel Maina Gatonga. The taxing officer proceeded to tax the 231 items of the Bill. Of interest to this application was item 1, in respect of which the taxing officer found that the applicant had been instructed to represent the respondent on the pending issue of distribution of the estate; that instruction fees on that kind of brief did not fall under the assessment of Schedule X paragraph 1a as it was not for applying for a grant, but that it came under the general paragraph on applications not otherwise provided for; and that the value of the estate was a guiding principle which she had considered in exercising the discretion as to how much the applicant was entitled to. Having considered the nature of the matter, the background work that needed to be done by the Advocate, the general conduct of the proceedings, and the interests of the parties against whom the Bill was taxed, the taxing officer proceeded to tax the Bill, allowing the instruction fees at Kshs.1,000,000/=.

2. Being dissatisfied with the taxing officer's decision, the applicant filed this reference seeking the following orders:

a) that the taxing officer's decision of allowing Kshs.1,000,000/= as basic instructions fees in respect of item (1) of the Advocate/Client Bill of Costs dated 13<sup>th</sup> August 2015 in the ruling delivered on 6<sup>th</sup> October 2016 be varied and/or set aside;

b) that the court in the spirit of expeditious and timely disposal of the subject matter be at liberty to re-tax the said Bill of costs with a view of enhancing the fees payable under the said item (1) and/or in the alternative, the matter be referred back for re-taxation before another taxing officer on such guidelines that the court may deem just and appropriate to issue; and

c) that the costs of this application be provided for.

3. The application was based on the grounds that the taxing officer in her ruling delivered on 6<sup>th</sup> October 2016 misdirected herself in both law and fact in arriving at a basic instructions fees of Kshs.1,000,000/= in respect of item 1 of the Bill of Costs; that costs were manifestly too low as the taxing officer failed to take into account the nature of the dispute handled by the Advocate in the parent file (**Nairobi High Court P & A 361/2001**); failing to appreciate the value of the suit properties yet there were valuation reports to help guide the value thereof; that the taxing officer misdirected herself in both law and in fact in that despite holding in her taxation ruling that the value of the subject property was to be considered in arriving at the basic instructions fees, she in fact failed to consider the value of the properties in dispute; that the taxing officer erred in both law and fact in failing to disclose the remuneration order she used in taxing the Bill of costs; the taxing officer acted on wrong principles and arrived at a figure on the basic instructions fees that was manifestly too low and which was a failure on her part to exercise her discretion judiciously; that the taxing officer misdirected herself in both law and fact in failing to appreciate the fact that the nature of the dispute in the parent file was a succession matter with the dispute being between the beneficiaries and ordinarily, advocate/client costs in such succession matters are paid out of the estate and should not have held that the 5<sup>th</sup> respondent had improperly been enjoined; that the taxing officer failed to exercise her discretion judiciously by allowing a figure in respect of the instructions fees that was manifestly too low all relevant factors considered; and that the interests of justice dictate that the orders sought be granted.

4. The application was supported by affidavit of Jeremy Njenga dated 26<sup>th</sup> October 2016. His case was that the subject matter/taxation stemmed from the applicant's representation of the 1<sup>st</sup> to 4<sup>th</sup> respondents in a succession matter in respect of their late father's estate (**Nairobi High Court Succession Cause No. 361 of 2001**) in which the 1<sup>st</sup> to 4<sup>th</sup> respondents were beneficiaries of the said estate; that the said representation which initially started as an application for the revocation of the grant, mutated into distribution of the estate and which distribution called for a host of valuations, meetings, discussions among the various advocates representing the various beneficiaries and the beneficiaries themselves as well as a host of applications; that the applicant's law firm played a pivotal role in the said distribution process which as stated hereinabove included valuation of some of the properties and filing of the appropriate valuations; that in the ruling delivered on 6<sup>th</sup> October 2016, the taxing officer allowed the Bill in the sum of Kshs.2,113,394/= out of the claimed sum of Kshs.66,019,812.50; and that the challenge against the said taxation orders on the amount of Kshs.1,000,000/= allowed in respect of item 1 of the Bill of Costs dated 13<sup>th</sup> August 2015 because the amount allowed was so manifestly low.

5. The respondents did not file a response to the application.

6. The applicant and the 5<sup>th</sup> respondent filed their submissions which I have considered. The 1<sup>st</sup> to 4<sup>th</sup> respondents did not file their submissions.

7. On the allegation that item 1 of the Bill of Costs was manifestly too low, it was the applicant's submission that when determining the issue of instruction fees, the taxing officer must appreciate that an advocate is entitled to full instruction fees irrespective of the stage at which the said advocate either left the matter or joined the matter, and must consider the value of the subject matter. He relied on the case of **Joreth Lts vs Kigano (2012) 1EA.92**. He also submitted that the scope of the work done by him was not as narrow as put by the taxing officer but entailed the initial instructions to have the grant revoked which mutated to distribution of the estate which involved valuation of the assets of the estate. On the value of the estate, he submitted that the estate involved a total of 158 assets worth of billions of shillings including such landmark assets like Ambassador Hotel building, the adjacent Capital building, Rajab Manzil, Spring Valley Shopping Centre, a host of buildings and apartments spread out in several towns in Kenya, thousands of acres of farm land, go-downs e.t.c. and all ought to have been considered.

8. On the issue of whether the taxing officer's decision that the 5<sup>th</sup> respondent was improperly enjoined was merited, his submission was that the reason why the estate was enjoined in the Bill of Costs was based on the widely held position that in succession matters, costs are payable from the estate unless in very exceptional circumstances and thus on abundance of caution the estate was equally enjoined just in case a decision was made that costs are payable from the estate appreciating that the 1<sup>st</sup> to 5<sup>th</sup> respondents were not litigating on their own private issues but rather on account of issues arising from their entitlement from the estate.

9. The 5<sup>th</sup> respondent was the only one who filed written submissions. The estate concentrated on the issue of whether the taxing officer's decision that it was improperly enjoined was merited. It was submitted that the 1<sup>st</sup> to 4<sup>th</sup> respondents did not instruct the applicant on behalf of the estate of the deceased but on their own accord; that the applicant misinterpreted the law by stating that in succession matters costs are payable from the estate; and that the law on indemnity of costs only applies if the party acted on behalf of the estate of the deceased as an administrator or personal representative under a grant of representation. He cited **Section 92(1) of the Law of Succession Act, cap 160** and relied on the case of **Christine Wangari Gachigi & 3 others v Elizabeth Wambui & 9 Others [2014] eKLR**.

10. I have considered the ruling on the Bill of Costs delivered on 6<sup>th</sup> October 2016, the application, the supporting affidavit, the written submissions, and the authorities referred to by learned counsel.

11. In the Court of Appeal decision in **Premchand Raichand –v- Quarry Services (No. 3) [1992] E.A 162** it was held that the court will not interfere with the award of the taxing officer merely because it thinks the award was somewhat too high or too low. It will only interfere if it thinks the award was so high or so low as to amount to an injustice to one party or the other. In **First America Bank of Kenya –v- Shah & Others [2002] E.A.L.R. 64**, the High Court noted that the applicant has to show that the award of the taxing officer was based on an error of principle, or the award made was so manifestly excessive as to justify an influence that it was based on the error of principle.

12. It is also trite that the taxing officer should consider that:

- (a) costs should not be allowed to rise to such level as to confine access to the courts to the wealthy;
- (b) a successful litigant ought to be fairly reimbursed for the costs he has incurred;

- (c) the general level of remuneration of advocates must be such as to attract recruits to the profession; and
- (d) so as practicable, there should be consistency in the award made.

What has to be emphasised, however, is that the taxing officer should be allowed to exercise his discretion in determining the amount to be awarded in a Bill of Costs. In exercising this discretion, he should bear in mind the value of the subject matter and, in doing so, he should not adopt a figure that is not based on a pleading, judgment or settlement (**Mereka and Company Advocates –v- National Bank of Kenya Ltd, HC Misc. Appl. No. 391 of 2002 at Milimani**).

13. In the Bill of Costs, the applicant, who had been instructed by the 1<sup>st</sup> to 4<sup>th</sup> respondents, asked for Kshs.37,507,500/=. The instructions were to pursue distribution of the assets due to the house of Bilha Njoki Maina following the certificate of confirmation of the grant issued on 3<sup>rd</sup> July 2008 amongst the beneficiaries of the said house who included the 1<sup>st</sup> to 4<sup>th</sup> respondents and to also pursue their shares in respect of Ambassadeur Investment Co. Ltd. According to the record the grant that was issued shared out quite a substantial number of assets of the estate of the deceased. There were assets that had not been allocated and which were registered under the umbrella of Ambassadeur Investment Co. Ltd that were the subject of the dispute that the applicant was instructed to help resolve. A valuation was done of the assets under the company. The value was Kshs.1,190,710,000/=. When the applicant stated that the value of the estate was Kshs.5,000,000,000/= he was referring to the entire estate, distributed and not distributed. When the taxing officer indicated that she had considered the value of the estate to reach the figure of Kshs.1,000,000/=: it is not clear what value she was working with. Was it Kshs.5,000,000,000/= or Kshs.1,190,710,000/=: or some other figure? More important, when the 1<sup>st</sup> to 4<sup>th</sup> respondents on 3<sup>rd</sup> June 2016 filed submissions to defend the Bill of Costs before the taxing officer they offered to pay Kshs.3,976,533/33 being instructions fees. It was not indicated in the ruling of the taxing officer why, given the offer, only Kshs.1,000,000/= was awarded. Further, according to the respondents' own calculation, Kshs.3,976,533/33 was on the assumption that one was dealing with only their share of the undistributed property worth Kshs.1,190,710,000/=. That share was, according to them, worth Kshs.529,204,444/=. It follows that, if one were to accept their argument, then where the value of the subject matter was Kshs.1,190,710,000/= the instructions fees awardable in item 1 should have been well in excess of Kshs.3,976,533/33.

14. In other words, when the taxing officer awarded Ksh.1,000,000/= being instructions fees in item 1 that was not a proper exercise of her discretion. This led to a figure that was too low that it amounted to an injustice on the part of the applicant. There was no evidence that indeed the value of the subject matter was considered.

15. The reference was also on the taxing officer's decision that the 5<sup>th</sup> respondent was improperly enjoined in the Bill of Costs. The applicant's position was that, in succession matters costs are payable from the estate unless in very exceptional circumstances; that it was out of abundance of caution that the estate was enjoined just in case a decision was made that costs would be paid from the estate. The 5<sup>th</sup> respondent's response was that the taxing officer was right in reaching the decision that the estate was improperly enjoined. It was submitted that the 1<sup>st</sup> to 4<sup>th</sup> respondent did not instruct the applicant to act on behalf of the estate, or for its benefit. The applicant was to act for them against the estate. It was further resubmitted that, the law on indemnity of costs only applies if the party acted on behalf of the estate of the deceased, that is, if the party acted on behalf of the estate as an administrator or personal representative under a grant of representation. **Section 92(1) of the Law of Succession Act (Cap 160)** provides that –

**“Any person making or permitting to be made any payment or disposition in good faith under a grant of representation shall be indemnified and protected in so doing, notwithstanding any defects or circumstances whatsoever affecting the validity of the grant.”**

The general principle is that the estate has to bear the expenses incident to the proper performance of the duties of the personal representative as personal representative. The general costs of administering the estate are testamentary expenses. The estate must therefore bear the costs of obtaining the grant, collecting and preserving the estate, discharging the debts and distributing the balance. The 1<sup>st</sup> to 4<sup>th</sup> respondents were not the administrators of the estate of Samuel Maina Gitonga alias Samuel Maina alias Maina Gitonga. They were objectors to the grant, and in that regard instructed the applicant. The costs of instructing or retaining the applicant were not to be borne by the estate but by themselves.

16. It follows that the taxing officer correctly refused to have the 5<sup>th</sup> respondent to be enjoined in the Bill of Costs.

17. Back to the award of instructions fees on item 1 of the Bill of Costs. In the case of **Steel Construction and Petroleum Engineering (EA) Ltd –v- Uganda Sugar Factory Ltd [1970] EA 141**, it was observed that it is not in the province of a judge to re-tax the Bill. If the judge comes to the conclusion that the taxing officer has erred in principle he should refer the Bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done.

18. I allow the reference on the issue of quantum on item 1 of the Bill of Costs, and remit the same for fresh taxation before another taxing officer. The applicant shall have the costs of the application.

**DATED and DELIVERED at NAIROBI this 17<sup>TH</sup> day of MAY 2018**

**A.O. MUCHELULE**

**JUDGE**