



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MISC NO. 28 OF 2016

**KIBANYA & KAMAU ASSOCIATES ADVOCATES.....APPLICANT**

**VERSUS**

**DORCAS WANJIRU MWANGI.....DEFENDANT**

**JUDGMENT**

1. The application coming for consideration is the Notice of Motion dated 28/6/2017. It is brought under Section 51(1) of the Advocates Act Cap 16 Laws of Kenya, Rules 2, 13A, 16& 55 of the Advocates Remuneration Order, Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 1A & 1B of the Civil Procedure Act. The applicant seeks the following the orders that;

a. The Honorable Court be pleased to order that the respondent do furnish a frank and full inventory of all assets which are subject to matter of **High Court Succession Cause No. 2114 of 2013 Milimani: In The Matter of The Estate of David Mwangi Mwarangu (Deceased)** so as to enable the honorable court to make appropriate orders as regards the determination of the value of the same.

b. That the Honorable Court to also be pleased to order the Client /Respondent to furnish certified copies of Bank statements for the following accounts(which are the subject matter of **High Court Succession Cause No. 2114 OF 2013 Milimani: In The Matter of The Estate Of David Mwangi Mwarangu (Deceased)**)showing the respective bank respective bank balances as at19th September 2014 (when the Advocate/Applicant received instructions);

a. Cooperative Bank Kariobangi Branch Account No. 01109042001600

b. Equity Bank Account No. 00200100047678

c. Family Bank Account No. 041000000303

d. Family Bank Account No. 041410302303

e. Barclays Bank Account at Kariobangi Branch Bank

f. Barclays Bank Account at Development House Branch Nairobi

g. Bank Account at Faulu Micro- Finance

c. That the court be pleased to allow valuation of all assets in **High Court Succession Cause No. 2114 of 2013 Milimani: In The Matter Of The Estate Of David Mwangi Mwarangu (Deceased)**cited in the inventory furnished to this Honorable Court pursuant to prayer 2 above by the valuer (s) to be agreed upon, failing to which, to be appointed by the Honorable court.

d. That in the alternative and without prejudice to the foregoing the honorable Court be pleased to order that the Advocate/Applicant herein do engage valuers to carry out valuation of all the assets cited in the inventory furnished to the honorable Court pursuant to prayer 2 above with cost of the same to be provided for and paid out of the said estate of **David Mwangi Mwarangu (Deceased) in High Court Succession Cause No. 2114 Of 2013 Milimani.**

e. That the Honorable Court be pleased to order that the Client/ Respondent do grant full and unlimited access to the assets cited in the inventory furnished to the Honorable Court for valuation of the same as ordered by the Honorable Court.

f. That in any event, the Honorable Court be pleased to provide for the cost of valuation of all assets in **High Court Succession Cause No. 2114 Of 2013 Milimani: In The Matter Of The Estate Of David Mwangi Mwarangu (Deceased)** cited in the inventory furnished to the Honorable Court pursuant to prayer 2 above which are born by the said estate.

g. The honorable court be pleased to make and grant any such further and or other orders or directions in the interest of justice.

2. The same is supported by the sworn affidavit of Wilson Kamau dated the 28th of June 2016. The grounds stated in support of the application form part of the applicant's affidavit which I need not repeat. The applicants main contention is that respondent at the time of giving the firm instruction relied on her estimate of Kshs. 3 million. That the said sum was not supported by any professional valuation or any evidence at all. That the matter is pending taxation yet the gross capital value of the estate in **High Court Succession Cause No. 2114 of 2013 Milimani: In the Matter Of The Estate Of David Mwangi Mwarangu (Deceased)** is contended as between the parties yet with the true value therefore being unknown hence the valuation of the estate. It's the application averment that according to paragraph 1 of the Schedule 10 of the Advocates ( Remuneration) (Amendment) Order 2014 there is provisions for instruction fees ( on a party and party basis) in contentious probate and administration matters and that they are assessed on the gross capital value of the estate. That there was a dispute as to the inventory of all the assets in the estate of Mwarangu. That the affidavits did not disclose the bank balances in the various bank accounts. That it is the interests of justice that the respondent provides a frank and full inventory of all the assets of the estate as sought in the application.

3. The application was opposed the respondent who filed her grounds of opposition dated 30th June 2016. She avers that the application is misconceived and incompetent as the court is devoid of the jurisdiction to grant the orders sought under the provisions of the law. That the capital value of the estate has been pleaded in form P & A 5 which the court has previously adopted in a similar taxation emanating from the same proceedings involving Nick Ndichu & Co. Advocates. That the bill of cost filed on 2nd March 2016 is not based on the capital value of the estate but factors that the court can discern from the pleadings filed and make an assessment on applicable costs adding that the application is an afterthought.

4. The respondent in her submissions filed on the 10<sup>th</sup> June 2016, submitted that the client's bill of cost emanates from High Court Succession Cause No. 2114 of 2013 and therefore the applicable law is provided under schedule 10 of the Advocate's Remuneration Order. That under schedule 10 paragraph 1 of the Advocates (Remuneration)(Amendment) Order (ARO) 2014 computation of instruction fees is provided for, "5% of the value on the 1st 1,000,000 thereof and 1% over Kshs.1, 000,000 adding that the value of the calculation should be on the basis of fees in item 1. That following the ruling by the Deputy Registrar Kendagor Caroline this suit was established at Kshs. 3,000,000 and therefore item 1 should be taxed at 70,000. That under schedule 10 of the Advocate's Remuneration Order service of documents is not allowed and therefore items 2(d), 5(d), 9 and 19(d) should not be allowed. That items 2(a), 2(b), 2(c), 3(a), 3(b), 4(a), 4(b), 5(b), 5(a), 5(b), 5(c), 6(a), 6(b), 6(c), 7(a), 7(b), 7(c), 7(d), 7(e), 7(f), 7(g), 8, 10, 10(b), 11, 15, 15(a), 15(b), 15(b), 16(a), 16(b), 19(b), 19(c), 22, 25 are drawn to scale and may be allowed. That whereas the advocate claims instruction fees on account of service rendered under item 7, 13, 14, 16, 17 and 19 schedule 10 paragraph 1 of the advocates Act does not provide for such items.

5. On item 12(a) schedule 10 paragraph 2 is applicable since the applicant extracted the consent orders. That drawing of any form or document as prescribed by the law amounts to Kshs.1,200. The applicant went ahead to forward the copies to two other law firms each copy at Kshs.235 thus Kshs.470 for both copies. A letter to the Deputy Registrar should be taxed at Kshs.300 under paragraph 3(a) and attendance at the registry should be taxed at Kshs.300 under paragraph 6(a) two copies of that letter were made at Kshs.470 as per paragraph 3(a) and attendance at Kshs.700 as per paragraph 6(i) therefore item 12(a) ought to be taxed at Kshs.3, 140. That item 13 refers to drawing of a reply to summons application dated 3/12/2014 with application of schedule 10 paragraph 2(a) ought to be taxed at Kshs.1200. The receiving and perusing paragraph 4(b) at Kshs.600 since the number of folios was not indicated. Item 13 should therefore be taxed at 1800. Item 14 the applicant amended the consent orders dated 8/12/2014 which amounts to Kshs.1200 under schedule 10 paragraph 2(a), he drafted a letter dated 17/12/2014 and dispatched it to the two firms for signatures which amounts to 300 as per paragraph 6(a) hence item 14 should be taxed at Kshs.1500. that in item 16 certificate of urgency and affidavit drawn. According to the schedule 10 paragraph 2(a) perusal of any document allowed at Kshs. 1200 hence item 16 should be taxed at 2400. In item 17 applicant perused both the notification of sale of motor vehicle and memorandum of Deposit. According to schedule 10 paragraph 4(b) perusal of any document prescribed or required by the law ought to be allowed at Kshs.600 thus  $600 * 2 = 1200$  and dispatching letter dated 19/12/2014 amounts to 300. Item 17 should be taxed at Kshs.1500. Item 18 attendances to court for mention should be taxed at Kshs.700 as per the schedule 10 paragraph 6(i). Item 19(a) the applicant drew summons under Section 45 with reference to schedule 10 paragraph 2(a) this amounts to  $Kshs.1200 * 2 = 2400$ . Item 19 ought to be taxed at Kshs.2400. Item 12, 20, 21 Court attendance for hearing of application. Duration is not specified putting complexity in consideration the same could not have taken more than 1 hour each Under schedule 10 paragraph 6(iii) each should be taxed at Kshs.700 hence each should be taxed at Kshs.2800. that in the case of Michael **Ochieng Mbuya v Jacob Ojwang Ojwang [2013] eKLR** the Court stated that the word folio, as ordinarily used in our country means page. That item 19(a) contains 15 pages, whereas under schedule 10 paragraph 2, drawing of a document per folio is Kshs. 235. Item 19(a) should be taxed at  $15 * 235 = 3,525$ . Item 23 and 24 refer to perusal of 60 and 50 page replying affidavit respectively under schedule 10 paragraph 4(b) perusal of any document should be taxed at 3600. Item 24 contains 50 pages should be taxed at Kshs.3000.

6. The advocate Client bill should be allowed as follows;

Subtotal Kshs. **121, 725.00**

Advocate Client increase subtotal by 50% Kshs. **60, 865.50**

Disbursements Kshs. **1,750.00**

**Total Kshs.182, 587.50**

It was submitted that the bill of costs dated 2nd March 2016 has been grossly exaggerated and he humbly prayed that the same be taxed and allowed at Kshs.182, 587.50.

7. Parties filed written submissions. The applicant in its submissions stated that application for delivery of documents should be filed under Section 51(1) of the Advocates Act Cap 16. Further that the powers of the taxing master to hear and determine application are provided under Rule 13A of the Advocates Remuneration Order which gives the taxing master wide powers in taxation proceedings. Further that the application is premised under section 1A and 1B of the Civil Procedure Cap 21 where courts are enjoined overriding objectives to facilitate just, expeditious and proportionate resolution of disputes hence the application is properly before the court. Further that Section 3A of Cap 21 gives the court power to make any such orders as maybe necessary to meet the ends of justice. Further it was submitted that the respondent cannot raise procedural technicalities to defeat the process of helping the court assess the amount of legal fees payable to the advocates as laid down under Article 159(1) (d) in light of which the respondent's argument holds no water. It was submitted that prayer 3 to 8 of the application call for further information to assist the taxing master in assessing the gross capital value of the property comprised in the estate of the late David Mwangi Mwarangu in line with rule 13A of the Advocate's Remuneration Order. Where the gross capital value of the property is not known as the documents filed have not given the gross capital value. That in the case of **Muriu Mungai vs. New Kenya Co-operative Creameries Limited [2008] eKLR** it was held that the taxing officer has a right to call for further information to assist him assess the true value of the subject matter for purposes of calculating the instruction fees. Adding that the full inventory of the deceased's properties of the estate of the estate of Mwarangu is not known and the respondent should avail the same to the court as the list of assets in the pleadings is not conclusive and the same cannot assist the court to determine the true value of the said estate. Further that the letter of administration gives 9 immoveable properties, 2 motor vehicles and 6 bank accounts. While the affidavit in support gives 10 immoveable properties while the replying affidavit by Jacinta Hito Grishon dated 18/5/2015 shows 8 immoveable properties, 3, motor vehicles and 3 bank accounts. All of the above show variances and hence the court cannot rely on the said pleadings instead the respondent should supply to the court a full list of such properties and balances of each bank account should be disclosed to the court for it to verify the true value of moveable and immoveable assets which he claims can only be ascertained by a registered valuer. In the case of **Tera Waigwa Waihenya & Another vs. Co-operative Bank of Kenya Limited** where it was held that the only way to verify true value of a property is to have the same valued by a professionals adducing valuation reports in evidence. Regardless of the stage at which the same is done. That under rule 51C of the Advocates Remuneration Order the scale of fees applicable to costs in probate and administration in the estates is schedule 10 of the Advocates Remuneration Order 2014 as the advocate was instructed on 6/10/2014. Further that the respondent had estimated the value of the assets of the estate of Mwarangu at Kshs. 3million which is an underestimation of the values of the properties belonging to the said estate. That the developments are generating an income of Kshs. 933,000 per month adding that 5 buildings in Nairobi cannot be valued at 3 million. Hence, the approach of the respondent adopting 3 million as the capital value has no basis in law and the taxing master has a duty to exercise his direction judiciously. As was held in the case of **Kyalo Mbobu t/a Kyalo & Associates Advocates vs. Jacob Juma [2015] eKlr**. It was submitted that the application shall assist the court to arrive at the gross capital value of the assets. This to enable the court assess the proper and due instructions fees payable to the advocate. It has been stated that the advocates should be justly compensated for services rendered.

8. Further, that under Rule 55 the court has power to order costs to be borne by the estate. Hence, the estate should bear the costs of valuation. That advocates fees arise from an advocate rendering a service and the client has a duty to pay for service rendered.

9. The client in her submissions submitted that the subject matter was never in issue reason the advocate filed his bill of costs for taxation. However that the advocate goes ahead and seeks instruction fees not based on the value of the estate later on turn around seeking determination of the capital assets. That the application is premised on provisions of section 51(1), Rules 2, 13A, 16 and 55 of the Advocates and Remuneration Orders and Section 1A and 1B of the Civil Procedure Act. It is submitted that it is incompetent to invoke Civil Procedure Act where the advocates Remuneration Order applies at Section 51(1) of the Advocate's Act does not confer jurisdiction to make an order sought by the advocate in the application neither does Rule 2, 13A, 16 and 55 of the Advocates Act hence the said application is defective and incompetent as the court lacks jurisdiction under the law cited to grant the orders sought. Further that costs under the probate and administration cases are taxed pursuant to Rule 51C of the Advocates (Remuneration) Order and Schedule x adding that there is no provision for orders on valuation of an estate. That the taxation is based on a value that is not pleaded in the bills of costs. Further that the petition for grant of letters of administration filed in succession cause no. 2114 of 2013 clearly shows the capital value of the estate. That claim that capital value of the property be established under Schedule x of the Advocates Remuneration Order has no legal basis adding that the petition for grant is the primary pleading hence no need for invoking Schedule 10. Further that the value set out in Form P&A5 filed together with the petition for grant has been previously adopted in taxation in the case of **Nick Ndichu & Co. Advocates** hence there is no basis to depart from the same and the court would have no jurisdiction to do so as was held in **Civil Case No.66 of 1999, Joreth Limited vs Kigano & Associates**. Further in the Joreth case the court of appeal held, "....."

10. That the gross value of the estate is not given is misleading. He sought to distinguish the case of **Muriu Mungai & Co. Advocates vs. Co-operative Creameries (2008)** the same relates to transfer of property which is non-contentious legal work and there are no pleadings in conveyancing matters. Further, in the said case valuation of the property had been done prior to the advocates presenting a bill of costs in court. Further that the reference made to **Lenna Cathereine Koinange vs. Majanja Luseno Advocates [2014] eKLR** in absence of a value of the estate from the pleadings, the taxing officer should use his or her own discretion to determine instruction fees. Hence, there is no basis to order for a valuation. Cost in the cause. It is so ordered.

Dated, signed and delivered this 13<sup>th</sup> day of July 2018.

**R. E. OUGO**

**JUDGE**

In the presence of;

.....**For the Objectors**

.....**For the Petitioner**

**Ms. Charity Court Clerk**