



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISCELLANEOUS APPLICATION NO. 32 OF 2014

IN THE MATTER OF THE ESTATE OF BAYANI MIYA ADAM

NAHIDA SAID.....PETITIONER

VERSUS

HALIMA HUSSEIN ACHU.....1ST RESPONDENT

MIRADAM BAYANI MIYA ADAM.....2ND RESPONDENT

AND

IN THE MATTER OF THE ESTATE OF ADVOCATE - CLIENT BILL OF COSTS

M. A. MWINYI ADVOCATE.....ADVOCATE

VERSUS

NAHIDA SAID.....CLIENT

RULING

1. Before me for consideration is an application dated 7.5.18 (the Application) by Nahida Said (the Applicant) seeking the review of the judgment of the Court issued on 28.11.14. She further seeks that M. A. Mwinyi Advocate, (the Advocate) do furnish the Court with the valuation report of the estate.
2. It is alleged that there is an error apparent on the face of the record in that the Court entered judgment in favour of the Advocate in the absence of a valuation report but with a false estimation of the value of the estate. She further alleges that the said judgment was entered as a consequence of her advocate Mr. Aziz's failure to attend Court. It is in the interest of justice that the judgment is reviewed.
3. In her Supporting Affidavit sworn on 7.5.18, the Applicant claims that she is a widow with 2 children and was totally dependent on her late husband. Upon the demise of her husband her co-wife and her children threw the Applicant out of the matrimonial home and obtained a grant of letters of administration behind her back. As she had no money, the Applicant sought the help of one the Kadhis in Mombasa who referred her to the Advocate. She explained her predicament to the Advocate who agreed to assist her without pay. The instructions were for the Advocate to file an application for revocation of the Grant. Things went on well until a meeting the Advocate held with the said co-wife and her son in the absence of the Applicant. Thereafter the Advocate stopped taking her calls and even stopped attending Court. When she confronted him he told her to look for another advocate.
4. With the help of the same Kadhi, the Applicant engaged Mr. Aziz on a *pro bono* basis. She alleges that the Advocate did not like this and demanded Kshs. 100,000/= from her. The Applicant told the Advocate's secretary that she would pay when she got the money. Thereafter she was served with a bill of costs based on Kshs. 50,000,000/= as the value of the estate. The Applicant claims this was wrong as no valuation of the estate was done by a certified valuer. According to the Applicant, the fee ought to have been Kshs. 4,500/=.
5. I have considered the Application. There is on record the ruling of the taxing officer dated 28.11.14 pursuant to the Advocate's bill of costs dated 22.8.14. The estate of the Applicant's deceased husband, the subject of the suit in which the Advocate acted on the Applicant is indicated as Kshs. 50,000,000/=. Accordingly the instruction fee is based on that value. The Applicant's complaint is that valuation of the estate was not done and the stated value was made up by the Advocate. It is therefore apparent that the Applicant objects to the instruction fee in the bill of costs.
6. The law on taxation of bills of costs is found in the Advocates Remuneration Order. The Advocates Remuneration Order is a complete

code and provides the remedy for a party who is dissatisfied with a decision of a taxing officer on a bill of costs. 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.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

16. The Applicant had 14 days from 28.11.14 to give notice in writing to the taxing officer that she objected to the instruction fee. Upon receipt of the Applicant's notice, the taxing officer would have recorded and forwarded to her the reasons for his decision. The Applicant was then at liberty to within 14 days from the receipt of the reasons approach this Court by way of reference setting out the grounds of her objection. This the Applicant did not do. She instead waited 3½ years to file this application for review, a procedure unknown in law to challenge a taxation.

17. In Machira & Co. Advocates v Arthur K. Magugu & another [2012] eKLR the Court of Appeal had this to say with regard to an applications for review in respect of bills of costs.

The appellate jurisdiction of any court is a creature of statute and has to be exercised in accordance with the provisions of the statute creating it. With regard to advocates' bills of costs, we agree with the decision of Ringera J (as he then was) in Machira vs Magugu[1] that the Advocates Remuneration Order is a complete code which does not provide for appeals from taxing master's decisions. Rule 11 thereof provides for ventilation of grievances from such decision through references to a judge in chambers.

18. My understanding of the above holding of the Court of Appeal is that this Court has no jurisdiction to entertain an application for review over a decision of a taxing master. The jurisdiction of this Court to interfere with the ruling of 28.11.14 of the taxing master could only be invoked through a reference under Paragraph 11 of the Advocates Remuneration Order. The Applicant cannot disregard the procedure clearly provided for in the Advocates Remuneration Order and purport to move this Court under the provisions of the Civil Procedure Act and Rules. The Court of Appeal has pronounced itself on failure to strictly adhere to procedure clearly stipulated by statute. In Speaker of the National Assembly v James Njenga Karume [1992] eKLR 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.

19. The record shows that the Advocate filed an application dated 19.5.17 seeking that judgment be entered against the Applicant in terms of the certificate of costs dated 10.12.14. Though served, the Applicant did not file a response to the Application. Accordingly judgment was entered against her on 21.2.18. It would appear that the Applicant did not pay the amount in the certificate of costs because a notice to show cause why execution should not issue was filed by the Advocate on 8.3.18. The record shows that the notice to show cause was served upon her on 12.3.18. This may have prompted the filing of the present Application on 7.5.18.

20. In view of the foregoing, this Court finds that the Application dated 7.5.18 is incompetent and an abuse of the Court process. The same is struck out. Each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 9th day of November 2018

M. THANDE

JUDGE

In the presence of: -

.....for the Applicant

.....for the Advocate

.....Court Assistant