

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

MISC. APP. NO.20 OF 2011

IN THE MATTER OF THE ADVOCATES ACT (REMUNERATION ORDER)

AND

IN THE MATTER OF TAXATION BETWEEN THE ADVOCATES AND CLIENT

MAJANJA LUSENO & COMPANY ADVOCATES.....APPLICANT

VERSUS

CHRISTOPHER NGATA KANYOTU.....RESPONDENT

RULING

Although the application before the court is for extension of time for the Respondent to lodge reference to this court, during the hearing of the application, Mrs. Koech for the Respondent and Mr. Mansur for the Applicant agreed that the court delivers a ruling in regard to whether the Taxing Officer was correct in assessing the costs payable to the advocate. The parties' interest was for the court to give a final determination in the matter in regard to the costs that is to be paid to the advocate by the client. The Taxing Officer of this court assessed the advocate's costs at Kshs.13,959,448/-. It was clear from the decision of the Taxing Officer that the basis upon which she assessed the instruction fees was the value of the entire estate of James Kanyotu (deceased). The Respondent in this case is one of the many beneficiaries of that estate. This court is seized of the succession dispute. Even if this court were to be generous to the Respondent, there is no possibility that he would inherit the entire estate. It is trite law that in assessing the costs to be paid to an advocate, the Taxing Officer is exercising judicial discretion. This court can only interfere with such exercise of discretion if it is established that the Taxing Officer committed an error of principle or that the assessed sum was manifestly excessive as to constitute an erroneous assessment of the costs. In **First American Bank of Kenya –Vs- Shall & Others [2002] 1EA 64** at Pg.69, Ringera J (as he then was) held thus:

***“First, I find that on the authorities, this court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle (see Steel Construction Petroleum Engineering (EA) Ltd –Vs- Uganda Sugar Factory [1970] EA 141).*”**

The Court of Appeal in **Joreth Ltd –Vs- Kigano & Associates CA No.66 of 1999** held that a Taxing Officer in assessing costs to be paid to an advocate in an Advocate-Client Bill of Costs is exercising judicial discretion which can only be interfered with when it is established that the discretion was exercised capriciously and in abuse of the application of the correct principles of the law.

In this reference, it was clear that the Taxing Officer made an error of principle when she assessed the Advocate's Bill of Costs on the basis of the entire value of the estate of the deceased and not the fraction of the estate that the Respondent may eventually be entitled to. The advocate's counsel concedes that on

7th March 2012, the advocate had agreed with the client to have the entire costs assessed at Kshs.2.9 million. The Respondent was required to pay this sum within thirty (30) days of the date of the consent. The Respondent has to date not paid the Applicant hence the advocate's decision to present his bill of costs to the court for taxation. This court is of the view that the advocate, in agreeing to the said sum of Kshs.2.9 million had acknowledged the fact that the Respondent can only expect to inherit a fraction of the properties that comprise the estate of the deceased.

In the premises therefore, the assessment of costs by the Taxing Officer made on 7th November 2012 is hereby set aside. It is substituted by a taxation of this court assessing the advocate's costs at Kshs.6,000,000/- inclusive of Value Added Tax. The Applicant shall have the costs of this reference. It is so ordered.

DATED IN NAIROBI THIS 3RD DAY OF FEBRUARY 2014.

L. KIMARU

JUDGE