IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, KIAGE & SICHALE JJ.A)

CIVIL APPEAL NO 350 OF 2013

BETWEEN

M/S ABUODHA & OMINO ASSOCIATES ADVOCATES.....APPELLANT

AND

JANE GATHONI MURAYA KANYOTU .....RESPONDENT

(Appeal against the ruling and orders of the High Court of Kenya at Nairobi (Kimaru, J.) dated 1st *November, 2013* in **Miscellaneous Application No. 439 Of 2010**

****

JUDGMENT OF THE COURT

This is an appeal against the ruling of ***Kimaru, J.*** delivered on 1st November, 2013. A brief background to this appeal is that ***Abuodha & Omino Associates Advocates,*** the appellant herein, filed an advocate/client Bill of Costs dated 21st September 2010. ***Jane Gathoni Muraya Kanyotu*** the respondent herein, was the respondent therein. On 9th October 2012 the taxing officer assessed the advocate-client Bill of Costs at Ksh.22,146,425. The respondent was aggrieved by the taxation and filed a reference vide a chamber summons dated 30th October 2012 and sought the following orders:-

> **"1. That the decision of the Deputy Registrar dated 9*th* *October 2012 be set aside and the Respondent's Advocate-Client Bill of Costs dated 21st* September, 2010 be taxed afresh.**
>
> **2. That this honourable court be pleased to order that the execution of the decision delivered on 9*th* *October 2012 be stayed pending the hearing and determination of this application.***
>
> ***3.* That the costs of this application be provided for"**.

The chamber summons was supported by the affidavit of the respondent in which she deposed that on or about June 2008, the 1st wife of the late ***James Kanyotu*** (the deceased), ***Mary Wanjiku Kanyotu*** and the deceased's brother ***John Ngata*** instructed the firm of ***Judy Thongori & Co. Advocates*** to petition for grant of letters of administration; that other parties claiming dependency filed various summons seeking interim provision from the estate; that on her part she instructed the appellant to present an application for interim provision for her children's school fees and other related expenses within Nairobi High Court Succession Cause No. 1239 of 2008 pending the determination of the succession cause.

In opposition to the summons, ***Franklin Omolo,*** a principal advocate in the appellant's firm swore an affidavit dated 19th May, 2012. He deposed that he acted for the appellant. ***"… and the greater part of the late James Kanyotu Estate"***, as well as the respondent's children who had hitherto been represented by ***Mutitu & Co Advocates***.

The learned judge (***Kimaru, J.)*** considered the merits and demerits of the summons and came to the conclusion:-

> **"*… that the respondent was instructed by the* applicant to file a specific application seeking preservatory orders of the properties that comprise the estate of the deceased and for the provision of dependants under Sections 26 & 27 of the Law of Succession Act. The respondent did not have instructions of all the beneficiaries of the estate of the deceased to seek a grant of probate or a grant of letters of administration intestate in respect of the estate of the deceased. The Taxing Officer**

therefore committed an error of principle in assessing the instruction fees to be paid to the respondent. The sum that was assessed as instruction fees of Ksh.16,880,625/- was manifestly excessive and exorbitant that it constituted a clear error of principle. This court will therefore interfere with the exercise of discretion by the Taxing Officer in the said assessment of the instruction fees to be paid to the respondent. All the items assessed by the Taxing Officer shall remain as taxed save for the instruction fees under item 1 which this court now assess (sic) ***at Ksh.1.5 million. This court has taken into account the nature of work done and the pleadings filed in court by the respondent."***

In so doing the learned judge further stated:

"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 discretion was exercised capriciously and in abuse of the application of the correct principles of the law."

The appellant was aggrieved by the said ruling thus provoking the appeal before us. In a memorandum of appeal dated 20th December 2013, the appellant complained that the learned judge erred in law and fact in acting outside the principle of law governing advocate/client bill of costs; in reducing the instructions fee from Ksh.22,146, 425/- to 1,500,000/- without stating the value of the estate and without taking into consideration the work done; in disrespecting the principle of the Advocates Act and the Advocates Remuneration Order as relates to instruction fees and finally, in misapplying schedule X of the Advocate Remuneration Order in determining the instruction fee.

On 3rd October 2018 the appeal came before us for hearing. Learned Counsel ***Mr. Omino***, appeared for the appellant and relied on the appellant's written submissions and list of authorities dated 24th May 2017. Learned counsel ***Miss Onyango*** appeared for the respondent and relied on the respondent's written submissions and list of authorities filed on 23rd June 2017 and 27th June 2017 respectively.

In highlighting the appellant's written submissions, Mr. Omino contended that the judge failed to set out the value of the subject matter; that the value of the core subject of litigation was ascertainable; that several applications had been filed by the appellant on behalf of the respondent; that the estimated value of deceased's estate is between Ksh.20-30 billion but the appellant pegged their bill on a value of Ksh.3 billion; that the brief handled by the appellant was of enormous importance, they carried out searches, spent long hours in handling the brief in view of the fact that the property involved is vast and that an appellate court should be cautious in wanting to interfere with a taxing matter's discretion. The decision of ***Ag. Vs. Prof. Peter Anyang Nyongo & Others African Court Of Justice Ref. No. 5 o f 2010*** was cited in support of this proposition. Further, the appellant faulted the judge for coming to the conclusion that the bill was based on the deceased's net estate (yet some properties such as where each spouse lived had been left out) and finally, the learned judge was faulted for finding that the appellant had no instructions to apply for and/or pursue the grant in respect of the estate of the deceased.

In highlighting the respondent's written submissions, ***Miss Anyango*** contended that the appellant did not file the petition for letters of administration of the estate of the deceased but was instructed to file a specific application seeking orders of preservation and provision of deceased's dependants under S.26 & 27 of the Law of Succession Act.

We have considered the record, the rival written and oral submissions, the authorities cited and the law. In the re-amended bill of costs dated 24th November 2011, Item No 1 is stated as:-

"To our instructions to take up probate and administration proceedings on behalf of Jane Kanyotu as regards the estate of the late James Kanyotu, to perusing the court record wherein three persons including Jane Kanyotu had applied for letters of administration, to looking up the law relating to succession and taking up instructions with daily contact with client both physically and by phone.

Thereafter the rest of the items relate to the estate of the deceased. It was argued by the respondent, and this was not denied, that the instructions given to the appellant were specific, to seek orders or preservation and provision for the deceased's dependants under S. 26 and 27 of the Law of Succession Act. The undenied fact is that the firm of Judy Thogori & Co advocates had instructions to file for grant of probate. This they did vide High Court Succession Cause No. 1239 of 2008. It is also not denied that there were 3 intended administrators, namely ***Mary Wanjiku Kanyotu, Jane Gathoni Kanyotu*** and ***John Ngata Kariuki***. In our view, it would be oppressive to have the respondent pay fees to the firm of Judy Thogori who had applied for grant of probate on her behalf and at the same time pay the appellant for instructions not given to them. The instructions given to the appellant were specific and these instructions came after the firm of Judy Thogori had filed the succession cause. Moreover, the appellant's instructions were limited to one of the 3 intended administrators, the respondent herein.

We agree with the findings of judge when he concluded that the taxing officer committed an error of principle when she

"she assessed the instruction fees of the respondent as if the respondent had instructions to act for all the beneficiaries of the estate of the deceased in succession proceedings. The respondent had been instructed to act for the applicant who is but one of the many beneficiaries of the estate of the deceased. Even if this court were to be generous to the respondent, when the estate of the deceased will be distributed to the beneficiaries, it is unlikely that the applicant will inherit the entire properties that comprise the estate of James Kanyotu – deceased. The applicant will get a fraction of the estate."

It is on the above basis that the Judge whilst noting that the instruction fees as per the Advocates Remuneration Order was Ksh.4,500.00, awarded Ksh.1,500,000

In **JORETH LIMITED VS. KIGANO & ASSOCIATES CA. NO. 66 OF *[2000] IEA22*** it was held that:

> **"… the judge ought not to interfere with the assessment of costs by the taxing officer unless the officer has misdirected himself on a matter of principle**."

In the instant matter, the assessment by the taxing officer was based on a misapprehension of the instruction given to the appellant and it was manifestly excessive. In ***FIRST AMERICAN BANK OF KENYA VS. SHAH & OTHERS [2002] EA 64*** it was held [at p.69]

> **"…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**."

It was wrong for the taxing officer to tax the appellant's bill of costs at Ksh.16,880,625.00 on the basis that the estate was vast. That may well be the position but the instructions to the appellant were specific and they related to the respondent who was one of the three persons who had filed for letters of administration in respect of the deceased's estate.

In **MORONGE & CO. ADVOCATES VS. KENYA AIRPORTAUTHORITY *[2014] eKLR*** it was stated that:

> **"The advocates pay, however, must be commensurate to his work otherwise it shall be what is termed as unjust enrichment. The same must be a reasonable compensation for professional work done ..."**

In our view this was a case that called for the judge's interference although it is generally frowned upon for Judges to tax bills of costs. In the matter of **KIPKORIR, TITOO & KIARA ADVOCATES VS. DEPOSIT PROTECTION FUND [2005] eKLR 528:-**

> **"Where there has been an error in principle, the court will interfere; but questions solely on quantum are regarded as matters with which the taxing officers are particularly fitted to deal with and the court will interfere only in exceptional circumstances."**

We think that there were exceptional circumstances herein to warrant the learned Judge's interference, and we cannot fault him for it. The upshot of the above is that we find no merit in this appeal. It is hereby dismissed with costs to the appellant.

Dated and delivered at Nairobi this 8th *of March, 2019*

P. N. WAKI

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

F. SICHALE

….....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR