



**Kimani Mwangi Advocates LLP t/a Kimani Mwangi Advocate LLP  
v Malik (Commercial Miscellaneous Application E037 of 2023)  
[2024] KEHC 15874 (KLR) (18 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15874 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
COMMERCIAL MISCELLANEOUS APPLICATION E037 OF 2023  
JK NG'ARNG'AR, J  
DECEMBER 18, 2024**

**BETWEEN**

**KIMANI MWANGI ADVOCATES LLP T/A KIMANI MWANGI ADVOCATE  
LLP ..... APPLICANT**

**AND**

**SAJID JAMSHED MALIK ..... RESPONDENT**

**RULING**

1. The Respondent/Applicant filed a Chamber Summons application dated 26<sup>th</sup> June 2024 under Certificate of Urgency Pursuant to Rule 11 (2) of the *Advocates (Remuneration) Order*, Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 42 Rule 6 of the *Civil Procedure Rules*, 2010 and all enabling provisions of the law.
2. The applicant seeks for orders that the ruling of the taxing master Hon. Rita Orora delivered on 13<sup>th</sup> June 2024 with respect to the Applicant's Advocate/Client Bill of Cost dated 24<sup>th</sup> October 2023 be set aside in its entirety, and that costs of this application be provided for.
3. The application is premised on grounds on its face and supported by the annexed affidavit of Sajid Jamshed Malik that vide a ruling delivered on 13<sup>th</sup> June 2024, the Deputy Registrar, Hon. Rita Orora the Applicant's bill of costs dated 24<sup>th</sup> October 2023 at Kshs. 341,100. That the Respondents were aggrieved by the decision and filed the reference herein. That the taxing master committed an error in principle in assessing the subject value of the matter. That the taxing master committed an error in principle by awarding costs that are so manifestly excessive when all circumstances of the case are taken into consideration. That in the circumstances, there exist valid reasons for the court to interfere and reverse the decision reached by the taxing officer. That it is therefore in the interest of justice that the orders sought are granted.



4. The Applicant/Respondent filed a Preliminary Objection dated 15<sup>th</sup> July 2024 in opposition to the application that the Supporting Affidavit sworn by Sajid Jamshed Malik contravenes Sections 4, 6 and 7 of the [Oaths and Statutory Declarations Act](#) which provides that any commissioner for oaths must satisfy that the deponent is the same person appearing before him which presumes that a deponent must physically be present while taking an oath or affidavit. That the deponent was not in the republic of Kenya while swearing the Supporting Affidavit and that it is impossible that the deponent executed the affidavit in Japan before a Commissioner for oaths stationed in Mombasa. That the application is therefore an abuse of the court process and should be struck out with costs.
5. The Applicant/Respondent also filed a Replying Affidavit sworn on 15<sup>th</sup> July 2024 by John Kimani Mwangi that exhibit 'SJM-3' does not constitute a reference to this suit and that it is only a mere notice under Rule 11 (1) of the [Advocates Remuneration Order](#) as a proper reference ought to move the Judge of this court under Rule 11 (2) of the Advocates Remuneration Order and the same cannot lie to the same taxing master of this court whose jurisdiction was extinguished after delivery of the ruling on 13<sup>th</sup> June 2024. That the Deputy Registrar gave a ruling having considered the appropriate scale and applied the appropriate principles guided by the provisions of the Advocates Remuneration Order and the bill was drawn to scale. That the Applicant has failed to show prima facie proof or error of any legal principle that the Deputy Registrar awarded costs that were excessive and prejudicial to the Applicant.
6. The Applicant/Respondent further stated that in the absence of a reference filed under Rule 11 (2) of the [Advocates Remuneration Order](#), this court's jurisdiction has not been invoked correctly and the orders sought therefore ought not to be granted. That granting the orders sought will be prejudicial to the Respondent herein who has not been compensated for the done from the years 2021.
7. The application was canvassed by way of written submissions. The Respondent/Applicant filed submissions dated 27<sup>th</sup> August 2024. On whether the Applicant/Respondent's Notice of Preliminary Objection is merited, they argued that evidence was not presented to that effect. They relied on the holding in the case of [KN v JMT](#) (2018) eKLR where it was held that the elementary principle of law is the he who alleges must prove. On whether the ruling delivered on 13<sup>th</sup> June 2024 ought to be set aside, the Respondents/Applicants submitted that the principles for setting aside the decision of the Taxing Master were established in [Premchad Raichand Limited & Another v Quarry Services of East Africa Limited & Another](#) (1972) EA 162, [First American Bank of Kenya v Shah and Others](#) (2002) EA 64 and [Joreth Ltd v Kigano and Associates](#) (2002) 1 EA 92 that there was an error of principle, that the fee awarded was manifestly excessive, or is so high as to confine access to the court to the wealthy, and that the successful litigant ought to be fairly reimbursed for the costs he has incurred. That the reference filed herein was proper pursuant to Rule 11 (1) and 11 (2) of the [Advocates Remuneration Order](#).
8. The Respondent/Applicant submitted that on a casual reading of the ruling delivered on 13<sup>th</sup> July 2024, no reasons were issued for the award. That the reference filed herein was therefore proper and sufficient to invoke the jurisdiction of this court. The Respondent/Applicant argued that the application is premised on the argument that the taxing master committed an error of principle in assessing the subject value and in awarding costs that are so manifestly excessive when all circumstances are taken into consideration. That proper discretion of the taxing officer was restated in the case of [Kamunyori & Company Advocates v Development Bank of Kenya Limited](#) (2015) KLR. The Court of Appeal addressed the issue of ascertaining the value of the subject matter in [Joreth Ltd v Kigano & Associates](#) (2002) 1 EA 92. That it is not in dispute that the prayers sought in the parent file were prerogative orders against the Respondents. That the court in [Republic v Ministry of Agriculture & 2 Others Ex parte Muchiri W'Njuguna & 6 Others](#) outlined the principles for consideration when the court is exercising its discretion in matters taxation.



9. The Respondent/Applicant contends that the taxing master misdirected herself in awarding the Applicant instruction fees of Kshs. 200,000 two times the prescribed fee payable without any justifiable reasons. Tat the matter herein did not proceed for full trial, had not been confirmed ripe for hearing, and that the Applicant did not file any other documents save for the notice of appointment. That the fees awarded was therefore unwarranted. Pursuant to the holding in the case of *United India Insurance Company Limited & Kenindia Insurance Company Limited v East African Underwriters Kenya Limited & Others* (1982 - 1988) KLR, 639, the Respondent/Applicant urged the court to set aside the aforementioned ruling and order for fresh taxation of the Applicant/Respondent's Bill of costs dated 24<sup>th</sup> October 2023.
10. I have considered the Chamber Summons application dated 26<sup>th</sup> April 2024, the Preliminary Objection dated 15<sup>th</sup> July 2024, Replying Affidavit sworn on 15<sup>th</sup> July 2024 and submissions. The issues for determination are: -
- a. Whether the Preliminary Objection is merited
  - b. Whether the ruling delivered on 13<sup>th</sup> June 2024 ought to be set aside
  - c. Who should bear costs
11. On the first issue, the locus classicus case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 made the following observation: -
- “So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.
12. Further, the court in *Oraro v Mbaja* (2005) eKLR held: -
- “I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point..”
13. The Applicant/Respondent pointed out that the Supporting Affidavit of Sajid Jamshed Malik sworn on 26<sup>th</sup> June 2024 contravened Sections 4, 6 and 7 of the *Oaths and Statutory Declarations Act* on the basis that the deponent was not in the Republic of Kenya while swearing the Affidavit. However, the Respondents/Applicants submitted that for the court to determine the assertions, it has to probe evidence on the same. It is the finding of this court that the issue raised by the Applicant/Respondent cannot be properly raised through the Preliminary Objection.
14. On whether the ruling delivered on 13<sup>th</sup> June 2024 ought to be set aside, the Respondents/Applicants submitted that the matter herein did not proceed to full trial, had not been confirmed ripe for trial and the applicant did not file any other document save for the notice of appointment. That the taxing



master awarded the Applicant instruction fees of Kshs. 200,000 two times the prescribed fee payable without justifiable reasons.

15. In *Joreth Limited v Kigano & Associates* (2002) eKLR, the court held that the value of the subject matter for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgement or settlement (if such be the case) but if the same is not so ascertainable the Taxing Officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances. It is not really 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. 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 principle the instruction fee is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached. The Taxing Officer whilst taxing his bill of costs is carrying out his functions as such only. He is an officer of the Superior court appointed to tax bills of costs.
16. This court has perused the ruling and noted that the Taxing Officer disclosed reasons for the decision. That the orders sought in the application did not contain monetary value of the subject matter. That paragraph (j) was the correct position to use to assess instruction fees.
17. Schedule 6 paragraph 1 (j) of the *Advocates (Remuneration) Order* provides as follows: -

To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing master in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised, the amount or value of the subject matter, the time expended by the advocate: -

  - i. where the matter is not complex or opposed such sum as may be reasonable but not less than 45,000
  - ii. where the matter is opposed and found to satisfy the criteria set out above, such sum as may be reasonable but not less than 100,000
  - iii. to present or oppose application for setting aside arbitral award 50,000
18. The taxing master taxed the bill of costs as follows: -
  1. Subtotal Kshs. 209,100
  2. Add ½ (Item 1) Kshs. 100,000
  3. Add VAT @ 16%  
(Item 1) Kshs. 32,000
  4. Disbursement Kshs. NILTotal Kshs. 341,100
19. The decision of the Taxing Officer is substituted with the following: -
  1. Subtotal Kshs. 109,100



2. Add ½ (Item 1) Kshs. 50,000
  3. Add VAT @ 16%  
(Item 1) Kshs. 16,000
  4. Disbursement Kshs. NIL  
Total Kshs. 175,100
20. Based on the foregoing, it is the finding of this court that the taxing master erred in her assessment hence arriving at the wrong assessment.
21. In the upshot, I allow the Chamber Summons application dated 26<sup>th</sup> April 2024. The ruling of the taxing master delivered on 13<sup>th</sup> June 2024 is hereby set aside.
22. No orders as to cost.

**DATED AND DELIVERED VIA TEAMS CTS TO PARTIES WITH PRIOR NOTICE THIS 18<sup>TH</sup> DAY OF DECEMBER 2024**

.....

**J.K. NG'ARNG'AR, HSC**

**JUDGE**

