



**Kimani Mwangi Advocates LLP t/a Kimani Mwangi Advocate
LLP v Malik & another (Commercial Miscellaneous Application
E036 of 2023) [2024] KEHC 16287 (KLR) (18 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16287 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
COMMERCIAL MISCELLANEOUS APPLICATION E036 OF 2023**

JK NG'ARNG'AR, J

DECEMBER 18, 2024

**IN THE MATTER OF: THE ADVOCATE ACT, CHAPTER 16 OF THE
LAWS OF KENYA, SCHEDULE OF THE ADVOCATES (REMUNERATION)
ORDER, 2009 AND ALL ENABLING PROVISIONS OF THE LAW**

AND

**IN THE MATTER OF: ADVOCATE-CLIENT BILL OF COSTS ARISING FROM LEGAL
SERVICES RENDERED IN MOMBASA HIGH COURT CIVIL CASE NO. E095 OF 2021**

BETWEEN

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

AND

SAJID JAMSHED MALIK 1ST RESPONDENT

HUSSEIN JAVED MALIK 2ND RESPONDENT

RULING

1. The Respondent/Applicants filed a Chamber Summons application dated 26th April 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 13th June 2024 with respect to the Applicant's Advocate/Client Bill of Cost dated 24th 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 13th June 2024, the Deputy Registrar, Hon. Rita Orora struck out the Respondent's bill of costs and taxed the Applicant's bill of costs at Kshs. 2,455,946. That the Respondents were aggrieved by the decision and filed the reference herein. That the taxing master committed an error in principle for failing to consider the fact that the above matters had been consolidated during mediation and thereafter the said settlement adopted in Mombasa High Court Civil Suit No. E099 OF 2021, [*Auto Japan \(Mombasa\) Ltd v Malik Zaka & 2 Others*](#).
4. The Respondents/Applicants averred that the taxing master committed an error in principle for failing to consider the fact that the parties in Mombasa High Court Civil Case No. E095 of 2021, *Malik Ali Zaka v Sajid Jamshed Malik & 3 Others* (the parent file) and [*Mombasa Ltd v Malik Zaka & 2 Others*](#) settled their grievances vide settlement dated 14th January 2022. That even after the taxing master found that the aforementioned settlement had not been adopted, she still relied on the said settlement to calculate the instruction fees.
5. That the taxing master committed an error in principle by awarding the applicant costs that cannot be claimed twice following an award in Mombasa Civil Misc. Application No. E271 of 2021, *Kimani Mwangi Advocates v Auto Japan (Mombasa) Ltd & 2 Others* failing on account of the same settlement. That the taxing master committed an error in principle for failing to consider the fact that the Applicant filed a bill of costs in Mombasa Civil Misc. Application No. E271 of 2021, *Kimani Mwangi Advocates LLP v Auto Japan (Mombasa) Ltd & 2 Others* premised on the parent file Mombasa High Court Civil Suit No. E099 of 2021, [*Auto Japan \(Mombasa\) Ltd v Malik Zaka & 2 Others*](#) and thereafter awarded costs of Kshs. 628,566.67. That it is in the interest of justice that the orders sought are granted.
6. The Applicant/Respondent filed a Preliminary Objection dated 15th July 2024 in opposition to the application that the Supporting Affidavit sworn by Sajid Jamshed Malik contravenes Section 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.
7. The Applicant/Respondent also filed a Replying Affidavit sworn on 16th 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 13th 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.
8. The Applicant/Respondent further stated that the matters are separate and distinct and the court drew a nexus with the present case while awarding costs therein as the parties in both cases were distinct from the parties herein and the orders sought were also different. That the Respondents have failed to demonstrate by documentary evidence to support the claim and that the advocate herein represented the Plaintiff in Mombasa HCCC. No. E99 of 2021, [*Auto Japan \(Mombasa\) Ltd v Malik Zaka & 2*](#)



Others and the taxing master in Mombasa Civil Misc. Application No. E271 of 2021, *Kimani Mwangi Advocates LLP v Auto Japan (Mombasa) Ltd & 2 Others* held as such.

9. The application was canvassed by way of written submissions. The Respondents/Applicants filed submissions dated 27th 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 13th 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) EA64 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*.
10. The Respondents/Applicants further submitted that Mombasa HCCC No. 099 of 2021, *Auto Japan (Mombasa) v Malik Ali Zaka & 2 Others* and Mombasa HCCC No. 095 of 2021, *Malik Ali Zaka & 2 Others* were consolidated and dealt with thus giving rise to the settlement. They relied on the holding in *Grace Wangui Ngenye v Wilfred Kiboro & Another* (2013) eKLR where it was held that where suits or appeals are consolidated there should be an apportionment of costs including the instruction fees, and that the advocates for the parties cannot expect to be paid twice over the same work because he has won three actions. The Respondents/Applicants stated that taking into consideration that the Applicant was awarded Kshs. 628,566.67 in Mombasa High Court Miscellaneous Civil Case No. E271 of 2022, *Kimani Mwangi Advocates LLP v Auto Japan (MSA) Ltd & 2 Others*, the taxing master misdirected herself by awarding the Applicant/Respondent with costs herein despite the Applicant/Respondent having already been adequately awarded. That as such, the award herein of Kshs. 2,455,946 amounted to unjust enrichment on the part of the Applicant/Respondent.
11. I have considered the Chamber Summons application dated 26th April 2024, the Preliminary Objection dated 15th July 2024, Replying Affidavit sworn on 16th July 2024 and submissions. The issues for determination are: -
 - a. Whether the Preliminary Objection is merited
 - b. Whether the ruling delivered on 13th June 2024 ought to be set aside
 - c. Who should bear costs
12. 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”.
13. 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.”

14. The Applicant/Respondent pointed out that the Supporting Affidavit of Sajid Jamshed Malik sworn on 26th 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.
15. On whether the ruling delivered on 13th June 2024 ought to be set aside, the Respondents/Applicants in Mombasa HCCC No. E099 of 2021, Auto Japan (Mombasa) Limited v Malik Ali Zaka & 2 Others and Mombasa HCCC No. E095 of 2021, Malik Ali Zaka v Sajid Jamshed Malik & Hussein Javed Malik were consolidated giving rise to the settlement dated 14th January 2022. That the said settlement was adopted in Mombasa High Court Civil Suit No. E099 of 2021, Auto Japan (Mombasa) Ltd v Malik Zaka & 2 Others. That the Applicant/Respondent was awarded Kshs. 628,566.67 in Mombasa High Court Misc. Civil Case No. E271 OF 2022, Kimani Mwangi Advocates LLP v Auto Japan (Mombasa) Ltd & 2 Others. That when the Taxing Master taxed the bill of costs at Kshs. 2,455,946, the Taxing Master committed an error in principle for failing to consider the fact that the matter had been consolidated during mediation.
16. The Applicant/Respondent was of contrary opinion that the taxing master gave a ruling having considered the appropriate scale and applied the appropriate principles. That the Respondents/Applicants have failed to show prima facie proof of error of any legal principles that the Taxing Master awarded costs that were excessive.
17. This court has perused the ruling of the taxing master in Misc. Civil Cause No. E271 OF 2022 dated 7th June 2023 and established that the Taxing Master in taxing the bill of costs pointed out that the Respondents/Applicants herein were separate and distinct from the company (Auto Japan (Mombasa) Limited) and their names were therefore struck out from the bill of costs.
18. This court has also established that the taxing master herein in the ruling dated 13th June 2024 stated that she perused the file that gave rise to the bill of costs and that it was not indicated that the judge ordered for consolidation of the two file and that the parent file in question was concluded by way of mediation, which is confirmed herein.
19. This court finds that there was no consolidation of the files and that the two files ought to have been taxed separately. The Taxing Master therefore did not err in her assessment.
20. In the upshot, I dismiss the Chamber Summons application dated 26th April 2024. Each party to bear their own costs.

DATED AND DELIVERED VIA TEAMS CTS TO PARTIES WITH PRIOR NOTICE THIS 18TH DAY OF DECEMBER 2024

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

