



**Republic v Preliminary Inquiry Committee & another; Mulupi & 14 others  
(Interested Party); Khainga & 2 others (Exparte) (Judicial Review Application  
43 of 2019) [2022] KEHC 315 (KLR) (Judicial Review) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 315 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW APPLICATION 43 OF 2019  
AK NDUNG'U, J  
APRIL 28, 2022**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**PRELIMINARY INQUIRY COMMITTEE ..... 1<sup>ST</sup> RESPONDENT**

**MEDICAL PRACTITIONERS & DENTISTS BOARD ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**JOSEPH MULUPI & 14 OTHERS ..... INTERESTED PARTY**

**AND**

**STANLEY OMINDE KHAINGA ..... EXPARTE**

**MARTIN AJUJO ..... EXPARTE**

**SURGEODERM HEALTHCARE ..... EXPARTE**

**RULING**

1. The Applicants moved this court vide a Chamber Summons application dated 28<sup>th</sup> June, 2021 seeking for orders:
  - i. That the decision of the Deputy Registrar dated 12<sup>th</sup> July, 2021 be set aside and/or varied and the 14<sup>th</sup> Interested Party's Party and Party Bill of Costs dated 26th February, 2021 be taxed afresh.
  - ii. That the costs of this application be provided for.



2. The application is founded on the grounds set out on the face therein the Supporting Affidavit of Prof. Kiama Wangai sworn on even date.
3. The applicants case is that on 12<sup>th</sup> July, 2021, the Deputy Registrar delivered a ruling electronically on the 14<sup>th</sup> Interested Party's Party and Party Bill of Costs dated 26<sup>th</sup> February, 2021. According to the ex parte Applicants (hereinafter "the Applicants"), the Honourable Deputy Registrar erred in law and in fact by setting the wrong value on the instruction fees and in not paying due regard to the fact that the 14<sup>th</sup> Interested Party did not instruct an advocate and he cannot instruct himself. Furthermore, that the Learned Taxing Master erred in facts in failing to appreciate the fact that no costs were awarded to the Interested Parties and that costs were awarded in respect of notice of motion dated 27<sup>th</sup> March 2019 and not the entire suit and thus the figure for instruction fee to defend and prosecute the motion cannot be the figure arrived at by the taxing master. It was contended by the Applicants that the Learned Taxing Master ignored their submissions.
4. The Applicants moved this court vide a Chamber Summons application dated 28<sup>th</sup> June, 2021 seeking for orders:
  - i. That the decision of the Deputy Registrar dated 12<sup>th</sup> July, 2021 be set aside and/or varied and the 14<sup>th</sup> Interested Party's Party and Party Bill of Costs dated 26<sup>th</sup> February, 2021 be taxed afresh.
  - ii. That the costs of this application be provided for.
5. The application is founded on the grounds set out on the face therein the Supporting Affidavit of Prof. Kiama Wangai sworn on even date.

## **Response**

6. The 14<sup>th</sup> Interested Party opposed the application through the Replying Affidavit of Peter Munge sworn on 11<sup>th</sup> January, 2022. He deponed that the Learned Taxing Master did not err in law or otherwise in arriving at the taxed costs as per the Ruling dated 12<sup>th</sup> July, 2021 in respect of the Bill of Costs dated 26<sup>th</sup> February, 2021 to warrant the orders sought in the instant application. In his view, the Applicants had not laid sufficient basis on which the court can interfere with the decision of the Taxing Officer. He was also of the view that the assessment made by the Taxing Officer was fair and reasonable and the Taxing Officer took into account all the relevant factors laid out in the Advocates Remuneration Order and exercised her discretion reasonably in arriving at her decision.
7. He averred that he was enjoined to these proceedings by the Applicants at the first instance whereby the Applicants sought orders against them which included an order for costs. It was also his contention that the claim against him is in his personal capacity and on his actions whilst sitting as a member of the Preliminary Inquiry Committee of the 2<sup>nd</sup> Respondent and he duly instructed the law Firm of Muriu, Mungai & Co. Advocates to act on his behalf and also protect his interests. However, on 28<sup>th</sup> March, 2019 an application was filed by the Respondents seeking amongst other orders, removal of the Interested Parties from the proceedings which application was vehemently opposed by the Applicants but the suit was struck out and the Applicants ordered to meet the costs.
8. It was therefore his contention that this Honourable Court has no jurisdiction to consider or vary the orders on costs which was made in the ruling of 14<sup>th</sup> May, 2020 at this stage and during the hearing of the present Reference. In any event, he averred that the Ruling of 14<sup>th</sup> May, 2020 did not specifically direct payment of costs for the Respondents, as alleged in the application, but all costs more so, as set out in the dicta on paragraph 35 of the ruling which ruling determined the entire suit against the



Interested Parties. Accordingly, he urged that the instant application is unmerited and ought to be dismissed with costs.

### Parties Submissions

9. The Applicant filed written submissions dated 28<sup>th</sup> January, 2022 in support of the application. Counsel argued that the costs relate to the notice of motion application filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and these were the parties awarded costs. That while the said application was supported by the affidavit of one Peter Munge Murage who is also an advocate of the High Court and a Partner in the firm of Muriu, Mungai & Co. Advocates, the 14<sup>th</sup> Interested Party was acting in person and has never instructed an advocate. It was also argued that the only notice of appointment of advocates filed in this matter was the one dated 27<sup>th</sup> March, 2019 on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. Counsel submitted that the 14<sup>th</sup> Interested Party neither appeared in court in person nor did he participate in the suit and the notice of motion application dated 27<sup>th</sup> March, 2019.
10. Counsel argued that the costs were not for the entire suit but for the said notice of motion and that the Taxing Master erred in proceedings like the costs were awarded for the entire suit. Furthermore, had the Learned Judge intended that the costs be for the entire suit, nothing would have been easier than to say so. It was also counsel's submission that although the 14<sup>th</sup> Interested Party purportedly acted as lawyer, he was also party to the proceedings and as such, he is not entitled to costs except the usual disbursements which he expended.
11. To buttress that argument, counsel cited the case of *Charles Lutta Kasamani T/A Kasamani & Co. Advocates v Patrick Johnson Okwaro & Anor* [2015] eKLR where the court held that the spirit of the Remuneration Order was to reward a party who has expended resources in hiring an advocate by being reimbursed, so to speak, what he has spent. Counsel also urged the court to be guided by the holding in the case of *AG v Theuri* [1985] KLR 157 and further urged that the claim for instruction fees be disallowed and orders sought be granted.
12. The 14<sup>th</sup> Interested Party on the other hand filed written submissions dated 16<sup>th</sup> February, 2022 in opposition to the application. On the issue of instruction fees, counsel submitted that the instruction fees are towards reviewing the substantive motion filed and to filing the application to set aside the application granting leave to commence judicial review proceedings and to arguing the application and having the case against the 14<sup>th</sup> Interested Party struck out.
13. It was further counsel's argument that the case raised by the Ex parte applicant raised novel questions of law which took a considerable length of time to peruse, understand the issues, research on the law and drafting of the notice of motion application and the submissions. To that end, counsel relied on Schedule 6(1)(j) and Clause 2 of schedule 11 of the *Advocates Remuneration Order*, 2014. Counsel also cited the cases of *Joreth Limited v Kigano & another* [2002] EA 92 and *Republic v Minister for Agriculture Ex parte Samuel Mburu Njuguna W'Njuguna* for the proposition that this was a complex matter in terms of the issues of facts and the laws applicable and the general conduct of the matter necessitated the deployment of a considerable amount of industry and was time consuming.
14. Counsel also cited the cases of *Republic v Kenya Revenue Authority Ex Parte Middle East Bank Kenya Limited* [2012] eKLR, *Republic v University of Nairobi & another Ex parte Wakenya Moses* [2018] eKLR, *Republic v Commissioner of Domestic Taxes Ex Parte Ukwala Supermarket Limited & 2 Others*, *Famy Care Limited v Public Procurement Administrative Review Board & Another & 4 Others* [2013] eKLR for the proposition that instruction fees of Kshs. 500,000/- was not excessive.



15. On the issue whether the Taxing master did not pay regard to the 14<sup>th</sup> Interested Party as being party to the suit and also an advocate, counsel submitted that there is no dispute that the 14<sup>th</sup> Interested Party was represented in the matter as he duly instructed the law firm of Muriu Mungai & Co. Advocates to act on his behalf and also protect his interests. On whether costs were awarded to the notice of motion or to the suit, counsel submitted that the ruling of 14<sup>th</sup> May, 2020 struck out the suit and the Applicants ordered to meet the costs which ruling was never challenged and the court cannot purport to now vary the said orders. Furthermore, that the ruling of 14<sup>th</sup> May, 2020 determined the entire suit against the Interested Parties who according to the said ruling were by law committee members of the 2<sup>nd</sup> Respondent.
16. On whether the Applicants' submissions were not taken into consideration by the Taxing Master, counsel submitted that at page 2 of the Taxing Master's ruling, the Taxing Master takes note of the submissions filed in opposition of the Bill of Costs. Accordingly, it was urged that the reference is unmerited and ought to be dismissed with costs.

### **Analysis and Determination**

17. I have considered the arguments advanced by both parties herein. The issue for determination is whether the bill of costs dated 26<sup>th</sup> February, 2021 herein should be set aside and remitted for taxation afresh.
18. The Applicants are disputing the decision of the Taxing Master delivered on 12<sup>th</sup> July, 2021 on the ground that the same failed to consider their submissions to the bill of costs particularly on the instruction fees. The Applicants have argued that the application in respect of costs was one dated 27<sup>th</sup> March, 2019 and filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents who had an advocate on record but who also happened to be the 14<sup>th</sup> Interested Party. In the Applicants' view, the 14<sup>th</sup> Interested Party did not instruct an advocate to act on its behalf and therefore not entitled to instruction fees. The 14<sup>th</sup> Interested Party on the other hand contends that having been sued in his personal capacity, he was entitled to costs. I have perused the court file and the notice of appointments on record is one dated 27<sup>th</sup> February, 2019 filed on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and one dated 27<sup>th</sup> March, 2019 filed on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties.
19. I have also perused the ruling of Nyamweya, J (as she then was) of 14<sup>th</sup> May, 2020 and at paragraph 36 of the same, she struck out the Notices of Motion dated 22<sup>nd</sup> February 2019 and 19<sup>th</sup> February 2019 and by extension the suit for being an abuse of the court process. The judge ordered "the Ex parte Applicants shall meet the costs of the notice of motion dated 27<sup>th</sup> March, 2019." Costs follow the event and my reading of the judge's ruling shows the entire suit was struck out and even though the judge did not address the issue of costs directly, the same should follow the event and thus the sued parties are entitled to costs of the suit and the application. While the 14<sup>th</sup> Interested Party is a member of the 1<sup>st</sup> Respondent committee appointed by the 2<sup>nd</sup> Respondent and was sued in his personal capacity, there is nothing on record to show that he indeed instructed an advocate and hence entitled to instruction fees.
20. In the case of Kenyari & Associates –v- Salama Beach Hotel Ltd & 4 Others [2014] eKLR Angote J stated as follows:

"I am in agreement with the reasoning and the award by the taxing officer. Instruction fees are only paid to an advocate in respect to the work done. Having not drawn the plaint in Malindi HCCC NO. 118 of 2009, the Applicant is not entitled to the instruction fees in respect to the suit. As was held in the case of First American Bank of Kenya –v- Shah & Another [2002]1 EA 64, an advocate becomes entitled to full instruction fees to defend a



suit the moment a defence is filed and the subsequent progress of the matter is not relevant. The same reasoning applies to the filing of a plaint. The advocate who draws a plaint is the one entitled to the full instruction fees notwithstanding the progress of the matter. The subsequent advocates can only be paid for the actual work done.”

21. It is trite law that the High Court will only interfere with the decision of a Taxing Master in cases where there has been shown to be an error in principle. In *Republic v Ministry of Agriculture & 20 Others Ex-Parte Muchiri W’ Njuguna* [2006] eKLR, Hon. Justice J. B. Ojwang (Retired) stated as follows: -

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other.... The 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.” [Emphasis mine]

22. Differently put, before the court can interfere with the decision of the taxing master it must be satisfied that the taxing master’s ruling was clearly wrong. This means that the court will not interfere with the decision of the taxing master in every case where its view of the matter in dispute differs from that of the taxing master, but only when it is satisfied that the taxing master’s view of the matter differs so materially from its own that it should be held to vitiate the ruling.
23. In the instant application, the Taxing Officer failed to consider that the 14<sup>th</sup> Interested Party did not instruct an advocate. She proceeded on the wrong premise and awarded instruction fee to the 14<sup>th</sup> interested party who had not instructed counsel. This misdirection warrants this court’s interference with the Taxing Master’s findings. I therefore find the chamber summons application dated 19<sup>th</sup> July, 2021 merited and is allowed as prayed. In the circumstances, I direct that the bill of costs dated 26<sup>th</sup> February, 2021 be taxed afresh before a different Taxing Master. There shall be no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF APRIL, 2022.**

**A. K. NDUNG’U**

**JUDGE**

