



REPUBLIC OF KENYA



KENYA LAW
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**Maina v Attorney General & 7 others (Environment & Land Case
486 of 2017) [2025] KEELC 3677 (KLR) (7 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3677 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 486 OF 2017**

JM ONYANGO, J

MAY 7, 2025

BETWEEN

BEATRICE WAMBUI MAINA PLAINTIFF

AND

THE ATTORNEY GENERAL 1ST DEFENDANT

THE DISTRICT COUNTY SURVEYOR KIAMBU 2ND DEFENDANT

DISRTICT LAND REGISTRAR KIAMBU 3RD DEFENDANT

SAMUEL WAIRERE KINYURU 4TH DEFENDANT

MIRIAM WAITHERA 5TH DEFENDANT

ANDREW NJENGA 6TH DEFENDANT

**BENSON KINYURU MUONGI ALIAS BENSON WAWERU
KINYURU 7TH DEFENDANT**

PAULINE NENDAYA NAITIPTIP 8TH DEFENDANT

RULING

1. The Plaintiff/Applicant filed a Reference vide a Chamber Summons Application dated 9th September, 2024 seeking the following orders:-
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of this application and the Reference, this Honourable Court be pleased to order that the execution of the Certificate of Costs arising from the Deputy Registrar's ruling on taxation dated 26th August 2024 be stayed.



- d. The decision of the Learned Deputy Registrar dated 26th August 2024 with respect to items 1 and 2 on Instruction fees and getting up fees on the 7th and 8th Defendants' Party and Party Bill of Costs dated 17th November 2022 and amended on 29th April 2024 be set aside and taxed afresh by this Honourable Court.
 - e. The Costs of this application be provided for.
2. The Reference is based upon the Applicant's Supporting Affidavit of the same date and the grounds on the face thereof. The Applicant's case is that the 7th and 8th Respondents filed a Bill of Costs dated 17th November, 2022 and amended on on 29th April 2024 in which he sought payment of Kshs. 19,683,773.28 as against the Applicant. Vide a ruling delivered on 26th August 2024, the Deputy Registrar taxed the Bill at Kshs. 1,618210/-. Since the reasons were contained in the ruling, the Applicant's advocate issued a Notice of Objection dated 5th September 2024.
 3. It is the Applicant's contention that in the Reasons for the ruling the Deputy Registrar appreciated the fact that instruction fees could not be assessed against the value of the subject matter, the Deputy Registrar awarded the Respondents manifestly excessive costs in the sum of Kshs. 1,500,000 as instruction fees without giving specific reasons to justify the award. The Applicant deponed that the Deputy Registrar improperly applied the law to award Getting up fees, notwithstanding the fact that the suit was not confirmed for hearing. Further that she failed to specify in detail the preparation the Respondents made towards hearing of the suit which entitled them to an award of getting up fees in the sum of Kshs. 1,618210/- She accused the Deputy Registrar of failing to consider the authorities cited to him thereby reaching an erroneous decision which occasioned injustice to the Applicant.
 4. Benson Kinyuru Muongi, the 7th Respondent, swore an Affidavit on behalf of himself and the 8th Respondents on 30th December, 2024 stating that the Reference is misconceived frivolous, vexatious an abuse of court process. He deponed that the taxing master judiciously exercised her discretion having considered the nature and importance of the matter, the interests of the parties , the general conduct of the case and proceedings, time taken and the impact of the caser on the parties , fair compensation of the winning party among other relevant circumstances.
 5. He added that the taxing master correctly considered that the value of the subject matter could not be ascertained and therefore exercised her discretion to award the 7th and 8th Respondents Kshs. 1,500,000as instruction fees.
 6. He deponed that the Applicant had not demonstrated any error of principle requiring the court's intervention through review.
 7. He was of the view that the Applicant had not demonstrated discovery of new and important matters of evidence which were not within her knowledge at the time when the order was made.
 8. He added that the Applicant participated in the taxation by filing his submissions which were considered by the taxing master in arriving at her decision.
 9. The application was canvassed by way of written submissions.

Applicant's Submissions

10. In the Applicant's submissions dated 12th February, 2024 Counsel for the Applicant gave a brief background of the case and identified two issues for determination:
 - i. Whether the instruction fee of Kshs. 1,125,000 as taxed by the taxing offer was manifestly excessive.



- ii. Whether awarding getting up fees was proper in view of the suit having not been confirmed for hearing.
11. Counsel relied on the case of *Peter Muthoka & Another v Ochieng & 3 Others* (2019) eKLR where the court addressed the issue of instruction fees when the value of the subject matter is not ascertainable. The court held that :
- “We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a Bill of costs ought to be determined from the pleadings, 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 importance of the cause, or matter, the interest of the parties, the general conduct of the proceedings, any directions by the trial judge and all other relevant considerations.”
12. Counsel submitted that the taxing master erred in principle by failing to consider the nature of the proceedings; that the suit instituted by the Plaintiff which gave rise to the impugned ruling on Taxation was instituted by the plaintiff in her capacity as a co-administrator of the estate of James Kinyuru Muongi for the sole purpose of preserving the estate’s immovable property against unlawful interference by the 4th-8th Defendants who are also beneficiaries of the estate.
13. It was her submission that the effect of the taxing master’s error in principle was to unfairly burden an administrator of an estate with costs as against other beneficiaries of the estate.
14. She submitted that the taxing master did not consider the mundane nature of the proceedings in that there was no novel issue arising therefrom that required the exertion of expertise beyond what was normal; no extra research was conducted nor were voluminous documents filed. She also pointed out that the Preliminary Objection was canvassed by way of written submissions and the suit did not proceed to hearing as it was struck out.
15. Counsel further submitted that the taxing master erred in principle in awarding Getting up fees contrary to the provisions of Schedule 6(A) (2) of the Advocates Remuneration Order which provides as follows:
- “In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation.
- (ii) Provided that no fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not more than 15% of the instruction fee allowed on taxation may be, if the judge so directs be allowed against the party seeking the adjournment in respect of each occasion upon which a confirmed hearing is adjourned.
 - (iii) In every case which is not heard, the taxing officer must be satisfied that the case has been prepared for trial under this paragraph”



16. Counsel submitted that the taxing officer erred by basing her award on preparation for the hearing of an application instead of preparation for the main hearing. She relied on the case of *Ngatia & Associates Advocates v Ngatia & Associates* (2018) eKLR where the court held that:

“I agree with the holding in *Kenya Agriculture & Livestock Research Organization (Formerly Kenya Agricultural Institute) v Njama* (2017) eKLR that no getting up fee is awardable where there is no preparation of witnesses to give viva voce evidence. There is no mention of witness statements in this case and even if witness statements were filed, they must have been done at the time of taking instructions and that should adequately be covered under instruction fee. I do not see justification for getting up fee in this case. I proceed to allow the Applicant’s objection”.

17. She prayed that the Reference be allowed with costs.

Respondents’ Submissions

18. On the other hand, the Respondents submitted that the Taxing master exercised her discretion judiciously in assessing the instruction fee as the value of the subject matter could not be determined from the pleadings. Counsel submitted that the Taxing master considered the nature and importance of the matter, the interests of the parties, the general conduct of the proceedings, time taken the impact of the case on the parties, fair compensation of the winning party amongst other relevant factors. Further that she considered that the value of the subject matter could not be ascertained and she therefore exercised her discretion to award Kshs. 1,500,000 as instruction fee. It was his submissions that the award was justified and should not be interfered with.
19. It was counsel’s submission that the Applicant’s had not demonstrated that there was an error of principle or a basis for interference with the discretion of the taxing officer. He submitted that the taxing officer is a Principal Magistrate with vast experience in taxation and this court should not interfere with the award as it had not been demonstrated that there was an error of principle.
20. Counsel submitted that the 7th and 8th Defendants filed a Defence together with at Replying Affidavit in response to the application for injunction. They then filed an application to strike out the suit. In the supporting affidavit they stated that the value of the estate was over Kshs. 400,000,000.
21. He submitted that the Taxing officer relied on the cases of *Joreth Ltd v Kigano & Associates* (2002) eKLR and *Peter Muthoka & Another v Ochieng & 3 Others* (2019) eKLR in exercising her discretion as the value of the subject matter could not be ascertained. He argued that the fact the plaintiffs and Defendants were siblings should not prevent the winning party from being compensated.
22. Counsel further relied on the case of *Rachuonyo & Rachuonyo Advocates v National Bank of Kenya Limited* (2020) eKLR where Majanja J citing *Republic v Minister for Agriculture & 2 Others ex-parte W’ Njuguna & 6 Others* (2006) eKLR and held that:
- “The Deputy Registrar would be entitled to look at not only the pleadings but also the applications, depositions and of course the proceedings in assessing the value of the subject matter”
23. He submitted that the Defendants gave the value of the subject matter as Kshs. 400,000,000 which was not controverted by the Plaintiff. He urged that the taxing officer considered the care and labour, nature and importance of the matter, the value of the subject matter, the interest of the parties the



complexity of the matter and the fact that applications made by the parties were contested. He urged that court not to interfere with the award as there was no error in principle.

24. With regard to getting up fee he submitted that the same is payable when liability in a matter is denied even if the case did not proceed for trial but was heard by affidavit evidence. He relied on *Nguruman Limited v Kenya Civil Aviation Authority (2014) eKLR*.
25. He further relied on *Mwakio Kirwa & Company Advocates V County Public Service Board & Joshua Terer (2022) eKLR* where the court awarded getting up fee even though the case proceeded by way of affidavit evidence and written submissions.
26. Counsel concluded by submitting that the party/party Bill of Costs was assessed as per the scale, which taxation should not be interfered with and asked that this reference be dismissed with costs.

Analysis and Determination

27. I have considered the reference and the response thereto, together with the parties' respective submissions as well as the authorities cited therein. Only two issues lend themselves for determination by this court, these are:
 - i. Whether the Taxing Master erred in assessing the instruction fees at KShs. 1,500,000/;
 - ii. Whether the Taxing master erred in awarding getting up fees.

i. Whether the Taxing Master erred in assessing the instruction fees at KShs. 1,500,000/-

28. From the Chamber Summons and Supporting Affidavit, the Applicant has expressed her objection to the award of KShs. 1,500,000/- by the Taxing master, terming it exorbitant. The Respondents on the other hand are of the view that considering the value of the subject matter at the time of institution of the suit, the award is justified and should not be interfered with.
29. Instruction fees are calculated based on the value of the subject matter, which value ought to be determined from the pleadings, judgment or settlement as the case may be. However, where the value of the subject matter is not ascertainable from the foregoing, the Taxing master has the discretion to assess the instruction fee as he considers just, taking into account such factors as were laid down in the *Joreth Limited vs Kigano & Associates Case (Supra)*. The Taxing master indicated in his ruling that he was guided by the principles in the *Joreth case* as well as the case of *Premchand Rainchand Ltd & Another v Quarry Services of East Africa (1972) EALR* where the court set out the following principles:
 - a. The costs should not be allowed to rise to such a level as to confine access to the court to the wealthy.
 - b. The successful litigant ought to be fairly reimbursed for the costs he had to incur.
 - c. The general level of remuneration of advocates must be such as to attract recruits to the profession. Further that as far as possible there should be consistency in the awards.
30. In the Court of Appeal in *Joreth Ltd vs Kigano & Associates (Supra)* outlined the principles to be considered when assessing the value of the subject matter as follows:

“We would at this stage point out that the value of the subject matter of a suit for the purpose of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into



account, among other matters, the nature and 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.”

31. The complaint the Applicant has with regards to the reasons issued are that they were general and she could not infer what specific action the Taxing master took into account in awarding the Kshs. 1,500,000/- instruction fee. In particular she complained that the taxing officer failed to give substantial and specific reasons justifying the award of Kshs. 1,500,000; she failed to specify clearly and candidly how she applied the principles she took into account in exercising her discretion to arrive at Ksh. 1,500,000 as instruction fees and that she failed to set out with specificity and in detail the complex elements in the proceedings that she considered, the novel issues that arose in the proceedings , the specific interests and the extra labour and responsibility placed on counsel to justify an award of Kshs. 1,500,000.
32. Having perused the ruling of the Taxing officer the reasons given for the award of instruction fees are in my opinion not only self-explanatory, but are also very clear and sound. I am not convinced by the argument that the Taxing master failed to properly exercise his discretion in awarding the sum of Kshs 1,500,000 as instruction fees.

Whether the Taxing master erred in principle in awarding getting up fees.

33. Under schedule 6A (2) of the Advocates Remuneration Order no getting up fee is chargeable until the case has been confirmed for hearing. Paragraph 6A (2) (iii) provides that in every case which is not heard the taxing officer must be satisfied that the case has been prepared for trial under this paragraph.
34. It is not in dispute that the suit herein did not proceed for hearing as it was struck out pursuant to a Preliminary Objection which was raised by the defendant that the application dated 3.5.2017 was res judicata. Iam not persuaded that in preparing for the P.O and application for the lifting of the caution, the parties could be said to have prepared for hearing. There were no additional witness statements and documents apart from those filed together with the pleadings. In the circumstances I respectfully disagree with the Taxing officer that getting up fee was merited.
35. In the final analysis, it is my finding that the award of Kshs. 375,000 as which is the third of 1,125,000 getting up fees cannot be justified and I must interfere with the decision of the Taxing Master by taxing it off. I therefore find merit in the application, set aside the orders of the Taxing Master and substitute them with a total award of Kshs. 1,243,210/= (One million, two hundred and forty three thousand two hundred and ten shillings only)
36. The costs of this application shall be borne by the Respondent.

DATED, SIGNED AND DELIVERED AT THIKA THIS 7TH DAY OF MAY 2025

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J. M ONYANGO

JUDGE

In the presence of:

1. Mr Waithaka for the 7th & 8th Defendants
2. Miss Moenga for the Plaintiff/ Applicant

Court Assistant: Hinga

