



**KM Mburu & Associates v Javisapa Enterprises Limited (Miscellaneous Application E008 of 2024) [2025] KEHC 3218 (KLR) (17 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 3218 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
MISCELLANEOUS APPLICATION E008 OF 2024**

**NIO ADAGI, J  
JANUARY 17, 2025**

**BETWEEN**

**KM MBURU & ASSOCIATES ..... APPLICANT**

**AND**

**JAVISAPA ENTERPRISES LIMITED ..... RESPONDENT**

**RULING**

1. Before me is a Reference by way of a Chamber Summons application dated 02/10/2024 by the Applicant/Advocate seeking orders under Rule 11(1)-(4) of the [Advocates Remuneration Order](#) and Sections 1A, 1B and 3A of the [Civil Procedure Act](#) that:-
  1. this Honourable Court be pleased to vary/ set aside the decision of the Taxing Officer contained in her ruling delivered on 19/9/2024.
  2. this Honourable Court be pleased to tax the Bill of costs itself.
  3. the costs of the application/reference be provided for.
2. The application is based on the grounds on the face of the application and is supported by the affidavit of Mwangi Mburu, Advocate, the Applicant herein. The Applicant believes that the dismissal of the Bill of Costs was an error and/or confusion that may have arisen out of an honest human mistake by the Taxing Officer. Given the confusion and obvious error on the face of the court record, there is need to consolidate the two files to enable the Honourable Court make a fair and justiciable decision towards taxation of the Applicant's valid Bill of Costs.
3. The Respondent filed an Affidavit sworn by Jackline Njeru in reply to the Bill of Costs and contended that the only instructions given to the Applicant was to prosecute Machakos High Court Civil Suit No. 5 of 2018 the execution of whose decree led to the Respondent having nothing absolutely to do with Mavoko Town Block 3/2014 when the same was attached in execution of the decree. That the



Respondent has fully paid the Applicant the agreed all-inclusive fees of Kshs.5,000,000/= in Machakos High Court Civil Suit No. 5 of 2018 and the Bill in this matter had been settled.

4. In a ruling delivered on 19/9/2024, the Taxing Officer dismissed the Bill of costs dated 09/04/2024.
5. Being dissatisfied by the said ruling the Applicant lodged the application/reference herein.
6. The instant application was canvassed by way of written submissions. The Applicant filed its written submissions dated 29/11/2024. He submitted on four issues; first that the Taxing Officer made a principle error in drawing issues of HCCMISC E242, *K.M Mburu & Associates Vs Javisapa Enterprises Limited* into the Bill of Costs herein and vice versa, to the extent that the Taxing Officer made pronouncements in another matter that had far reaching consequences to this Bill of Costs. Secondly that, the absence of reasons is not a bar from filing a competent reference so long as the reasons are stated in the ruling. The Taxing Officer having given the reasons for dismissal of the Bill of costs, that sufficed. Thirdly that, it is settled and as provided in law pursuant to Section 2 of the *Civil Procedure Act* that a “suit” means all civil proceedings commenced in any manner prescribed and under Schedule VI (1) (a) of the *Advocates Remuneration (Amendment) Order*. Fourthly that the applicable legal provision is the *Advocates Remuneration Order* for 2014 Schedule 6, hence under item 1, the subject matter is indicated as Kshs.220,000,000 where the Applicant seeks Kshs.3,665,000 as instruction fees and the other items drawn to scale should be allowed as drawn.
7. The Respondent also filed their written submissions dated 29/11/2024 through the Law Firm of Kivuva Omuga & Co. Advocates. The Respondent submitted that the Taxing Officer dutifully discharged her duties in the matter and further that the Applicant instituted multiple Miscellaneous suits in Machakos High Court being; HCCMISC APP E008/2024, the suit herein, HCCMISC APP E242/2023 in which a comprehensive ruling was delivered factoring in all issues brought forth by the Applicant and HCCMISC APP E152/2024 which was purportedly withdrawn as the Applicant’s letter dated 9/9/2024 and the Notice of withdrawal of suit dated 9/9/2024 arising from Machakos HCCMISC E055/2022 in which they claimed costs from the Respondent and this is an abuse of the court process. The Respondent prays that the application herein dated 02/11/2024 be dismissed with costs.
8. I have considered the pleadings, the court records, the rival written submissions, the cited authorities and the relevant provisions of law and I find the following are issues for determination:-
  1. Whether the ruling delivered on 19/9/2024, by Taxing Officer should be set aside.
  3. Who should bear the cost of this application.

**Whether the ruling delivered on 19/9/2024 by Taxing Officer should be set aside.**

9. The principles of setting aside the decisions of a Taxing Master were well established in the cases of *Premchand Raichand Limited & Another vs Quarry Services of East Africa Limited and Another* [1972] E.A 162, *First American Bank of Kenya vs Shah and Others* (2002) EA 64 and *Joreth Ltd vs Kigano and Associates* (2002) 1 EA 92. These includes:-
  - a. That there was an error of principle
  - b. The fee awarded was manifestly excessive or is so high as to confine access to the court to the wealthy
  - c. That the successful litigant ought to be fairly reimbursed for the costs he has incurred
  - d. That so far as practicable there should be consistency in the award.



10. In *First American Bank of Kenya Vs Shah and Others* [2002] E.A.L.R 64 AT 69, the court held as follows;

“First, I find that on the authorities, 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 so manifestly excessive as to justify an inference that it was based on an error of principle”.

11. The question I have to address is whether the ruling delivered by the Taxing Officer on 19/9/2024 amounted to an error of principle. In the ruling the Taxing Officer stated that upon perusal of the said Bill of costs she noted that the same was identical to the Bill of costs filed in HCCMISC 242 of 2023, the items were identical and the figure drawn only differed by virtue of the fact that that Bill was increased by half in accordance to the remuneration order. The Advocate seemed to have multiple Bills of Costs over the same subject matter. The Bill of costs in this matter had been taxed in HCCMISC 242 of 2023.
12. From my perusal of the documents on record, I note that indeed there are three Bill of Costs that were filed by the Applicant being HCCMISC APP E008/2024, the suit herein and HCCMISC APP E242/2023 arising from Machakos HCC E05/2018 and HCCMISC APP E152/2024 arising from HCCMISC APP E055/2024, all in which the Applicant claims costs from the Respondent.
13. The record further shows that the Applicant filed a Bill of costs dated 04/12/2023 in this matter for Kshs.8,758,305/= and another Bill of Costs dated 04/12/2023 in HCCMISC APP E242/2023 for Kshs.5,840,287.32 and on 09/04/2024, they filed a Notice of withdrawal of the said Bill of costs dated 04/12/2023 in HCCMISC APP E242/2023 and on that same date they filed a fresh Bill of costs dated 09/04/2024 for Kshs.8,758,305/=. The Applicant had also filed another Bill of Costs dated 28/5/2024 in HCCMISC APP E152/2024 in which a letter dated 9/9/2024 attached a Notice of Withdrawal of the said Bill of costs.
14. The Applicant contends that upon withdrawal of the Bill of Costs dated 4/12/2023 in HCCMISC APP E242/2023 and the Bill of Costs dated 28/5/2024 in HCCMISC APP E152/2024, they filed the Bill of Costs in this matter dated 9/9/2024 and that the Taxing Master ought to have considered the same.
15. I have perused the Bill of Costs filed by the Applicant against the Respondent both in this matter and in HCCMISC APP E242/2023. I have also perused HCCMISC APP E152/2024 on the CTS. I have established that indeed notices of withdrawal of the Bill of Costs dated 4/12/2023 and 28/5/2024 were issued by the Applicant.
16. The Applicant contends that there was effective withdrawal of the mentioned Bill of Costs by the mere filing and service of the Notices of Withdrawal whereas the Respondent argues that the withdrawal Notices were not procedural as per the requirement of Order 25 (2) of the *Civil Procedure Rules* which provide that a suit may be discontinued by filing of a written consent signed by all parties or by the leave of the court.
17. From the provisions of Order 25 Rule 2(1) & (2) of the *Civil Procedure Rules*, it is clear that a suit or a part thereof may be discontinued either by the consent of all parties or by the leave of the court. It is my view that once the Notice of withdrawal of a suit or a part thereof is filed in court without the consent of the other parties, it follows that the applying part has to seek the leave of the court to endorse such withdrawal. I have perused the records in the two suits and I have not come across any request for leave of the court to endorse the said Notices of withdrawal. I will therefore agree with the Taxing Officer



and the Respondent that there were multiple Bills of costs by the Applicant against the Respondent which were pending and thus causing confusion.

18. Even assuming that the Bill dated 04/12/2023 in HCCMISC APP E242/2023 and the one dated 28/5/2024 in HCCMISC APP E152/2024 were withdrawn as contended by the Applicant, then two Bills of Costs both dated 09/04/2024 in this matter and in HC MISC 242 of 2023 were pending to be taxed. A further perusal at these two Bills of Costs reveals that the same are identical in terms of items and figures as drawn and the amount charged are the same. Considering that the Taxing Officer had already taxed the Bill of costs in HCCMISC APP E242/2023 which was identical to this matter and which arose from instructions given only in suit Machakos HCC E05/2018 by the Respondent, I see no error of principle to fault the decision of the Taxing Officer in dismissing the Bill of costs in this matter. Taxing the two Bills of Costs would have amounted to double charging of the Respondent over the same subject matter whose value is known to be Kshs.220,000,000.
19. In addition, this court has considered the Applicant's Bill of Costs in this matter dated 9/9/2024 and clearly, the same arises from HCCMISC APP E055/2022 which was for eviction orders following the judgment and decree in Machakos HCCOMM 5 OF 2018. The dispute enumerated in HCCMISC APP E055/2022 was an eviction order and the value of the property was not an issue. There was no good reason why the Applicant filed the separate Misc. application for eviction before this court when there was the main suit in which the Applicant would have done so. The High Court in ordering sale of property by public auction has wide powers under Order 22 of the Civil Procedure Rules. One such power is to order eviction of the trespassers upon the sale. The Applicant did not demonstrate that the filing of HCCMISC APP E055/2022 was with instructions of the Respondent.
20. The Applicant submitted that the value of the subject matter is indicated as Kshs.220,000,000 and he seeks Kshs.3,665,000 as instruction fees with the other items drawn to scale should be allowed as drawn. The Respondent has argued that HCCMISC APP E055/2022 does not qualify as a suit and hence the Applicant should not be awarded the costs sought in this matter arising from that application. The Applicant has cited Section 2 of the Civil Procedure Act and submitted that under the said Section a "suit" means all civil proceedings commenced in any manner prescribed.
21. What follows next is whether the Miscellaneous application No. E055/2022 qualified as a "suit" in the prescribed manner. In the case of Joseph Kibowen Chemior V William C Kiseru [2013] eKLR the court extensively discussed filing of suits as follows:

The word "suit" has several meanings. Black's Law Dictionary defines "suit" as any proceedings by a party or parties against another in a court of law (7) "suit of a civil nature" is defined to be a civil action.

(8) "A civil action" is an action brought to enforce, redress, or protect a private or civil right.

(9) Section 2 of the Civil Procedure Act, defines "suit" as all civil proceedings commenced in any manner "prescribed" under Section 2 means prescribed by rules.

"Rules" means rules and forms made by the Rules Committee to regulate the procedure of courts.

(12) "pleadings" includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.



Under Section 19 of the Civil Procedure Act, every suit shall be instituted in such manner as may be prescribed by rules. It will be observed that Section 19 does not pretend that the Civil Procedure Rules have a monopoly on how suits should be instituted. It provides that suits may be instituted in the manner prescribed by rules. There could be rules in other statutes on how Proceedings may be commenced. For example, the Probate & Administration Rules under the Succession Act, (14) prescribe how matters touching on succession of estates of deceased persons need to be instituted.

It means therefore that where a person is commencing a civil suit (in this instance to enforce a civil action), he needs to follow prescribed rules.

Order 3 Rule 1 (2) provides that every suit shall be instituted by way of a Plaint or in such other manner that may be prescribed. As a general rule a suit can only be instituted by way of a Plaint, Petition or an Originating summons. A Notice of Motion is not legally recognized as an originating process. A Notice of Motion can only be filed within a properly instituted suit.

22. The Applicant cited the case of George Arunga Sino T/A Jone Brooks Consultants Limited v Patrick J.O. & Geoffrey D.O. Yogo T/A Atieno, Yogo & Co. Advocates [2012] eKLR which I have had the opportunity to read through and I find that it is distinguishable to the instant application in that in the cited case the matter involved taxation of a Bill of Costs under Schedule VI(1)(a) of the Advocates (Remuneration) (Amendment) Order, 1997 which was in place at the relevant time . Matters commenced by way of a Notice of Motion as the matter that was before the court was, is in law a suit. The matter in HCC MISC. No. E055 OF 2024 involved eviction and the Misc application was brought under Sections 1A, 1B, 3, 3A of the Civil Procedure Act and Sections 152A, 152B and 152E of the Land Act in which eviction could not be allowed in the absence of a substantive suit in the prescribed manner. See Ndung'u & 2 Others v Mutisya (Environment and Land Miscellaneous Application E039 of 2022) [2023] KEELC 20573 (KLR) (11 October 2023) (Ruling)
23. On the foregoing, HCCMISC NO. E055 OF 2022 did not qualify as a suit on which the Applicant could base a Bill of Costs on instruction fees and other charges where there was already a suit involving a property of a known value. I am also of the view that an Applicant cannot use short cuts to access justice where there are laid down procedures to be followed. It was incumbent upon the Applicant to move the court in HCCCOMM 5 of 2018 under Order 22 of the Civil procedure Rules or to institute a suit for eviction at the Environment and Land Court on instructions of the Respondent.
24. I must also point out that, the Respondent through the Replying affidavit sworn by Jackline Njeru in reply to the Bill of Costs herein stated that the Respondent had fully paid the Applicant the agreed all-inclusive fees of Kshs.5,000,000/= in Machakos High Court Civil Suit No. 5 of 2018 and the Bill in this matter had been settled. This fact has not been controverted by the Applicant.
25. Consequently, this court finds that the Taxing Officer did not make any principle error that may necessitate interference of her ruling in this matter This court therefore declines to set aside the ruling of the Taxing officer delivered herein on 19/9/2024.

## **2. Who should bear the cost of this application.**

26. Section 27 of the Civil Procedure grants the Court the discretion to grant costs. However, it is trite that costs usually follow the events unless special circumstances present themselves. In the instant application, the Court finds that the Respondent has succeeded and consequently is awarded costs of the application.



27. The upshot of the foregoing is that the Reference in respect of the Ruling issued on 19/9/2024, in respect of the bill of costs dated 9/4/2024, is dismissed with costs to the Respondent assessed at Kshs.15,000/=.

28. It is so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 17TH JANUARY 2025.**

**NOEL I. ADAGI**

**JUDGE**

**DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 17TH JANUARY 2025**

In the presence of:

Mr. Kiluva hb for Mr. Kivuva..... for Applicant

Mr. Mburu ..... for Respondent

MillyGrace..... Court Assistant

