Kuria v Chege Wainaina & Company Advocates (Miscellaneous Application E007 of 2024) [2025] KEHC 8737 (KLR) (Anti-Corruption and Economic Crimes) (20 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8737 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

ANTI-CORRUPTION AND ECONOMIC CRIMES

MISCELLANEOUS APPLICATION E007 OF 2024

BM MUSYOKI, J

JUNE 20, 2025

BETWEEN

MICHALE KAMAU KURIA ..... APPLICANT

AND

CHEGE WAINAINA & COMPANY ADVOCATES ..... RESPONDENT

RULING

1. This is an application by way of chamber summons dated 17th February 2025 which asks the court to grant the following orders;

    1. That pending the hearing and determination of this Reference there be a stay of further proceedings in miscellaneous application No. E048 OF 2024.

    2. That pending the hearing and determination of this Reference there be a stay of issuance of a certificate of taxation in miscellaneous application no. E048 of 2024.

    3. That the ruling of the Taxing Master in respect to items 1 and 2 of the bill of costs dated 30th September 2024 be set aside and taxed afresh by any other Taxing Officer.

    4. That the ruling of the Taxing Master dated 12th February 2025 be dismissed and/or set aside.

    5. That the bill of costs dated 30th September 2024 be dismissed.

    6. That in the alternative, the advocate/client bill of costs dated 30th September 2024 be remitted back for taxation before any other Taxing Officer.

    7. That costs of this Reference be in the cause.

2. I find it unprocedural for the applicants to have filed a fresh cause challenging taxation of a bill in a different cause. A reference should in my view, for good order and procedure be filed in the same cause where taxation was done. Nevertheless, I do not see any prejudice in me proceeding to deal with the cause as presented. The applicants have approached a court of law and since other cause is within my reach for confirmation of details, I will exercise my discretion to ensure that I grant the applicants their rights to access to justice and adjudicate on the application as if it were filed in miscellaneous civil application number E048 of 2024. In this regard, I order that this cause is hereby consolidated with this court's miscellaneous civil application number E048 of 2025.

3. The chamber summons is supported by affidavit of the 3rd applicant sworn on 17th February 2025. I have gone through the said affidavit and replying affidavit of the respondent sworn in 13th March 2025 and is clear to me that the applicants are challenging the ruling of the taxing officer in respect of items 1 and 2 of the respondent's bill of costs dated 30th September 2024 which are instructions fees and getting up fees. The basis of the objection on item 1 is that the taxing officer applied the wrong principle by using Kshs 153,030,873.60 as the value of the subject matter and as the basis of taxing the instructions fees. Item 2 is being challenged on the basis that the same was not chargeable because the advocate did not prepare for hearing as the matter was not ready for hearing.

4. The principle governing a Judge's consideration of an application of this nature is that the taxations of costs is in the discretion of the taxing officer and the Judge should not interfere with such discretion unless it is proved that the taxing officer made an error of principle in reaching the assessment or the amount awarded is manifestly excessive and unjustified. In Nyangito & Co Advocates v Doinyo Lessos Creameries Ltd [2014] KEHC 5481 (KLR),Honourable Justice GV Odunga as he then was held it was held that;

5. The circumstances under which a Judge of the High Court interferes with the taxing officer's exercise of discretion are now well known. These principles are,

    (1) that 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 inference that it was based on an error of principle;

    (2) it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration Order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge;

    (3) if the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practise is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high;

    (4) it is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary;

    (5) he Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it;

    (6) the full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees;

(7) the mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary. These principles were stated in the case of First American Bank of Kenya v Shah and Others [2002] 1 EA 64.'

6. I do believe that using the wrong value of the subject matter amounts to application of a wrong principle. The same applies where the taxing officer awards getting up fees where the matter had not been prepared hearing. This court will proceed to consider this application on the basis of the two issues.

7. In her ruling, the taxing officer stated that the respondents and the interested parties then who are the applicants in this matter had not contested the value of Kshs 156,030,873.60 and had used the same value to calculate the instructions fees due to the advocate. I have looked at the pleadings in the primary suit and it is clear to me that the value of the subject matter as pleaded was the said Kshs 156,030,873.60 and obviously this is what the applicants instructed the advocate to defend and was the basis of the defence drawn and under instructions of the applicants.

8. The applicants have deponed and submitted that the value of the subject matter was not determinable from the pleadings because the valuation report by the plaintiff in the primary suit differed from the applicant's valuation report dated 24th January 2024. This to me is a wrong approach in determining the value of the subject matter. The valuation report by the applicants was part of the defence to counter what the plaintiff in the suit had claimed. Putting up a defence of a lesser value does not depreciate or affect the fact that the advocate was given instructions to defend the suit based on the subject matter as pleaded. Again, the valuation report seems to have come on the date the advocate was made aware of the change of advocates.

9. I have also looked at the applicants' replying affidavit dated 28th October 2024 and submissions dated 5th October 2024 in opposition to the advocate/client's bill of costs. At paragraph 15 item 1 thereof the applicants stated as follows;

> " That the following is an analysis to counter the figures provided in the said bill of costs;
>
> Towards taking instructions: -
>
> Subject matter being Kshs 156,030,873.60
>
> 1st 1,000,000 - 75,000
>
> 1.75 per cent of 155,030,873.60- 2,713,040.28
>
> 1.5 of 135,030,873.60 - 2,025,463.10
>
> Total= 4,813,502.38."

10. All that the applicants contested in the said replying affidavit and their submissions was that the bill had not been drawn to scale and that they had paid the advocate Kshs 2,900,000.00. They did not contest the value of the subject matter. It is clear to me that the applicants are raising the issue on the value of the subject matter for the first time in this application. Having conceded before the taxing officer that the value of the subject matter was Kshs 156,030,873.60 and actually having based their own calculations on that value, the applicants are estopped from contesting the same in this reference.

11. On getting up fees, the applicant has argued that the advocate was not entitled to charge the same because he had not prepared for hearing. I have called for and gone through the primary file being

ACEC suit number 6 of 2020 (OS). The proceedings commenced before Honourable Justice Mumbi Ngugi as she then was on 20-02-2020 and the respondent/advocate appeared for the applicants for the first time in court on 4-03-2020. The applicants' replying affidavit dated 9-12-2021 in that suit which is considered their defence was drawn and filed on 16-12-2021 by the advocates.

12. The proceedings in the primary suit shows that on 16-12-2021 the advocate for the plaintiff in the primary suit confirmed having been served with all documents and applied to be allowed to file a further affidavit which application was granted. On 15-02-2022, the parties told the court that they were ready to take a date for hearing and that they would approach the court for settlement in the event an agreement was reached. On 21-09-2022 Miss Maina appeared for the applicants and again when the matter was fixed for hearing on 24th and 25th January 2023. It would appear that the advocate was not served with any notice of change of advocates which was filed on 4-10-2022 because on 24-01-2023 Miss Maina was present for the applicants and the matter took off that date. However, on this date Mr. Ndegwa appeared alongside her. It is not clear to me whether the Miss Maina who continued to appear for the applicants thereafter was from the firm of the respondents herein but it is common ground that the respondent firm was not made aware of the change of advocates until the 24th January 2023.

13. Despite there having been reference to intention to file further documents, PW1, PW2, PW3 and PW4, were heard on 24-02-2023 which means that the matter was ready for hearing and obviously the respondent had prepared the file for hearing. It would therefore mean that when the matter came up on 24-01-2023 when it took off, the advocate had prepared for hearing.

14. Getting up fees become due when the advocate has made progress and preparations and remains with the brief as at the time the matter is confirmed for hearing. In the Nyagito casecited above, the Judge took the same position which I agree with when he stated that;

> " With respect to fees for getting up and preparing for trial under Schedule VI paragraph *2*, no fees is chargeable under the said paragraph until the case is confirmed for hearing and in case where the case is not heard, the taxing master must be satisfied that the case has been prepared for trial."

15. The argument that further documents were filed after the current advocate took over does not hold water. *Advocates act* on instructions given by their clients and unless there is evidence of withdrawal of such instructions, the advocate remains on record. Filing of further documents depends on what the advocate is supplied with and instructed to do.

16. The applicants argue that immediately after filing the notice of change of advocates, the current advocate engaged the plaintiff in the primary suit in an out of court settlement and wrote several letters towards that end which were copied to the Deputy Registrar. According to the applicants, these letters meant that the respondent had not complied and hence the matter had not been prepared for hearing. None of these letters were copied to the respondent herein and he could not therefore stop preparing the case for hearing. The applicants did not complain that the respondent failed to execute any of their instructions. On this basis, I find no fault in the taxing officer allowing getting up fees.

17. The upshot of the above is that this application has no merits and the same is dismissed with costs to the advocate/respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Ruling delivered in presence of Miss Maina for the applicant and in absence of the respondent.