



**Gatheru Gathemia & Company Advocates v Maina & another & 8 others  
(Miscellaneous Application E328 of 2022) [2024] KEHC 14516 (KLR)  
(Commercial and Tax) (19 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14516 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E328 OF 2022  
PM MULWA, J  
NOVEMBER 19, 2024**

**BETWEEN**

**GATHERU GATHEMIA & COMPANY ADVOCATES ..... APPLICANT**

**AND**

**TIMOTHY MUCHIRI MAINA & PATRICIA MUKAMI  
MUCHIRI ..... 1<sup>ST</sup> RESPONDENT  
TABIHA DIANNE & FIDEL OMWARE T/A MONDIAL  
VENTURES ..... 2<sup>ND</sup> RESPONDENT  
JENIFFER GICHUKI ..... 3<sup>RD</sup> RESPONDENT  
BILDAD HAROLD ODIPO ..... 4<sup>TH</sup> RESPONDENT  
TABITHA NDEGWA ..... 5<sup>TH</sup> RESPONDENT  
CATHERINE WAMBUI ..... 6<sup>TH</sup> RESPONDENT  
EVELYN KWANYA MABEMBA ..... 7<sup>TH</sup> RESPONDENT  
KAGWE NJOROGE ..... 8<sup>TH</sup> RESPONDENT  
DAVID KAROKI MUHIA ..... 9<sup>TH</sup> RESPONDENT**

**RULING**

1. Before the court for determination is a reference application dated 1<sup>st</sup> August 2023 filed by the Respondents/Clients pursuant to paragraph 11(2) of the Advocates (Remuneration) Order and section 3A of the [Civil Procedure Act](#).



2. The Respondents prayed to have the decision of the Deputy Registrar delivered on 28<sup>th</sup> July 2023 and the subsequent certificate of taxation set aside and/or varied and to have the bill of costs dated 15<sup>th</sup> April 2022 taxed afresh.
3. The reference is premised on the grounds that the bill of costs was taxed at Kshs.12,460,245.80 and the Respondents herein are aggrieved by the taxation and have sought for reasons on the taxation from the taxing officer. Further reasons advanced are:
  - i. The Learned Deputy Registrar erred in her application of the principles to be relied on in taxation of bill of costs.
  - ii. The Learned Deputy Registrar misdirected herself and failed to identify the value of the subject matter as contained in the deed of settlement dated 15th July 2022 at Clause H (1.1) thereof as Kshs. 46,665,551/- and as adopted by the Honourable Court vide the order of the court dated 10th August 2022.
  - iii. The Learned Deputy Registrar erred in law and in fact in determining instruction fees at Kshs. 472,500,000/-.
  - iv. The Learned Deputy Registrar erred in law and in fact when she awarded the amount of Kshs. 12,460,245.80/= without taking into consideration the amount paid to the advocate as contained in the Respondent's replying affidavit deposited by Fidel Fredrick Omware on 15th December 2022 and properly on record. Further the clients never took any loan facility as alleged in the impugned ruling. The clients/applicants were mere prospective purchasers of the proposed property to be built by the developer and if the developer had taken a loan over the land where units were to be built, that cannot be the burden upon the innocent clients/applicants who had merely contributed Kshs. 46,665,551/- and this is what the advocate had gone to Court to protect by obtaining a temporary injunction.
4. The respondents further contended that the deputy registrar erred in not deducting the amount already paid to the advocates and in failing to make a finding that the advocates had not been overpaid but proceeded to award the advocates the amount of money they were not entitled to instead of ordering for a refund of the overpayment.
5. The Applicant/Advocate opposed the application through a replying affidavit sworn on 18<sup>th</sup> September 2023 by Gatheru Gathemia.
6. He averred that the Respondents had not demonstrated that the decision by the taxing master was based on an error of principle and that the taxing master exercised her unfettered judicial discretion rightfully in assessing the subject matter, in considering the complexity of the matter and the amount of time employed in preparation of the pleadings.
7. Further that his bill of costs dated 25<sup>th</sup> April 2022 factored in the amounts paid by the respondents with the total amount being Kshs. 850,000/- and that the respondents failed to disclose to the court that the advocate was handling other matters over the same subject transaction being CMCC No. 3022 of 2019 - Peter & Tabitha Ndegwa v Norwood Gardens Ltd & 3 others and CMCC No. 2979 of 2019 Catherine Wambui Njuguna vs Norwood Gardens Ltd & 3 others.

### **Analysis and determination**

8. The respondents and client canvassed their arguments through written submissions dated 13<sup>th</sup> March 2024 and 14<sup>th</sup> April 2024 respectively. I have considered the pleadings filed in this matter and the issue for determination is whether the reference application is merited.



9. The advocate represented the clients herein in HCCC No. 220 of 2019 Timothy Muchiri Maina and others v Norwood Gardens Ltd whereby a settlement was reached by the parties.
10. The advocate filed a bill of costs dated 25<sup>th</sup> April 2022 which was taxed vide a ruling dated 28<sup>th</sup> July 2023 at Kshs.12,460,245.80.
11. The Respondents are dissatisfied with the taxation mainly on the basis that the taxing master erred by failing to identify the value of the subject matter as contained in the Deed of Settlement dated 15<sup>th</sup> July 2022, as Kshs.46,665,551/- which was adopted as an order of the court on 10<sup>th</sup> August 2022.
12. In her ruling, the taxing master stated that the terms of the Deed of Settlement were not disclosed to the court and were not on the court record neither were they disclosed to the Advocate. Based on this, she found that the value of the subject matter could not be ascertained from the settlement agreement. And that she obtained the value of the subject matter from the loan facility advanced to the developers by I&M bank which was Kshs. 475,500,000/-.
13. I am guided by the decision of the Court of Appeal in the case Joreth Limited v Kigano & Associates [2002] KECA 153 (KLR) where it was held:

“We would at this state 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, judgement 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 among other matters, the nature and importance of the cause or matter, the interests of the parties, general conduct of proceedings, any directions of the trial judge and all other relevant circumstances.”
14. In this case, the deputy registrar asserted that although there was a settlement agreement, its terms were unknown to the court and she therefore did not obtain the value of the subject matter from it.
15. I have had the chance to look at the aforementioned settlement agreement dated 15<sup>th</sup> July 2022 as produced in the respondent's supporting affidavit and marked as 'FF04'. Clause H (1.1) thereto states:

“The outstanding debt owed by the chargor (Norwood Gardens Limited) to the chargee (I&M bank) is Kshs. 486,074,941.01 as at 1st June 2022. The purchaser's joint interest in the charged property is Kshs. 46,665,551/- which is the subject matter in the suit HCCC 220 OF 2019 where they claim the amount they paid to purchase units from the developer (chargor) who failed to deliver.”
16. From the settlement agreement, it is clear that the respondents' interest was Kshs.46,665,551/- as this is what they jointly contributed toward the development by Norwood Gardens Limited. This figure was also the subject matter in HCCC No. 220 OF 2019.
17. I am of the view, therefore, that an injustice was occasioned to the Respondents when the Deputy Registrar used the amount of Kshs. 475,500,000/- as the value of the subject matter in taxing the bill of costs. Although the taxing master argued that the contents of the settlement were not available to her. She could as well have demanded for a copy of the same from the parties before taxing the bill of costs using an erroneous value of the subject matter.
18. I note further that the taxing master did not consider the amounts already paid in legal fees by the Respondents to the Advocate. The amounts are annexed in the supporting affidavit of the Respondents as 'FF05' and indicate that certain amounts of money were paid to the advocate.



19. As a consequence, I find that the reference application has merit. The decision of the Deputy Registrar delivered on 28<sup>th</sup> July 2023 and the subsequent certificate of taxation are hereby set aside. The bill of costs dated 15<sup>th</sup> April 2022 is to be taxed afresh. Costs to the Respondents/Clients.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 19<sup>TH</sup> DAY OF NOVEMBER 2024.**

.....

**P. MULWA**

**JUDGE**

In the presence of:

Mr. McDonald & Mr. Khatete for applicant

Dr. Kenyariri for 2<sup>nd</sup> respondent

Court Assistant: Carlos

