



**KM Mburu & Associates v Javisapa Enterprises Limited (Miscellaneous Application E242 of 2023) [2024] KEHC 16794 (KLR) (17 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16794 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
MISCELLANEOUS APPLICATION E242 OF 2023**

**NIO ADAGI, J**

**DECEMBER 17, 2024**

**BETWEEN**

**K. M. MBURU & ASSOCIATES ..... ADVOCATE**

**AND**

**JAVISAPA ENTERPRISES LIMITED ..... CLIENT**

**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. In the alternative and without prejudice to prayer (1) herein, this Honourable Court be pleased to declare the ruling of the taxing Officer contained in her ruling delivered on 19/9/2024 as void ab initio.
  3. The costs of the application/reference be provided for.
2. The application is based on the grounds on the face thereof and is supported by the affidavit of Mwangi Mburu, Advocate, the Applicant herein. The Applicant's case is that on 19/9/2024, the taxing Officer delivered a ruling in which the Applicant's Advocate-Client Bill of Costs dated 4/12/2023 was taxed at Kshs.1,031,150/=. That prior to taxation of the subject Bill of Costs, the Applicant had by a Notice of withdrawal dated 9/4/2024 withdrawn the Bill of costs, invariably, there did not exist a Bill of Costs for taxation, thus the ruling of the Taxing Officer is null and void ab initio and ought to be set aside. That following the said withdrawal, the Applicant filed a fresh Bill of Costs in HCCCMISC/E008/2024 [K.M Mburu & Associates v Javisapa Enterprises Ltd.](#) The Applicant believes that this error and/or confusion may have arisen out of an honest mistake by the Taxing Officer, and as a result of



the apparent confusion, the Taxing Officer dismissed the valid and legitimate Bill of Costs on the basis of multiplicity of Bills of Costs in her ruling in HCCMISC/E008/2024 *K.M Mburu & Associates v Javisapa Enterprises Ltd* where she stated that:

“Upon further perusal of the said Bill of Costs, the court has noted the Bill of Costs was identical to the Bill filed in HCCCMISC 242 of 2023. The items were identical. The figure drawn only differed by virtue of the fact that the Bill was increased by half in accordance to the Remuneration Order. The advocates seem (*sic*) to have multiple Bills of Costs over the same subject matter. As a result, this entire Bill of Costs is dismissed with no order as to costs. The same has already been taxed in HCCMISC.E242 of 2023”

3. The Applicant further argue that given the confusion and obvious error on the face of the court record, there is need to consolidate the two files to enable this court to make a fair and justiciable decision towards taxation of the Applicant’s valid Bill of Costs. The Applicant prays that the application be allowed.
4. The application is opposed by the Respondent through a Replying Affidavit sworn on 19/11/2024 by Jackline Njeru. The Respondent states that the Applicant’s Bill of Costs dated 1/12/2023 came up for taxation on 28/3/24 when the Taxing Officer was not sitting and another taxation date of 5/6/2024 was given for mention before the Taxing Officer. It is upon the Respondent’s response to the Bill of Costs dated 4/12/2023 that the Applicant filed a Notice of Withdrawal which he filed on 9/4/2024 and served the Respondent’s Advocates. That simultaneously with filing of the Notice of withdrawal dated 9/4/2024, the Applicant filed the Bill of Costs dated 9/4/2024. That on the 5/6/2024 this matter was mentioned before the Taxing Officer wherein directions were given reserving a new date for taxation of the Bill of Costs dated 4/12/2024 to 5/9/2024. That the Applicant did not at any time apply for his Notice of Withdrawal dated 9/4/2024 to be allowed by the court. That only an order of the Taxing Officer endorsing the same would have given effect considering that a taxation date had already been fixed by the time it was filed.
5. The Respondent maintains that the Applicant’s Bill of Costs dated 4/12/2023 remained validly on the record of the court and was only subsumed in the subsequent ruling of the Taxing Officer when the said Bill of Costs was taxed in the amount contained in the ruling. That it was unfortunate that the Applicant is heaping all the blame on the Taxing Officer when there is absolutely nothing in the conduct of the Taxing Officer to Complain about. Lastly that it is convoluting of matters for the Applicant to agitate issues in HCCMISC/E008/2024 through this Taxation Cause when this is a completely separate file. The Respondent prayed that the application be struck out and or dismissed as the same is not hoisted on a valid Notice of Objection to the Taxing Officer.
6. The instant application was canvassed by way of written submissions. Both parties filed their written submissions dated 29/11/2024.
7. I have considered the pleadings, the court record, the rival written submissions, the cited authorities and the relevant provisions of law and I find the single issue for determination is whether the decision of the Taxing Officer contained in a ruling delivered on 19/9/2024 should be set aside for being null and void ab initio.
8. The principles of setting aside the decisions of a Taxing Officer were well established in the cases of *Premchand Raichand Limited & Another v Quarry Services of East Africa Limited and Another* [1972] EA 162, *First American Bank of Kenya v Shah and Others* (2002) EA 64 and *Joreth Ltd v 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.
9. In *First American Bank of Kenya v Shab and Others* [2002] EALR 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 Applicant faults the Taxing Officer for basing her ruling on an invalid Bill of Costs dated 4/12/2023 that had been withdrawn vide a Notice of Withdrawal dated 9/4/2024.
12. 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.
13. Order 25 Rule 2(1) & (2) of the [Civil Procedure Rules](#) provide that:
- (1) Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn, upon the filing of a written consent signed by all the parties.
  - (2) Where a suit has been set down for hearing the court may grant the plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just.
  - (3) The provisions of this rule and rule 1 shall apply to counterclaims.
14. 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 this matter and I have not come across either a consent of parties or any request for leave of the court to endorse the said Notice of withdrawal herein. In the case of [Josephat Mwangi Moracha & another v HFC Limited & 2 others](#) [2021] eKLR it was held:
- “ 16. The application dated 2.8.2021 having been set for hearing on 11.8.2011, the Notice of withdrawal filed on 6.8.2021 was irregular and of no effect by dint of order 25 rule 2 (1) & (2). Should the plaintiff be still desirous of withdrawing the Notice of Motion dated 2.8.2021, compliance must be had to the provisions of order 25 rule 2 of the Civil Procedure rules.
  - 17. With the result that the Notice of withdrawal dated 6.8.21 in respect of the Notice of Motion dated 2.8.2021 is found to be irregular and of no effect. The same is struck out. Collateral damage to the striking out is the Notice of Motion dated 4.8.2021 which, on the material before court, is an abuse of the court process as it is a duplication of the notice of motion dated 2.8.21 which is



now, by the finding herein, alive before the court. The notice of motion dated 4.8.21 is in those circumstances struck out with costs to the respondents."

15. I will therefore agree with the Taxing Officer and the Respondent that the valid and legitimate Bill of Costs then on record for taxation was the one dated 4/12/2023 which the Taxing Officer rightly taxed.
16. Based on the above finding, I will not delve into the issue of the giving of the objection notice to the Taxing Officer prior to filing of the application as submitted by the Respondent.
17. Considering that the Applicant did not challenge the award of Kshs.1,031/150/- taxed by the Taxing Officer, I will affirm the same.
18. There is also no prayer for consolidation of this suit with any other, I will therefore refrain from determining the issue of consolidation.
19. The upshot of the foregoing is that the Chamber Summons dated 2/10/2024 is without merit and is hereby dismissed with costs to the Respondent assessed at Kshs.15,000/=.
20. It is so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 17<sup>TH</sup> JANUARY 2025.**

**NOEL I. ADAGI**

**JUDGE**

**DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 17<sup>TH</sup> JANUARY 2025**

In the presence of:

Mr. Kiluva h/b for Mr. Kivuva..... for Applicant

Mr. Mburu..... for Respondent

Milly Grace..... Court Assistant

