



**Makove v Statutory Manager United Insurance Company Limited & 196 others (Civil Appeal (Application) 279 of 2009) [2024] KECA 846 (KLR) (12 July 2024) (Ruling)**

Neutral citation: [2024] KECA 846 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) 279 OF 2009  
DK MUSINGA, M NGUGI & LA ACHODE, JJA  
JULY 12, 2024**

**BETWEEN**

**SAMMY MUTUA MAKOVE (COMMISSIONER OF INSURANCE) APPELLANT**

**AND**

<b>STATUTORY MANAGER UNITED INSURANCE COMPANY LIMITED .....</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>MBUU HOLDINGS LIMITED .....</b>	<b>2<sup>ND</sup> RESPONDENT</b>
<b>KIKI INVESTMENTS LIMITED .....</b>	<b>3<sup>RD</sup> RESPONDENT</b>
<b>KIRAGU FAMILY HOLDINGS .....</b>	<b>4<sup>TH</sup> RESPONDENT</b>
<b>GEORGE NGURE KARIUKI .....</b>	<b>5<sup>TH</sup> RESPONDENT</b>
<b>PETER J. MWANGI .....</b>	<b>6<sup>TH</sup> RESPONDENT</b>
<b>JOHN K. MBUU .....</b>	<b>7<sup>TH</sup> RESPONDENT</b>
<b>JANE W. MICHUKI .....</b>	<b>8<sup>TH</sup> RESPONDENT</b>
<b>ANTONY NAHASHON NGUNJIRI (T/A A. N. NGUNJIRI &amp; CO. ADVOCATES .....</b>	<b>9<sup>TH</sup> RESPONDENT</b>
<b>CHARLES LUTTA KASAMANI T/A KASAMANI &amp; CO. ADVOCATES .....</b>	<b>10<sup>TH</sup> RESPONDENT</b>
<b>CHRISTINE ORARO &amp; COMPANY ADVOCATES &amp; &amp; 186 OTHERS .....</b>	<b>11<sup>TH</sup> RESPONDENT</b>

*(An application for reference to a full bench of the Court with respect to the ruling by a single judge at the Court of Appeal, Nairobi (J. Mohammed, J.A.) upon reference on taxation in Civil Appeal (Application) No. 279 of 2009)*



## RULING

1. This ruling is in respect of a reference to a full bench from the ruling of a single judge, (J. Mohammed, J.A.) dated 13<sup>th</sup> August 2021. The background to the reference is well set out in the impugned ruling, but for the purpose of contextualising this decision, we shall briefly set it out.
2. On 27<sup>th</sup> November 2007 the 1<sup>st</sup> respondent filed an appeal from the order and ruling of the High Court dated 2<sup>nd</sup> October 2007 in Winding-Up Cause No. 22 of 2006. Subsequently, an application was made by several respondents to strike out the appeal for non- service of the record of appeal. The application was allowed, with the result that the appeal was struck out, and costs thereof as well as of the application awarded to the respondents.
3. Charles Lutta Kasamani, previously an advocate of the High Court of Kenya practising in the name and style of Kasamani & Co. Advocates, is the 10<sup>th</sup> respondent in the appeal. Between 2001 and 2005 he had rendered services to United Insurance Company as an advocate and had not been paid his fees. He had taxed his bills of costs for services he had so far rendered at Kshs.27,761,501. He had however been struck off the Roll of Advocates when the appeal was filed.
4. On 23<sup>rd</sup> October 2018, the 10<sup>th</sup> respondent filed a bill of costs dated 22<sup>nd</sup> October 2018. It was titled: “10<sup>th</sup> respondent’s bill of costs”. It was however drawn and filed by Kasamani & Company Advocates. It was signed by the 10<sup>th</sup> respondent, but below the signature it was indicated “Law Society of Kenya Practising Certificate Number 2018/7949, Admission Number P.5/100047/13,” which actually belongs to Mukoya Vincent Richard Kasamani, a son of the 10<sup>th</sup> respondent.
5. The first item in the 10<sup>th</sup> respondent’s bill of costs read as follows:

“Instruction fees to oppose an interlocutory appeal where the appeal was struck out with costs. The petition having been filed seeking the Winding Up of United Insurance Company Ltd where the subject matter was an insolvency margin pegged at Kshs.1,242,825,501.”

The amount that was sought as fees was Kshs.59,992,500.
6. The bill of costs was listed for taxation before L. Ogombe, Deputy Registrar. The 1<sup>st</sup> respondent submitted that the 10<sup>th</sup> respondent is not entitled to instruction fees as he had participated in the appeal in person and not as an advocate for a creditor, having been struck off the Roll of Advocates when the appeal was filed and when he drew the said bill. Reliance was placed on a letter dated 18<sup>th</sup> October 2018 by the Law Society of Kenya. He was, therefore, only entitled to reasonable expenses as a party, the 1<sup>st</sup> respondent’s advocate submitted.
7. In response, the 10<sup>th</sup> respondent stated that the decision by the Law Society of Kenya to strike him off the Roll of Advocates was reviewed and quashed by the High Court on 16<sup>th</sup> June 2010; that the appeal was filed in 2009; and therefore, he was entitled to full instruction fees.
8. The Deputy Registrar overruled the 1<sup>st</sup> respondent’s objection and proceeded to tax the bill in the sum of Kshs.4,010,930. The 1<sup>st</sup> respondent was dissatisfied with the said decision and sought a reference, which was done before J. Mohammed, J.A. The 10<sup>th</sup> respondent also filed a cross reference, arguing that the sum awarded was manifestly inadequate.
9. Dismissing the reference and the cross reference, the learned judge concluded as follows:



28. Applying the above principles to the rival arguments herein, it is clear that the taxing officer considered the relevant principles, the value of the subject matter, the scale of costs awardable for drawing of various documents, the relevant provisions for perusals and court attendances. The taxing officer therefore took the relevant provisions into consideration, took the correct approach and reasonably and judiciously exercised her discretion. I find no error.
  29. Accordingly, the reference by the 1<sup>st</sup> respondent and the cross-reference by the 10<sup>th</sup> respondent are dismissed with no order as to costs.”
10. The 1<sup>st</sup> respondent was aggrieved by the single judge’s decision and sought a reference to the full bench on the following grounds:
- I. The Hon. Judge failed to properly and judiciously consider and correctly apply the requisite principles and properly exercise her discretion with regard to the Appellant’s plea for reference of the Deputy Registrar’s Ruling on Taxation on the following grounds:
    - a. The Deputy Registrar failed to consider material facts namely that the substantive winding up cause no. 22 of 2006 is pending determination in the High Court, Nairobi and that the appeal that was struck out by this Honourable Court was an appeal against an order of the High Court in an interlocutory application (seeking leave to file a supplementary affidavit) in the pending winding up proceedings. The value of the subject matter could not, therefore, in the taxation be that of the winding up cause.
    - b. The Bill of costs is, in all circumstances, manifestly excessive and oppressive.
    - c. The Deputy Registrar failed to consider material facts including that the Bill was filed by a person under suspension from acting as an advocate and without a practicing certificate therefore;
    - d. The Deputy Registrar failed to consider the material fact that the 10<sup>th</sup> Respondent was throughout the proceedings acting in person and not through an advocate and was therefore not entitled to instruction fees; and
    - e. The Deputy Registrar failed and or neglected to properly and or correctly apply the law to the facts of the matter before her and therefore arrived at an unjust and unfair decision.
  - II. The Honourable Judge, in the premises, in upholding the ruling on taxation by the Hon. Deputy Registrar failed to consider the errors in principle committed and the following unjust outcomes:
    - a. The consequences of the exorbitant and oppressive award of costs on taxation including the impeding of access to justice and regulatory mandate of the Insurance Regulatory Authority (as regulator) and the multiplicity of claims for similar costs by a large number of respondents many of whom are creditors and policyholders of the insurer, the United Insurance Company Ltd (under statutory management);
    - b. The negative precedential effect of failing to correctly consider ‘the amount of appeal’ within the context of taxation of costs in an interlocutory appeal that is not dispositive of the suit in the Superior Court and the real risk therefore of unjust enrichment and impeding of access to justice.



- III. The Appellant avers that the Learned Judge failed to consider and rule on the issue raised that the Deputy Registrar failed to consider material facts including that the Bill was filed by a person under suspension from acting as an advocate and without a practicing certificate therefore; and also failed to consider the material fact that the 10<sup>th</sup> Respondent was throughout the proceedings acting in person and not through an advocate and was therefore not entitled to instruction fees.
  - IV. The Appellant avers that the Hon. Judge did not correctly exercise her discretion judiciously in holding that the ‘taxing officer therefore took the relevant provisions into consideration, took the correct approach and reasonably and judiciously exercised her discretion. I find no error’.
  - V. The Appellant avers that there is error of principle and discretion by both the Deputy Registrar and the Single Judge.
  - VI. Reasons Wherefore the Appellant (Applicant) prays for consideration of the matter before a Full Bench of this Honourable Court and:
    - a. The Reference be allowed.
    - b. The decision by the Taxing Master be set aside.
    - c. In the alternative to (b) above item 1 of the Bill of Costs on instruction fee and all items relating to attendance and drawing as an Advocate be struck out and the 10<sup>th</sup> Respondent be only allowed reasonable expenses of a party who appeared in person or in the alternative the Bill of Costs be referred back with the requisite directions of this Honourable Court to a Taxing Master other than Hon. L. Ogombe.
    - d. In the further alternative, this Honourable court makes such deduction as will render the bill reasonable and just.”
11. What is our remit in considering this reference? In *Kimathi & another vs Muriuki & 12 others*, [2023] KECA 666 (KLR) June 2023 (Ruling) this Court stated:
- “At the outset, we underscore that a reference is not an appeal and, as a fully constituted bench, we may only interfere with the exercise of the wide discretion bestowed on a single judge under rule 4 of this Court’s Rules on the basis of sound principles. The Court has to consider whether the single judge took into account an irrelevant factor which he ought not to have taken into account; whether he failed to take into account a relevant factor which he ought to have taken into account; whether he misapprehended or failed to appreciate some point of law or fact applicable to the issues at hand; or whether the decision on the available evidence and law is plainly wrong.”
12. We shall therefore consider this reference in light of the foregoing principles, though we hasten to point out that the single judge was not considering an application under rule 4 of this Court’s Rules, but the applicable principles are the same.
  13. The gravamen of this reference is whether the single judge, in upholding the Deputy Registrar’s holding, took into account all the relevant factors relating to the 10<sup>th</sup> respondent’s legal status at the time he participated in the appeal that was struck out, giving rise to the impugned bill of costs.
  14. The Deputy Registrar held that the rules do not “make any distinction between parties in person or parties represented by counsel for purposes of party and party costs.” She therefore concluded that the 10<sup>th</sup> respondent was entitled to instruction fees. The single judge upheld that position, but a perusal



- of the impugned ruling reveals that both the Deputy Registrar and the single judge failed to take into consideration a number of very relevant factors, among them, the meaning of “instruction fees”; to whom such fees is payable; and whether a party who appears in person at a hearing is entitled to instruction fees.
15. Rule 2 (1) of the Third Schedule makes it clear that it is only the advocate for the party who has been awarded costs who may lodge a bill of costs for taxation, not a successful party who was acting in person. The rule states as follows:

“2. (1) Where costs are to be taxed, the advocate for the party to whom the costs were awarded shall lodge his bill with the taxing officer and shall before or within seven days after lodging it, serve a copy of it on the advocate for the party liable to pay it.”
  16. For a party who appeared in person, there is no provision for filing of a bill of costs, the taxing officer is empowered to allow reasonable expenses only. Rule 19 stipulates:

“19. The taxing officer shall allow the reasonable expenses of a party who appeared in person at the hearing of an application or appeal ....”
  17. A party who appeared in person cannot seek to recover instruction fees, because he cannot instruct himself. Only an advocate can claim instruction fees. Instruction fees has been stated by this Court to be chargeable by an advocate the moment a client instructs him. See *Joreth Ltd vs Kigano & Associates* [2002] eKLR.
  18. Was the 10<sup>th</sup> respondent entitled to instruction fees? The appeal that gave rise to the contested taxation was filed on 11<sup>th</sup> November 2009. The 10<sup>th</sup> respondent opposed it as a creditor, but not as an advocate. The application seeking to strike it out was filed on 24<sup>th</sup> July 2018. By a ruling delivered on 12<sup>th</sup> October 2018, the appeal was struck out and the costs of the application and the appeal were awarded to the respondents.
  19. According to a letter dated 18<sup>th</sup> October 2018 by Florence Muturi, who was then Deputy Secretary, (Compliance and Ethics), Law Society of Kenya, the 10<sup>th</sup> respondent was struck off the Roll of Advocates with effect from 17<sup>th</sup> September 2007 but on 16<sup>th</sup> June 2010 a Judicial Review Order was issued for his reinstatement, which was done. So, at the date of filing the appeal he was not an advocate. On 19<sup>th</sup> September 2016, he was struck-off again from the Roll of Advocates, and there is no denial that he was not authorized to practice law in 2018 when the appeal was struck out. He therefore appeared in person, not as an advocate.
  20. That notwithstanding, on 23<sup>rd</sup> October 2018 the 10<sup>th</sup> respondent filed a bill of costs in which he sought “instruction fees to oppose an interlocutory appeal”, and sought to be paid Kshs.59,992,500 under that heading!
  21. That was a criminal offence under section 9 of the *Advocates Act*, because he was unlawfully holding himself out as an advocate of the High Court of Kenya, knowing very well that he was not. Therefore, the entire bill of costs was for striking out, which we hereby do. It is trite law that documents prepared by unqualified persons, including non-advocates or advocates whose names have been struck off the Roll of Advocates, shall be void for all purposes. See *National Bank of Kenya Limited vs Anaj Warehousing Limited* [2015] eKLR.
  22. In the circumstances, the Deputy Registrar, in failing to consider that no instruction fees were payable to the 10<sup>th</sup> respondent as he was not an advocate, failed to take into account very relevant provisions of the law and thus exercised her discretion injudiciously. She therefore erred in law in awarding him



Kshs.4,000,000 as instruction fees. Equally, the learned single judge failed to take into account the misdirection in law on the part of the Deputy Registrar.

23. In view of the foregoing, we must therefore allow this reference. The decision by the taxing master is hereby set aside in its entirety. We equally dismiss the 10<sup>th</sup> respondent's cross-reference that contested the sum awarded for instruction fees as being too low.
24. In view of the provisions of rule 19 of the Third Schedule, we find that the 10<sup>th</sup> respondent, being a party who appeared in person, was only entitled to reasonable expenses, which we assess at Kshs 40,000 on account of several court attendances and actual disbursements. The 10<sup>th</sup> respondent remains a creditor of the Insurer, which is now under statutory management, in the sum of Kshs.27,761,501.
25. Each party shall bear its own costs of this reference.

**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF JULY 2024.**

**D. K. MUSINGA, (P.)**

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**JUDGE OF APPEAL MUMBI NGUGI**

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**JUDGE OF APPEAL**

**L. ACHODE**

..... **JUDGE OF APPEAL**

**I certify that this is a true copy of the original**

**SIGNED DEPUTY REGISTRAR**

