



**Patrick Kimathi Muchena t/a Arimi Kimathi & Co. Advocates v Kamau & 3 others (Suing as the Legal Representatives of the Estate of Kamau Thiong'o - Deceased) (Environment and Land Miscellaneous Application E072 of 2022) [2024] KEELC 5443 (KLR) (23 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5443 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**  
**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E072 OF 2022**  
**NA MATHEKA, J**  
**JULY 23, 2024**

**BETWEEN**

**PATRICK KIMATHI MUCHENA T/A ARIMI KIMATHI & CO.**  
**ADVOCATES ..... APPLICANT**

**AND**

**MONICA WAMBUI KAMAU ..... 1<sup>ST</sup> RESPONDENT**  
**JANE NJERI ..... 2<sup>ND</sup> RESPONDENT**  
**JOSEPH NYINGI KAMAU ..... 3<sup>RD</sup> RESPONDENT**  
**ZACHARIA NJENGA KAMAU ..... 4<sup>TH</sup> RESPONDENT**  
**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF KAMAU**  
**THIONG'O - DECEASED**

**RULING**

1. The application is dated 18<sup>th</sup> March 2024 and is brought under Section 51 (1) and (2) of the *Advocates Act* Cap 16 (Laws of Kenya) Rule 7 of the *Advocates (Remuneration) Order* seeking the following orders;
  1. That this application be certified as urgent and service be dispensed with at the first instance.
  2. That there be a stay of proceedings herein pending the hearing of this application and/or the application dated 7<sup>th</sup> September 2023.
  3. That this honourable court be pleased to enjoin Jacob Kamau Kahi as an interested party these proceedings for purposes of determining the application dated 17<sup>th</sup> November 2023.



4. That the costs of this application be in the cause.
2. It is grounded on the following grounds that the applicant was instructed by the interested party pursuant to the agreement dated 28<sup>th</sup> July 2016. That to determine who is to pay for the taxed bill it is fair that the intended interested party be enjoined.
3. This court has considered the application and the submissions therein. The applicant seeks to be enjoined and a defendant or an interested party. As to whether he ought to be enjoined in the suit as a defendant or an interested party, the Court is guided by Order 1 Rule 10(2) of the Civil Procedure Rules which states;

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”.

4. The Supreme Court decision in Communications Commission Of Kenya And 4 Others v Royal Media Services Limited & 7 Others Petition No. 15 of (2014)eKLR where the Court pronounced itself on who an Interested Party is and held as follows:

“In determining whether the applicant should be admitted into these proceedings as an interested party, we are guided by this Court’s decision in the *Mumo Matemo* case where the court (at paragraphs 14 and 18) held:

“An interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. Similarly in the case of *Meme v. Republic*, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

- (i) Joinder of a person because his presence will result in the complete settlement of all the question involved in the proceedings;
- (ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- (iii) Joinder to prevent a likely course of proliferated litigation.

We ask ourselves the following questions:

- a) what is the intended party’s state and relevance in the proceedings and
  - b) will the intended interested party suffer any prejudice if denied joinder.?”
5. It is therefore clear that the parties who should be made parties to a suit are persons who are necessary for a complete and effectual adjudication of disputes before the court. The applicant states that he was the beneficial and legitimate owner of the suit property and the person in possession and enjoyment of the same.



6. I have perused the court record and find that the respondents advocate was party to the entire process of taxation and the ruling was delivered on the 13<sup>th</sup> September 2023. On the 19<sup>th</sup> March 2024 the respondents filed this application under certificate of urgency. I find this is an abuse of the court process and meant to delay execution of this matter. Indeed, from the proceedings of the Deputy Registrar dated 6<sup>th</sup> September 2023 Mr. Wameyo informed the court that he was abandoning the application to enjoin the person who instructed the applicant and a ruling date was set for 13<sup>th</sup> September 2024. I find this application is not merited and I dismiss it with costs.
7. The second application is dated 17<sup>th</sup> November 2023 and is brought under section 51(1) and (2) of the Advocates Act cap 16, Rule 7 of the Advocates Remuneration Order seeking the following orders;
  1. That this Court be pleased to enter judgement in favour of the applicant for Kenya shillings Four Hundred and Thirty Eight Thousand and Forty Five Only (438,045) being the sum costs taxed by the taxing master.
  2. That the court be pleased to order the sum above said of Kenya shillings Four Hundred and Thirty Eight Thousand and Forty Five Only (438,045) do attract interest at Fourteen per cent (14%) per annum from the date of taxation till payment in full.
  3. That the applicant be allowed to execute the judgement herein against the respondents.
  4. That the costs of this application be provided for.
8. It is based on the grounds that the respondent was duly served with the notice of taxation and bill of costs and the matter proceeded inter parties. That the costs were duly taxed and a certificate of costs issued. That the costs are now due from the respondent.
9. This court has considered the application and the submissions therein. The procedure for the challenge of a taxing master's decision is provided under Rule 11 of the Advocates Remuneration Order which provides as follows:
  - “(1) Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which the objects.
  - (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.”
10. From the foregoing, it is clear that the reasons for the decision are to be sought for by way of a notice within 14 days of the decision of the taxing officer, and the reference is to be filed within 14 days of receipt of the reasons. In the present case, the record shows this was not sought for. Be that as it may, the principles of varying or setting aside a Taxing Master's decision as set out in the cases of *First American Bank of Kenya v Shah and Others* (2002) EA 64 and *Joreth Ltd v Kigano and Associates* (2002) 1 EA 92, are that the Taxing Master's judicial discretion can only be interfered with when it is established that there was an error of principle, that the fee awarded is manifestly excessive for such an inference to arise, and where discretion is exercised capriciously and in abuse of the proper application of the correct principles of law.



11. In *First American Bank of Kenya v Shah and Others* (2002) EALR 64 the court held that;

“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”.
12. These principles reiterate the position of the Court of Appeal in *Joreth Ltd v Kigano & Associates* (2002) eKLR, where the said Court held that a taxing master in assessing costs to be paid to an advocate in a bill of costs was exercising her judicial discretion and that such judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously, and in abuse of proper application of the correct principles of law, or where the amount of fees awarded by the taxing master is excessive to amount to an error in principle.
13. I have perused the court file and from the ruling find that the taxing master noted that the instructions were given in 2021 and he was guided by the *Advocates Renumeration (Amendment) Order* of 2014. He also noted and considered the fact that the matter never proceeded to conclusion but was withdrawn by the plaintiff on the 7<sup>th</sup> November 2017. The plaintiff later filed an application dated 5<sup>th</sup> March 2020 which was dismissed.
14. In the instant matter the subject matter cannot be ascertained from the pleadings and the law is that, if the subject matter is unascertainable from the pleadings, judgments or settlement, the taxing master is entitled to use his/her discretion to assess such instruction fee as he/she considers just, see the Court of Appeal decision in *Joreth Ltd v Kigano & Associates* (2002) eKLR in this regard. I find that the taxing master considered the work and responsibility involved as the prayers were only injunctive in nature. I see no reason to interfere with the decision of the taxing master.
15. In *Republic v. Minister for Agriculture & 2 Others ex parte Samuel Muchiri W’Njuguna* (2006) eKLR Ojwang, J (as he then was) expressed himself as follows:

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other...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. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the *Advocates (Remuneration) Order* itself, some of the relevant factors to take into account include the nature and importance of the case 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. Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice 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...A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved...Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they



cannot be served out without either a specific statement of the authorising clause in the law, or a particularised justification of the mode of exercise of any discretion provided for... The complex elements in the proceedings which guide the exercise of the taxing officer's discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs....”

16. From the facts of this matter and authorities cited above I find that the application dated 17<sup>th</sup> November 2023 is merited and I grant it as prayed with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23<sup>RD</sup> DAY OF JULY 2024.**

**N.A. MATHEKA**

**JUDGE**

