



Kamau (Sued as the Legal Representative Ad Litem of the Estate of Monicah Wambui Kamau) v Kamau t/a Mwangi & Partners Advocates (Miscellaneous Civil Application E416 of 2024) [2025] KEHC 11429 (KLR) (Civ) (31 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11429 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS CIVIL APPLICATION E416 OF 2024

JN MULWA, J

JULY 31, 2025

BETWEEN

SIMON MAINA KAMAU (SUED AS THE LEGAL REPRESENTATIVE AD LITEM OF THE ESTATE OF MONICAH WAMBUI KAMAU) APPLICANT

AND

**GEORGE MWANGI KAMAU T/A MWANGI & PARTNERS
ADVOCATES RESPONDENT**

RULING

1. For determination is the motion dated 4th February 2025 by (hereinafter Simon Maina Kamau the Applicant) seeking inter alia that the Court be pleased to set aside the taxed bill of costs and the resultant decree for Kshs.181,247.68/= together with any warrants of execution issued in MCCC/E6083/2020 for lack of service of taxation pleadings and violation of the Applicant's right to a fair hearing under Article 50 of *the Constitution*, and that the Court be pleased to strike out the Advocate/Respondent's claim for professional fees for lack of instructions by the Applicant.
2. The Applicant further seeks that upon hearing and determination of this Application inter-partes the Court be pleased to set aside the ruling delivered on the 8th day of August 2024 by the Honourable Deputy Registrar Vincent Kiplagat in respect of the Advocates Bill of costs dated 8th May, 2024.
3. The motion is expressed to be brought pursuant to Sections 1A,1B and 3A of the *Civil Procedure Act*, Order 9 Rule 9, Order 40 Rule 1, Order 45 Rule 1, Order 51 Rule 1 and Article 50 of *the Constitution* of Kenya and upon grounds on the face of the motion as amplified in the affidavit of Simon Maina Kamau, described as the legal representative of the estate of Monicah Wambui Maina.



4. The gist of his disposition is that the Applicant did not participate in the hearing of the bill of costs dated 8th May 2024 as the same was not served upon him; that he only became aware of the bill of costs and the Court's ruling on 27th January 2025 upon being served with a decree dated 6th November 2024 and warrant of attachment in execution of decree.
5. The Applicant further disputes the taxed amount of Kshs.181,247.68/= stating that it is exaggerated and not drawn to scale as per the Advocates Remuneration Amendment Order, 2014.
6. The motion is opposed by way of a replying affidavit deposed by Mr. George Mwangi Kamau, an Advocate practicing in the name and style of Mwangi & Partners Advocates the Respondents herein.
7. The respondent avers that he was instructed by the Applicant in 29/6/2019 to obtain letters of Administration in respect of his late mother, wherein he charged shs.30,000/=which was paid, but also proceeded to file a suit for compensation, but later the Applicant failed to pay legal fees for the case despite demands having been given, which lead to filing the Advocate/Client bill of costs.
8. It is the Respondent's deposition that despite being served with the bill of costs and taxation notice, he failed to attend the DR and that the certificate of taxation was also served upon him.
9. For the above reasons, the Respondent states that the application is without merit and ought to be dismissed.

Analysis and Determination

10. On whether the Applicant was served with the Bill of costs, the Respondent has provided a notice of change of Advocates dated 11/4/2024 upon which the new Advocates, Mwenda Njagi & co Advocates the Bill of costs was served, that upon taxation, it is evident that the Respondent send letters to the Applicant demanding payment of the taxed costs dated 15/4/2024 to the Applicants advocate and to the Applicant by WhatsApp, and that his Advocates by letter dated 25/4/2024 acknowledged receipt of the demand letter but even then, the costs were not paid.
11. The court finds that the Applicants allegation that he was not served with the Bill of costs has no substance at all.
12. On the prayer to set aside the taxed costs in the sum of Kshs. 181,247.68, together with any warrants of attachment in execution of the decree, the court finds that the Applicant invoked Order 45 of the Civil Procedure Rules that underpin Review of courts orders and Judgments as well as Section 1A,1B and 3A of the *Civil Procedure Act*, Order 9 Rule 9, Order 40 Rule 1, Order 45 Rule 1, Order 51 Rule 1 and Article 50 of *the Constitution* of Kenya.

However the reliefs sought by the Applicant are different, being an order for stay of execution and setting aside of the taxed costs.
13. Clearly, the motion is not brought under the correct legal provisions, which are very different from the substance of the motion before the court.
14. In Jason Ondabu t/a Ondabu & Company Advocates & 2 Others v Shop One Hundred Limited (2020) eKLR the Court of Appeal observed that an application for review involves exercise of judicial discretion. Further the applicant invoked Section 3A of the CPA, which reserves;-

“the inherent power of the Court, to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”



15. In *Equity Bank Limited v West Link Mbo Limited* (2013), ECLR, Musinga, JA stated inter alia, that, by “inherent power’ it means that:-

“Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights interests of different parties but within the confines of law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from *the Constitution* or statute. Such power enables the judiciary to deliver on their Constitutional mandate.....inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion.”

16. The Supreme Court went further in the *Board of Governors, Moi High School Kabarak and another versus Malcolm Bell* (2013) eCLR, to add the following: -

“Inherent powers are endowments to the court as will enable it to remain standing as a constitutional authority and to ensure its internal mechanisms are functional. It includes such powers as enable the Court to regulate its intended conduct, to safeguard itself against contemplation or descriptive intrusion from elsewhere and to ensure that its mode of disclosure or duty is consumable, fair and just”

17. It is undisputed that on 8th August 2024 the Court delivered ruling on the Advocate/Client bill of costs dated 8th May,2024 at Kshs.181,247.68/=. In the instant case, it is evident that the Applicant essentially seeking to set aside the Court’s order allowing the Respondent/Advocates application rather than a review of the said order.

18. It is settled that the discretion of the Court to set aside its order is unfettered and that a successful applicant is obligated to adduce material upon which the Court should exercise its discretion, or in other words,the factual basis for the exercise of the Court’s discretion in their favor.

19. In the case of *Shah v Mbogo and Another* (1967) E.A 116 the rationale for discretion was spelt out as follows: -

“The discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

20. The Applicant, alleges that he was not afforded an opportunity to challenge the bill of costs as the taxation notice was not served upon him. In *Ochieng Onyango Kibet and Ohaga Advocates v Akiba Bank Ltd* [2007] eCLR (Warsame J), similar views were expressed, that:

“The act of authorizing an advocate to act on behalf of a client constitutes the advocate’s retainer by the client. It is not the law that an advocate must obtain a written authority from the client before he commences a matter. The participation and authority of an advocate in a matter can be implied or discerned from the conduct of the client. In my view retainer is no more than an authority given to an advocate to act in a particular matter and manner. It may be restrictive; it may be wide. And nevertheless it can be implied from the conduct of the client/advocate relationship.” The court submitted that instructions need not be in writing but can be inferred from the conduct of the parties.



21. In the courts view therefore, it is manifestly clear that during the survival of the Advocate-Client relationship, the Respondent/Advocate reached the Applicant through the phone number he had provided through WhatsApp, and through his Advocates named above and further filed screenshots, a Mpesa message confirming that the number is registered in the name of Simon Maina Kamau and affidavits of service confirming service of a hearing notice and mention notice.
22. It is therefore evident and clear to the court that the Advocates indeed notified the Applicant of the Bill of costs, the date of Taxation outcome of the taxation and demand notices for payment, not only to him, but also through its Advocates. The court is not inclined to accept the explanation tendered by the Applicant concerning service.
23. As earlier observed, setting aside an order of the Court involves exercise of discretion which intended to avoid injustice or hardship resulting from accident, inadvertency or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct justice.
24. The Court is of the view that the Applicant ought to have sought extension of time within which to file a reference against the ruling delivered by Hon. Vincent Kiplagat rather than file the instant application.
25. In the end, the court finds The Applicant's prayer seeking to set aside the taxed bill of costs bereft of merit and must fail. The motion dated 4th February 2025 is without merit and is accordingly dismissed with costs to the Respondent/Advocate.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF JULY, 2025.

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JANET MULWA.

JUDGE

