Mua v Loki & Associates Advocates (Civil Miscellaneous E346 of 2024) [2025] KEHC 14357 (KLR) (31 July 2025) (Ruling)

Neutral citation: [2025] KEHC 14357 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL MISCELLANEOUS E346 OF 2024

NIO ADAGI, J

JULY 31, 2025

BETWEEN

JOSEPHAT MUSYOKA MUA ..... APPLICANT

AND

LOKI & ASSOCIATES ADVOCATES ..... RESPONDENT

RULING

1. The Applicant filed a Chamber Summons application under Certificate of Urgency dated 31st December 2024 seeking the following orders from the court;

   a. Spent

   b. Spent

   c. Spent

   d. The Honourable Court be pleased to preserve the subject matter of the application through an interim order of stay of execution of the certificate of costs or such other consequential steps arising from Hon. Deputy Registrar's ruling on taxation date 19th December ,2024.

   e. The Honourable Court be pleased to order a stay of execution of the Certificate of Costs or such other consequential steps arising from the Hon. Deputy Registrar's ruling on taxation dated 19th December 2024.

   f. The decision of the Learned Deputy Registrar dated 16th February ,2024 be quashed for it was arrived at without scrutinizing the facts by the Applicant that he was bound by the agreement and the invoice dated which crystalizes the agreement and which documents are the bedrock of the interpretation of the contract o legal representation.

g. In the alternative to prayer (4) above, the Honourable court be pleased to set aside the decision of the Learned Deputy Registrar dated 19th December 2024 and remit the matter for fresh taxation before a different taxing master pursuant to the Honourable Court's direction on the relevant principles.

h. The costs of the application be provided for.

2. The application is based on the grounds that Deputy Registrar grossly failed to appreciate the fact that the Applicant and the Respondent had an agreement in which the Applicant was to pay the Respondent Kshs.220,000.00 and which the Applicant dutifully paid.

3. Upon their relationship getting strained, the Respondent decided to use the Honorable Court to heavily tax the Applicant and punish him for terminating his services which the Applicant felt that the Respondent was not adequately representing him.

4. On 19th December,2024, Hon. V. Ochanda in the absence and without notice to the Applicant's Advocates, delivered a Ruling on the Respondent/Advocate's party to party Bill of Costs dated 16th February,2024 (the "Bill of Costs') by which Ruling the Learned Deputy Registrar awarded the immense and manifestly excessive sum of Kshs.2,009,775.00 as Advocates costs.

5. The Respondent is an expert in matters involving the application of the Advocates Remuneration Order 2014 and when he charged the Applicant Kshs.220,000.00 to conduct his matter, being Machakos Succession E042 of 2023 the Respondent ought to have professionally charged the right fees hence his actions amount to undercutting and his professional misconduct ought not to be meted upon the Applicant if in the actual sense the fees is Kshs.2,009,775.00.

6. The application is further supported by the affidavit of Josephat Musyoka Mua, the Applicant. He deposed that vide an invoice stated 8/8/2023 and an email print out dated 22/01/2024, they had agreed on a fixed fee of Kshs.220,000 which he paid therefore he alleges that the taxed bill of costs was fraudulent and that it amounts to unjust enrichment and double jeopardy. The Applicant contends that the taxing master failed to take into consideration the principles in taxation and assessment of instruction fees, took into account factors which were not supposed to be considered and failed to exercise discretion judiciously in accordance with the law. For these reasons, the court was urged to interfere with the ruling.

7. The Respondent did not respond to the Application. The court has seen the affidavits of service dated 23/01/2025 and 28/08/2025.

8. The application was canvassed by way of written submissions. The Applicant filed submissions dated 28/05/2025 in which he submitted that he had already settled the legal fees in excess of Kshs.107,000. He contended that his advocate acted in an unethical manner while representing him by failing to file responses, poor communication, failure to follow directions, failure to issue receipts, that there was conflict of interest as the advocate were friends with his opponent's advocate. Secondly, he submitted that when he said he would represent himself is when the advocate filed a bill of taxation as a scheme to defraud him. That the court cannot re-write a contract between parties. The Applicant has named about seven advocates whom he alleges engaged in unethical conduct, law fare and an organized scheme to defraud him. He stated that he has reached out to the Director of Public Prosecutions, Law Society of Kenya and Advocates Complaints Commission to assist with the misconduct highlighted herein. The Applicant submitted that there was corruption in having his case dismissed.

Analysis and determination

9. The court has considered the application, the affidavits on record and the submissions filed only by the Applicant and frames the issues for determination to be as follows:

    a. Whether there were irregularities and illegalities in the taxation of the bill of costs.

    b. Whether the certificate of taxation should be set aside and /or taxed a fresh

a)Whether there were irregularities and illegalities in the taxation of the bill of costs

10. The Applicant has raised very serious allegations of fraud, misconduct and corruption against the court and named seven advocates whom he says worked together to defraud him in an organized scheme. He has also submitted that he reported the concerns to the Director of Public Prosecution, the Law Society of Kenya and the Advocates Complaints Commission. I note that the Chamber Summons application as well as the affidavit in support thereof have no such allegations made and these allegations only arise in the Applicant's written submissions. Unfortunately, the named advocates are not parties to this matter and therefore are not in a position to respond to the serious allegations made against them by the Applicant in his submissions.

11. It is trite law that submissions are not pleadings neither are they evidence. This was stated in the case of Robert Ngande Kathathi v Francis Kivuva Kitonde [2020] KEHC 7276 (KLR) where Odunga J as he then was stated as follows;

> " It also relied on submissions of the parties to which no agreed documents were annexed. Submissions, with due respect, do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions. As was held by Mwera, J (as he then was) in Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007:
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> "Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided."
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> 19. The same Judge in Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993 expressed himself as follows:
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> "Indeed, and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."
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> 20. Similarly, in Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749, the Court held that:
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> "As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallize the substance of the case, the evidence and the law relating to that case. It is, as it

were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

21. As stated by the Court of Appeal in Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

22. The Court of Appeal in Avenue Car Hire & Another vs. Slipha Wanjiru Muthegu Civil Appeal No. 302 of 1997 held that no judgement can be based on written submissions and that such a judgement is a nullity since written submissions is not a mode of receiving evidence set out under Order 17 Rule 2 of the Civil Procedure Rules [now Order 18 rule 2 of the Civil Procedure Rules]. The same Court in Muchami Mugeni vs. Elizabeth Wanjugu Mungara & Another Civil Appeal No. 141 of 1998 found the practice of making awards on the basis of the submissions rather than the evidence deplorable."

12. With this in mind, such allegations that go to the reputation and character of the said advocates as well as issues not related to the reference which is the subject of this miscellaneous cause, cannot be handled by this court in the manner raised. The Applicant ought to take up the matter in the right forum with the entities mandated to handle such allegations. Nonetheless, coupled with the doctrine of exhaustion, the Applicant has not provided any evidence to support the said allegations, neither has he raised them in his pleadings to allow the court to take such matters into consideration.

13. The Court of Appeal in the case of Geoffrey Muthiga Kabiru & 2 Others v Samuel Munga Henry & 1756 others [2015] eKLR, stated that:

> " It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts."

14. There are many other avenues for the Applicant to have the allegations raised herein handled other than this court sitting as one handling a reference on a certificate of costs. As such, I find that there were no irregularities and illegalities in the manner in which the bill of costs was taxed.

b) Whether the certificate of taxation should be set aside and /or taxed a fresh

15. The grounds upon which a court can interfere with the decision of the taxing masters was discussed by the Supreme Court in the case of Fredrick Otieno Outa v Jared Otieno Odoto & 3 Others SC Petition

No 6 of 2014; [2023] KESC 75 (KLR) highlighted the following principles to be considered in an application for setting aside a taxation decision:

> "
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> "(11) A certificate of taxation will be set aside, and a single Judge can only interfere with the taxing officer's decision on taxation if;
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> a. there is an error of principle committed by the taxing officer;
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> b. the fee awarded is shown to be manifestly excessive or is so high as to confine access to the court to the wealthy;(and I may add, conversely, if the award is so manifestly deficient as to amount to an injustice to one party).
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> c. the court is satisfied that the successful litigant is entitled to fair reimbursement for the costs he has incurred, (and I may add, the award must not be regarded as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected by the other party); and
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> d. the award proposed is so far as practicable, consistent with previous awards in similar cases.
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> To these general principles, I may add that;
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> i. There is no mathematical formula to be used by the taxing officer to arrive at a precise figure because each case must be considered and decided on its own peculiar circumstances,
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> ii. Although the taxing officer exercises unfettered judicial discretion in matters of taxation that discretion must be exercised judicially, not whimsically,
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> iii. The single Judge will normally not interfere with the decision of the taxing officer merely because the Judge believes he would have awarded a different figure had he been in the taxing officer's shoes."

16. The Court of Appeal in Joreth Limited v Kigano & Associates [2002] KECA 153 (KLR) held that

> " A High Court judge when hearing such an objection is not sitting in his capacity as a judge exercising his appellate jurisdiction as, say, would be the case when he hears an appeal against the decision of a magistrate. The taxing officer whilst taxing a bill of costs is carrying out his functions as such only. He is an officer of the superior court appointed to Tax bills of costs."

17. In the case of Steel Construction & Petroleum Engineering (E.A.) Ltd vs. Uganda Sugar Factory Ltd (1970) E.A. 141 per spry JA at page 143:

> " Counsel for the appellant submitted, relying on D'Souza v. Ferao [1960] EA 602 and Arthur v. Nyeri Electricity Undertaking [1961] EA 492 that although a judge undoubtedly has jurisdiction to re-tax a bill himself, he should as a matter of practice do so only to make corrections which follow from his decision and that the general rule is that where a fee has to be re -assessed on different principles, the proper course is to remit to the same or another

taxing officer. I would agree that, as a general statement, that is correct, adding only that it is a matter of juridical discretion."

18. The elements for consideration were properly laid out in Morgan Air Cargo Limited v Evrest Enterprises Limited [2014] eKLR.

19. The taxing master in her ruling went ahead to rely on Joreth Limited Vs Kigano & Associates (2002) eKLR with the understanding that the value of the subject matter was unascertainable. The court in the above case held as follows: -

> " We would at this stage point out that the value of the subject matter for purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable the Taxing Officer is entitled to use his discretion to assess such instruction fees as he considers just taking into account amongst other matters, the nature and the importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances."

20. In my writing of this ruling, I have faced a challenge on considering the issue of agreed fees in this matter for the reasons that:

    a. There being no record for the taxation, it is not known whether the Applicant raised the issue of the invoice on agreed fees at the time of taxation because from the ruling it was not considered and neither have I come across one on the record.

    b. If he did not present it then, then the taxation was properly done.

    c. If in deed the Applicant presented the invoice on agreed fees and the same was not considered, then the matter can be taken back for re-taxation before another taxing master other than Hon. V. Ochanda whom the Applicant seem to have equally made allegations against.

21. Accordingly, I find that the Chamber Summons application dated 31st December 2024 to be lacking in merit and the same is dismissed.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 31ST JULY 2025

NOEL I ADAGI

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 31ST JULY 2025

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In the presence of

Josphat Mua in person..... Applicant

Mr. Loki.....for Respondent

Milly.....Court Assistant