



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**MISCELLANEOUS CRIMINAL APPLICATION 31 OF 2019**

**JOHN GITONGA ARITHI.....APPLICANT**

**~VS~**

**KINORO TEA FACTORY COMPANY LIMITED.....1<sup>ST</sup> RESPONDENT**

**KTDA MANAGEMENT SERVICES LIMITED.....2<sup>ND</sup> RESPONDENT**

**KENYA TEA DEVELOPMENT AGENCY LIMITED.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Applicant John Gitonga Arithi through Chamber Summons dated 25<sup>th</sup> March 2019 sought that this court be pleased to set aside the decision/reasons of the learned Magistrate in Meru CMCC No. 2 of 2017 dismissing the applicants objection to the taxation of costs done on 20/6/2019;

**“That this court be pleased to set aside the costs of taxation done on 20/6/2017 in Meru CMCC No. 2 of 2017.**

**He also asked for costs of the application”.**

2. The application was based on the grounds on the face of the summons and affidavit of John Gitonga Arthur. The grounds were that the taxation was done by the Executive Officer contrary to the provisions of Rule 10 of the Advocates Remuneration Order;

i. That the costs taxed against the appellant were exaggerated unreasonable, punitive and contrary to schedule 7 of the Advocates (Remuneration) Order.

ii. That the costs assessed on both instruction fees and attendances was baseless and inordinately high.

iii. That the decision/ruling of the learned Magistrate failed to address all the issues raised in the notice of objection to taxation.

3. In the supporting affidavit, the applicant averred that the costs in Meru CMCC No. 2 of 2017 were assessed by the E.O. on 31/1/2017 at Kshs.23,475/= and later the same costs were re-taxed at Kshs.69475/=.

4. That on 20/6/2018 he filed a formal application requesting the lower court’s decision be set aside but the trial Magistrate in her ruling delivered on 28/11/2018 dismissed the application on the ground she had no jurisdiction to set aside assessment of costs done by the Executive Officer.

5. The applicant averred further that he was aggrieved by the ruling of the trial Magistrate and he sought leave to file the reference herein arguing that the instructions fees awarded was grossly exaggerated. He averred that the Respondents filed a joint Notice of Preliminary Objections through joint advocate and were therefore not entitled to separate instructions fees.

6. He argued that the Respondents who are corporate bodies were not represented by their authorized agents on the date the lower court matter was withdrawn and the award of Kshs.3000/= for attendance of each of the Respondents was baseless.

7. The 1<sup>st</sup> Respondent in Replying Affidavit sworn on 14<sup>th</sup> July 2020 by Dr. John Kennedy Omanga averred that the Applicant having sued the 1<sup>st</sup> and 3<sup>rd</sup> Respondents separately and 1<sup>st</sup> and 3<sup>rd</sup> Respondents having instructed advocates to represent them separately, the 1<sup>st</sup>

Respondent was entitled to its costs independently as awarded by the court which relied on the Advocates Remuneration Order. It was averred that the application herein is vexatious an abuse of court process or is devoid of any merit and should be dismissed as it is a waste of precious judicial time.

8. The 2<sup>nd</sup> Respondent also opposed the application vide Replying Affidavit sworn on 14<sup>th</sup> July 2020 by Susan Musyoka the Head Legal & Regulatory Affairs of the 2<sup>nd</sup> Respondent. She said that the Applicant sued the 2<sup>nd</sup> Respondent in Meru CMCC No. 2 of 2017 as an independent party cited as 2<sup>nd</sup> Defendant.

9. She argued that the 2<sup>nd</sup> Respondent instructed the firm of Millimo Muthomi & Co. Advocates to represent it in the lower court suit which firm took up instructions and represented 2<sup>nd</sup> Respondent which is an independent entity from the 1<sup>st</sup> Respondent. She also said that the application is vexatious and an abuse of court process, devoid of merit and a waste of judicial time and deserves to be dismissed.

10. The 3<sup>rd</sup> Respondent also opposed the application vide Replying Affidavit of Dr. John Kennedy Omanga sworn on 14<sup>th</sup> July 2020 in which he contended that the 3<sup>rd</sup> Respondent was sued by the Applicant in Meru CMCC No. 2 of 2017 and the 3<sup>rd</sup> Respondent instructed the firm of Millimo Muthomi & Co. Advocates to represent it. He argued that the 3<sup>rd</sup> Respondent and the 1<sup>st</sup> Respondent are independent entities from each other and that the 3<sup>rd</sup> Respondent duly instructed the law firm to represent it in the matter and is therefore entitled to costs.

11. The deponent who is Company Secretary to both the 1<sup>st</sup> and 3<sup>rd</sup> Respondent's said the application herein is vexatious and an abuse of court process, devoid of merit, a waste of precious judicial time, frivolous and meant to clog the justice system and deserves to be dismissed. The application dated 25/3/2019 was canvassed by way of written submissions.

12. I have considered the application, the Replying Affidavit and submissions by parties as well as the ruling of the lower court parties and the issues for determination are:-

- i. Whether costs in the trial court were assessed by the Executive Officer.
- ii. Whether the trial Magistrate erred in awarding separate costs for each of the Respondents.
- iii. Whether instructions fees were grossly exaggerated.
- iv. Whether the award on attendance at Kshs.3000/= for each Respondent was without basis.
- v. Who should bear the costs of the application?

13. From the ruling delivered on 28<sup>th</sup> November 2018 the trial Magistrate is very clear. She owns the certificate of costs and decree as having been issued by her – page 3 – paragraph 2. She also confirmed having re-assessed the costs upon the Respondents advocate complaining that costs in-respect of other Respondents had not been assessed.

14. The applicant has not told this court which Executive Officer assessed the costs and being that the trial Magistrate has owned the process this court finds that this ground relied upon to set aside the taxed costs cannot stand.

15. I have tried to search the authorities relied upon by the applicant; High Court of Kenya at Meru Misc. Civil Application Nos. 159 of 2019 and 18 of 2018 but unfortunately they don't seem to have been reported and counsel did not attach them to the submissions as indicated.

16. The Applicants counsel did not also give a rejoinder to the Respondents submissions that the three Respondents are independent entities and that they gave instructions separately to the same firm of advocates. In the decision on *Nguruman Limited vs Kenya Civil Aviation Authority and 3 Others [2014] eKLR* Justice Lenaola as he then was held:-

**“This does not mean that the advocate has one instruction. Receipt of instructions from a client is separate exercise from drawing of pleadings and preparation of documentation for filing. To me there is nothing wrong receiving two sets of different instructions from different clients on the same matter and executing those instructions vide single pleading. This does not disentitle the executing advocate from demanding payment for each of the separate instructions received....To hold that these set of instructions ought to be considered as one of the grounds that the same pleading was filed to both the 1<sup>st</sup> and 2<sup>nd</sup> Respondent is erroneous”.**

17. I find this holding sound and apt. It is the Applicant who identified the Respondents in the plaint as separate and this would serve them with summons to enter appearance as such. He cannot turn and say that they should share instructions fees as one party. Assuming the Respondents had sued the Applicant as different entities would have sought instructions for defending the suit against each and every Respondent and the same should apply to him.

18. On the court attendance fees, I have noted that there were attendances on 9/1/2017 by the advocates for both parties; there was also attendance on 29/8/2018. The attendance fees of Kshs.3000/= is therefore reasonable.

19. The upshot is that the application herein is dismissed with costs to Respondents.

**Dated and signed this 30<sup>th</sup> day of December 2020**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**Delivered at Meru this 28<sup>th</sup> day of January 2021**

**HON. LADY JUSTICE CHERERE**

**JUDGE**