



Adega & 2 others v Kibos Sugar and Allied Industries Ltd & 4 others; Kenya Union of Sugar Plantation and Allied Workers (Interested Party) (Environment & Land Petition 8 of 2018) [2023] KEELC 21649 (KLR) (20 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21649 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND PETITION 8 OF 2018
SO OKONG'O, J
NOVEMBER 20, 2023**

BETWEEN

**BENSON AMBUTI ADEGA 1ST PETITIONER
ERICK OCHIENG 2ND PETITIONER
BETHER ATIENO OPIYO 3RD PETITIONER**

AND

**KIBOS SUGAR AND ALLIED INDUSTRIES LTD 1ST RESPONDENT
KIBOS POWER LIMITED 2ND RESPONDENT
KIBOS DISTILLERS LIMITED 3RD RESPONDENT
MANAGEMENT AUTHORITY 4TH RESPONDENT
COUNTY GOVERNMENT OF KISUMU 5TH RESPONDENT**

AND

KENYA UNION OF SUGAR PLANTATION AND ALLIED WORKERS INTERESTED PARTY

RULING

Background

1. The petitioners brought this petition against the respondents by way of a petition dated 25th October 2018 seeking several reliefs. The interested party joined the petition on 20th December 2018. In a judgment delivered on 31st July 2019, this court allowed the petitioners' petition and condemned the respondents to pay the costs of the petition. The respondents and the interested party were dissatisfied



with the decision of this court and appealed against the same to the Court of Appeal in Kisumu Court of Appeal Civil Appeal No. 153 of 2019. In a judgment delivered on 31st January 2020, the Court of Appeal set aside the judgment of this court and ordered the petitioners herein together with the 4th respondent to pay the costs of the appeal and of the petition. The petitioners were dissatisfied with the decision of the Court of Appeal and appealed against the same to the Supreme Court in Supreme Court Petition No. 3 of 2020. In a judgment delivered on 4th August 2020, the Supreme Court struck out the petitioners' appeal against the Court of Appeal decision.

2. Following the striking out of the petitioners' appeal by the Supreme Court that left the decision of the Court of Appeal undisturbed, the 1st and 2nd respondents filed separate party and party bills of cost both dated 30th August 2021 on 2nd November 2021 for taxation. During the taxation of the 1st and 2nd respondents' bills of cost, the 4th respondent raised a preliminary objection. The 4th respondent contended that the 1st, 2nd and 3rd respondents were represented in this suit by one firm of advocates that did not file separate pleadings for each of the respondents. The 4th respondent contended that the 3rd respondent having filed its bill of costs which had already been taxed, the 1st and 2nd respondents who were represented by the same firm of advocates during the hearing and determination of this suit were barred under Paragraph 62 of the Advocates Remuneration Order from filing separate bills of cost for taxation.
3. The 4th respondent contended further that since it had challenged in the Court of Appeal the decision that was made by this court on a reference to the taxation of the 3rd respondent's bill of costs which decision enhanced the instruction fees that had been awarded to the 3rd respondent by the taxing officer, the said decision by this court on the reference should not be used by the taxing officer as a basis for taxing the 1st and 2nd respondent's bills of costs. In her ruling on the taxation of the 3rd respondent's bill of costs dated 19th April 2021 on 4th November 2021, the taxing officer taxed the instruction fees at Kshs. 3,000,000/- and getting up fees at Kshs. 1,000,000/- being 1/3 of the instruction fees. The other fees were taxed at Kshs. 338,557/- and the disbursement at Kshs. 6,010/-. The bill of costs was taxed at a total sum of Kshs. 4,344,567/-. On a reference to this court, the court (Ombwayo J.) increased the instruction fees to Kshs. 12,000,000/- and getting up fees to Kshs. 4,000,000/- in a ruling dated 15th July 2022. The taxation of the other items in the bill remained the same. Following that reference, the 3rd respondent's bill of costs was taxed at Kshs. 16,344,567/-. The 4th respondent appealed the decision of Ombwayo J. to the Court of Appeal. The appeal is still pending.
4. On the 4th respondent's preliminary objection, the taxing officer (Hon. M.I. Shimenga) held that the 1st, 2nd and 3rd respondents were separate legal entities and as such gave separate instructions to the firm of advocates that represented them in this suit. The taxing officer held that the 1st and 2nd respondents had a right to file separate bills of cost from that of the 3rd respondent for taxation. On the issue of the appeal that the 4th respondent had filed against the decision of Ombwayo J. on the reference by the 3rd respondent, the taxing officer held that she was bound by the said decision of Ombwayo J. that had not been stayed or set aside by the Court of Appeal.
5. In her ruling delivered on 27th April 2023, the taxing officer while assessing the instruction fees payable to the 1st and 2nd respondents stated that this court having found on a reference by the 3rd respondent that the instruction fees of Kshs. 3,000,000/- that she had awarded to the 3rd respondent was too low and having set aside the same, she could not award the same instruction fees to the 1st and 2nd respondents who were represented by the same advocate as the 3rd respondent during the trial of this suit. Guided by the ruling by Ombwayo J. in the said reference, the taxing officer taxed the instruction fees payable to the 1st and 2nd respondents at Kshs. 12,000,000/- each. Consequently, the getting up fees



was taxed at Kshs. 4,000,000/-. The 1st and 2nd respondents' bills of cost were taxed at Kshs. 16,654,267/- for each respondent.

6. What is now before me is a reference to the said taxation by the 4th respondent brought by way of Notice of Motion dated 12th May 2023 under Order 40 of the Civil Procedure Rules and Paragraph 11(2), (4), and Paragraph 62 of the Advocates Remuneration Order 2009. The 4th respondent has sought an order that the decision of the taxing officer made on 27th April 2023 on the 1st and 2nd respondents bills of cost be set aside in that the same was wrong in principle. In its application that was supported by the affidavit sworn by Mamo B.Mamo the 4th respondent contended that at the trial of this suit the 1st and 2nd respondents were represented by one law firm while the 3rd respondent was represented by another law firm. The 4th respondent averred that the 3rd respondent through its present advocates had its bill of costs taxed at Kshs. 16,344,567/- following a reference. The 4th respondent averred that after it lodged an appeal to the Court of Appeal against the said award of Kshs. 16,344,567/- to the 3rd respondent, the 1st and 2nd respondents using the same law firm representing the 3rd respondent who never acted for the 1st and 2nd respondents at the trial filed separate bills of cost and were each awarded costs of Kshs. 16,654,267/- by the taxing officer on 27th April 2023. The 4th respondent contended that the advocates appearing for the 3rd respondent herein who never acted for the 1st and 2nd respondents during the hearing and determination of this suit managed to file three separate bills of cost in which they were awarded over Kshs. 16,000,000/- in each. The 4th respondent averred that since the 1st and 2nd respondents were represented by the same firm of advocates from the commencement, hearing and determination of this suit, they were not entitled to file separate bills of costs and to be awarded separate costs. The 4th respondent averred that it brought this issue to the attention of the taxing officer but the same was not addressed by her in the ruling. The 4th respondent contended that since the 1st and 2nd respondents were each awarded Kshs. 16,654,267/- as costs, the inference was that the two parties attracted the same attention and effort. The 4th respondent averred that the taxation of the 1st and 2nd respondents' bills of cost was contrary to the provisions of Paragraphs 62 and 62A of the Advocates Remuneration Order. The 4th respondent averred further that the taxing officer erred in taxing the 1st and 2nd respondents' costs at Kshs. 16,654,267/- each on bills of cost drawn by a firm of advocates that did not represent the two respondents at the trial and determination of this suit. The 4th respondent averred that even where a single advocate or firm of advocates is instructed to represent several plaintiffs or defendants and ends up filing separate pleadings for each, the taxing officer had a duty during taxation to consider the propriety or necessity of such separate pleadings to avoid unfair remuneration. The 4th respondent averred that the taxing officer failed to peruse the trial file and address these issues of principle.
7. The 1st and 2nd respondents opposed the application through a Notice of Preliminary Objection dated 2nd June 2013 and a replying affidavit sworn by Wesley Gichaba advocate on 2nd June 2023. In their Notice of Preliminary Objection, the 1st and 2nd Respondents averred that the 4th respondent was in breach of the orders of the court made on 15^h July 2022, and as such it had no right of audience before the court. On the limb of the application seeking a stay of execution of the taxed costs on the ground that the same was excessive, the 1st and 2nd respondents averred that the issue was res judicata the court having pronounced itself on the same on 15th July 2022. The 1st and 2nd Respondents averred further that the application was incompetent for want of notice which was a prerequisite for a valid reference.
8. In the replying affidavit by Wesley Gichaba, the 1st and 2nd respondents (hereinafter referred to only as "respondents" for ease of reference) averred that the 4th respondent (hereinafter referred to only as "the applicant" for ease of reference) had brought an earlier application for stay of execution of the decision of Ombwayo J. made on 15th July 2022 increasing the instruction fees to Kshs. 12,000,000/-.



The respondents averred that in a ruling made on 8th December 2022, the court granted the applicant an order of stay on condition that the applicant deposited in court the taxed costs as security. The respondents averred that the applicant did not comply with the order. The respondents averred that due to the applicant's defiance of the order, the applicant had no right of audience before the court. The respondents averred that the order for stay sought by the applicant pending the hearing of the present application had no merit.

9. On the merit of the reference application, the respondents averred that the same was intended to delay, frustrate, and stall the payment of the costs that were awarded to the respondents and should be rejected by the court. The respondents averred that the applicant had brought up new issues in the application that were not raised before the taxing officer. The respondents averred that the issue of representation of the parties was not raised before the taxing officer and she did not rule on the same. The respondents averred that this court lacked jurisdiction to determine the issue.
10. The respondents admitted that initially, the 1st, 2nd and 3rd respondents were represented by one law firm. The respondents averred that their advocates on record took over the conduct of this suit on behalf of the 3rd respondent on 8th February 2019 while the 1st and 2nd respondents changed their advocates on 9th August 2019 from the initial firm of advocates that was representing them. The respondents averred that they instructed their advocates currently on record to act for them in this matter on 30th August 2021. The respondents averred that the various notices of change of advocates were on record. The respondents averred that it was on the basis of the appointment of their current advocates to act for them and the 3rd respondent that the applicant had argued before the taxing officer that their advocates should have filed a single bill of costs for the 1st, 2nd and 3rd respondents instead of filing separate bills for each respondent.
11. The respondents averred that they had a right to be represented by an advocate of their choice at all stages of the proceedings. The respondents averred that they were sued as independent legal entities and the instructions came from each of them. The respondents averred that in this case, the instruction by each respondent was specific and independent in view of the distinct reliefs that were sought against each respondent. The respondents submitted that the instructions to counsel did not end with the delivery of judgment.
12. The respondents averred further that the applicant had not demonstrated any error of principle on the part of the taxing officer. The respondents averred that the applicant's contention that the instruction fees that was taxed at Kshs. 12,000,000/- was excessive and amounted to an error of principle was baseless in that the court had already made a determination on a reference arising from a similar bill of costs by the 3rd respondent that a fair instruction fees was Kshs. 12,000,000/- and getting up fees was Kshs. 4,000,000/- which decision was binding upon the taxing officer. The respondents averred that the said decision by this court (Ombwayo J.) had not been reviewed, varied or set aside by the Court of Appeal. The respondent averred that the taxing officer did not err in taxing the instruction fees at Kshs. 12,000,000/- and getting up fees at Kshs. 4,000,000/- as she merely followed the rule of stare decisis.
13. In its supplementary affidavit also sworn by Mamo B. Mamo on 27th June 2023, the applicant averred that the excessiveness of the award of costs to the respondents was an error of principle. The applicant averred further that the respondents' advocate was not competent to depose to contested facts. The applicant invited the court to strike out the respondent's replying affidavit and have it expunged from the record. The applicant averred that the issue of representation of the 1st, 2nd and 3rd respondents was relevant and critical. The applicant averred that the law did not allow a single advocate to raise identical and separate bills of cost for taxation. The applicant admitted that the respondent's advocates on record took over the conduct of their case after judgment. The applicant, however, wondered why



the firm was taxing the 1st and 2nd respondents' bills of cost and having the ruling on taxation of the 3rd respondent's bill apply to the 1st and 2nd respondents. The 4th respondent averred that it was seeking protection from persons who were seeking unjust enrichment from public coffers.

The Submissions

14. The application was heard by way of written submissions. The applicant filed its submissions dated 18th July 2023 while the respondents filed submissions dated 17th August 2023. The applicant contended that the taxing officer committed an error of principle by proceeding to tax the respondents' bills of costs while the same was a duplication the 1st, 2nd and 3rd respondents having been represented by the same advocates initially and the 3rd respondent having filed and had its bill of costs taxed. The applicant contended that the taxation of the 1st, 2nd and 3rd respondents' bills of costs at the same amount showed that the charges were duplicated. The applicant contended that the 1st and 2nd respondents were represented by the same firm of advocates from the commencement of this suit until the determination of the matter by this court. The applicant contended that the 1st, 2nd and 3rd respondents having been represented by the same advocates and having filed common pleadings, they were not entitled to file separate party and party bills for taxation. The applicant contended that the three respondents ought to have filed one bill of costs. The applicant submitted that the 1st and 2nd respondent's bills of costs that were filed subsequent to the 3rd respondent's bill of cost should have been struck out by the taxing officer for duplicity. The applicant contended that it raised these issues with the taxing officer but the same were ignored. The applicant relied on Paragraph 62 of the Advocates Remuneration Order, and *Kiunjuri v. Waithaka & 2 others* (Appeal No. 17 of 2020) [2022]KEELC 2256 KLR and *Desai Sarvia & Pallan Advocates v. Tausi Assurance Company Limited* [2015]eKLR in support of its submissions on this issue. In *Kiunjuri v. Waithaka & 2 others* which concerned taxation of party and party bill of costs where three defendants were represented by the same firm of advocates and filed one set of pleadings, the court found that there was no justification for the three defendants filing three separate bills of costs for taxation. In *Desai Sarvia & Pallan Advocates v. Tausi Assurance Company Limited* that concerned advocate and client bill of costs, the court found no justification for the advocate who was instructed by one of the two defendants to act for both of them and who filed one set of pleadings for the two defendants filing two separate advocate and client bills of costs for taxation. The court held that the taxing officer was justified in disallowing the second bill of costs. In addition to challenging the competency of the respondents' bills of costs on account of duplicity, the applicant had also contended that the amount awarded as instruction fees and getting up fees were manifestly excessive. The applicant did not submit on this ground in its Submissions.
15. The respondents submitted that the applicant was in contempt of court orders made on 8th December 2022 and as such it had no right of audience before the court. The respondents submitted that the order required the applicant to deposit a sum of Kshs. 12,000,000/- as security which it had failed to do. The respondents submitted further that the reference was incompetent for want of notice under Paragraph 11(1) of the Remuneration Order. The respondents submitted that the applicant did not give notice of objection to taxation setting out the items in the bills of cost whose taxation it was objecting to prior to filing a reference. The respondents submitted that that procedural infraction was fatal to the reference. On the issue of the instruction fees and getting up fees being manifestly excessive, the respondents submitted that the issue was *res judicata* because this court differently constituted had considered the issue and made a determination thereon which determination guided the taxing master in its ruling the subject of the present reference. The respondents submitted that the court was *functus officio* on the issue and could not be called upon to determine it. On the issue of duplicity in the bills of cost, the respondents submitted that they were entitled to file separate bills of cost. The respondents submitted that each party that was represented was entitled to file a bill of costs and



charge instruction fees. In support of this submission, the respondents relied on *Ogeto t/a Ogeto & Ogeto Advocates v. Muchiri* [2022] KEELC 3239(KLR) in which the court cited *Nguruman Limited v. Kenya Civil Aviation Authority & 3 Others* [2014]eKLR where the court stated that an advocate was entitled to separate fees in respect to each party he represents in a suit notwithstanding that he acts for them in a single suit and that to hold that instruction by two parties represented by an advocate can be considered as one on the grounds that the same pleading was filed for both is erroneous. The respondents submitted that the case of *Desai Sarvia & Pallan Advocates v. Tausi Assurance Company Limited*(supra) was distinguishable and irrelevant in that the decision concerned taxation of advocate and client bill of costs.

16. The respondents submitted that the applicant had failed to satisfy the conditions that would warrant interference with the exercise of discretion of the taxing officer. The respondents submitted that the reference was incompetent, lacked merit and should be dismissed. The respondents urged the court to discharge the stay order that was granted on 8th December 2022 so that the respondents could proceed with execution.

Analysis and Determination

17. I have considered the applicant’s reference together with the affidavits filed in support thereof. I have also considered the replying affidavit by the respondents, and the submissions by the advocates for the parties. The issue arising for determination in this reference is whether sufficient cause has been shown by the applicant to warrant interference with the decision of the taxing officer made herein on 27th April 2023. In *Nyangito & Co. Advocates v. Doinyo Lessos Creameries Ltd.* [2014] eKLR, the court stated that:

“The circumstances under which a judge of the High Court interferes with the taxing officer’s exercise of discretion are now well known. These principles are:

1. that the court cannot interfere with the taxing officer’s discretion 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 interference that it was based on an error of principle;
2. it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the remuneration order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause 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;
3. 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 and the court is not entitled to upset a taxation because in its opinion, the amount awarded was high;
4. it is within the discretion of the taxing officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary.”



18. In *Republic v. Kenyatta University & Another Ex parte Wellington Kihato Wamburu* [2018] eKLR the court cited with approval the Ugandan Supreme Court case of *Bank of Uganda v Banco Arabe Espanol* SC Civil Application No. 23 of 1999, where the court stated that:

“Save in exceptional circumstances, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs are matters with which the taxing officer is particularly fitted to deal, and in which he has more experience than the judge. Consequently, a judge will not alter a fee allowed by the taxing officer, merely because in his opinion he should have allowed a higher or lower amount.

Secondly, an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the taxing officer exercised, or applied a wrong principle. In this regard, application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or manifestly low.

Thirdly, even if it is shown that the taxing officer erred on principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties.”

19. In the South African case of, *Visser v Gubb* 1981(3) SA 753 (C) 754H – 755 C that was cited with approval in *KTK Advocates v. Baringo County Government* [2017] eKLR, the court stated as follows:

“The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue.... The court must be of the view that the taxing officer was clearly wrong, i.e its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.”

20. Before going to the merit of the application, I wish to dispose of some preliminary issues that were raised by the respondents. The first issue of a preliminary nature that was raised by the respondents was that the reference was incompetent for failure by the applicant to give notice of objection pursuant to Paragraph 11(1) of the Advocates Remuneration Order. I find no merit in this objection. The applicant annexed to its affidavit in support of the application a letter dated 10th May 2023 addressed to the Deputy Registrar in which it gave notice of its dissatisfaction with the entire ruling by the taxing officer and of its intention to file a reference. In the letter, the applicant stated that it assumed that the reasons for the taxing officer’s decision were contained in the ruling. I have seen a copy of the said letter in the court file with a receipt stamp of 10th May 2023 with a note from the Deputy Registrar that the reasons for the taxation were contained in the ruling. From the foregoing, I am satisfied that the applicant gave notice of its objection to taxation under Paragraph 11(1) of the Advocates Remuneration Order. The other objection taken by the respondents was that the applicant was in contempt of court and as such had no right of audience. I am of the view that this objection has been overtaken by events in that the applicant has been heard and as such the court cannot decline to make a determination on its application on account of the alleged contempt. In any event, I find merit in the objection based on contempt of court. The proceedings before me concern a ruling on taxation that was delivered on 27th



April 2023. The court has not given any order in relation to that ruling or taxation to be complied with by the applicant which the applicant has defied. It is clear from the respondents' replying affidavit and submissions that the alleged act of contempt which forms the basis of the respondents' objection arose from other proceedings. I am of the view that the same cannot form a valid basis for refusing to hear the applicant in these proceedings.

21. Having disposed of the preliminary issues, I will now consider the merit of the applicant's reference. I have taken time to peruse the entire record of these proceedings. These proceedings were commenced by way of a petition dated 25th October 2018. The petition was accompanied by an application for conservatory orders. All the respondents were parties to the petition from the commencement of the suit while the interested party joined the petition later. The respondents against which substantive reliefs were sought in the petition were the 1st, 2nd and 3rd respondents. From the petition, the 4th and 5th respondents were joined to the petition as physical planning, environmental management, and administration regulators for the role that they played on the issues that were the subject of the petitioners' complaints. The 1st, 2nd and 3rd respondents were sued and reliefs were sought against them jointly. The causes of action against the 1st, 2nd and 3rd respondents were the same, the same as the reliefs sought against them by the petitioners. The 1st, 2nd and 3rd respondents appointed the firm of Olel, Onyango Ingutiah & Co. Advocates to act for all of them in the matter. The said firm of advocates filed a Notice of Appointment on 31st October 2018. On the same date, the said firm filed a replying affidavit to the petition on behalf of all three respondents sworn by Joyce Opondo. In the affidavit, Joyce Opondo stated that the 1st, 2nd and 3rd respondents were sister companies that were operating from the same area. Joyce Opondo described herself as the Group Corporate Affairs Manager/ Head of the Environment Department meaning that she was representing all three respondents. From the consents that were given by the 1st, 2nd and 3rd respondents to Joyce Opondo to enable her to sign the pleadings on their behalf, it is apparent that the three respondents share the same directors and shareholders. This fact is clear from the particulars of the directors and shareholders of the three companies from the registry of companies that was annexed to the affidavit of Benson Ambuti Adegwa sworn on 13th August 2019 in support of the petitioners' Notice of Motion application of the same date. The said particulars show that the 1st, 2nd and 3rd respondents have the same directors and shareholders. The 1st, 2nd and 3rd respondents filed a joint supplementary affidavit on 24th January 2019. The petition was heard by way of written submissions. The 1st, 2nd and 3rd respondents filed joint submissions on 28th June 2019.
22. From 31st October 2018 to around 8th February 2019, the 1st, 2nd and 3rd respondents were represented by one firm of advocates and they filed one set of pleadings. On 8th February 2019, the 3rd respondent appointed the firm of Gichaba & Company Advocates to act for it in place of the firm of Olel, Onyango, Ingutiah & Company Advocates. It is not clear from the record whether this notice of change of advocates was served immediately because on 28th June 2019 several months after the firm of Gichaba & Company Advocates had filed a Notice of Change of Advocates, the firm of Olel, Onyango, Ingutiah & Company Advocates filed joint submissions on behalf of the 1st, 2nd and 3rd respondents without any objection from Gichaba & Company Advocates. After the firm of Gichaba & Company Advocates took over the conduct of the petition on behalf of the 3rd respondent, the firm of Olel, Onyango, Ingutiah & Company Advocates continued to act for both the 1st and 2nd respondents.
23. Judgment was delivered in the petition on 31st July 2019 in favour of the petitioners against the respondents. This means that the firm of Olel, Onyango, Ingutiah & Company Advocates acted for the 1st and 2nd respondents from the commencement of the petition up to the time the judgment was delivered during which period the firm filed one set of pleadings for both parties. On 9th August 2019 after judgment, the 1st and 2nd respondents appointed Wamocho Elizabeth Nandako advocate to act



for them in the matter in place of the firm of Olel, Onyango, Ingutiah & Company Advocates. On 31st January 2020, the Court of Appeal set aside the judgment of this court and condemned the petitioners and the 4th respondent to pay the costs of the appeal and before this court to the 1st, 2nd, 3rd and 5th respondents, and the interested party. As mentioned earlier, the petitioners' appeal to the Supreme Court was struck out on 4th August 2020.

24. On 30th August 2021, the 1st and 2nd respondents changed their advocates from Wamocho Elizabeth Nandako advocate to Gichaba & Company Advocates. This means that on 30th August 2021, the 1st, 2nd and 3rd respondents were once again represented by one firm of advocates. Following the confirmation of the Court of Appeal judgment by the Supreme Court, the 1st, 2nd, 3rd and 5th respondents, and the interested party started filing their bills of cost for the costs incurred before this court for taxation. The 1st, 2nd, and 3rd respondents who shared pleadings and advocates before this court as highlighted above, filed three separate bills of cost for taxation in which each of the respondents claimed separate instruction fees, getting up fees, drawing fees, perusal fees and court attendance fees. The first bill of costs was filed by the 3rd respondent through the firm of Gichaba & Company Advocates. The 3rd respondent's bill of costs dated 19th April 2021 drawn in the sum of Kshs. 71,470,476.12 was filed on 21st April 2021. In this bill of costs, the 3rd respondent claimed fees under items 1, 2, 3, 5 and 6 for services rendered between 31st October 2018 and 14th November 2018 namely; instruction fees, getting up fees, perusal of the petition, perusal of the application for conservatory orders, drawing a replying affidavit of Joyce Opondo, and attending court for hearing of the application for conservatory order. Instruction fees was claimed in the sum of Kshs. 45,000,000/- and getting up fees of Kshs. 15,000,000/-. The 3rd respondent claimed fees for all court and registry attendances and service of pleadings from 14th November 2018 to 30th November 2019.
25. The 3rd respondent's bill of costs was taxed at Kshs. 4,344,567/- on 4th November 2021 on which instruction fees was Kshs. 3,000,000/- and getting up fees Kshs. 1,000,000/-. Following a reference by the 3rd respondent, the instruction fees payable to the 3rd respondent was increased on 15th July 2022 from Kshs. 3,000,000/- to Kshs. 12,000,000/- with the getting up fees increasing to Kshs. 4,000,000/-. The 3rd respondent's bill of costs was taxed at Kshs. 16,344,567/- following the said reference.
26. The 1st and 2nd respondents filed separate bills of costs dated 30th August 2021 on 2nd November 2021 through the firm of Gichaba & Company Advocates. The two bills of cost were each drawn in the sum of Kshs. 46,891,400/-. The 1st and 2nd respondents claimed instruction fees of Kshs. 30,000,000/- and getting up fees of Kshs. 9,000,000/- each. The two bills of cost were the same word for word. Several items in the two bills were also a duplication or repetition of the services that were rendered by a single firm of advocates and were already charged in the 3rd respondent's bill of costs.
27. The issues that have been raised as grounds of objection to the ruling by the taxing officer made on 27th April 2023 were raised before the taxing officer and she considered the same. I have earlier in this ruling highlighted the decision of the taxing officer on those issues. What I need to determine is whether, in light of the relationship between the 1st, 2nd and 3rd respondents and the history of their representation in this suit, the taxing officer was correct in her decision that the 1st and 2nd respondents were entitled to file separate bills of costs. Having carefully considered the matter, I disagree with the opinion of the taxing officer on the issue. The 1st, 2nd and 3rd respondents were sister companies that shared directors and shareholders and operated from the same area. The 1st, 2nd and 3rd respondents instructed the firm of Olel, Onyango, Ingutiah & Company Advocates together through their Group Corporate Affairs Manager, Joyce Opondo who signed all the affidavits which were filed in this suit on their behalf. The 1st, 2nd and 3rd respondents were sued together. The causes of action against them were the same. The reliefs sought against them were the same. They filed one affidavit and supplementary



affidavit in opposition to the petition and joint submissions. In the circumstances, I am unable to see any justification for each of the three respondents claiming instruction fees, getting up fees, drawing fees and court attendance fees separately. This in my view was a joint instruction to the firm of Olel, Onyango, Ingutiah & Company Advocates. The firm could not claim instruction fees from each of the three respondents. The firm could not also get up to prepare for the case of each respondent. The same applies to court attendance. While acting for the three respondents, there was no way the firm could purport to be attending court for each of the respondents so as to justify separate attendance fees. This also goes to the fees for drawing and perusal. Only one set of pleadings were drawn, each respondent could not be charged separately for such drawing. The same applies to the documents that were perused. This mischief is what in my view Paragraphs 62 and 62 A of the Advocates Remuneration Order which I reproduce hereunder were intended to address.

“ 62. Costs where same advocate is employed by two or more plaintiffs or defendants

Where the same advocate is employed for two or more plaintiffs or defendants, and separate pleadings are delivered or other proceedings had by or for two or more such plaintiffs or defendants separately, the taxing officer shall consider in the taxation of such advocate’s bill of costs, either between party and party or between advocate and client, whether such separate pleadings or other proceedings were necessary or proper, and if he is of opinion that any part of the costs occasioned thereby have been unnecessarily or improperly incurred, the same shall be disallowed.

62A. Costs where there has been a change of advocates

- (1) Where there has been a change of advocates or more than one change of advocates, the advocate finally on the record shall draw a single bill for the whole of the matter in respect of which costs have been awarded.
- (2) On taxing the bill the taxing officer shall take into account the following principles, that the bill shall not be larger than if a single advocate had been employed and that the party taxing the bill shall not obtain indemnity for costs which he has not paid.
- (3) The bill shall be accompanied by a certificate setting out the dates during which all advocates acted, together with all agreements for remuneration made with them, all sums paid to them for costs and whether those sums were paid in full settlement.”

28. I am of the view that Paragraph 62 of the Remuneration Order was intended to put into check the practice of filing unnecessary pleadings in multi-party suits aimed only at attracting more legal fees. The paragraph ensures that where an advocate represents two or more parties in a suit, separate pleadings should only be filed and charged where necessary. This means that the filing of separate pleadings and charging for the same in such situations should be the exception rather than the norm. That explains why where they are filed and fees is sought to be charged in respect thereof, the taxing officer has to determine whether the same was necessary. The underlying objective of the rule is to curb duplication of services and fees.

29. In the case before me there was no duplication of services but of fees. Instruction fees is payable once. In this case, the firm of advocates that was instructed and as such was entitled to instruction fees for defending the petition was Olel, Onyango, Ingutiah & Company Advocates. The advocates that came



in after they were not entitled to instruction fees to defend the petition. Gichaba and Co. Advocates came in to represent the 3rd respondent after a response to the petition had been filed. For the 1st and 2nd respondents, the firm came in after judgment had been entered. In fact, their role in this petition as far as the 1st and 2nd respondents were concerned was only to file the two bills of cost. As provided in Paragraph 62A of the Advocates Remuneration Order, change of advocates is not supposed to increase costs to a party and a party taxing a bill is not supposed to get indemnity for costs not paid. The fact that the 1st, 2nd and 3rd respondents changed advocates and appointed their current advocates did not entitle them to a new set of instructions fees.

30. I am in agreement with the applicant that the 1st, 2nd and 3rd respondents were only entitled to one set of instruction fees and getting up fees because the advocate received joint instructions and filed one set of pleadings. The advocate drawing pleadings and attending court was also doing so for the three respondents jointly and not separately. The taxing officer having taxed the 3rd respondent's bill of costs and awarded it full instruction and getting up fees, a fresh claim for instruction fees and getting up fees by the 1st and 2nd respondents should have been rejected for duplication. The same applies to the other fees and charges that were raised in the 3rd respondent's bill of costs. I am in agreement with the applicant that in allowing separate instruction and getting up fees, and other duplicated fees for the 1st and 2nd respondents, the taxing officer committed an error of principle. Having reached this conclusion, it is not necessary to determine the issue of whether or not the fees awarded to the 1st and 2nd respondents as instruction fees were manifestly excessive.
31. In the final analysis, the applicant has made a case for this court to interfere with the decision of the taxing officer as it relates to the taxation of all the items in the 1st and 2nd respondents' bills of cost dated 30th August 2021. In *Kipkorir Titoo & Kiara Advocates v. Deposit Protection Fund Board*[2005]1KLR528 the court stated as follows:
- “ And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see – *D'Sonza v Ferrao* [1960] EA 602. The Judge has however a discretion to deal with the matter himself if the justice of the case so requires (see *Devshi Dhanji Naran Patel (No. 2)* [1978] KLR 243.”
32. I find no compelling reason why I should tax the bills of cost herein. I am of the view that the taxing officer would be better placed to tax the bills afresh with appropriate directions.

Conclusion:

33. In conclusion, the ruling and orders made by the taxing officer, Hon. M.Shimenga on 27th April 2023 in respect of the 1st and 2nd respondents' bills of cost both dated 30th August 2021 are set aside in their entirety. The said bills are remitted back to the same taxing officer for taxation afresh with the following directions;
1. The two bills of cost shall be consolidated and taxed as one bill of costs. For the avoidance of doubt, the bills of cost shall be treated as if the 1st and 2nd respondents had filed one bill of costs.
 2. The 1st and 2nd respondents are not entitled to instruction fees and getting up fees, the full instruction fees and getting up fees having been recovered in the 3rd respondent's bill of costs.
 3. The 1st and 2nd respondents are not entitled to separate fees for all the services rendered and charged in the bills of cost.



4. All the services charged in the bills of cost in respect of which fees were charged in the 3rd respondent's bill of costs dated 19th April 2021 filed on 21st April 2021 shall be disallowed and taxed off for duplication.
5. The taxing officer shall issue a new certificate of costs to the 1st and 2nd respondents.
6. The parties shall be at liberty to address the court during the fresh taxation.

DELIVERED AND DATED AT KISUMU ON THIS 20TH DAY OF NOVEMBER 2023

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the 4th Respondent

Mr. Sala for the 5th Respondent

Mr. Gichaba for the 1st, 2nd and 3rd Respondents

