



REPUBLIC OF KENYA



**Mukuna & 4 others v Wairia & 6 others (Environment & Land Case  
81 of 1999) [2022] KEELC 3473 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3473 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 81 OF 1999**

**LC KOMINGOI, J**

**JULY 28, 2022**

**BETWEEN**

**JOHNSON MANA MUKUNA ..... 1<sup>ST</sup> PLAINTIFF  
ERASTUS MARENYE MUKUNA ..... 2<sup>ND</sup> PLAINTIFF  
WILSON MBOGO MUKUNA ..... 3<sup>RD</sup> PLAINTIFF  
WILSONWAIRIA MUKUNA ..... 4<sup>TH</sup> PLAINTIFF  
JOHN MUKUNA WAIRIA ..... 5<sup>TH</sup> PLAINTIFF**

**AND**

**MATHU WAIRIA ..... 1<sup>ST</sup> DEFENDANT  
JOSEPH D KIMURA ..... 2<sup>ND</sup> DEFENDANT  
MWANGI ELIJAH ..... 3<sup>RD</sup> DEFENDANT  
JULIUS GACAU KANYIRI ..... 4<sup>TH</sup> DEFENDANT  
SAMUEL MUGO MWANGI ..... 5<sup>TH</sup> DEFENDANT  
PETER KARANJA B CHEGE ..... 6<sup>TH</sup> DEFENDANT  
JOHN NJOROGE NGUCHITA ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

1. This is the Plaintiffs' Chamber summons application dated 2<sup>nd</sup> February 2022.
2. It is brought under Rule 11 (2) of the Advocates Remuneration Order, Section 3A of the [Civil Procedure Rules](#) and all other enabling provisions of the law. The Plaintiffs seek orders;
  - a. Spent.



- b. Spent.
  - c. That the decision of the learned Taxing officer to allow and tax items 1 and 2 of the Bill of costs by the 2<sup>nd</sup> to 7<sup>th</sup> Respondents dated 28<sup>th</sup> April 2021 and any consequential orders/certificates arising therein be set aside/vacated.
  - d. That costs of the application be paid by the 2<sup>nd</sup> to the 7<sup>th</sup> Respondents.
3. The application is supported by six grounds that are set out on the face of the Chamber Summons. It was also supported by the affidavit sworn on 22<sup>nd</sup> February 2022 by Mr. James Kamande Mwaura Gichahi who has conduct of this case on behalf of Plaintiffs.
4. Counsel deponed that judgment was delivered in this case together with costs of the suit in favour of the Defendants. He further deponed that since the inception of the case, all the Defendants were represented by one Advocate at any given time until the last hearing date when an additional Advocate came on record by way of a Notice of Change of Advocates to represent the 2<sup>nd</sup> to 7<sup>th</sup> Defendants and the initial Advocate was retained to represent only the 1<sup>st</sup> Defendant.
5. He also deponed that pursuant to the judgement in this matter, the initial Advocate representing the 1<sup>st</sup> Defendant filed a bill of costs dated 13<sup>th</sup> April 2021 whereas the new Advocate filed another bill of costs dated 28<sup>th</sup> April 2021 in respect of the 2<sup>nd</sup> -7<sup>th</sup> Defendants.
6. He deponed that he is of the view that the Defendants despite having two Advocates on record were not entitled to file two separate bills of costs particularly on the instruction fees and getting up fees because doing so amounts to double charging of the Plaintiffs which is contrary to the provisions of Rule 62 of the Advocates Remuneration order. He added that he raised a preliminary objection to the filing of two separate bills of costs but the learned taxing officer dismissed it and allowed the two separate bills where she applied the provisions of Rule 62 A (1) of the Advocates Remuneration Order thus contravening provisions of Rules 62 and 62 A (2) of the said Order.
7. The application is opposed. There is a replying affidavit sworn by Raphael N. Gachoka, advocate of the 1<sup>st</sup> Defendant, sworn on the 17<sup>th</sup> March 2022.
8. He deponed that Mwaniki Gachoka & Company Advocates represented the 1st Defendant till the final determination and pursuant to Rule 62 A of the Advocates Remuneration Order, they are entitled to draw the final Bill of Costs. She further deponed that the getting up fees for the 1<sup>st</sup> Defendant is based on the 1st Defendant's instruction fee and is therefore rightfully taxed.
9. On the 24<sup>th</sup> March 2022 this court with the consent of the parties directed that the Chamber Summons be canvassed by way of written submissions

### **The Plaintiff's submissions**

10. They are dated 20<sup>th</sup> April 2022. Counsel submitted that the Learned Taxing Officer erred in relying on Rule 62A (1) of the Advocates Remuneration Order which envisages a situation where there is successive change of Advocates where the previous one ceases to act and the new one takes over until the last Advocate who will be finally on record for the party who has been awarded costs who will then draw a bill of costs. He further submitted that Rule 62 A (1) was inapplicable since the Notice of Change in this case introduced a second Advocate into the case where at the same time the former one was still in the case thereby having two Advocates on the same case at the same time.



11. It was his submission that by allowing the two Advocates finally on record each to charge his own bill, the Taxing Officer doubled the charges contrary to Rule 62 A(2) of the Advocates Remuneration Order. He added that the learned Taxing Officer also contravened Rule 62 of the Remuneration Order. He relied on the case of *Desai Sarvia & Pallan Advocates v Tausi Assurance Company Limited* [2015] eKLR as well as the case of *Nyamogo v Nyamogo Advocates v Kenya Bus Services & Another* [2006] eKLR.

### **The 1<sup>st</sup> Defendant's/Respondent's submissions**

12. They are dated 17<sup>th</sup> May 2022. Counsel for the 1<sup>st</sup> Respondent addressed the following issues:-

- a. Whether there are sufficient grounds for interfering with the taxing officer's ruling dated 20<sup>th</sup> January 2022.
- b. Whether the decision of the taxing officer should be stayed/vacated.

13. It was counsel's submission that the court can only interfere with the taxing master's decision where the taxing master erred in principle and if the erring is on quantum, the court should only interfere with the calculation in exceptional circumstances. He further submitted that there are no exceptional circumstances which were brought forth by the Plaintiffs. He relied on the case of *Lubellah & Associates Advocates v N.K Brothers Limited* [2014] eKLR and the case of *Premchand Raichand Ltd & Another v Quarry Services of East Africa Limited and another* [1972] E.A.

14. Counsel for the 1<sup>st</sup> Defendant/Respondent also submitted that the Plaintiffs/Applicants have not demonstrated reasons for staying or vacating the decision of the Taxing Officer. He added that some of the relevant factors to be considered before a decision of the taxing master is stayed include; the nature and importance of the matter, the amount of value of the specific subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge.

15. I have considered the chamber summons and the affidavit in support. I have also considered the response thereto, the written submissions and the authorities cited. The issue for determination is Whether the Plaintiffs/Applicants have established grounds to set aside the Learned Taxing Master's decision of 20<sup>th</sup> January 2022.

16. The Plaintiffs brought this reference in objection to the Taxing Master's Ruling of 20<sup>th</sup> February 2022 in respect of items 1 and 2 of the 2<sup>nd</sup> -7<sup>th</sup> Defendants Bill of Costs dated 28<sup>th</sup> April 2021. They argued that all the seven <sup>Defendants</sup> were represented by M/S Mwaniki Gachoka & Co. Advocates until the last day of hearing of the case when M/S Kwengu & Company Advocates were retained to represent the 2<sup>nd</sup> - 7<sup>th</sup> Defendants.

17. In the ruling of the Learned Taxing Officer of 20<sup>th</sup> January 2022, the 1<sup>st</sup> Defendant's Party and party Bill of costs was taxed at Ksh.1,777,490/= while the 2<sup>nd</sup> to 7<sup>th</sup> Defendant's Bill of costs was taxed at Ksh.1,607,150/=.

18. The Plaintiffs contended that in view of the fact that the 2<sup>nd</sup> -7<sup>th</sup> Defendants' Advocate herein only came on record at the eleventh hour when the matter was almost complete, item 1 and 2 should not have been taxed in the bill of costs dated 28<sup>th</sup> April 2021 as it amounts to double taxation. They also contended that the taxing officer was in contravention of rule 62 and 62 A(2) of the Advocates remuneration order.

19. This court is guided by the decision in *Kipkorir, Tito & Kiara Advocates v Deposit Protection Fund Board* [2005] eKLR where the court held; "On reference to a Judge from the taxation by the Taxing



Officer, the Judge will not normally interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer, erred in principle in assessing the costs.”

20. Rule 62 A. of the Advocates Remuneration order provides:-
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.
21. The Taxing officer based her decision on Rule 62A (1) of the Advocates Remuneration order. In *Machira & Co. Advocates v Arthur K. Magugu & another* [2012] eKLR, the court of Appeal held as follows, “... Paragraph 62 A (1) upon which the judge based his decision states that: “Where there has been a change of Advocates or more than one change of advocates, the Advocate finally on record shall draw a single bill for the whole of the matter in respect of which costs have been awarded.” Save for interlocutory applications, costs are normally not awarded until the determination of the matter. That being the case, the above provision clearly refers to party and party costs and not to advocate/client costs. As Justice Ringera observed, the objective behind the provision is to shield litigants from being “burdened with costs incurred as a result of change of advocates by the adverse party.” The Taxing officer therefore correctly applied Rule 62A(1)
22. On being instructed at whatever stage of proceedings, an Advocate is entitled to instruction fees being Advocates client fees. However, item 1 and 2 of the Bill of Costs dated 28<sup>th</sup> April 2022 being, instruction fees of party and party costs, only one instruction fee can be recovered by the 1<sup>st</sup> to 7<sup>th</sup> Defendants who changed Advocates. I’m guided by the decision in *Kenya Tea Development Agency Ltd V J. M. Njenga & Co. Advocates* [2008] eKLR the court stated, “... But having said that, a new Advocate coming onto a matter somewhere in the middle of the proceedings in the High Court will be entitled to the full instruction fee prescribed in Part A of Schedule VI of the Order subject to the taxing officer’s discretion to increase or (unless otherwise provided) reduce it, and as augmented by the formula in Part B (increase by one-half). A client who changes advocates in the High Court therefore can expect to pay the full instruction fee as many times as he pleases to change advocates, notwithstanding that he can recover only one instruction fee in a party and party taxation, unless there is a judge’s certificate for more than one counsel.”
23. From the foregoing, I find that the Taxing Master erred in principle by allowing two instruction fees of the Bill of Costs from the two firms representing the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> -7<sup>th</sup> Defendants for failing to appreciate appreciation that the 2<sup>nd</sup> -7<sup>th</sup> Defendants could only recover one instruction fee. Further, the 2<sup>nd</sup> to 7<sup>th</sup> Defendants’ bill of costs contravenes Rule 62A (2) of the Advocates Remuneration Order. The consequence is that the taxation led to a manifestly excessive bill that justifies the setting aside of the Taxing Master’s ruling of 20<sup>th</sup> January 2022. Mr. Kwengu came on record for the 2<sup>nd</sup> – 7<sup>th</sup> Defendants on 16<sup>th</sup> October 2019. He only took in the evidence of PW4, DW1 and DW2.



24. I agree with the Plaintiffs/Applicants' submissions that the seven Defendants were from inception represented by one advocate and they filed a joint statement of defence and all other pleadings. I find merit in this application and I grant orders in terms of prayer no 3 of the Chamber Summons. I make no orders as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED NAIROBI THIS 28<sup>TH</sup> DAY OF JULY 2022.**

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Gichachi advocate for the Plaintiffs

Ms Nkatha holding brief for Mr. Gachoka for the 1<sup>st</sup> Defendant

No appearance for 2<sup>nd</sup> -7<sup>th</sup> Defendants

Steve - Court Assistant

