



Mutuura alias Rose Wangari Njuguna v Nachu Ballast Masters Limited & 3 others (Environment & Land Case 157 of 2019) [2023] KEELC 21459 (KLR) (7 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21459 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 157 OF 2019
JG KEMEI, J
NOVEMBER 7, 2023**

BETWEEN

**ROSE WANGARI MUTUURA ALIAS ROSE WANGARI
NJUGUNA PLAINTIFF**

AND

**NACHU BALLAST MASTERS LIMITED 1ST DEFENDANT
THE LAND REGISTRAR, KIAMBU 2ND DEFENDANT
SIMON MBOCHA KINYATI 3RD DEFENDANT
CONNECTA AFRICA LIMITED 4TH DEFENDANT**

RULING

1. The Applicants herein were the 1st, 3rd and 4th Defendants in the main suit whereas the Respondent was the Plaintiff. At the Respondent's instance, the suit was discontinued on 27/4/2022 with costs to the Applicants capped at 40% upon assessment by the Taxing Master of this Court.
2. Consequently, the Applicants filed their Bill of Costs dated 27/4/2022 for Kshs. 5,107,620/-. On 25/10/2022 the Taxing Master assessed the costs at Kshs. 251,373.33 and taxed off Kshs. 4,856,246.67 from the Bill. Aggrieved with the award and vide a Notice of Objection dated 25/10/2022, the Applicants filed their Reference to this Court by way of Chamber Summons dated 2/11/2022 for Orders that;
 - a. This Honourable Court be pleased to set aside and tax afresh the decision of the Taxing Master as evidenced in the Ruling delivered on 25th October 2022 with Respect to Items No. 1, 2, 106, 107, 108, 109, 13, 14, 18, 20, 21, 22, 23, 24, 25, 26, 27, 34, 60, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75,



76,77,78,79,80,83,84,85,86,97,100,124,125,127,128,142,143,144,145,158,159,160,161,8,28,38,45,88,93,102 and 190 in the Bill of Costs dated 27/04/2022.

- b. Costs of this Application be provided for.
3. The Chamber Summons is based on the grounds thereat and a lengthy Supporting Affidavit of even date sworn by Edwin Omulama Onditi, the Applicants' Counsel. He deponed that the impugned award was erroneous and contrary to set binding precedents resulting in a manifestly low award to warrant interference by this Court. In particular he faulted the Taxing Master's decision to adopt Kshs. 15 Million as the value of the subject suit property in place of Kshs. 21.5M according to the Valuation Report of the suit land. On instruction and getting up fees, Counsel was emphatic that the Taxing Master's decision to charge once and not as per the number of Defendants was wrong and contrary to the established doctrine of stare decisis. That some of the Items should not have been disturbed in computing the relevant charges per folio, Court attendances and service of pleadings. In totality Counsel averred that the Taxing Master failed to exercise her discretion judiciously hence the Reference.
4. The Reference is opposed.
5. The Respondent, Rose Wangari Mutuura filed her Replying Affidavit sworn on 14/2/2023. She termed the Application as incurably defective and bad in law disguised as a fresh Bill of Costs. That the Reference was filed out of time and the totality of her pleadings is that she sought declaratory and eviction orders which lack an ascertainable monetary value. The Respondent similarly faulted the Taxing Master's assessment of certain Items in the impugned award on the basis of placing reliance on wrong principles and awarding the Applicants unjustified costs.
6. Contemporaneously, the Respondent filed a Chamber Summons of even date seeking Orders inter alia that this Court be pleased to enlarge and extend time and the Notice of Objection and (her) Reference be deemed as properly filed and the Taxing Master's awards in Items 1, 2, 19, 102, 110, 117, 121, 130, 150, 151 and 153 be reviewed. The Chamber Summons is supported by the Respondent's Affidavit wherein she rehashed the chronological history of the suit to its discontinuance/withdrawal and the order of costs as directed on 27/4/2022.
7. On the inordinate filing of the Reference, it was averred that her Counsel relocated his offices causing an inadvertent mix up of the files. She implored the Court not to visit the mistakes of Counsel upon her but allow her Application as she was essentially challenging the same Items as the Applicants and therefore the Applicants would not suffer any prejudice if her prayers are granted.
8. In reply, the Applicants filed their Grounds of Objection dated 3/3/2023 and a Further Affidavit of even date. They dismissed the Respondent's Application as incompetent for want of compliance with express statutory timelines. That the Respondent failed to file a written objection to the Taxing Master's award and allowing her Reference to be deemed as properly filed, will cause them injustice.
9. In support of their Reference, the Applicants rely on their Application in its entirety.
10. The Respondent on her part filed written submissions dated 17/3/2023 through the firm of Nyamweya Mamboleo Advocates in support of her Application and in objection to the Applicants' Reference.
11. She maintained that her claim sought declaratory reliefs and eviction orders against the Applicants hence the payment of nominal fees of Kshs. 6,480/= at the time of filing her suit. That in that case the adoption of Kshs. 21.5 Million in the Applicants' Bill of Costs is not applicable herein since the Valuation Report in any event relates to a different parcel of land altogether. The Respondent also urged the Court to extend her time to file her Reference out of time placing reliance on the case of Meru



HCCC No. 80 of 2005 Rev. Jeremiah Muku Vs. Methodist Church in Kenya Trustees Registered & 2 Others (2015)eKLR that allowed extension of time to file a Reference.

12. The Respondent further contended that the Applicants' instruction fees based on Kshs. 21.5 Million as value of the suit land is untenable because the Valuation Report related to a different parcel of land. That the said valuation was done four years after the suit was filed and, in any event, the said value is not contained in the pleadings. To support this assertion, reliance was placed on the Court of Appeal decision in Nairobi CA No. 105 of 2014 Eastland Hotel Ltd Vs. Wafula Simiyu & Co. Ltd [2014] eKLR that faulted a Taxing Master for deriving the value of the subject of a suit from affidavits as opposed to actual pleadings as defined under Section 2 of the *Civil Procedure Act*.
13. On instruction fees, the Respondent submitted that the residual provision under Schedule 6 of the Advocates Remuneration Order ought to have applied noting that her case was not hinged on the monetary value of the suit land. She implored the Court to award the minimum fees of Kshs. 75,000/-.
14. Regarding getting up fees, the Respondent was emphatic that a 1/3 of the instruction fees would suffice i.e. Kshs. 25,000/= and which sum ought not be charged separately for each of the three Defendants. The basis for this is that there are no separate pleadings for each Defendant and that Courts have pronounced themselves on similar cases for instance in Nbi HC (Comm& Adm) Division Misc. 472 of 2011, Singh Gitau Advocates Vs. City Finance Ltd (2013)eKLR where the Court declined to order separate instruction fees for the three Defendants in favour of their Advocate.
15. Concerning the Applicants' Reference, the Respondent reasoned that the same was prematurely filed before the getting a response from the Taxing Master as provided under para. 11(2) Advocates Remuneration Order. That this Court's jurisdiction in determining a Reference is limited and can only interfere with the Taxing Master's decision if it is outrightly erroneous which is not the case herein. She beseeched the Court to dismiss the Reference with costs.
16. Opposing the Respondent's Chamber Summons, the Applicants through the firm of Edwin Omulama & Associates filed submissions dated 3/3/2023. Three issues were drawn for determination; whether the delay has been sufficiently explained, whether the consequences of the Respondent's Counsel should be visited upon the Applicants and whether the Applicants stand to suffer prejudice if the Application is allowed. It was argued that the Respondent failed to file her Notice of Objection to the Taxing Master's award pursuant to Para. 11 of the Advocates Remuneration Order. That whereas this Court can exercise its discretion and admit a Reference out of time, such discretion can only be exercised upon giving reasonable justification which is lacking in the present scenario.
17. Secondly that the Applicants are strangers to the Advocate/Client relationship in respect to the Respondent. So that her Counsel's inaction to move the Court timely as envisaged under the law, should not be entertained to their detriment.
18. Lastly that the Applicants stand to suffer prejudice if the Respondent's Application is allowed.

Analysis & Determination

19. From the forgoing pleadings, the Court records, the rival written submissions and cited authorities and the relevant provisions of law, the following issues call for determination;
 - a. Whether the Respondent has satisfied the criteria for extension/enlargement of time to file a Reference.
 - b. Whether the Trial Magistrate erred in determining the subject value of the suit property for purposes of assessment.



- c. Whether the Trial Magistrate erred in charging a lump sum instruction and getting up fees for the three Defendants.
- d. Who bears the costs?
20. On the first issue enlargement of time is a discretionary exercise of Court under Section 95 *Civil Procedure Act*. The Supreme Court devised principles to be considered in an Application for extension of time in the case of *Nicholas Kiptoo Arap Korir Salat Vs. Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR as follows;
- “ 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court
3. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice to be suffered by the Respondents if the extension is granted;
6. Whether the Application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.” See also *Leo Sila Mutiso -Vs- Rose Hellen Wangari Mwangi* [1999] 2 EA 231.”
21. The Court of Appeal in *Sakiri Vs. Anyumba* [2022] KECA 521 (KLR) reiterated that, solely blaming one’s Advocate is not enough to unlock the Court’s discretionary favor. The Applicant must avail evidence of the actions she/he took, as the litigant to mitigate any delay.
22. Applying the above principles, the facts of this case are fairly straight forward as already highlighted in the preceding paragraphs. A perusal of the Court record shows that after the Taxing Master / Deputy Registrar delivered her Ruling on 25/11/2022, by a letter of even date the Applicants’ Counsel immediately wrote to the Deputy Registrar requesting for the typed taxation award for their further action. Simultaneously they forwarded a draft Certificate of Taxation for the Deputy Registrar’s execution.
23. Two days later on 27/10/2022, the Respondent’s Counsel also wrote to the Deputy Registrar requesting for copy of the Taxation Ruling. The record similarly contains an undated letter from the Respondent’s Counsel addressed to this Court’s Deputy Registrar asking for reasons for her Decision to enable the Respondent file her Reference before the Judge. That letter was received in the Court registry and stamped on 11/11/2022; 17 days after delivery of the impugned Taxation Ruling.
24. Attempting to urge the Court to exercise its discretion in her favor under Para. 11 of the Advocates Remuneration Order, the Respondent stated that the Applicants’ move to file their Reference is an important factor to be considered. Additionally, in her Supporting Affidavit at paras. 18-21, the Respondent blames her Counsel for the late filing allegedly owing to the relocation of offices. To my mind, the Respondent has not proffered plausible explanation to this Court to exercise discretion in



her favor. There is no evidence by the said Counsel alluding to the alleged relocation if any for the Court to consider. Even if there was, the Respondent has not demonstrated any steps she personally took to challenge the award which she admits to having been aware of right from the time it was delivered. This is so especially since she is also challenging the same Items as the Applicants.

25. In Nairobi Civil App. No. 810 of 2001 Microsoft Corporation Vs. Mitsumi Computer Garage Ltd & another [2001] eKLR the Court observed that rules of procedure are handmaidens and not mistresses of justice, and they are meant to aid in the administration of justice and not to cause injustice. Therefore, applicable rules of procedure must be followed in all instances including filing cross-references like in the instant case. This position was echoed by Kiage JA in Nairobi Court of Appeal Application No. 228 of 2013 Nicholas Kiptoo Arap Korir Salat Vs. Independent Electoral and Boundaries Commission & 6 others [2013] eKLR, where he held that:

“I am not in the least persuaded that Article 159 of *the Constitution* and the oxygen principles which both command Courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all Courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules.”

26. The answer to the first issue is consequently in the negative.
27. Before addressing the second issue and as matter of housekeeping, the Respondent in her Replying Affidavit objected to the manner the Applicants moved this Court.
28. The relevant steps for an aggrieved party to invoke the jurisdiction of the Court when challenging the decision of a Taxing Master are contained in para 11 of the Advocates Remuneration Order that;

- “(1) Should any party object to the decision of the Taxing Master, he may within fourteen days after the decision give notice in writing to the Taxing Master of the items of taxation to which he objects.
- (2) The Taxing Master shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a Judge by Chamber Summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
- (3) Any person aggrieved by the decision of the Judge upon any objection referred to such judge under subsection (2) may, with the leave of the Judge but not otherwise, appeal to the Court of Appeal.
- (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; Application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days’ notice in writing



or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”

29. It is the Respondent’s averment at para. 3 of her Replying Affidavit that the instant Reference was filed out of time. Applying the above provisions, the Applicants Notice of Objection dated 25/10/2022 was filed on 26/10/2022. The Taxation Ruling and attendant reasons was issued on 25/10/2022. The Reference was filed on 2/11/2022 well within the statutory timelines. The Respondent’s objection on this limb is therefore bereft of merit and it fails.
30. Regarding the second issue, did the Trial Magistrate err in determining the value of the suit land? The guiding principles of setting aside the decisions of a Taxing Master were well established in the cases of Premchand Raichand Limited & Another Vs. Quarry Services of East Africa Limited and Another [1972] E.A 162, First American Bank of Kenya Vs. Shah and Others (2002) EA 64 and Joreth Ltd Vs. Kigano and Associates (2002) 1 EA 92. These includes;
- a. That there was an error of principle;
 - b. The fee awarded was manifestly excessive or is so high as to confine access to the Court to the wealthy;
 - c. That the successful litigant ought to be fairly reimbursed for the costs he has incurred;
 - d. That so far as practicable there should be consistency in the award.
31. Moreover, in First American Bank of Kenya Vs Shah and Others [2002] E.A.L.R 64 at 69, the Court held as follows;
- “First, I find that on the authorities, this Court cannot interfere with the Taxing Master’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle.”
32. The core issue to consider is whether the Ruling delivered on 25th October 2022, amounted to an error in principle. The Applicants contend that the Trial Magistrate’s decision to adopt Kshs. 15 Million as the subject value of the suit land to determine instruction fee was erroneous and ought to have used Kshs. 21.5 Million per the Valuation Report that prompted the transfer of the suit to the Environment and Land Court.
33. A glean of the amended plaint dated 14/4/2021 filed by the Respondent sought declaratory prayers inter alia that the title deed over the suit property issued on 6/12/1992 to the 1st Applicant is null and void; declaration that title No. KARAI/LUSIGETTI/T.1784 reverts back to the Respondent and eviction orders issued against the 1st Applicant. The Respondent’s claim was denied vide the amended defence dated 3/5/2021.
34. It is common ground that the pleadings, on the face of it do not contain the value of the subject land in light of their content. The Trial Magistrate highlighted that she relied on the sale agreement and Valuation Report as filed before Court. It is trite that annexures form part of pleadings as affirmed by the Supreme Court in Petition 2B of 2014 Gatirau Peter Munya Vs. Dickson Mwenda Kithinji & 2 Others [2014] eKLR at para 89.
35. In arriving at the sum of Kshs. 15 Million the Trial Magistrate sufficiently explained her reliance on the sale agreement dated 14/1/2012 and Valuation Report dated 14/1/2019 vis the value of the suit land in 2016; the time of filing suit. The Trial Magistrate was categorical that she had taken into account



- the principles enunciated in the case of Joreth (supra) that require a Taxing Master to consider nature, complexity and importance of the cause; interest of parties; general conduct of the proceedings and any direction from the Judge, and adopted sum of Kshs. 15 Million. The Applicants are aggrieved with this amount and are emphatic that the valuation value of Kshs. 21.5 Million ought to apply.
36. Refuting the above, the Respondent averred that the subject suit land in the Bill of Cost (KARAI/LUSEGETTI/T.1786 measuring 7.605 Ha) is different from the one in the Valuation Report. This averment cannot stand because prayer b of the amended plaint describes the suit property as Title No. KARAI/LUSIGETTI/T.1784 just as it is contained in Item 1 in the Bill of Costs dated 27/4/2022.
37. In the case of Joreth (supra), the Court of Appeal addressed the issue of subject value thus;
- “We would at this stage point out that the value of the subject matter of a suit for the 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 so ascertainable the Taxing Master is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”
38. Further in the case of Vipul Premchand Haria Vs. Kilonzo & Co. Advocates [2020]eKLR, the Court of Appeal outlined the nature of the Taxing Master’s discretion thus;
- “Once the client was dissatisfied with the bill, it fell upon the Taxing Master to tax it. Such taxation, much as it lies in the Taxing Master’s discretion, is governed by clear principles. In other words, the discretion is a judicial one to be judicially and judiciously exercised. It is not to be exercised whimsically or capriciously in accordance with personal inclination. And the matters the Taxing Master takes into consideration should be apparent from the reasons that she gives for her decision. It is those reasons that give an indication whether or not the discretion reposed in the Taxing Master was properly exercised.”
39. In the above case the Court found that the Trial Magistrate had misdirected herself in failing to give reasons for allowing the bill as drawn and therefore an abuse of discretion. The bill was remitted for fresh re-assessment.
40. In the case of Republic Vs. Ministry of Agriculture and 2 Others; Ex-parte Muchiri W’Njuguna & Others NRB HC Misc. Civil Appl. No. 621 of 2000 [2006] eKLR the Court held as follows:
- “The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a Taxing Master, particularly where he is an officer of great experience, merely because it thinks the award is somewhat too high or too low; it will only interfere if it thinks the award is so high or so low as to amount to an injustice to one party or the other.... The Court cannot interfere with the Taxing Master’s decision 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 inference that it was based on an error of principle. Of course, it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors.”



41. In Peter Muthoka and Another Vs. Ochieng and 3 Others NRB CA Civil Appeal No. 328 of 2017 [2019] eKLR, the Court of Appeal observed that:

“It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the Court.

Where, however, a suit is settled, then, from a literal and practical reading of the provision, the subject matter value must be sought by reference, in the first instance, to the terms of the settlement. Just as one would not start with the pleadings in the face of a judgment, it is indubitable that one cannot start with the pleadings where there is a settlement.

It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the Taxing Master is permitted to use his discretion to assess instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily provided: either the pleadings, the judgment or the settlement. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three. It is not open to the Taxing Master to choose one or the other or to use them in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive.

It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleading that form the basis for determining the subject value.”

42. This Court agrees that the Trial Magistrate has a wide discretion in calculating the payable costs when called upon to do so. It is not open for this Court to set aside the consequent award unless it is manifestly clear that there is an error of principle.

43. At page 2 of her Ruling, the Trial Magistrate stated thus;

“... It is worth noting that the sale agreement was done in the year 2012 while the Valuation Report was done in the year 2019. The suit herein was filed in the year 2016. It is expected that the value would have appreciated from the year 2012 to 2016 when the suit was filed and also that the same would have a lower value in 2016 compared to the value as per the Valuation Report done in 2019. The Taxing Master will therefore take that in to consideration as well as the fact that the suit was filed in 2016.....

After taking in to consideration the nature and complexity of the matter as well as taking in to account the aforesaid reasons, I will adopt a figure of Kshs. 15,000,000/= in calculating the instruction fees.”



44. In my view the Trial Magistrate attempted to get an average value of the suit land hence the sum of Kshs. 15 Million. Be that as it may the said figure ought to be supported by evidence or clear computation of appropriate values. In so doing the Trial Magistrate wields huge discretion to arrive at an applicable figure. It is this discretion that ought to be exercised judiciously to oust any interference by the appellate Court.
45. Kiage JA in the case of Vipul (supra) stated that;
- “... I would venture to state that in actual fact a Taxing Master is not only entitled, but actually expected and required to consider the matters stated by this Court. A failure to do so amounts to a misdirection or non-direction as the case may be, which is tantamount to abuse of discretion.”
46. In that case the Court of Appeal having satisfied itself that the Trial Magistrate failed to give reasons for her blanket taxation amounted to abuse of discretion set aside the Reference ruling and remitted the Bill of Costs for fresh assessment.
47. It is the finding of this Court that in this case as well, the amount of Kshs. 15 Million as opposed to any other figure is not anchored on clear computation in line with the accepted taxation guidelines. The second issue is therefore answered in the affirmative.
48. The third issue concerns separate charging of instruction and getting up fees for three Defendants. The Applicants’ demand for instruction fees for Items 1 & 2 are dated 9/11/2016 and 15/11/2016 respectively. The instruction fees is expressed to rely on the Valuation Report of 14/1/2019. In the Bill of Cost they demanded for Kshs. 1.2 Million basing the computation on pages 8 & 9 of their Chamber Summons bundle (para. 12 of the Supporting Affidavit).
49. On Item Nos. 106,107, 108 & 109 – Getting up fees – the Applicants vehemently swore that the doctrine of stare decisis bound the Trial Magistrate to allow separate charge for fees for each Defendant as opposed to a one-off charge. Reliance was placed on the case of Nguruman Limited Vs. Jan Bonde Nielsen & 2 Others [2014]eKLR as affirmed in the Court of Appeal case of Desai, Sarvia & Pallan Advocates Vs. Tausi Assurance Co. Ltd [2014] eKLR.
50. These decisions are distinguished as follows:-
51. In the case of Nguruman (supra) the appellate Court was asked to inter alia set aside the Trial Magistrate’s Ruling and remit the 1st and 2nd Respondents Bill of Costs dated 19/6/2013 for fresh assessment and set aside the awards under Items Nos 2 and 3 in the said Bill of Costs. The taxation arose from a dismissal of a Petition filed by the Applicant on 24/8/2011. Upon hearing the parties, the Court dismissed the Petition and granted the Respondents costs. Affirming the Trial Magistrate’s award of Kshs. 300,000/- to both the 1st and 2nd Respondents and acknowledging the complex nature of the Petition, Lenaola J (as he was then) observed that the Trial Magistrate exercised his discretion judiciously and the amounts were reasonable in the foregoing circumstances. On separate charge for instruction fees for each Respondent, the Court agreed that when an advocate is instructed to sue or defend a suit, he becomes entitled to an instruction fee. See D. Njogu & Co. Advocates Vs. Panafcon Engineering Ltd [2006]eKLR. It is worth mentioning that in this particular case the appellate Court upheld Kshs. 300,000/- as instruction fees in a Bill of Costs that totalled Kshs. 18 Million.
52. In the instant case, the 1st Applicants’ Counsel filed the Notice of Appointment dated 24/11/2020 for the 3rd and 4th Applicants. In opposing the joinder of the 3rd and 4th Applicants, a Replying Affidavit sworn on 30/10/2020 by Lawrence Ndungu Mukundi was filed. A reading of the said Replying



Affidavit shows that the Applicants are co related by virtue of their business. It is deponed at para. 1 therein that the 4th Applicant is corporate director of the 1st Applicant. The 3rd Applicant was similarly listed as a witness of the 1st Applicant – see List of Witnesses dated 15/11/2016. The amended defence as filed was in respect of all the three Applicants, however in Nguruman Ruling, the Court at para. 28 - appreciated that-

“That to my mind makes the 1st and 2nd Respondents’ entitlement to getting fees as they clearly and separately denied liability for the action complained of.’ In the instant case, an amended defence was filed for all the three Applicants jointly hence the distinction.”

53. The Applicants further avowed that the Court of Appeal in the case of Desai (supra) affirmed the decision in Nguruman as good law. The facts in Desai case were that the Respondent (insurance company) had engaged the Applicant (law firm) to defend its insured and insured’s driver in a claim for compensation following a road traffic accident. The Applicant filed two Bill of Costs for the Defendants and the Respondent objected. The Trial Magistrate upheld the objection and struck out the two Bill of Costs for duplicity. Unhappy with the Ruling, the Applicant filed a Reference to the High Court. The High Court affirmed the Trial Magistrate decision and dismissed the Reference. The Applicant preferred a further appeal to the Court of Appeal which also suffered the same fate. The Court of Appeal held that the instruction to defend emanated from the Respondent only on behalf of the Defendants.
54. To that end and in my view, the Trial Magistrate did not err in allowing a lump sum fee for the three Defendants as opposed to separate fees and the award is affirmed.
55. The upshot of the foregoing in my view is that the Applicants’ Reference partially succeeds to the extent of the determination of the proper subject value to be applied by the Trial Magistrate. Aware that the instruction fee sets the pace for the rest of the Items to be assessed in a Bill of Cost, delving into the merits of the other contested Items would amount to usurping the mandate of the Trial Magistrate under the Advocates Remuneration Order.
56. On the last issue of costs, bearing in mind the history of the case it is in the best interests of justice that each party bears their own costs.
57. Final Orders for disposal;-
 - a. **The Chamber Summons dated 14.2.2023 is hereby struck out.**
 - b. **The Chamber Summons dated 2.11.2022 partially succeeds – in terms of remitting the Bill of Cost dated 27.4.2022 for fresh assessment in line with this Ruling.**
 - c. **Each party to bear their own costs.**

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 7TH DAY OF NOVEMBER, 2023
VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Plaintiff – Absent but served

Omulama for 1st Defendant

2nd Defendant – Absent but served



Omulama for 3rd and 4th Defendants
Court Assistants – Phyllis & Lilian
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