



Kilonzo & Company Advocates v Board of Trustees National Social Security Fund (NSSF) (Commercial Miscellaneous Application 67 of 2005) [2024] KEHC 11729 (KLR) (Commercial and Tax) (20 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11729 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION 67 OF 2005**

**MN MWANGI, J
SEPTEMBER 20, 2024**

BETWEEN

KILONZO & COMPANY ADVOCATES ADVOCATE

AND

THE BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY FUND (NSSF) CLIENT

RULING

1. The Advocate/applicant filed a Chamber Summons application dated 15th September, 2022 seeking orders that the Notice of Change of Advocates filed by Archer & Wilcock dated 17th December, 2021 be struck out, the written submissions dated 19th July, 2022 prepared by Mauncho & Company Advocates and filed by Archer & Wilcock Advocates be struck out, and that the costs of this application be borne by Archer & Wilcock Advocates and/or Mauncho & Company Advocates. The application is premised on the grounds on the face of the Summons and is supported by an affidavit sworn on the same day by Bonface M. Mapesa, an Advocate of the High Court of Kenya.
2. In brief averments, Mr. Mapesa deposed that the firms of Archer & Wilcock and Simon Mauncho & Co. Advocates have no instructions to act on behalf of Kilonzo and Company Advocates, and as such, the Notice of Change of Advocates dated 17th December, 2021 and written submissions dated 19th July, 2022 prepared by Mauncho & Company Advocates and filed by Archer & Wilcock Advocates ought to be struck out with costs.
3. In opposition to the above application, Mauncho & Co. Advocates filed a Notice of Preliminary Objection dated 19th December, 2022 raising the following ground-



- i. That this Honourable Court lacks jurisdiction to determine the issue at hand in respect to the application dated 15th day of September, 2022 and therefore the same ought to be struck out with costs to the Advocate/applicant.
4. Mauncho & Co. Advocates also filed a replying affidavit sworn on 19th December, 2022 by Ms. Cyrose Nduku Kilonzo, one of the Executors of the Estate of the late Senator Mutula Kilonzo who deposed that the bill of costs dated 27th January, 2005, was filed on even date by the firm of Kilonzo & Co. Advocates when Mutula Kilonzo (deceased) and A.K. Mululu were the only partners in the said firm. That on 17th February, 2005, the firm of Kilonzo & Company Advocates instructed the firm of Mauncho & Co. Advocates to act on its behalf in this matter.
5. Ms Nduku Kilonzo deposed that on 18th January, 2008, Kilonzo & Company Advocates was reconstituted, and Mutula Kilonzo Junior and Kethi Diana Kilonzo became the new partners. Ms. Nduku Kilonzo emphasized that based on a legal position taken by the said partners in Constitutional Reference No. 105 of 2012: Mutula Kilonzo Junior and Kethi D. Kilonzo both trading as Kilonzo & Co. Advocates vs Kenya Revenue Authority, the current partners cannot be held liable for liabilities that accrued on (sic) the firm of Kilonzo & Company Advocates prior to them being partners.
6. She contended that all receivables due to Kilonzo & Co. Advocates before 18th January, 2008, including the bill of costs dated 27th January, 2005, are owed to the former partners of Kilonzo & Company Advocates, Mutula Kilonzo (now his estate) and A.K. Mululu.
7. Ms. Nduku Kilonzo stated that all legal work from the filing of the said bill of costs in the year 2005, to date, has been done by the firm of S. Mauncho & Company Advocates on behalf of Kilonzo & Co. Advocates.
8. In addition, she averred that the current partners in the firm of Mutula Kilonzo & Company Advocates were unaware of the matter until 12th November, 2020 when they saw it on the day's cause list.
9. She asserted that the Executors of Mutula Kilonzo's Estate did not instruct the current partners of the firm of Kilonzo & Company Advocates to file a Notice of Change of Advocates in respect of the bill of costs in issue. She contended that the Notice of Change of Advocates filed on 16th March, 2021, was filed without consent from the Executors.
10. She averred that the proper firm on record for the Advocate/applicant is Mauncho Company Advocates, and not Archer & Wilcock Advocates.
11. In a rejoinder, the Advocate/applicant filed a further affidavit sworn on 10th March, 2023 by Bonface M. Mapesa, an Advocate of the High Court of Kenya stating that the Estate of the late Senator Mutula Kilonzo has two Executors, retired Justice P.N. Waki and Cyrose Nduku Kilonzo, making Nduku's affidavit incompetent for want of her Co-Executor's authority.
12. He deposed that A.K. Mululu was not a partner at Kilonzo & Company Advocates when the bill of costs in issue was filed, as she had resigned over 18 years earlier and had not made any claims against the firm.
13. He also further deposed that the late Senator Mutula Kilonzo had resigned from the firm that he founded, and passed on the reigns in his lifetime to his son and daughter, who were practicing with, and under him at the time, and he had no claim against the firm.
14. Mr. Mapesa stated that A.K. Mululu practices under Archer & Wilcock Advocates, and that Simon Mauncho has his own firm, Mauncho & Company Advocates. He stated that they cannot make



- decisions for Kilonzo & Company Advocates, whether in 2005, 2008, 2013 when the late Senator Mutula Kilonzo passed away, or in the present.
15. He averred that the legal services subject to the bill of costs in issue were provided by Kilonzo & Company Advocates, a partnership, and a going concern.
 16. Mr. Mapesa stated that Kilonzo & Company Advocates was not a sole proprietorship in 2013 when the Senator Mutula Kilonzo passed on.
 17. He further stated that the Executors of Senator Mutula Kilonzo's Estate are not partners of Kilonzo & Company Advocates and therefore have no authority to act for, or on behalf, or in the name of the law firm.
 18. The instant application was canvassed by way of written submissions which were highlighted on 13th March, 2024. The Advocate/applicant's submissions were filed by the law firm of Kilonzo & Company Advocates on 30th May, 2023 and 6th October, 2023, whereas the Advocate/respondent's submissions were filed on 11th July, 2023 by the law firm of Mauncho & Company Advocates.
 19. Ms. Kethi, learned Counsel for the Advocate/applicant relied on the holding of the Court in *London & Blackwell Ry Co. v Cross* which was adopted in *Danish Mercantile Co. Limited & others v Beaumont & another* [1951] 1 All ER and the case of *Patriotic Guards Ltd. v James Kipchirchir Sambu* [2018] eKLR, and submitted that Mauncho & Company Advocates had an obligation to diligently perform the work assigned to them, and that their withdrawal without proper notice to the applicant constituted professional misconduct. Furthermore, that Mauncho & Company Advocates failed to keep the applicant periodically informed about the case's status, leading the applicant's Managing Partner to raise a complaint with them vide a letter dated 15th May, 2014.
 20. Counsel cited the case of *Danish Mercantile Co. Limited & others v Beaumont & another* [1951] 1 A11 ER, and stated that neither Mauncho & Company Advocates, Archer & Wilcock Advocates, nor the Estate of the late Mutula Kilonzo had the authority to assume the role of the applicant. She also cited the case of *Lobo v Saleh S. Dhiyebe* [1961] EA 223 at P.229 and *Ochieng', Onyango, Kibet & Ohaga Advocates v Akiba Bank Limited* [2007] eKLR, to support her assertion that while clients must pay legal fees, Advocates must show that the clients expressly or impliedly contracted their services, without which, any firm acting on behalf of a client does so in futility. She submitted that in this instance, the Court cannot imply a principal-agent relationship between the Advocate/applicant and Archer & Wilcock Advocates.
 21. Ms. King'ori, learned Counsel for the Advocate/respondent submitted that the application herein does not specify the Order, Rule, or statutory provision it is based on, contrary to Order 51 Rule 10 of the Civil Procedure Rules, 2010. She maintained the position that whereas Mauncho & Company Advocates have always been authorized to execute instructions from the former partners of Kilonzo & Company Advocates, it uses Archer & Wilcock Advocate's e-filing portal due to several system errors with Mauncho & Company Advocates' own account, and they also work in consultation with Ms. A. Mululu, a partner at Archer & Wilcock Advocates. Counsel contended that under the now-repealed Partnership Act, Cap 29 Laws of Kenya, partnerships at will could be dissolved by any partner giving notice of their intention to dissolve the partnership.
 22. She referred to the case of *Shantilal Khimji Shah v Thakorbhahi Nanalal Patel & 2 others* [1986] eKLR, and asserted that Ms. A. Mululu's resignation from Kilonzo & Co. Advocates in the year 2005 dissolved the partnership, but the partnership continued for winding up and sharing of profits among the former partners. Citing the case of *Sultanali P. Molu & another v The Kenya Railways Corporation & another* [2002] eKLR, Counsel contended that the filing of the bill of costs on 27th January, 2005, by Kilonzo



& Co. Advocates was part of the winding-up process to realize income for the benefit of both the late Senator Mutula Kilonzo and Ms. A. Mululu for profit-sharing purposes.

23. Ms. King'ori cited *Mcfoy v United Africa Co. Ltd* [1961] 3 All ER, and *Danish Mercantile Co. Limited & others v Beaumont & another* [1951] 1 ALL ER, to argue that the Notice of Change of Advocates dated 16th March, 2021 by Kilonzo & Company Advocates is invalid, since the 2008 partnership lacked the former partnership's instructions to come on record, rendering the notice a nullity.
24. In a rejoinder, Ms. Kethi cited Order 9 Rule 5 of the Civil Procedure Rules, 2010, arguing that Kilonzo & Company Advocates rightfully filed the Notice of Change of Advocates dated 16th March, 2021, as the applicant. She referred to Sections 3, 4 and 6 of the Partnership Act stating that a partnership is a going concern expected to continue operating without the need to liquidate or significantly reduce its operations.
25. She acknowledged that the instant application does not specify the Order, Rule, or statutory provisions it is based on, but cited Order 51 Rules 10(1) of the Civil Procedure Rules, 2010, which states that no objection should be made, and no application refused, merely due to the failure to state the specific provisions under which it falls.

Analysis and Determination.

26. Upon consideration of the instant application, the grounds on the face of it and the affidavits in support of, the Preliminary Objection and the replying affidavit filed in opposition to the application by the Advocate/respondent, as well as the written and oral submissions by Counsel for the parties, the issue that arises for determination is whether the instant application is merited.
27. Before determining the merits and demerits of the instant application it is important to note that the Advocate/respondent had filed a Notice of Preliminary Objection dated 19th December, 2022 challenging the Taxing Officer's jurisdiction to determine the instant application. However, since the application has been placed before this Court, which has unlimited original jurisdiction in civil and criminal matters under Article 165(3)(a) (subject to Article 165(5)) of *the Constitution* of Kenya, 2010, the issue of jurisdiction on the issue raised in the Preliminary Objection has been dispensed with, and this Court will proceed to determine the application herein. As such, I agree with Counsel for the Advocate/respondent that the said Notice of Preliminary Objection has since been overtaken by events, thus this Court shall not belabour on it.

Whether the instant application is merited.

28. The contestation between the Advocate/applicant and the Advocate/respondent is on which law firm between the firm of Mauncho & Company Advocates, Archer & Wilcock Advocates, and the law firm of Kilonzo & Company Advocates is properly on record for the applicant in this matter.
29. The law firm of Kilonzo & Company Advocates was founded in the year 1974. Prior to the resignation of Ms. A. Mululu, the said law firm had two partners, being Ms. A. Mululu and the late Senator Mutula Kilonzo. On perusal of the correspondence and/or annexures attached to the Advocate/applicant's further affidavit, it is evident that as at January 2005, Ms. A. Mululu was no longer a partner in the firm of Kilonzo & Company Advocates. It is not disputed that it is the law firm of Kilonzo & Company Advocates that was instructed to act on behalf of the client/respondent in the suits giving rise to the taxation in issue. The record shows that on 27th January, 2005, the law firm of Kilonzo and Company Advocates filed an Advocate/client bill of costs against the client/respondent.



30. On 17th February, 2005, the firm of Kilonzo & Co. Advocates instructed the firm of Mauncho & Company Advocates to act on its behalf in the taxation matter. During the pendency of the said taxation matter, the firm of Kilonzo and Company Advocates was reconstituted on 18th January, 2008. Mutula Kilonzo Junior and Kethi Diana Kilonzo became the new partners of the said law firm. From the foregoing, it is evident that Mauncho & Company Advocates were appointed by the firm of Kilonzo & Company Advocates to represent the said law firm, and not by the late Senator Mutula Kilonzo.
31. The law firm of Kilonzo & Company Advocates was not wound up after Ms. A. Mululu resigned, as such, the constitution of the partnership of the firm of Kilonzo and Company Advocates at the time of instructing Mauncho & Company Advocates to represent it, and its constitution at the time the Notice of Change of Advocates dated 16th March, 2021 was filed, was the same due to continuity of Kilonzo and Company Advocates as a going concern. As was stated by Mr. Mapesa, at the time Senator Mutula Kilonzo passed on in the year 2013, the law firm of Kilonzo & Company Advocates was not a sole proprietorship.
32. It was submitted by the Advocate/respondent that pursuant to the provisions of Section 36(1)(a) of the Partnership Act (now repealed), the partnership of Kilonzo & Co. Advocates stood dissolved as at 2005 when Ms. A.N. Mululu resigned from the law firm. Section 36(1)(a) of the Partnership Act (now repealed) states as follows -
- A partnership which breaks up in the manner described in section 35 shall carry on with partnership business in so far as it is necessary for -
- a. the dissolution of the partnership;
33. It is not disputed that upon the resignation of Ms. A. Mululu from the law firm of Kilonzo & Company Advocates, she did not lodge any claim against the said firm of Advocates. From the nature of the documents annexed to the Advocate/respondent's replying affidavit and the Advocate/applicant's further affidavit, it is evident that after the resignation of Ms. A. Mululu, Kilonzo & Company Advocates continued to trade as a sole proprietorship of the late Senator Mutula Kilonzo and this was never challenged by Ms A. Mululu.
34. It is worthy of note that the Advocate/respondent has demonstrated that on 18th January, 2008, the late Senator Mutula Kilonzo retired as a proprietor of the law firm of Kilonzo & Company Advocates and Mutula Kilonzo Junior and Kethi Diana Kilonzo became the new partners trading as Kilonzo & Company Advocates. In the premise, it is my finding that at the time of filing of the bill of costs dated 27th January, 2005 when the firm of Mauncho & Company Advocates was instructed to prosecute the said bill of costs, Kilonzo & Company Advocates was a sole proprietorship which was later reconstituted to a partnership between Mutula Kilonzo Junior and Kethi Diana Kilonzo, after the late Senator Mutula Kilonzo retired. Therefore, Kilonzo & Company Advocates as it is now, is the same as Kilonzo & Company Advocates as it was at the time of filing of the bill of costs dated 27th January, 2005, when Mauncho & Company Advocates was instructed to prosecute the said bill of costs.
35. Order 9 Rule 5 of the Civil Procedure Rules, 2010 states that as follows-
- “A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered



the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

36. Since the bill of costs in issue relates to work done by the law firm of Kilonzo & Company Advocates, it is my finding that the law firm of Kilonzo & Company Advocates as constituted now, is at liberty to change its Advocate in this matter at will, and at any time. As was correctly submitted by Kethi Kilonzo for the Advocate/applicant, the fate of the bill of costs dated 27th January, 2005 filed by the law firm of Kilonzo & Company Advocates is not tied to the law firm prosecuting it.
37. Ms King’ori went on to submit that Ms. A. Mululu is entitled to the costs as per the bill of costs in issue, as she was a partner at the law firm of Kilonzo & Company Advocates when the work that forms the subject of the said bill of costs was done. It is however my considered view that the issue of who is entitled to the costs that will be taxed by the Taxing Officer cannot be dealt with, until the bill of costs is taxed and determined. The application filed by the Advocate/applicant is very specific as to the prayers sought, and the issue of who is entitled to the costs as per the said bill of costs is not a matter for determination before me.
38. With the filing of the Notice of Change of Advocates dated 16th March, 2021 the proper law firm on record for the firm of Kilonzo & Company Advocates, is the firm of Kilonzo & Company Advocates. since it is the said law firm that has the authority to instruct Counsel to represent it.
39. In the circumstances, this Court finds that the application herein is merited. As a result, I make the following orders -
- i. The Notice of Change of Advocates filed by Archer & Wilcock Advocates dated 17th December, 2021 is hereby struck out;
 - ii. The written submissions dated 19th July, 2022 prepared by Mauncho & Co. Advocates and filed by Archer & Wilcock Advocates are hereby struck out; and
 - iii. Each party shall bear its own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF SEPTEMBER, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Ms Kethi Kilonzo for the Advocate/applicant

Ms Wakhisi for the NSS Board of Trustees/respondent

No appearance for the Advocate/respondent

Ms B. Wokabi – Court Assistant.

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