**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**MISCELLANEOUS CIVIL APPLICATION NO. 1 OF 2018**

**IN THE MATTER OF TAXATION OF ADVOCATE-CLIENT BILL OF COSTS**

**BETWEEN**

**GITHUKU AND GITHUKU CO. ADVOCATES....APPLICANT/ADVOCATES**

**AND**

**ENOCK WAMALWA KIBUNGUCHY.....RESPONDENT/CLIENT**

**(Arising from Kakamega HC Election Petition No. 5 of 2017)**

**RULING**

1. Githuku and Githuku Co. Advocates, hereafter referred to as the applicant/advocates, filed a miscellaneous application on 15th August 2018 against the respondent/client seeking Kshs. 3,018,193.76 being in respect of legal services that it had rendered in Election Petition No. 5 of 2017, hereinafter referred to as the election petition.

2. In apparent response to that bill of costs, Enock Wamalwa Kibunguchy, hereinafter referred to as the respondent/client, filed an application by way of Notice of Motion, under certificate of urgency, dated 5th September 2018, seeking a stay of taxation of the advocate's bill of costs that was scheduled for 12th September 2018 until hearing and determination of the said application. The respondent/client relied on various grounds in support of his application, *inter alia*, that he had entered into a retainer agreement with one Peter Wangaki Wena, hereinafter referred to as Mr. Wena, which had stipulated the legal fees payable. The respondent/client added that Mr. Wena was paid the legal fees in installments until payment in full. He stated that Mr. Wena personally attended all court sessions as the respondent/client's advocate. He stated that he was unaware of the relationship between Mr. Wena and the applicant/advocates, and that he had discharged his obligations under the retainer agreement, and thus he should not be made to pay legal fees twice.

3. An interim order was made on 11th September 2018 staying taxation of the advocate/client bill of costs filed by the applicant/advocates until 24th September 2018.

4. The applicant/advocates filed a replying affidavit to the respondent's application, sworn by Ms. Diana Githuku, hereinafter referred to as Ms. Githuku, the principal in Githuku and Githuku Co. Advocates, on 19th September 2018. She averred, *inter alia*, that at all material times, the applicant/advocates had been instructed to act for the respondent/client in the election petition. She added that she was introduced to the respondent/client by Mr. Wena, who informed her that the respondent/client needed representation in the election petition case against him. Mr. Wena further informed her that he wanted both of them to represent the respondent/client through the applicant/advocates. She stated that it was agreed that the applicant/advocates was to come on record in the election petition as defending the respondent/client, and that Mr. Wena was to be lead counsel, with Ms. Githuku as the assisting counsel. She further stated that it had been agreed that all costs and expenses pertaining to the election petition were to be borne by the applicant/advocates. She stated that it was at the backdrop of that verbal agreement that she drafted a letter to Nyaencha Waicharia & Co., Advocates, for the petitioner in the election petition, informing them that the applicant/advocates had been instructed to act on behalf of the respondent/client. She added that the applicant/advocates proceeded to file a notice of address of service and a response to the petition, all of which were signed by her. Subsequently, all court notices, pleadings from various parties to the petition and other court process were served upon the applicant/advocates. She added that she and Mr. Wena filed their practicing certificates in the election petition pursuant to the directions that were given therein by Judge handling the election petition. She further averred that the respondent/client did meet her and Mr. Wena on various occasions. She also said that there was correspondence between the applicant/advocates and the respondent/client through emails, dated 25th September 2017, 19th November 2017 and 18th December 2017, pertaining to the election petition. She argued that from the proceedings on record in the election petition, it was crystal clear that the parties present and representing the respondent/advocates were Mr. Wena and herself. She contended that the letter of engagement and legal fees agreement dated 13th September 2017, purported to be between the respondent/client and Mr. Wena, had been fabricated after the filing of the bill of costs, and was meant to oust the applicant/advocates out of its rights and entitlement to fees despite tireless work having been done for the same. She submitted that the respondent/client could not claim to pay one advocate and not the other for representation in court, yet the respondent/client had instructed both to act for him.

5. The respondent/client filed a supplementary affidavit, sworn by Mr. Wena on 9th October 2018. He stated that he had met the respondent/client on 9th September 2017 with a possibility of representing him in the election petition that had been filed challenging the respondent/client's election as a Member of the National Assembly, Likuyani Constituency. He averred that he accepted to represent the respondent/client in the election petition, but he informed him that he had stopped practicing in the firm of Miller & Co., Advocates and that he would therefore represent the respondent/client through another firm of advocates. Mr. Wena deponed that he informed the respondent/client that he would have personal conduct of the matter and the respondent/client would not pay any fees over and above what they had agreed upon, which was Kshs. 1,200,000,00, which was to be paid in installments. Mr. Wena stated that he requested Ms. Githuku to use her firm to represent the respondent/client. Ms. Githuku accepted the request. He stated that at the time of the request, he had made it clear to her that the agreed fees was to be paid to him directly and no fees was be paid directly to her or the applicant/advocates. Mr. Wena added that he was to meet all expenses and costs for the case including court fees, travel and even the stationery that would be used in preparing pleadings. He stated that the receipts for court and filing fees were issued in the name of the applicant/advocates as it was the firm on record, but he insisted that he was the one who catered for those costs and other expenses, including travel. He reiterated that the agreement of engagement and legal fees was executed between himself and the respondent/client, and there was no way the applicant/advocates would meet litigation costs for a client they had no prior relationship with and who had not paid them any fees. Mr. Wena stated that emails and pleadings were sent and signed by the applicant/advocates as it was the firm on record, but he stated that he took responsibility for preparation of all pleadings, submissions and list of authorities. He reiterated further that he attended all court sessions during the proceedings, right from the first mention to the delivery of judgment, with Ms. Githuku attending hearing only on four occasions. Mr. Wena added that during the pendency of the petition, the issue of fees was never brought up and no fee note was tendered to the respondent/client or a refund of alleged disbursements made by the applicant/advocates. He submitted that the respondent/client paid the agreed legal fees in installments until payment was made in full. Mr. Wena stated that if the applicant/advocates had a claim of fees then the said claim should be made to him and not the respondent/client.

6. The applicant/advocates filed a further affidavit, sworn on 25th October 2018, by Ms. Githuku. She stated that Mr. Wena had not provided proof of payment of court fees and other expenses including for travel and stationery. She further stated that they hand delivered fee notes to the respondent/client dated 6th November 2017 and 19th December 2017, which were never honoured by him. She submitted that had she not had instructions from the respondent/client, then she would not have signed the pleadings or Mr. Wena would not have sent his practicing certificate to the applicant/advocates. She argued that although Mr. Wena was paid the alleged Kshs. 1,200,000.00, he never disclosed it to the applicant/advocates, neither did he remit any fees to the applicant/advocates for work done and expenses incurred for the benefit of the respondent/client. She stated that it had not been disputed that the applicant/advocates rendered legal services to the respondent/client as per paragraph 28 of Mr. Wena's supplementary affidavit. She further stated that the bill of costs dated 14th August 2018 should proceed for taxation before the taxing master and that Mr. Wena be held accountable by this court and ordered to pay the fees and expenses incurred by the applicant/advocates.

7. From the application and the rival affidavits, the issues that emerge for determination are whether the applicant/advocates were instructed by the respondent/client and whether the applicant/advocates are entitled to legal fees from the respondent/client.

8. On the first issue, the applicant/advocates submitted that they were instructed by the respondent/client when Mr. Wena introduced Ms. Githuku to the respondent in a tripartite meeting held sometime in September 2017, where it was verbally agreed that the applicant/advocates represent the respondent/client in the election petition. On the other hand, the respondent/client submitted that it was Mr. Wena who was instructed by him through a retainer agreement dated 13th September 2017 signed between the respondent/client and Mr. Wena. The respondent/client submitted that the said retainer agreement was valid and binding within the meaning of Section 45 of the Advocates Act, Cap 16, Laws of Kenya, as it was in writing, was specific on the amount of fees payable and that the respondent/client was not be liable to pay any further fees to either the appellant/advocates or any other firm that Mr. Wena used for the conduct of the matter. Mr. Wena submitted that he seized conduct of the respondent/client's matter through the applicant/advocates, and that for purposes of the election petition proceedings he was an agent of the applicants/advocates. The respondent/client submitted that if there was any oral agreement or instructions, which he maintained was not there, then the same could not supersede a written agreement that was duly executed.

9. The Court of Appeal, in the case of *said regarding retainer & Tollo Advocates vs. Mount Holdings Limited* [2016] eKLR held that:

> *"The resolution of this dispute appears to us to turn on the definition of two concepts; a retainer and a retainer agreement and the rights of the parties thereto.*
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> *According to the Black's Law dictionary (supra), a retainer is defined as:*
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> *"1. A client's authorization for a lawyer to act in a case.*
>
> *2. A fee that a client pays to a lawyer simply to be available when the client needs legal help during a specified period or on a specified matter.*
>
> *3. A lump sum fee paid by the client to engage a lawyer at the outset of a matter- also termed engagement fee.*
>
> *4. An advance payment of fees for work that the lawyer will perform in the future- also termed retaining fee.*
> *"*
>
> *In Halsbury's Laws of England, (supra) at page 13 para 763; the concept is also defined thus: -*
>
> *"The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor's retainer by that client. Thus, the giving of a retainer is equivalent to the making of a contract for the solicitor's*

*employment…"*

*From the above definition, 'retainer' covers a broad spectrum. It encompasses the instructions given to an advocate as well as the fees payable thereunder. A retainer need not be written, it can be oral and can even be inferred from the conduct of the parties. However, if there is no evidence of retainer, except a statement from the advocate, which a client contradicts, the court will treat the advocate as having acted without authority from the client (see. Halsbury's Laws of England, (supra) at page 14 para 765).*

*On the other hand, the term 'retainer agreement' is anchored in the Advocates Act and in particular section 45 thereof. It provides inter alia:*

> *"45. Agreements with respect to remuneration*
>
> *(1) Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may -*
>
> > *(a) before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate's remuneration in respect thereof;*
> >
> > *(b) before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate's instruction fee in respect thereof or his fees for appearing in court or both;*
> >
> > *(c) …*
> >
> > *and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf."*

*An agreement entered into pursuant to the above section is what can be termed as a 'retainer agreement.' As the section indicates, under such agreement, the parties 'fix' or put a cap on the advocate's instruction fee, meaning that both parties are beholden to the amount so fixed. From the foregoing it should thus be clear that the presence of a retainer is what in turn gives rise to the retainer agreement. In other words, only when the engagement and the terms thereof have been agreed upon, can the same be reduced into writing. It also follows that for the retainer agreement to be valid and binding, the same must have been put in writing and signed by the client and or his agent. It is therefore erroneous as submitted by counsel for the respondent that retainer and retainer agreement mean one and the same thing. The learned Judge also seem to have fallen in the same error in equating a retainer with a retainer agreement when she held that there was a retainer agreement in this case in line with Section 45 of the Act. We would also agree with counsel for the appellant that what was before her for determination was whether there was a retainer between the parties and not whether there was a retainer agreement. In introducing the issue of retainer agreement in the mix, the Judge chartered an unpleaded path which was an error."*

10. The court said the following on the same in *Mereka & Company Advocates vs. Zakhem Construction (Kenya)* [2014] eKLR, that:

> *"It is trite law that a retainer need not only be in writing but can be implied from the parties conduct on this am guided by the case of Ohaga vs. Akiba Bank Limited [2008] 1 EA 300, where it was held that, "a retainer may be implied where: (i) the client acquiesces in and adopts the proceedings; or (ii) the client is estopped by his conduct from denying the right of the advocate to act or from denying the existence of the retainer; or (iii) the client has by his conduct performed part of the contract; or (iv) the client has consented to a consolidation order."*

11. The aforementioned sentiments were echoed in the case of *Stephen Aluoch K'opot t/a K'opot & Company Advocates vs. Cornel Rasanga Amoth* [2017] eKLR, which was relied upon by the applicant/advocates, where the High Court said that:

> *"A retainer is the basis of a relationship between the advocate and client. Such a relationship may be oral or in writing, express or implied. It is not necessary that retainer be in writing. The purpose of section 45(1) of the Advocates Act is to regulate remuneration agreements between advocates and clients. It does not limit the nature of agreement that may be entered into between advocate and client for the provision of legal services. In Ochieng Onyango and Kibet & Ohaga Advocates v Akiba Bank Limited [2008] 1 EA 380, the court held that;*
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> > *"It is the position of the law that if there is no evidence of a retainer except the oral statements of the advocates which is contradicted by the client, the Court will treat the advocate as having acted without authority/permission… the burden of proof to establish the retainer is always on the shoulders of the advocates. And more weight will be given to the contention of the client that he did not instruct the Advocate to act for him. I hasten to add that the yard stick for such proof is not beyond reasonable doubt. In fact, it is in the normal parameters of balance of probability."*

*Where a retainer is denied, the burden falls on the Advocate to prove the retainer on the balance of probabilities. The Advocate filed a supporting and further affidavit detailing his involvement in the matters after he had been requested by the Client to act on his behalf. It is evident from the court records that the Advocate was actively involved in the*

*proceedings. He appeared personally in court defending the election petition in the High Court and acted for him in the Court of Appeal. The respondent did not file any affidavit denying the Advocate's allegations hence these facts remained unchallenged. I therefore find that apart from oral instructions, the retainer can be implied from the fact that the Advocate acted on behalf of the Client in the proceedings. The Client having taken the benefit of such representation, cannot turn around and say that the Advocate did not have instructions particularly in such a weighty matter as an election petition … I have considered the case of Ochieng, Onyango, Kibet and Ohaga Advocates v Akiba Bank Limited (Supra) cited by counsel for the Client to support his submission that where an advocate has a choice to ask another Advocate to lead him in a matter, he cannot make the client liable for costs incurred without the express instruction or permission of the client."*

12. In *Gitonga Mureithi & Co. Advocates vs Centre for Multiparty Democracy* [2018] eKLR, the same court held that:

> *"I also note that Mr. Anyango conceded during the hearing of this objection, that they are not disputing the fact that Mr. Gitonga of Gitonga Mureithi & co advocates acted in petition No. 182 of 2015. Their contention was, however, that instructions were to S Musalia Mwenesi advocate and to whom the legal fees was paid because it was him who had instructions to act in that petition. Mr. Anyango relied on the affidavit by Dr. Francis Onyango sworn on 15th May 2017 wherein he contended that the client instructed the firm of S Musalia Mwenesi advocate to act for them in that petition. The affidavit contains letters exchanged between S Musalia Mwenesi advocate and the client.*
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> *A scrutiny of the letters attached to Dr. Onyango's affidavit shows that they were written after the petition had been heard. None of the letters instructs S Musalia Mwenesi advocate to Act in that petition or take over the conduct of the matter from the firm of Gitonga Mureithi & Co. Advocates. There is also no notice of change of Advocates filed to signify that indeed there was change of instructions in that petition. The letter of 12th June 2015 from S Musalia Mwenesi advocate to the client, merely reports that Mr. Mwenesi attended Court accompanied by Mr. Gitonga confirming that indeed Mr. Gitonga was acting in the matter.*
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> *Mr. Mwenesi went ahead and submitted his fee note which was settled. In the letter of 27th August 2015 the author, Njeri Kabeberi advised Mr. Musalia Mwenesi to extend part of the fees to Mr. Gitonga who "drafted the written opinion". This was despite the fact that it was the firm of Gitonga Mureithi & Co. Advocates that drew and filed her affidavit in that petition.*
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> *To my mind, only the firm of Advocates of Gitonga Mureithi & Co. advocates was on record for the client in that petition and indeed drafted and filed pleadings including submissions and affidavit sworn on behalf of the client. Even though Mr. Anyango, learned counsel for the client argued that no instructions were given to the firm of Gitonga Mureithi & Co. Advocates, the fact that the said firm drafted and filed all the pleadings which are not disputed and Mr. Gitonga attended Court though in the company of Mr. Mwenesi, is evidence of implied instructions, and for that reason, I am satisfied that the firm of Gitonga Mureithi & Co. Advocates was the firm on record, a fact that is also acknowledged in the judgment … this particular case, there is no denial that the firm of Gitonga Mureithi & co Advocates was on record and indeed acted for the client. The client even accepts that the firm drafted the opinion and participated in drafting and filing pleadings including an affidavit by the client's executive director a fact that has not been challenged. There cannot be any other inference to be drawn from such conduct than that there were instructions to the Advocates to act in that petition.*
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> *Even if Mr. Mwenesi attended Court during the hearing of the petition or any other time, he did so as one instructed by the firm of Gitonga Mureithi & co Advocates which was on record and not S Musalia Mwenesi Advocate who did not file any documents in that matter. Any suggestion that Gitonga Mureithi & Co. Advocates had no instructions to act in the petition is not supported by the evidence on record and is, therefore, unsustainable.*
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> *If the client chose to pay S Musalia Mwenesi Advocate, they took a risk and paid an advocate who was not on record and cannot use that excuse to deny the advocate on record their professional fees for work done on behalf of the client. In this regard I am in agreement with the holding in the case of Machira & Company Advocates v Arthur K. Magugu & another (HCC Misc. App. No. 358 of 2001.) that "a client who chooses to withdraw instructions from his advocate without any payment, undertaking or any other appropriate arrangement regarding the advocate's fees must be prepared to pay to the advocate such sum as may be found due and payable upon taxation of advocate/client bill of costs."*

13. In *Kakuta Maimai Hamise vs. Peris Pesi Tobiko, Independent Electoral and Boundary Commission & Returning Officer Kajiado East Constituency* [2017] eKLR, it was held that:

> *"The issue of validity of agreements between advocates and clients with respect to remuneration was dealt with by Ochieng, J in Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited (2) [2006] 1 EA 5 in which the learned Judge held that a reading of section 45(1) of the Advocates Act reveals that the agreements in respect of remuneration would be valid and binding on the parties thereto provided that the agreements were in writing and signed by the client or his agent duly authorised in that behalf."*

14. In the instant case, the respondent/client produced a retainer agreement dated 13th September 2017 between himself and Mr. Wena, which was in writing and was signed by both the respondent/client and Mr. Wena. The applicant/advocates alleged that the said retainer agreement was fabricated. However, the applicant/advocates did not prove this, and thus the said retainer agreement has to stand in the absence of evidence proving forgery or fabrication as the same is valid as per Section 45(1) of the Advocates Act.

15. The respondent/client admitted that the applicant/advocates were on record in the election petition on his behalf. In so far as the record of the election petition proceedings is concerned, both Mr. Wena and Ms. Githuku were on record as counsel from the applicant/advocates. They were one and the same. All pleadings were drafted and filed in the name of the applicant/advocates, and both Mr. Wena and Ms. Githuku attended court sessions in the said proceedings representing the respondent/client under the applicant/advocates.

16. It is my conclusion, therefore, that the respondent/client expressly instructed Mr. Wena, the instructions impliedly extended to the applicant/advocates, who were on record for the respondent/client, and in whose name the pleadings in the court record were drafted, signed and filed. The respondent/client was also aware at the time of executing the retainer agreement that Mr. Wena would be using the applicant/advocates in the election petition as that fact is expressly captured in the retainer agreement. I find that the respondent/client was well aware that the applicant/advocates were on record, and that they participated in the drafting and filing of pleadings for and on his behalf. Essentially and overall, the respondent impliedly instructed the applicant/advocates, which included Mr. Wena for purposes of the election petition.

17. I now turn to the issue as to whether the applicant/advocates are entitled to legal fees from the respondent/client. Having found that the express instructions to Mr. Wena impliedly extended to the applicant/advocates, the next question is whether the applicant/advocates are entitled to legal fees from the respondent/client. The respondent/client submitted that he had already settled the legal fees in full as was stipulated in the retainer agreement to Mr. Wena, a fact Mr. Wena confirmed and the applicant/advocates do not dispute. As I stated here before, Mr. Wena and Ms. Githuku were acting for the respondent/client as one, under the umbrella of the applicant/advocates. This means that any payment made to either Mr. Wena or M/s Githuku was payment to the applicant/advocates, and I am in agreement with the respondent/client that Mr. Wena was an agent of the applicant/advocates in the said election petition and so was Ms. Githuku. Anything said or done by either Mr. Wena or Ms. Githuku in the proceedings was something that was said or done by the applicant/advocates. The payment that was made to Mr. Wena by the respondent/client in respect of the election petition was a payment to the applicants/advocates as well. From the evidence herein, the respondent/client was not privy to any internal arrangement between Mr. Wena and Ms. Githuku, and even if he was, it was really not a matter of much consequence as long as he paid the legal fees as was provided for in the retainer agreement dated 13th September 2017.

18. As was stated by the Court of Appeal in *Omulele & Tollo Advocates vs. Mount Holdings Limited* [2016] eKLR (supra), the parties in a retainer agreement "'fix' or put a cap on the advocate's instruction fee, meaning that both parties are beholden to the amount so fixed." The respondent/client cannot pay over and above the legal fees that was agreed between himself and Mr. Wena. I am in agreement with the respondent/client that should Ms. Githuku have any claim for sums due to her, for any work done, then she has to seek it directly from Mr. Wena, and not from the respondent/client who discharged his obligation in the retainer agreement.

19. In *John Maina Mburu t/a John Maina Mburu & Co. Advocates vs. George Gitau Munene (sued as Administrator of the Estate of Samuel Gitau Munene) & 3 others* [2015] eKLR, the High Court said that:

> *"I agree with the submissions of Ms. Thongori on the application and effect of Section 45 of the Advocates Act. Where there is a fee agreement between an Advocate and clients, there is no jurisdiction to tax a bill of costs. The decision of D. N. Njogu & Co. Advocates vs. NBK (2007) eKLR is instructive in this regard. In that case, Warsame J, as he then was, held: -*
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> > *"If two parties willingly agree to conceive an idea and the same is put into writing, signed accepted and executed by the parties, then the court can only be called to intervene in distinct situations…It is provided under section 45(6) of Cap 16 that where there is an agreement, the costs of an advocate shall not be taxed unless there is fraud, illegality and/or coercion in the agreement …""*

20. In conclusion, I find that the instructions that were expressly given to Mr. Wena by the respondent/client impliedly extended to the applicant/advocates. This is so as the retainer agreement between them clearly stipulated the involvement of the applicant/advocates in the election petition. The respondent/client was well aware that the firm of the applicant/advocates was on record on his behalf in the election petition proceedings. Mr. Wena and M/s Githuku were for all intents and purposes one and the same, acting as agents of the applicant/advocates in the election petition on behalf of the respondent/client. Consequently, the payment of Kshs. 1,200,000.00 that was made to Mr. Wena by the respondent/client must be deemed to have been made to the applicant/advocates as per the retainer agreement, which capped the retainer at Kshs. 1,200,000.00. The applicant/advocates cannot have any claim against the respondent/client as he discharged his obligation under the retainer agreement by paying the retainer in full. The applicant/advocate can only seek redress against Mr. Wena personally, if at all they had any agreement or arrangement in respect of the legal fees. The respondent cannot pay legal fees twice to the same law firm as that would be unfair and unreasonable. In the presence of a valid retainer agreement capping the legal fees payable, there can be no taxation of an advocate/client bill against the respondent/client.

21. In light of the foregoing, I find that the respondent/applicant's application dated 5th September 2018 is merited and should be allowed. I hereby allow the same, the effect of which is that the advocate-client bill of costs filed by the applicant/advocates herein against the respondent/client on 15th August 2018 is hereby struck out. Let each party bear their own costs.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 14th DAY OF June 2019**

**W MUSYOKA**

**JUDGE**