



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC MISC. APPL. NO. 22 OF 2019

FLORENCE MWANIKA OCHIENG.....APPLICANT

VERSUS

NAHASHON OCHIENG ONYANGO.....1ST RESPONDENT

JOHN MARTIM SITUMA WEKESA.....2ND RESPONDENT

NANCY MUTHONI MUGO.....3RD RESPONDENT

CHARLES BONYO.....4TH RESPONDENT

LINUS LIGARE.....5TH RESPONDENT

RULING

1. The applicant filed chamber summons dated **29/11/2019** on **2/12/2019** seeking the following orders:

1. ...spent

2. ...spent

3. That the taxing officer's decision on 9/5/2019 awarding instructions fees to the 2nd, 3rd and 4th respondents be set aside.

4. That the taxing officer' decision of 9/5/2019 taxing and awarding to the 5th respondent costs be set aside.

5. That the respondents do pay the costs of this application.

2. The application is brought under **Paragraph 11(2) of the Advocates Remuneration Order, Section 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act Cap 21** Laws of Kenya.

3. The grounds upon which this application is brought are that the taxing officer erred in failing to appreciate the meaning of **paragraph 62 of the Advocates Remuneration Order**; that the taxing officer misunderstood and misapplied the decision of **Nyamogo & Nyamogo Advocates -vs- Kenya Bus Service and Another [2006] eKLR** and that the taxing master erred in taxing and awarding costs to the 5th respondent in the absence of an order for costs in his favour.

4. The application is supported by the affidavit of the applicant dated **29/11/2019**. The applicant depones that the firm of Mbugua, Atudo & Macharia Advocates were instructed and filed a joint statement of defence for the 1st, 2nd, 3rd and 4th respondents in **Kitale ELC No. 21 of 2018**; that no separate pleadings were ever filed or delivered; that the 5th respondent entered appearance through Walter Wanyonyi & Company and filed a statement of defence; that at instance of the 1st, 2nd, 3rd and 4th respondents notice of motion for striking out the suit was struck out; that however the respondents subsequently filed a separate bill of costs against the applicant which bill of costs were ruled upon by the taxing officer without hearing any presentations for or against the bills of costs and that ruling went against the decision in **Nyamogo in Nyamogo Advocate case** (supra); that though costs were granted only to the 1st - 4th respondents the taxing officer erred by taxing a bill against the 5th respondents.

5. While the application was still pending this court granted interim orders staying the execution of the certificate of costs/certificate of taxation against the 2nd, 3rd and 4th respondents but exempting the 1st respondent from the stay.

6. On **6/2/2020** the 1st, 2nd, 3rd and 4th respondents filed grounds of opposition. The grounds are that the application is directed at the 1st respondent; that the applicant has not established that the taxing master's ruling was clearly wrong or that she failed to exercise her discretion judiciously to warrant the court's intervention; that she applied the right principles and the costs were properly taxed in accordance with the applicable laws and that the respondents deserve the award of costs.

7. The application is opposed by the 5th respondent vide grounds of opposition dated **5/2/2020**. The grounds are that the taxing master considered all the relevant factors, principles of taxation as per the Advocates Remuneration Order in her decision; that costs follow the event; that no objection was raised to the bill of costs and that the award of costs covered all the parties.

8. The 1st, 2nd, 3rd and 4th respondents filed submissions on **12/2/2020**. The applicant filed her submissions on **13/2/2020**. The 5th respondent filed his written submissions on **5/2/2020**. I have considered the application, the response and the submissions.

9. The plaintiff cited **Article 48** of the **Constitution**, submitted that any person having a dispute has a right to have it disposed of at a cost that is affordable; and further that the remuneration order was enacted as guideline on taxing costs so that costs do not rise above a reasonable level. Referring to **Section 27** of the **Civil Procedure Act** he stated that the issue of costs is at the discretion of the court and that in **Kitale ELC No. 21 of 2018** the court only granted prayers **No. (2)** and **(7)** of the application dated **21/5/2018** which prayers were as follows:

“2. That the honourable court be pleased to strike out the suit against the 1st, 2nd, 3rd and 5th defendants/applicants hereto on grounds of res judicata;

7. That the costs of the suit hereto and this application be awarded to the applicants herein”.

10. Counsel for the applicants noted that the 1st, 2nd, 3rd and 4th respondents having retained **one** advocate were entitled to instruction fees only once; that however the taxing officer awarded each of the **4** respondents' instruction fees and cited the case of **Nyamogo (supra)**. Referring to paragraph **62** of the **Advocates Remuneration Order**, Mr. Ingosi submitted that the joint statement of defence, having been filed by the same advocate, was sufficient evidence that the advocate was instructed once to defend the proceedings; if not the advocate would have filed separate pleadings. Mr Ingosi proceeded to argue that the taxing officer *should have* taxed instruction fees *once* in respect of the **4** respondents and *disallowed* the separate claims of instruction fees by the 2nd, 3rd and 4th respondents. He maintained that the **Nyamogo** decision (*supra*) did not grant authority to allow the instruction fees for each respondent separately and that the taxing officer misunderstood and misapplied the decision. He further argued that *“it is the practice”* that where an advocate acts for two or more parties and costs are granted in favour of his clients he can only claim instruction fees *once* and he cannot tax party and party costs separately for each client. It is maintained that the court having pronounced itself on the issue of costs, the taxing officer had no discretion as to who to award costs but could only tax costs in accordance with that order. His argument segregates the 5th respondent herein who he states was not an applicant in **Kitale ELC No. 21 of 2018** and who was not covered by **prayers No. (2)** and **(7)** of the subject application and therefore the taxing officer erred in taxing and awarding him costs when no orders had been made in his favour.

11. Citing **KTK Advocates -vs- Baringo County Government [2017] eKLR** and **KANU National Elections Board & Another -vs- Hon. Salah Yakub Farah [2018] eKLR** where the court referred to the decision in **Ocean Commodities Inc. and Others -vs- Standard Bank of SA Ltd and Others [1984] (3) SA 15 (A)** the 1st – 4th respondents' submissions are that the application is not directed to the 1st respondent and therefore his bill must remain undisturbed. Again citing **KANU National Elections Board case (supra)** they maintain that the applicant has not established that the taxing master's ruling was clearly wrong to warrant the intervention of this court or that the taxing master failed to exercise her discretion judiciously. They lauded the taxing master's decision as having been arrived at after application of the right principles and the applicable law.

Determination

Issues for determination

12. The main issues for determination in this application are as follows:

- a. Whether the four defendants, having been represented by the same advocate, were each entitled to separate instructions fees;**
- b. Whether the 5th defendant was entitled to costs.**
- c. Who should bear the costs of the application?**

The issues are discussed as hereunder.

a. Whether the four defendants, having been represented by the same advocate, were each entitled to separate instructions fees;

13. The applicant's objection is basically to an instruction fee for each of the 1st-4th defendants as opposed to a single instruction fee. His

argument is premised on the fact that all the first four defendants were represented by the same firm of advocates and could therefore have issued instructions to that firm only once. The filing of a single defence on their behalf by those advocates is cited as a pointer to the fact that they deserved a single instruction fee.

14. **Section 27 of the Civil Procedure Act** is rightfully cited by the applicant as the basis for the court's discretion in awarding costs.

15. It must be stated here that the suit **Kitale ELC 21 of 2018** did not proceed to hearing as it was struck out by orders made in a ruling on a striking out application brought by the 1st, 2nd, 3rd, and 4th respondent herein. The 5th respondent herein was therefore not an applicant in that striking out application. This court, in the ruling striking out the suit stated as follows:

“In the end I only grant prayers 2 and 7 of the application dated 21/5/2018. This suit is therefore struck out with costs to the applicants.”

16. The applicants were therefore granted costs as prayed in their application. The applicant herein thinks the costs should have included only one set of instructions fees for all the four applicants in that application for the reasons set out hereinbefore.

17. **Paragraph 62 of the Advocates Remuneration Order** relied on by the applicant provides as follows:

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

18. In this Court's view, the most appealing interpretation of the above paragraph is that separate costs in respect of parties represented by the same advocate are applicable only in certain instances. The instances given in the rule are:

a. where separate pleadings are delivered; or

b. other proceedings engaged in on behalf of some of the parties.

19. In instances where such separate pleadings were filed or other proceedings undertaken the taxing officer is mandated to consider whether such pleadings or proceedings were necessary, and he has the discretion to disallow the costs thereof if of the opinion that they were not.

20. In this particular instance where the 1st - 4th respondents' had common representation, no separate pleadings or proceedings were filed on behalf of the 1st - 4th respondents herein and the discretion of the taxing master is therefore non-existent. Had there been any separate pleadings or proceedings, the taxing master would have had a basis for considering that she had discretion to award them instruction costs separately. However, even then, her exercise of discretion in favour of separate instructions fees would have to be premised on very sound grounds and could not be whimsically exercised.

21. In the **Nyamogo case** (supra) the counsel for the applicant submitted that the taxing officer ought to have considered the existence of two defendants and therefore allow an additional fee under **rule 1 (c)** of the Advocates' Remuneration Rules. That rule provides as follows:

“(c) To defend proceedings where the defendant substantially adopts the defence of another defendant; an instruction fee calculated under sub-paragraph 1(a).”

22. The court in the **Nyamogo case** was not convinced that there should have been a higher fee under **rule 1(c)** of the **6th schedule** in that case. Relying on **rule 62 (2)** of the advocates remuneration order the court in the **Nyamogo Case** stated as follows:

“That there were two defendants represented by the advocate herein as submitted before me is not enough to warrant a higher fee without there having been a duplication of pleadings or proceedings as is clearly required in the above cited rule. Counsel having not demonstrated that indeed that was the case I have no reason to interfere with the Taxing Officers' discretion in regard to that point.”

23. It must be clearly seen here that the issue is not the amount arrived at by the taxing master but the principle behind the award of instructions costs to the 2nd, 3rd and 4th respondents who were represented by the same counsel as the 1st respondent.

24. Therefore, though I agree with the respondents who cite from the **KTK decision** (supra) that :

“...the court must be satisfied that the taxing master's ruling was clearly wrong...”

and:

“... the court will not interfere with the decision of the taxing master in every case where its view of the matter in dispute differs from that of the taxing master, but only when it is satisfied that the taxing master's view of the matter differs so

materially from its own that it should be held to vitiate the ruling,”

I must indicate that in the circumstances of the instant application there is sufficient ground to interfere with the decision of the learned taxing master, the applicant having amply demonstrated that there was no basis at all for considering that there was discretion to order separate instructions fees as though separate pleadings and proceedings had been undertaken for each of the four defendants.

b. Whether the 5th defendant was entitled to costs.

25. The 5th respondent was the 6th defendant in the suit **Kitale ELC 21 of 2018**. He was not involved in the application and as seen herein above the instant applicant's grievance is that he was awarded costs at the taxation stage despite the fact that the order striking out the suit did not award him costs.

26. It is true that he did not participate in the interlocutory proceedings that led to the termination of the suit in respect of the 1st -4th defendants.

27. Though it is arguable that the order striking out the suit omitted express mention of him and his case, it is clear that he had been enjoined by the plaintiff alongside all the other defendants, and the lease or sale agreement in his favour, which was under challenge by the plaintiff was, in so far as no specific distinguishing features thereof were pleaded by the plaintiff, ranked on the same level as the leases or sale agreements in respect of the other defendants. The suit was struck out on the basis of the *res judicata* doctrine.

28. The 5th respondent was not party to the suit no **Kitale ELC 31 of 2009** whose determination is, according to the striking out ruling, the basis for the application of the *res judicata* doctrine. Should the taxing master considered him eligible for costs in the circumstances?

29. The 1st – 4th respondents herein applied for the striking out of the suit against them and the court obliged them. The 5th applicant failed to join them. The only prayers granted in the striking application were specific with regard to the suit against the 1st to 4th respondents herein.

30. A court of law must abide by the record. If the prayers granted did not include the 5th respondent's suit, then the same must be regarded as still pending as only the suits mentioned were struck out. In stating this the court is alive to the possibility of a plaintiff being able to establish his claim against some of the defendants, and failing to do so against others, in certain instances.

31. It cannot be assumed that the suit against the 5th defendant's would necessarily follow along the path adopted by the suit filed against the 1st to 4th defendants.

32. While the 1st to 4th respondents had a basis for taxing their costs, the 5th respondent did not since his suit still existed. For the foregoing reasons, I find that the suit against the 5th respondent was not affected by the specific orders issued in the ruling dated **25/10/2018**.

c. Who should bear the costs of the application?

33. In view of the foregoing, the 2nd 3rd and 4th and 5th respondents should bear the costs of the instant application.

CONCLUSION.

34. In the final analysis I hereby issue the following orders:

a. The application dated 29/11/2020 is allowed in terms of prayers nos. 3 and 4 thereof.

b. The costs of the application shall be borne by the 2nd 3rd and 4th and 5th respondents

It is so ordered.

Dated, signed and delivered at Nairobi via Teleconference on this 8th day of May, 2020.

MWANGI NJOROGE

JUDGE

In the presence of :

Mr Wanyonyi for the 5th respondent.

N/A for the 1st -4th respondents

N/A for the Applicant.

Hon. Mercyline Lubia, Deputy Registrar.

MWANGI NJOROGE

JUDGE