



REPUBLIC OF KENYA



**Ngome & 30 others v Muturi & 5 others (Environment & Land Case
11 of 2021) [2023] KEMC 274 (KLR) (23 August 2023) (Ruling)**

Neutral citation: [2023] KEMC 274 (KLR)

**REPUBLIC OF KENYA
IN THE KWALE LAW COURTS
ENVIRONMENT & LAND CASE 11 OF 2021
ZK KAGENYO, DR
AUGUST 23, 2023**

BETWEEN

KALU NGOME	1ST APPLICANT
JUMA MUNYOKI	2ND APPLICANT
BAYA MWAITA MWANZALA	3RD APPLICANT
JUMA DANDA	4TH APPLICANT
MKALA ZUMA	5TH APPLICANT
KIDZELI KALAMA	6TH APPLICANT
JANE NDORO	7TH APPLICANT
JOSEPH MUMBO	8TH APPLICANT
CHAKO MUGALA	9TH APPLICANT
MBEYU MUDURUMA	10TH APPLICANT
SALOME KIMWELI	11TH APPLICANT
JIRA MUNYIKA DALU	12TH APPLICANT
KANGA MBUJA	13TH APPLICANT
MWANYIKA DALU	14TH APPLICANT
MOSE MWANGALE DZIHAMBO	15TH APPLICANT
MUSYOKA KIEMA	16TH APPLICANT
MUUNGANO MOGELA	17TH APPLICANT
NDORO NYAWA	18TH APPLICANT
MATSUNGU VURA	19TH APPLICANT



MUNYUMBA CHAKA 20TH APPLICANT
SAIDI BEMAGOMA 21ST APPLICANT
MRIPHE CHIMERA 22ND APPLICANT
NYAMAWI NDAO 23RD APPLICANT
LUVUNO BAGALA MWANGANA 24TH APPLICANT

AND

MBEYU MWINGO PLAINTIFF

AND

JOHN MWAIVU BEMAUNDU 1ST APPLICANT
NDAO MUNYIKA NDALUMUKERE 2ND APPLICANT
PETER CHIGAMBA NDAO 3RD APPLICANT
MUNYIKA NDAO 4TH APPLICANT
MWANYAMA MUNGA NDEGWA 5TH APPLICANT
JEMIMAH SYOMBUA 6TH APPLICANT

AND

DANIEL MUTURI 1ST RESPONDENT
ANDREW WAIRAGU MUKERE 2ND RESPONDENT
RAHAB MWERU MWANGI 3RD RESPONDENT
CYRUS WARUTHINGO KIRUGUMI 4TH RESPONDENT
ELIAS MUKUNDI NGARARI 5TH RESPONDENT
STEPHEN KIMONDO NJERU 6TH RESPONDENT

RULING

1. The Bill of Costs subject of this ruling is dated March 10, 2023 and was lodged at our registry on 20th March 2023 by the 6 Respondents in the main suit, the Applicants herein, against the 31 Applicants in the main suit, the Respondents herein.
2. The Bill of Costs was filed following the withdrawal of the suit by the Respondents on the 9th November 2022 with costs to the Applicants.
3. The matter had been initiated by way of an Originating Summons dated and filed on 18th March 2020 at the Environment and Land Court at Mombasa and therefore the applicable Advocates Remuneration Order is the Legal Notice No. 35, the Advocates (Remuneration) (Amendment) Order, 2014 hereinafter the ARO and more particularly under Schedule 6 for costs of proceedings in the High Court and Courts of Equal Status. The matter was contested.



4. The 1st and 6th Applicants herein entered an appearance on 30th April 2020 by filing a Memorandum of Appearance dated 27th April 2020.
5. On the 21st September 2022, there was what was said to be a change of advocate for the Applicants herein and in my view the 2nd, 3rd, 4th and 5th Applicants herein irregularly entered an appearance by way of the said Notice as there was no appearance in the first place but nonetheless and most importantly to this ruling is that contemporaneously, the Applicants filed a Notice of Preliminary Objection dated 16th September 2022. As such, without a clear prescribed mode of responding to an Originating Summons under order 37 of the Civil Procedure Rules, the application, by dint of the Notice of Preliminary Objection stands as opposed and a denial of liability filed.
6. The Bill of Costs is drawn at Ksh. 3, 309, 833.33 only. The Respondents are opposed to items 1 and 10 only of the Bill and admits that the rest of the Bill is drawn to scale.
7. At this juncture, I must state that the Bill of Costs was confusingly drawn as it offended Rule 69 of the Advocates (Remuneration) Order, 1962 and that is why in my view, the Respondents only objected to items 1 and 10, under the impression that getting up fees is part of item 1 which should not be the case but rather an item on its own.
8. Nonetheless, the said unopposed items are taxed as drawn at Ksh. 80, 400/=.
9. On the item Instruction Fees, the same is drawn at Ksh. 2, 413, 825/=. The Applicant listed the prayers sought in both the Notice of Motion application and the Originating Summons and is seen to have indicated a figure of Ksh. 106, 255, 000 besides the prayer, suggesting the figure to be the value of the property.
10. In *Joreth Limited v Kigano & Associates* [2002] eKLR, the Court of Appeal guided that,

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 officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.
11. The court in its capacity as the Taxing Officer endeavored to find the basis of laying the taxation of the instruction fees.
12. The Respondents submitted that,

The claim was for adverse possession for land parcel Kwale/ Mnanasini/721 whose value was never disclosed in the originating summons. It should be noted however that the Respondents indicated that he had purchased the land parcel for the sum of Kshs. 6, 000, 000.00. how then can they turn around to claim that the subject matter is Ksh. 106, 255, 000.00 devoid of the said award or valuation?
13. On their part, the Applicants equally submitted that,

the subject property was bought at Ksh. 6, 000, 000.00 on 16th February 2017.



14. I have read through the file to locate any mention of Ksh. 6, 000, 000/= pre-filing of the submissions by the parties and it appears that the same is too hidden for me to see as my countless perusals came to no fruition. At what instance was the Ksh. 6, 000, 000/= mentioned in the file?
15. In this case, the value of the subject matter could not be discerned from the pleadings by the parties, any judgment or any settlement.
16. I have considered the nature of the suit and the court record generally. I have also considered the interest of the parties given the nature of the matter in that it was about land, which has been said to be a very emotive issue, and more particularly on the acreage involved which is quite a large portion of the earth. I have endeavoured to consider the stakes that either party had and the consequences of a loss of the suit to the other on either party.
17. I did not however have the benefit of knowing the location of the piece of land to have a rough mental picture of the value of such piece of land. Nonetheless, I had a look at the photographs attached and find that even though I did not know the location of the land, the photographs depicted a peaceful and serene parcel of land that is pleasing to the eyes given the nature of the vegetation that depicted a productive surface of land. The land was also described as an agricultural land and indeed where crops were grown. In my view, the land is not of a meager value, more particularly considering the growing population in the world and the static size of land thereof.
18. However, the nature of the suit was just like any other suit that required a standard advocate's professional expertise. There was nothing novel.
19. Trickling from the foregoing I am persuaded that an instruction fee of Ksh. 510, 000/= is fair and reasonable in the circumstances and Ksh. 1, 903, 825/= is taxed off.
20. The other, to be contested item, was on Getting up fees. The Applicants asked to be awarded the getting up fees at Ksh. 804, 608.33 only maintaining that the suit had been certified for trial. On this one, I will respectfully disagree on this submission by counsel as the record does not support the same.
21. On its part, the Respondents stated that the Applicants were not entitled to such fees as the matter had not been prepared for hearing citing Schedule 6 (2) (iii) of the ARO.
22. Schedule 6 paragraph 2 of the ARO provides that;

In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall be not less than one-third of the instruction fee allowed on taxation:

Provided that;

- i. this fee may be increased as the taxation officer considers reasonable but it does not include any work comprised in the instruction fee;
- ii. no fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not more than 15% of the instruction fee allowed on taxation may, if the judge so directs, be allowed against the party seeking the adjournment in respect of each occasion upon which a confirmed hearing is adjourned;
- iii. in every case which is not heard the taxing officer must be satisfied that the case has been prepared for trial under this paragraph.

The court shall proceed on the assumption that the above are disjunctive conditions.



23. The court interrogated the import of condition (iii) above in the context of the fate of a successful litigant in a matter determined before trial, but all the parties had for instance complied with Order 3 Rule 2 and Order 7 Rule 5 of the Civil Procedure Rules, but the matter had not gone through pre-trial conference due to a series of applications by the parties or absenteeism by the other. I believe that the distinction between the instruction fees and the getting up fees is that instructions fees are the professional fees charged to a client when he appears before an advocate and the advocate takes up his case, advise this client on what should be done, research on the law around the circumstances and probably give the professional opinion therefrom. On the other hand, the get up fees are the professional fees that this advocate is paid to face the adversary.
24. By the time this matter was being withdrawn, the Applicants had filed a Notice of Preliminary Objection and served the counsel for the Respondents. The record shows that the service of the Notice of Preliminary Objection had been hampered by the change in advocates but when the current advocate intimated to come on record, he was granted 14 days leave to file their documents. On the next court appearance, the document that was filed was a Notice of Withdrawal of the Suit. A rhetorical question presented itself to me thus, would the Respondents have withdrawn their case against the Applicants herein were it not for the notification of a Preliminary Objection? I don't think they would have done so.
25. Given that the Notice of Preliminary Objection provoked the Respondents to withdraw the suit, would it be fair to assume that since the suit had not gone to trial, the industry by counsel to forge the best way forward to tackle the Respondents' case is to be bundled together with the instruction fees? It is my view that the advocate was employing his skills, outside the paid instruction fees to face the adversary. This was the instance of demanding the get up fees from his client. The Judge would have sustained or extinguished the existence of the case by the Respondents at the instance of the Preliminary Objection as was the desire by the Applicants.
26. It is my view that in awarding the instruction fees, this matter is one covered under the confines of condition (iii) in Schedule 6 paragraph 6 of the ARO.
27. In *Shamshudin Khosla As Chairman, Abdul Gafur Pasta as Honorary Secretary & Mohamed Bayusuf as Treasurer [On their Own Behalf and on Behalf of] The Members Of Kenya Transport Association V Kenya Revenue Authority [2011] eKLR* the Court had this to say,
- From the foregoing authority, I would draw the inference that “getting-up” fees, in ordinary litigation, partially overlaps with instruction fees. Whereas instruction fees represent the formal commitment of the Advocate to a new client who thereafter gives sufficient instructions, in a process of hearing-and-receiving by the Advocate, getting-up fees relate to the first step (and possibly, later, equally-significant steps) which the Advocate takes, in preparing the pleadings and other vital process-documents, for lodgment and service..... It is obvious that after counsel took instructions from the applicant/respondent, counsel moved on to the next stage of formulating, lodging and serving the cause papers; so in this regard, there was an element of getting-up fees.
28. As such, I will equally allow getting up fees at Ksh. 170, 000/= being a $\frac{1}{3}$ of the instruction fees and tax off Ksh. 634, 608.33 only.
29. Item 10 drawn at Ksh. 10, 000/= is taxed off as the same is not supported by any evidence.



30. In the end, the Bill of Cost dated March 10, 2023 and filed on the March 20, 2023 is taxed at Ksh. 760, 400/=. A total of Ksh. 2, 549, 433.33 only is taxed off.

31. The Bill of Cost was drawn at Ksh. 3, 309, 833.33/= of which more than a $\frac{1}{6}$ has been disallowed and hence the Applicants shall bear their own cost of this Bill.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA MS-TEAMS (HTTPS: BIT.LY/3AM8SK7) AT KWALE ON THIS 23RD DAY OF AUGUST 2023.

KIONGO KAGENYO

DEPUTY REGISTRAR

ENVIRONMENT AND LAND COURT, KWALE

In the presence of;

Mr. Archibald Kimbada- Court Assistant

Mr. Osodo for the Respondents in the Bill of Costs

No Appearance for the Applicants in the Bill of Costs

