



**Mwaniki Gitau & Co. Advocates v Gitonga (Deceased) & another (Miscellaneous Civil Application 65 of 2019) [2024] KEELC 13940 (KLR) (18 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13940 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
MISCELLANEOUS CIVIL APPLICATION 65 OF 2019  
MN GICHERU, J  
DECEMBER 18, 2024**

**BETWEEN**

**MWANIKI GITAU & CO. ADVOCATES ..... APPLICANT**

**AND**

**JAMES NDINDA GITONGA (DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**CRISPUS MBICI GAKUI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling is on the notice of motion dated 6/5/2024. The motion is brought under Order 9 rules 9 and 10, Order 51 rule 15, Order 10 rule 11 and Order 22 rule 22 of the Civil Procedure Rules, Section 3A *Civil Procedure Act* and all enabling provisions of law.
2. The motion seeks the following orders.
  2. That the firm of Kathambi Rwito and Company Advocates be allowed to come on record on behalf of the 2<sup>nd</sup> respondent Chrispus Mbici Gakui.
  3. That pending the hearing and determination of this application, this court be pleased to stay the execution of the taxation ruling in the suit herein.
  4. That this court be pleased to set aside the taxation ruling in the suit herein and the resulting Certificate of Taxation.
  5. That this court be pleased to grant the applicant leave to enter appearance and defend his case against the taxation herein Misc. Application No. 65 of 2019 and the same be heard on merit.
  6. That in the alternative this court be pleased to order that matter be retried to allow the applicant to tender his defence against the decision of the taxing master and the bill of costs be taxed on its merit.



8. That the costs of this application be provided for.
3. The motion is based on 25 grounds and is supported by an affidavit sworn by the second respondent which has three (3) annexures and is dated 6<sup>th</sup> May 2024. The gist of the motion is as follows. One, the 2<sup>nd</sup> respondent never instructed the applicant to act for the him in Machakos JR. No. 407/2009. Two, the second respondent is wrongly joined in this matter. Three, the second respondent owned  $\frac{3}{4}$  of an acre out of the 4 acres which were the subject matter of JR. No. 407/2009 and it is James Ndinda Gitonga who owned the rest of the land. Four, the payment of fees should be on a pro rata basis and should therefore consider the size of the land each of the two clients owned. Five, the second respondent should not pay Kshs. 671, 423/- demanded from him by counsel that he never instructed. Six, the 2<sup>nd</sup> respondent was not aware of any taxation of the bill of costs and only saw auctioneers coming to execute against him. Seven, there is a pending application dated 4/12/2023 seeking stay of execution which is yet to be heard and determined.
4. The motion is opposed by Mwaniki Gitau and Company Advocates who have filed six grounds of opposition dated 21/6/2024. They are as follows. Firstly, the application is incompetent, bad in law, misconceived and an abuse of the court process. Secondly, it is scandalous, frivolous and vexatious as drawn. Thirdly, the application violates Order 1A, 1B and 3A of the Civil Procedure Act. Fourthly, the supporting affidavit is false and should be struck out in limine as being contrary to the Oaths and Statutory Declarations Act as well as the Evidence Act. Fifthly, the application violates Order 9 rules 9 and 10 of the Civil Procedure Rules there being no proper change of advocates and should be dismissed in limine. Finally, it violates Order 51 rule 1 of the Civil Procedure Rules.
5. In addition to the grounds of opposition, J.M. Gitau Advocate has sworn a replying affidavit dated 21/6/2024 in which he deposes as follows. Firstly, he is wrongly named as a 1<sup>st</sup> respondent in the motion dated 4/12/2024 (sic) and the one dated 6/5/2024 contrary to Order 1A, 1B and 3A of the Civil Procedure Act. Secondly, Kathambi Rwito Advocate cannot attest to the contentious matters arising in this case. Thirdly, the law firm of Kathambi Rwito is not properly on record for failure to comply with Order 9 rule 9 of the Civil Procedure Rules. Fourthly, the onus to settle fees is on the respondents individually and collectively or apportioned in accordance with the fruits of the judgement obtained. Fifthly, the admission and partial payment makes the application a flagrant abuse of the court's time and will prolong the matter unnecessarily. Sixthly, the ruling complained of cannot be set aside without complying with the rules on filing a reference based on rule 11 of the Advocates Remuneration Order. Seventhly, the liability between the respondent and the applicant cannot be settled separately or be apportioned. Finally, the 2<sup>nd</sup> respondent deliberately omitted to serve the auctioneer and James Ndinda Gitonga.
6. In reply to the grounds of opposition, Kathambi Rwito swore an affidavit dated 11/7/2024 in which she deposes as follows. Firstly, the firm of O.O. Alphonse Advocates only represented James Ndinda Gitonga and not Chrispus Mbici Gakui. Secondly, Order 9 rule 9 of the Civil Procedure Rules does not apply in this case since Chrispus Mbici Gakui has never been represented by any advocate and all that he needs to file is a notice of appointment by his counsel. Thirdly, since he did not instruct Mwaniki Gitau and Company Advocates, he should not be made to pay any costs. Finally, should Chrispus Mbici Gakui be condemned to pay costs, let such costs be pro rated so that he pays what is proportional to his share of the suit which is only  $\frac{3}{4}$  of an acre out of 4 acres which is 18.75% of the total amount.
7. Counsel for the parties filed written submissions dated 24/6/2024 and 25/9/2024 respectively. Counsel for the 2<sup>nd</sup> respondent treated the six grounds of opposition as the issues for determination. Relying on the authority of Brite Print (K) Limited –versus- A.G. Nairobi HCCC 1096/2000, counsel urged that the motion cannot be scandalous because it is relevant and only an irrelevant matter can



- be scandalous. In this case the question of whether the second respondent appointed the Law Firm of Mwaniki Gitau is relevant. Also relevant is whether the payment of fees should be on a pro rata basis.
8. On the second ground, counsel urges that striking out a suit or an application is a draconian move which should not be resorted to unless the case is hopeless.
  9. As for the application violating Order 9 rule 9 Civil Procedure Rules, counsel urges that the 2<sup>nd</sup> respondent did not appoint any counsel at any time and this is the first time that he has done so and Order 9 rule 9 does not apply to him. The notice of appointment that he filed should suffice.
  10. I have only seen two (2) pages of submissions filed by Mwaniki Gitau advocates and two (2) authorities. They do not answer the submissions filed by counsel for the second respondent.
  11. I have carefully considered the notice of motion dated 6/5/2024 in its entirety including the grounds in support and in opposition. I have also considered the affidavits by both sides as well as the annexures. I find that the following issues arise.
    - i. Whether the motion is incompetent, bad in law, misconceived, scandalous, frivolous, vexatious and an abuse of the court process
    - ii. Whether it violates Order 1A, 1B and 3A of the *Civil Procedure Act*.
    - iii. Whether the supporting affidavit is false and is for striking out.
    - iv. Whether Order 9 rule 9 of the *Civil Procedure Act* applies to the 2<sup>nd</sup> respondent.
    - v. Whether the motion violates Order 51 rule 1 of the Civil Procedure Rules.
    - vi. Whether Order 11 of the Advocates Remunerations Order applies in this case.
    - vii. Which of the orders sought should be allowed.
  12. On the first issue, I find that the motion dated 6/5/2004 is proper because it raises a number of justiciable issues the primary ones being whether the 2<sup>nd</sup> respondent ever instructed the firm of Gitau Mwaniki Advocates to act for him and whether the fees payable to the advocate should be pro rated according to the size of the land owned by the two owners of the suit property.
  13. As for the second issue, a look at the Civil Procedure Rules does not show Orders 1A, 1B and 3A at all. If counsel meant Sections 1A, 1B and 3A of the *Civil Procedure Act*, he has not explained how they have been violated. Be that as it may, an aggrieved party with a justiciable case can come to court and seek justice subject of course to the Law of Limitation. Once in court, such a party is entitled to a fair hearing as envisaged by Order 50(1) of *the Constitution*. By coming to court, the second respondent has not violated any law.
  14. In regard to the supporting affidavit being false and suitable for striking out, I do not find any material yet to make me reach the conclusion that the same is false.
  15. If it turns out to be true that the second respondent did not instruct counsel at all, then Order 9 rule 9 of the Civil Procedure Rules would not apply in this case. The proper way to proceed, in my view, would be for the second respondent to file an application in the primary suit seeking to revoke the order on costs made against him. Alternatively, he could challenge that order at the forum where it was made.
  16. No material in form of evidence or submission has been filed in this case to show how the motion dated 6/5/2024 violates Order 51 rule 1 of the Civil Procedure Rules which deals with procedure of all applications filed in this court.



17. Like I have said in paragraph (15) above Order 11 of the Advocates Remuneration Order would only apply if the second respondent instructed counsel in the primary suit and he was served with the bill of costs. If he did not, then Order 11 of the Advocates Remuneration Order would not apply to him.
18. For the above stated reasons, I find merit in the motion dated 6/5/2024 and I allow it in terms of prayers 2, 3, 4, 5 and 6. Costs in the cause.

It is so ordered.

**DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY 18<sup>TH</sup> DAY OF DECEMBER 2024.**

**M.N. GICHERU**

**JUDGE**

