



Wandugi & Co. Advocates v Wakanene & another; Njuguna (Interested Party) (Miscellaneous Case E0851 of 2021) [2025] KEHC 3716 (KLR) (Civ) (25 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3716 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS CASE E0851 OF 2021

RC RUTTO, J

MARCH 25, 2025

BETWEEN

WANDUGI & CO. ADVOCATES APPLICANT

AND

JOSEPHINE WANJIKU WAKANENE 1ST RESPONDENT

ROBERT MBUTHIA WAKANENE 2ND RESPONDENT

AND

ISAAC GITERE NJUGUNA INTERESTED PARTY

RULING

1. Before this court for determination is a Notice of Motion application dated 6th March 2023 filed by the interested party. The application is premised upon the provisions of Article 35 (1) of *the Constitution*, sections 68 (1) and 69 of the *Evidence Act*, sections 1A, 1B, 3A, 63 (e) of the *Civil Procedure Act* and order 11 rules 2, 3 (5) (b) and order 51 rule 1 of the Civil Procedure Rules seeking:
 1. ... Spent
 2. That this honourable court be pleased to issue an order directed at the applicant to produce and avail certified copies to the interested party herein various documents in regards to matters in question in this suit, and particularly:
 - a. the bank's statement of a sum of Kshs.70,000.00 deposited on 10th February 2020 to account no. 1510278623138 domiciled at Equity Bank, Mayfair Branch in the name of Wacira Wambugu & Company Advocates LLP;



- b. the bank's statement of a sum of Kshs..10,000.00 deposited on 6th July 2020 to account number 1510278623138 domiciled at Equity Bank, Mayfair Branch in the name of Wacira, Wambugu & Company Advocates LLP;
 - c. the bank's statement of a sum of kshs.45,000.00 deposited on 23rd March 2019 to account number 1510278623138 domiciled at Equity Bank, Mayfair Branch in the name of Wacira, Wambugu & Company Advocates LLP;
 - d. the bank's statement of a sum of kshs.20,000.00 deposited on 4th April 2019 to account number 1510278623138 domiciled at Equity Bank, Mayfair Branch in the name of Wacira, Wambugu & Company Advocates LLP;
 - e. the bank's statement of a sum of kshs.5,000.00 deposited on 28th May 2019 to account number 1510278623138 domiciled at Equity Bank, Mayfair Branch in the name of Wacira, Wambugu & Company Advocates LLP;
 - f. the bank's statement of a sum of kshs.43,000.00 deposited on 23rd January 2020 to account number 0212374552004 domiciled at SBM Bank, KMA Branch in the name of Wacira, Wambugu & Company Advocates LLP;
 - g. the bank's statement of a sum of kshs.100,000.00 deposited on 23rd August 2019 to account number 0212374552004 domiciled at SBM Bank, KMA Branch in the name of Wacira, Wambugu & Company Advocates LLP
3. That costs for this application be provided for.
2. The application is supported by the grounds on the body of the Motion and the supporting affidavit sworn on 6th March 2023 by Isaac Gitere Njuguna, the interested party and a former partner in the applicant firm. The facts giving rise to the application are that by a letter dated 5th February 2019, the respondents instructed the applicant firm to carry out the removal of a caveat on all that parcel of land namely L.R. No. 1160/290. They also instructed the applicant to transfer all that parcel of land namely Dagoretti/Karandini/44 to the beneficiaries of the estate of Eric Kuria Wakanene and Harun Wakanene Mbuthia. The interested party deposed that he took over the conduct of the matter and discharged those instructions by filing Nairobi High Court Succession Case No. 164 of 2017.
 3. Vide a letter dated 6th February 2019, the applicant accepted those instructions and subsequently issued a fee note justifying their legal fees of Kshs.175,000.00. According to the deponent, those sums were paid on diverse dates as set out in prayer two of this application. On conclusion of those instructions, the applicant served the respondents with a bill of costs dated 23rd November 2021 seeking to have the same taxed at Kshs.3,097,794.00. According to the interested party, the respondents settled all sums due to the applicant.
 4. The interested party urged this court to allow the application on account of the following reasons: the documents sought to be adduced contain crucial information that will lead to a just determination of the case; the documents are in the custody of the applicant; no party will be prejudiced if those documents are adduced as each party will have an opportunity to respond to them; and the application had satisfied the test set out in section 35 (2) (b) of *the Constitution* on the enforcement of the interested party's constitutional rights.
 5. The applicant opposed the application by filing its replying affidavit sworn on 16th May 2023 by Karathe Wandugi, the applicant's proprietor. He deposed that he was in the conduct of the matter in Nairobi High Court Succession Case No. 164 of 2017 in his capacity as holding brief for the firm of



- Wandugi & Co. Advocates, the applicant herein; that the interested party could not claim that fees had been fully paid when the work was done by the applicant and not the firm of Wacira Wambugu & Co. Advocates LLP. That the respondents attached blank receipts that provided no proof of payment for work done. In any event, the firm of Wacira Wambugu & Co. Advocates LLP disowned the receipts as they were not serialized in their receipt book. For those reasons, the applicant contended that the interested party could not claim to discuss legal fees for a file he was not handling.
6. The applicant justified that the bill of costs drawn by it was done in pursuance of work done and completed. The fees were in the circumstances justifiable. That the interested party worked and dealt with the firm of Wacira Wambugu & Co. Advocates LLP and not the applicant herein. In any event, the respondents were in possession of the transaction receipts and banking slips used in settlement of the purported legal fees. Contending otherwise, the applicant deposed that the onus was on the respondents to prove that they had paid the applicant's fees. The applicant ultimately prayed that the application be dismissed with costs.
 7. By a replying affidavit sworn on 8th June 2023, the 2nd respondent deposed that in 2016, as a co-administrator of the Estate of Eric Kuria Wakanene, the administrators approached Cooperative Bank of Kenya seeking to obtain a business or finance facility. The firm of Wacira Wambugu & Co. Advocates (now Wacira Wambugu & Co. Advocates LLP) was instructed by the said bank to perfect the security. In the course of perfection, it was then informed on the parties that the estate of the deceased did not have an administrator. Consequently, the firm of Wacira Wambugu & Co Advocates approached the applicant wherein it was agreed that the applicant's firm name would be used to petition for a grant of letters of administration.
 8. The 2nd respondent confirmed that the interested party acted for him in the proceedings and continues to remain his advocate. The 2nd respondent further deposed that he did not know Karathe Wandugi, the applicant's proprietor. He stated that at all material times, legal fees were paid to the account of Wacira Wambugu & Co Advocates and receipts issued therein. In view of the depositions, the 2nd respondent supported the application adding that no prejudice would be occasioned on any party if the orders sought were granted.
 9. The application was canvassed by way of written submissions. The interested party filed written submissions dated May 2023 (sic) and a list of authorities dated 30th May, 2023. He submitted that his application was made in a quest to produce documents relevant to meeting the ends of justice. That the application invoked section 22 of the *Civil Procedure Act* in the form of a discovery. He cited several decisions in support of that argument. He urged this court to allow the application as prayed. In his written submissions dated 8th June 2023, the 2nd respondent interestingly and word for word, filed the same written submissions as those of the interested party praying that the application be allowed. The only distinction was in the font used.
 10. The applicant filed written submissions dated 5th June 2023. It summarized the depositions in its replying affidavit to submit that by dint of section 107 of the *Evidence Act*, the interested party had not demonstrated that the respondents had paid the applicant its legal fees in full. Citing several decisions fortifying its submissions, the applicant prayed that's the application be dismissed with costs.
 11. I have considered the application, the affidavits in support and the oppositions thereto, examined the parties' written submissions and analyzed the law. The interested party seeks to compel the applicant to adduce the documents captured in prayer two of its application as follows:



- a. The bank's statement of a sum of Kshs.70,000.00 deposited on 10th February 2020 to account no. 1510278623138 domiciled at Equity Bank, Mayfair Branch in the name of Wacira Wambugu & Company Advocates LLP;
 - b. The bank's statement of a sum of Kshs.10,000.00 deposited on 6th July 2020 to account number 1510278623138 domiciled at Equity Bank, Mayfair Branch in the name of Wacira, Wambugu & Company Advocates LLP;
 - c. The bank's statement of a sum of kshs.45,000.00 deposited on 23rd March 2019 to account number 1510278623138 domiciled at Equity Bank, Mayfair Branch in the name of Wacira, Wambugu & Company Advocates LLP;
 - d. The bank's statement of a sum of kshs.20,000.00 deposited on 4th April 2019 to account number 1510278623138 domiciled at Equity Bank, Mayfair Branch in the name of Wacira, Wambugu & Company Advocates LLP;
 - e. The bank's statement of a sum of kshs.25,000.00 deposited on 28th May 2019 to account number 1510278623138 domiciled at Equity Bank, Mayfair Branch in the name of Wacira, Wambugu & Company Advocates LLP;
 - f. The bank's statement of a sum of kshs.43,000.00 deposited on 23rd January 2020 to account number 0212374552004 domiciled at SBM Bank, KMA Branch in the name of Wacira, Wambugu & Company Advocates LLP;
 - g. The bank's statement of a sum of kshs.100,000.00 deposited on 23rd August 2019 to account number 0212374552004 domiciled at SBM Bank, KMA Branch in the name of Wacira, Wambugu & Company Advocates LLP.
12. My understanding of the application, is that the interested party has essentially issued a notice to produce the cited documents; an application governed by the provisions of section 22 of the *Civil Procedure Act*. Instead, the interested party invoked section 68 (1) and 69 of the *Evidence Act*. I find those provisions are inapplicable in the circumstance for the reason that if the interested party is of the view that the applicant herein is in possession of the documents sought, wouldn't they better off being adduced in their original form if the application is merited?
 13. The interested party also cited Article 35 of *the Constitution*. I find that the said provision does not assist the said party as it is not applicable in the circumstances of this case. It has not been demonstrated how this right enshrined therein has been breached or infringed. I find wisdom in the ruminations of Aburili J, in *Nyanza Management Limited & another vs. National Bank of Kenya Limited & 3 others* [2023] KEHC 19329 (KLR) who dealt with an application to compel the respondent to produce the cited documents. The learned judge held as follows and this court wholly adopts those sentiments:

“What a party in a civil suit needs to do is to read the law on discovery under section 22 of the *Civil Procedure Act*, Notice to produce under section 69 of the *Evidence Act* and order 11 of the Civil Procedure Rules and make an appropriate application under those provisions of the law. I say so for reasons that Article 35 of *the Constitution* can only be invoked in proceedings for enforcement of rights or where there is an allegation that the citizen's right to access information has been violated. In *Federation of Women Lawyers-Kenya & 28 others v Attorney General & 8 others* [2015] eKLR, Lenaola J (as he then was) stated as follows:

“... there are procedures known in law in which a party can compel another to produce any document which they have authored. For instance, if a document is of use to



prove the Petitioners case, they can make an application for an order to compel the maker of that document to produce it in Court without recourse to article 35 of *the Constitution*.”[emphasis added]”

14. In the absence of citing the relevant legal provision, what would be the fate of the application? The interested party has invoked the oxygen principles as well as Article 159 of *the Constitution* to address poor draftsmanship, as is the case here. However, I must reiterate the importance of citing the appropriate legal provisions.
15. Nonetheless, since this court is required to do justice, I will consider the merits or otherwise of the application by looking at the relevant provisions. In that regard, section 22 of the *Civil Procedure Act* provides as follows:

“Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party:

(a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;

(b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;

(c) order any fact to be proved by affidavit.”

16. The discretion granted by the court therein is wide and unfettered. In exercising this discretion, I am invited to consider the application judiciously and not be guided by whims. In the case of *Concord Insurance Company Limited (Under Statutory Management) v NIC Bank Limited* [2020] KEHC 8086 (KLR) Tuiyott, J. (as he then was) held:

“One object of this Section is to avoid trial by ambush and to ensure that all material relevant to the just and fair determination of a dispute can be availed to all parties and the Court in good time. As stated by Gikonyo J in *ABN Amro Bank N.V v Kenya Pipeline Company Limited* [2014] eKLR (a case cited by counsel for Concord), the provisions serve a useful purpose. The Judge held:

“Discovery as a compulsory disclosure, at the request of a party, of information that relates to the litigation in a civil suit is provided for in section 22 of the *Civil Procedure Act* and Order 11 rule 3(2) of the Civil Procedure Rules, and given the nature of discovery, I would class it as a means of access to information in the sense of Article 35(2)(b) of *the Constitution*. And as Justice Kimondo J stated in the Oracle productions case, I too conclude that “the true purpose of discovery is to level the litigation field, to expedite hearing, reduce costs and allow parties to gauge the case they will face at trial.” It, therefore, serves a higher objective as the enabler of fair hearing.”

17. The present application seeks to compel the applicant to submit several documents related to the bill of costs filed against them. Firstly, I note that these proceedings do not fall within the scope of order 11 of the Civil Procedure Rules. Secondly, the interested party appears to be acting on behalf of the respondents and advocating their rights. Notably, both the respondent and the interested party have separately filed identical submissions raising concerns. It is unclear why the respondents did not file the application themselves if they are certain that they have settled the applicant’s fees. This leads to my



third observation, the documents in question are already in the respondent's possession. Given that the respondents claim to have duly settled the legal fees, there is no apparent reason preventing them from presenting evidence to substantiate their assertions.

18. Thus, the application herein does not serve any purpose. If anything, I find that the same is an abuse of the process of the court and a waste of the court's precious judicial time. Taking cue from this, I come to the inescapable conclusion that the Notice of Motion dated 6th March 2023 lacks merit. It is hereby dismissed with costs to the applicant firm.

19. Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF MARCH, 2025.

RHODA RUTTO

JUDGE

Delivered on the virtual platform, Teams this 25th day of March, 2025.

In the presence of;

.....Plaintiff

.....Defendant

Wanyoike Court Assistant

