



**Kasamani & Associates Advocates v Piemo (Miscellaneous Civil Application
E185 of 2023) [2024] KEHC 10200 (KLR) (15 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10200 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E185 OF 2023**

RE ABURILI, J

AUGUST 15, 2024

IN THE MATTER OF ADVOCATES CAP 16

AND

**IN THE MATTER OF TAXATION OF ADVOCATES CLIENT
BILL OF COSTS IN THE KISUMU HC MISC. NO. E164 OF 2022**

BETWEEN

KASAMANI & ASSOCIATES ADVOCATES ADVOCATE

AND

JOSHUA OUKO PIEMO CLIENT

RULING

1. This is an advocate client bill of costs matter. The bill was assessed Exparte by the taxing master upon which a certificate of costs was issued. The advocate then applied to this court for entry of judgment under section 51 of the *Advocates Act* and the Court did enter judgment and decree dated 29th January, 2024 drawn. The advocate applied for execution of decree and as soon as the execution process was set in motion, the client filed an application seeking to set aside the proceedings leading to the execution claiming that he had never been served with any bill of costs or hearing of the same for taxation purposes.
2. The initial application which was dated 2nd April 2024 was struck out on 15/4/2024 as the applicant could not tell the court why he had appeared and he could not even understand his own application. Neither could the court comprehend the application which was filed in person. The court nonetheless granted the applicant client leave to file a proper application with the assistance of an advocate.
3. The client then filed another application dated 6/6/2024 through an advocate and this court directed the parties to appear and argue the same orally on 13/6/2024. On the latter date, the advocate raised a preliminary objection dated 12/6/2024 to the decision of 15/4/2024 claiming that the application



was res judicata the decision of 15/4/2024 and that he had executed and had been discharged in the Homabay matter from acting for the client.

4. Opposing the preliminary objection, Ms Nyambeki counsel for the client submitted that the advocate was only discharged from the Homabay ELC matter 1 of 2023 after he had filed this advocate client bill of costs . She relied on the case of *Gichuki King'ara & Co. Advocates V. Mugoya Construction & Engineering Ltd* 2010 eKLR, where the court held that an advocate could not tax his bill of costs if he was still acting for the client in the matter. And before ceasing to act for the client. she submitted that the taxation was premature.
5. Mr. Mukoya submitted in rejoinder that his bill had been taxed and that he had applied for execution hence he should be allowed to execute and recover his costs.
6. I have considered the preliminary objection and the response thereto which in essence also raises a preliminary objection to the bill of costs which was taxed and was in the process of being executed. In other words, the Preliminary objection is responding to another preliminary objection.
7. Commencing with Mr Mukoya's preliminary objection that the application by the client is res judicata the decision 15/4/2024, I need not trouble myself on what a preliminary objection and res judicata entails as far as this matter is concerned as that is now a matter of judicial notice.
8. However, examining the order of 15/4/2024 striking out the application initially filed by the client, striking out the application is not the same as dismissing it. Furthermore, when the court struck out the application, it made it clear that the applicant was at liberty to file a fresh and proper application with the help of an advocate and that is exactly what he did subsequently, after engaging an advocate.
9. When a suit has been dismissed, it is a bar to litigation of the matter and thus open to a likely plea of estoppel per rem judicata, unlike in a situation where a suit is struck out. In the latter case, only the statute of limitation can bar the filing of another suit. Striking out suit is synonymous with withdrawal of suit and when that happens, a party retains the right to refile that suit. See the principle espoused in the case of *Abayami Babatunde v Pan Atlantic Shipping and Transport Agencies Ltd*; Supreme Court of Nigeria NO. 154/2002 by the Supreme Court of Nigeria as applied in Kenya in *John Ochanda V. Telkom Kenya Ltd*, SC APP. No 25 Of 2014, Ibrahim SCJ and in *Beijing Industrial Designing & Researching Institute v Lagoon Development Limited* [2015] eKLR.
10. Having said that, I find that there is no merit in the preliminary objection by the advocate. I dismiss it.
11. On the submission by Ms Nyambeki that the advocate filed the bill of costs before he was discharged from acting for the client, that is a matter that can be canvassed in the main application by the client seeking to set aside the orders of taxation and the subsequent certificate of costs, decree and execution process. I decline to entertain it at this stage as a preliminary objection since it requires material to be placed before this court to determine whether the advocate was still representing the client when he filed the bill of costs against him for taxation, arising from legal representation in that suit. Off course, this will also hinge on whether this court would be the correct court with jurisdiction to entertain taxation proceedings, assuming the matter giving rise to the taxation is an ELC matter.
12. Accordingly, I decline both preliminary objections and direct that the client's application shall be heard orally on 3/10/2024 inter partes.
13. I so order

DATED, SIGNED AND DELIVERED AT KISUMU THIS 15TH DAY OF AUGUST, 2024

R.E. ABURILI



JUDGE

