



**Achola Jaoko & Co. Advocates v Onsongo (The Administrator – of the Estate of Alice Kemunto Ondieki) & another (Environment and Land Miscellaneous Application E121 of 2023) [2025] KEELC 536 (KLR) (5 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 536 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E121 OF 2023**  
**MD MWANGI, J**  
**FEBRUARY 5, 2025**

**BETWEEN**

**ACHOLA JAOKO & CO. ADVOCATES ..... APPLICANT**

**AND**

**KENNEDY OBWAYA ONSONGO (THE ADMINISTRATOR – OF THE ESTATE OF ALICE KEMUNTO ONDIEKI) ..... 1<sup>ST</sup> RESPONDENT**

**KENNEDY OBWAYA ONSONGO ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

In respect of the applications dated 16th April 2024 by the Advocate/Applicant and 30th September 2024 by the Client/Respondent.

**Background**

1. This ruling is in respect of two applications. The first one is by the Advocate/Applicant herein which is a Notice of Motion dated 16<sup>th</sup> April 2024 brought under the provisions of Section 51 (2) of the *Advocates Act*. The Advocate prays for entry of judgment for the sum of Kshs. 287,604.60 with interest at 14% per annum against the Client/Respondent with effect from 7<sup>th</sup> February 2024. The application is premised on the grounds on the face of it. The Advocate/Applicant states that a certificate of taxation was issued on 18<sup>th</sup> March 2024 and the same has not been disputed, set aside or varied.
2. The Advocate's application is opposed by the Respondent vide the replying affidavit of Kennedy Obwayo sworn at Nairobi on the 30<sup>th</sup> September 2024. The deponent admits that the Advocate's bill of costs, the subject matter of these proceedings was indeed taxed at Kshs. 287,604.60. The Advocate had also filed a separate Bill of Costs in ELCMisc. E120 of 2003 which was taxed at Kshs. 50,058.70. The total taxed amount for the two bills of costs was therefore a sum of Kshs. 337,663.30/-.



3. The deponent deposes that he engaged the Advocate through his counsel, Mr. Were and they agreed on a sum of Kshs. 237,664.30, to be paid by the Respondent to the Advocate in full and final settlement of both matters. The deponent attached the correspondence exchanged in the course of the negotiations as annexures to the replying affidavit confirming the position. He further deposes that he duly and fully paid the agreed amount and this matter should therefore be marked as settled.
4. The 2<sup>nd</sup> application is by the Respondent brought under the provisions of Sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act* 2010 and Article 159 of the *Constitution* seeking that this court do issue an order that this matter has been settled in the terms agreed by the parties. The application is premised on the grounds that the parties engaged in negotiations after the taxation and the Advocate discounted Kshs. 100,000/- out of the aggregated amount. The Respondent acting on the words of the Advocate paid the agreed amount believing that he had fully settled the matters. The Advocate is therefore estopped from running away from his own proposal which had even been reduced into writing.
5. The Advocate responded to the 2<sup>nd</sup> application filed by the Respondent with a replying affidavit sworn at Nairobi on 2<sup>nd</sup> October 2024. The Advocate avers that the Respondent had rejected the waiver of Kshs. 100,000/- which information he communicated to the Respondent's Advocates. He asserts that no compromise was reached. He further affirms that his letter of 13<sup>th</sup> June 2023 was made on a without prejudice basis and therefore it was not binding.
6. The Advocate further alleges that the Client remitted a sum of Kshs. 237,664/- only leaving a balance of Kshs. 100,000/- outstanding. He states that the Respondents' Advocate's letter of 5<sup>th</sup> August 2024 was belated and therefore inconsequential.

#### **Directions by the Court.**

7. The court's direction were that the two applications be heard concurrently and by way of written submissions. Both parties complied and the court has had an opportunity to read and consider the submissions filed which form part of its record.

#### **Issues for Determination.**

8. Having considered the two applications, the responses thereto and the submissions filed, the sole issue for determination is whether this matter should be marked as settled or judgment entered in favour of the Advocate/Applicant as prayed.

#### **Analysis and Determination**

9. It is not disputed that a certificate of taxation was issued in this matter in favour of the Advocate/ Applicant for the sum of Kshs. 287,604.60/- after the taxation of the Advocate-Client Bill of Costs, the subject matter of these proceedings. The Client's contention is that he negotiated the amount taxed and they settled on a lesser amount with the Advocate in full and final settlement.
10. The Advocate on his part acknowledges the payment of the sum of Kshs. 237,664.30/- but claims that no settlement was reached between him and the Client. He actually alleges that the Client rejected the waiver of Kshs. 100,000/-. That is why he proceeded with the filing of the application dated 16<sup>th</sup> April 2024 seeking entry of judgment for the full taxed amount of Kshs. 287,604.60/-. The Advocate alleges that the correspondence between him and the Advocate for the Respondent were on a "without prejudice" basis and cannot therefore be relied upon by the Client as evidence of the alleged negotiations.



11. I note that the Advocate/Applicant duly received the monies from the Respondent up to the figure allegedly agreed with the Client. Was the money too received on a without prejudice basis?
  12. The “without prejudice” rule applies to exclude all negotiations genuinely aimed at settlement, as held by the court in *High Chem East Africa Limited v Wambugu* (2020) eKLR.
  13. It must be noted however that the rule is not absolute and resort may be had to the “without prejudice” material for a variety of reasons when the justice of the case so demands. This case is one such exception, where the Client/Respondent needs to explain the reason for the payment of the sum of Kshs. 237,604.30/- and not any other amount; not a penny more not a penny less.
  14. The Respondent’s explanation is that it was the negotiated amount as explained in the correspondence between his Advocate and the Applicant herein. The Advocate/Applicant accepted and received the said amount from the Respondent. His conduct and action of receiving the amount supports the Respondent’s assertions.
  15. The Advocate is estopped by his conduct of receiving the money from denying the existence of the negotiations.
  16. Looking at the totality of the circumstances of this matter, this court is persuaded that indeed the parties had agreed on an amount to be paid in full and final settlement which the Client/Respondent duly paid to the Advocate and the Advocate accepted and received the same.
  17. This matter is therefore settled and is hereby marked as such.
  18. The Advocates application dated April 16, 2024 is therefore dismissed.
  19. On the issue of the costs of the applications, the court orders that each party bears its own costs.
- It is so ordered.

**DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 5<sup>TH</sup> DAY OF FEBRUARY 2025.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Mr. Were for the Client/Respondent

N/a for the Advocate Applicant

Court Assistant: Mpoye

**M.D. MWANGI**

**JUDGE**

