



**Equator Bittlers Limited v Stanely Suguvi Kegode t/a Kirinda Ditributors & another (Civil Miscellaneous Application E072 of 2021) [2025] KEHC 1566 (KLR) (19 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1566 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL MISCELLANEOUS APPLICATION E072 OF 2021  
S MBUNGI, J  
FEBRUARY 19, 2025**

**BETWEEN**

**EQUATOR BITTLERS LIMITED ..... APPLICANT**

**AND**

**STANELY SUGUVI KEGODE T/A KIRINDA DITRIBUTORS .... 1<sup>ST</sup>  
RESPONDENT**

**PHYLIS E. WANGWE ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. What is before this court for ruling is the Application of the 1<sup>st</sup> Respondent/Applicant dated 19<sup>th</sup> April, 2024 seeking Orders:-
  - a. Spent
  - b. That this honourable court be pleased to issue an order for stay of execution or further execution proceedings herein against the 1<sup>st</sup> Respondent/Applicant pending hearing of this Application inter-partes.
  - c. That this honourable court be pleased to restrain the applicant/ respondents by itself, through TIMPECH Auctioneers or any other agent, servants or workers howsoever from proceeding with attachment of the Applicants movable property in execution for the taxed costs.
  - d. That the applicant/respondents application having been one for advancement of interest of justice and the proper and efficient conduct of the arbitral proceedings, the payment of any party and party costs that may be taxed as between the Applicant/Respondent and the 1 Respondent/Applicant do await the conclusion of the arbitral proceedings.
  - e. Costs of this application be provided for.



2. This matter originated from Kakamega High Court Civil Case No. 4 of 2020 where in a ruling delivered by Justice W. Musyoka on 16<sup>th</sup> October, 2020, the original suit was stayed pending the conclusion of arbitration proceedings commenced pursuant to the Arbitration clause contained in the Soda Distribution Agreement dated 1<sup>st</sup> January, 2015.
3. By a letter dated 27<sup>th</sup> November, 2020, the 1<sup>st</sup> applicant had appointed Phyllis Wangwe as the sole arbitrator. In response, the Respondent initiated the current suit to challenge the appointment. By a ruling delivered by this Honourable Court on 27<sup>th</sup> May, 2022, the respondent succeeded against the applicant and was awarded costs.
4. The Respondent thereafter filed its Party and Party Bill of costs. The Bill of costs was taxed at Kshs. 445,640.00 and the certificate of Taxation dated 9<sup>th</sup> November, 2022 issued.
5. Consequently, by the ruling dated 5<sup>th</sup> February, 2024, this honourable court affirmed that the costs awarded by the Ruling of 27<sup>th</sup> May, 2022 are due and recoverable from the Applicant.
6. It is upon the ruling dated 5<sup>th</sup> February 2024 and the certificate of taxation dated 9<sup>th</sup> November, 2024 that the respondent obtained warrant of execution for attachment and sale of moveable properties of the applicant.
7. The Applicant upon being served with certificate of taxation and warrant of attachment and upon the auctioneers proclaiming this properties on 18.4.2024 filed the present application saying is a stranger to the costs, for it was never served with the party and party bill of costs and was thus never accorded an opportunity to challenge the bill of costs and further that the taxed costs do not apply to it but to the second respondent Phylis E. Wangwe and that the Respondent turned to him after failing to execute the taxed costs against the 2<sup>nd</sup> Respondent.
8. The Applicant further contends that the issue of taxed costs is merely meant to delay the arbitral proceedings and that the taxed costs can conveniently be set off upon conclusion of the arbitral proceedings.
9. The parties agreed to dispose off the Application by way of written submissions. The counsels filed submissions.

### **Applicants Submissions**

10. The Applicant submitted that it will suffer irreparable damage and loss if the orders sought are not granted he cited the case of Pius Kipchirchir Kogo Vs Frank Kimeli Tenia (2018) eKLR.
11. The applicant further submitted that the balance convenience tilts in its favour for the arbitral proceedings between it and the respondent are ongoing and cited the case of Amir Vs Amboseli Resort Limited (2004) eKLR.
12. The applicant buttress the above by submitting that it is at a higher risk to suffer injustice because the respondent intends to use the issue of costs that may be taxed to frustrate and /or delay the arbitral proceedings and thus the execution proceeding violates its rights to fair trial as it is enshrined in article 50 of *the constitution* and cited the case of Ridge Vs. Baldwin (1964) 40 and an excerpt in Halsbury Laws of England, 5<sup>th</sup> Edition 2010 Vol. 61 at para. 639.

### **Respondents Submissions**

13. It is the Applicants/respondents submission that this Application is frivolous and an abuse of the court process as the application is res-Judicata.



14. The Applicant/Respondent issued mention and hearing notices on the taxation proceedings and filed affidavits of service regarding the same.
15. The instant application is thus brought in bad faith to deny the Respondent/Applicant of their right to be reimbursed for the costs incurred.
16. This court by a ruling dated 5.2.2024 affirmed that the costs to be awarded the Respondent and the Applicant was the one to pay the costs to the Respondent.
17. The decision of the taxing master was not varied or set aside neither a reference was filed against it in accordance with rule 11 of Advocates remuneration order.
18. The applicant should not be allowed to seek refuge under the guise of constitutional protections.
19. He further submitted that once the certificate of costs dated 9.11.2022 was issued the court became functus officio with the regard to the party and party bill of costs which could only be challenged by the Applicant by filing a reference within the statutory period.
20. On the issue of that the taxed costs can be conveniently set off upon the conclusion of arbitration proceedings the respondent submitted that the issue of costs is unrelated to the arbitration proceedings as they arise from an application filed in this honourable court where respondent was rightfully awarded costs in compensation for prosecuting its application.
21. The Respondent further submitted that the Application dated 19.4.2024 is incompetent that it was brought under Section 3(A),63 (e) , Order 22 rule 22 (2) and Order 40 rule 1and 2 instead of it being brought under the *Advocates Act* or under the Advocates Remuneration Order.

### **Analysis and Determination**

22. I have looked at the Application, supporting affidavit, replying affidavit by the respondent and the submissions filed by the counsels.
23. I isolate the following issues for determination:-
  - i. Whether the Application dated 19.4.2024 is res-judicata.
  - ii. Whether the jurisdiction of the court has been properly invoked.
  - iii. Whether the Application has merit.
  - iv. Who bears the costs of this Application.

### **Determination.**

24. The Respondent counsel submitted that the Application is Res-Judicata for the issue on who was to pay the costs awarded in prosecuting the Application dated 11.6.2021 was settled via this courts ruling dated 5.2.2024.
25. When the court said in paragraph 9 “.....it is thus determined that the costs awarded by the ruling on 27.5.2021 are due and recoverable from STANLEY KEGODE SUGUVI t/a KIRINDA DISTRIBUTORS.
26. The doctrine of Res-judicata is provided for under Section 7 *civil procedure act* cap 21 which provides that “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try



such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

27. The Court of appeal in Independent Electoral & Boundaries Commission Vs Maina Kiai, Khelef Khalifa, Tirop Kitur, Attorney -General, Katiba Institute and Coalition for Reforms & Democracy (2017) KECA 477 (KLR) , analyzed the doctrine of res judicata in paragraph (F) as follows

“(F) or the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. The former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

Additionally, the court state;

“The rule or doctrine of res judicata served the salutary aim in bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought disrepute or calumny. The foundation of res judicata thus rests in the public interest for swift, sure and certain justice.

28. I fully agree with the counsel submissions that this application is res judicata the only option open for the Applicant was to apply to set aside that ruling and also the ruling on taxation on grounds that he was not served. The other option was to file a reference in line with the Advocates remuneration order Rule 11 which provides.....

- (a) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
- (b) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
- (c) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.



- (d) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.
29. The same position was held by M.A Odeny (J) he dismissed a similar application in Charo Vs Omagwa Angima & Company (2022) KEELC 13310 (KLR). I find that the application before me is not merited as it has not followed the laid down procedure that obliges an aggrieved litigant to file a reference within 14 days. The impugned ruling delivered in 2010 and the mischief that the applicant wanted to beat was the issue of not filing reference within the stipulated period of 14 days.
30. In Elijah Njuguna Vs Peter Muriu Njuguna, Stanley Karanja Njoki, Gladys Wangui Njoki, Rebecca Nyambura Njoki & Agnes Njeri Kiragu (2021) KEELC 201 (KLR) Gacheru J had the following to say
- “The procedure contemplated above (Advocates Remuneration order Rule (11) is:-
- a. The aggrieved party issues a notice within 14 days on the items objected.
  - b. The taxing officer shall forthwith give reasons for his decision.
  - c. Upon receipt of the reasons, the objector shall within 14 days file and application to the High Court setting out grounds for objection.
  - d. If dissatisfied with the High Court, the objector shall with leave of court appeal to the court of appeal.
- The procedure stated above carried a mandatory requirement. Undoubtedly, the Applicant did not comply. It is trite that rules of procedure are handmaidens and not mistresses of justice and they are meant to aid in the administration of justice and not to cause injustice”
31. Further the Applicant by invoking provisions of Civil procedure Section 3 (A), 63 (e), Order 22 Rule 22 (2), Order 40 Rule 1 (a) (b) makes the Application incompetent for the Advocates Act and Advocates Remuneration Order has its own procedure which regulates issues on taxation.
32. Kasango J. observed the same in Nyamogo and Nyamogo Advocates Vs Mwangi (2008) 1 E.A 283 (CAK) when she said:- “ Having considered the application and the arguments placed before court I am of the firm view that the Civil procedure Act does not apply to matters relating to the Advocates Act. I therefore make a finding that the prayers sought by the client for stay of execution cannot be granted. The Advocates Remuneration order has elaborated procedure laid out for objecting to taxed costs. The Application therefore dated 29<sup>th</sup> September and 23<sup>rd</sup> October, 2006 are therefore incompetent for seeking to rely on the Civil procedure Act.....having made a finding that there cannot be stay of taxed costs I find that the client's both applications must fail. In making that finding I rely on the case of Frances Kabaa Vs Nancy Wambui and Jane Wanjiru Civil Application number NAIROBI 298 OF 1996 (113 OF 1996 UR) where the Court of Appeal had the following to say;
- .....furthermore, we do not think that stay can be granted in respect of costs.
33. On the Issue whether the Application has merit, I say no for stay orders cannot be granted in the respect of costs as envisaged under Order 42 Rule 6 (a) (b) of the Civil Procedure Rules. See the last line in the holding cited in Paragraph 32.



34. The upshot of the above is that I find the Application has no merit, the same is dismissed with costs to the respondent for costs follow the event See Section 27 of the Civil Procedure Act which provides.....

- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
- (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such. AND the case of Rai & 3 others v Rai & 4 others (Petition 4 of 2012) [2014] KESC 31 (KLR) (4 March 2014) where it was held “.....It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation”.

35. Right of Appeal 30 days.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 19<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**S.N MBUNGI**

**JUDGE**

In the presence of:

Court Assistant – Elizabeth Angong’a.

Ms Gichuru holding brief for Mr. Kiragu for the Respondent -present.

Kraido Advocate for the Applicant – Absent.

