



REPUBLIC OF KENYA



Sherman Nyongesa & Mutubia Advocates v Furncon Limited (Miscellaneous Civil Application E051 of 2021) [2025] KEHC 12110 (KLR) (3 April 2025) (Ruling)

Neutral citation: [2025] KEHC 12110 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION E051 OF 2021**

F WANGARI, J

APRIL 3, 2025

BETWEEN

SHERMAN NYONGESA & MUTUBIA ADVOCATES RESPONDENT

AND

FURNCON LIMITED APPLICANT

RULING

1. By a Chamber Summons Application dated 15/10/2024 brought under the provisions of Order 11 (4) of the *Advocates Remuneration Order, 1962*, the Applicant sought for the following reliefs;
 - i. That the taxation ruling dated 01/2/2024 on the Advocate-Client Bill of Costs dated 18/03/2021 be and is hereby set aside.
 - ii. That the Bill of Costs dated 18/03/2021 be and is hereby referred for taxation before any other Deputy Registrar other than Hon. R. Arora (DR).
 - iii. That in alternative to order 2 above, the Honorable Court be pleased to determine the instructions fee payable.
 - iv. That the cost of this application be provided for
2. It was contended that the amount of Kshs. 1,051,378.33 awarded by the Taxing Master is inordinately high. The Applicant faulted the Taxing Master for awarding instruction fees for a counter claim and with no explanation given. The Appellant further stated that the Taxing Master erred in law by using the amount claimed in both the counterclaim and the Plaintiff yet in the judgment, the claims were dismissed.
3. The application is opposed. The Respondent filed the Replying Affidavit dated 08/11/2024. It was deponed that his was the 2nd Reference filed by the Applicant on the same Bill of Costs. The 1st ruling was dated 04/05/2022 in respect to the Bill. The Applicant filed a Reference dated 17/5/2022



challenging the decision. Via this court's ruling dated 14/11/2022, the decision by the Taxing Master dated 04/05/2022 was set aside, and the Bill of Costs referred to a different Taxing Master for re-taxation.

4. The Bill was taxed and a ruling dated 01/02/2024 rendered. Subsequently, the Certificate of Costs was issued on 08/02/2024. It is the said ruling that is subject to this Reference.
5. The Respondent deponed that the Certificate of Taxation having been issued, this court was functus officio. Further, the ruling having been in regard to the previous Reference filed, this Reference was res judicata, and the Taxing Master cannot sit on appeal of her own decision. The Applicant therefore ought to settle the professional fees towards the professional services rendered by the Respondent.
6. Lastly, it was contended that the Applicant seeks to introduce new issues that were not subject of taxation and which amounts to trial by ambush. They prayed that the application be dismissed with costs.
7. Directions were taken to have the application canvassed by way of written submissions. Both parties duly complied by filing their respective submissions as well as citing authorities in support of their rival positions. The Applicant's submissions are dated 07/02/2025 the Respondents are dated 13/02/2025. I have given due consideration to both sets of submissions.

Analysis and Determination

8. I have carefully considered the application, submissions for and against, the authorities cited as well as the law. This being the 2nd Reference filed in respect to the ruling of the Taxing Master regarding the Bill of Costs dated 18/03/2021, the main issue that will determine if the court can deal with the orders being sought for is;
 - a. Whether the application is res judicata
 - b. If the answer to (a) above is in the negative, what orders ought to issue? and,
 - c. What is the order as to costs?
9. Section 7 of the [Civil Procedure Act](#) provides as follows;

“No court should try any suit or issue in which the matter directly and substantively in issue has been directly and substantively 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 sum issue has been subsequently raised and has been heard and finally decided by such court”.
10. I make reference to my ruling dated 11/10/2024 and the authority of *Wainaina v Joseph Gikonyo t/ a Garam Investments* [2022] eKLR, cited by the Respondent in its argument that the matter was res judicata. At the time, the court was not persuaded that the matter was res judicata as per paragraph 18 to 21 of the said ruling.
11. However, the circumstances are different in this matter. The main issue being raised by the Applicant in this Reference is the same issue that was raised in the Reference dated 17/05/22. The Applicant sought;
 - i. To have the Bill of Costs re-taxed; or in the alternative
 - ii. This court do determine the instructions fees



12. Similarly, in the Reference dated 17/05/2022, the main issue of contention is the money payable to the Advocates as the instruction fees and how much was due and owing to them. This court in its ruling dated 14/11/2022 gave guidelines on the re-taxation of the instruction fees. In paragraph 25, it is stated as hereunder;

25. That being the case, the applicant was obliged to charge the instruction fees in accordance with the prevailing *Advocates (Remuneration) (Amendment) Order* at the time of institution of the suit”

13. In the ruling dated 01/02/2024 subject to this Reference, the Deputy registrar made reference to the guidance given by this court and stated as hereunder;

“In the ruling, the Judge gave guidance that the remuneration order for purposes of ascertaining the instructions fees is Legal Notice No. 550 of 12th December, 1997”

14. The issue of instruction fees was dealt with in the respective rulings The Applicant having been dissatisfied with how the item on instruction fees was taxed, cannot seek to have the Bill of Costs taxed for the 3rd time. The Deputy Registrar gave reasons for taxing the item as she did. Litigation must come to an end. There is nothing new to be brought before the Taxing Master. I do concur with the submissions by the Respondent that the Applicant ought to have filed an appeal against the ruling of the Taxing Master.

15. Based on the above, and having found this application to be res judicata, the application is hereby dismissed. Due to the strained relationship between the parties, each party to bear its own costs.

16. Having found the application successful, the following orders flow therefrom:

- a. The application dated 15/10/2024 is found to be res judicata
- b. Each party to bear its own costs

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 3RD DAY OF APRIL, 2025.

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F. WANGARI

JUDGE

In the presence of:

Mr. Githumbi Advocate for the Applicant

Takkah Advocate h/b for the Respondent

M/S Salwa, Court Assistant

