



REPUBLIC OF KENYA



**Startruck Auctioneers Investments v Gaturu & another (Civil Miscellaneous Application E006 of 2025) [2025] KEHC 5701 (KLR) (5 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5701 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL MISCELLANEOUS APPLICATION E006 OF 2025**

**DKN MAGARE, J**

**MAY 5, 2025**

**BETWEEN**

**STARTRUCK AUCTIONEERS INVESTMENTS ..... APPLICANT**

**AND**

**PETER MACHARIA GATURU ..... 1<sup>ST</sup> RESPONDENT**

**PETER NJUGUNA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application for consideration is Applicant's Notice of Motion dated the 7/2/2025 brought under Sections 1A, 1B, 3A of the *Civil Procedure Act*, Order 22 Rule 25, Order 42 Rule 6, Order 50(6) of the *Civil Procedure (amendment) Rules* 2020 and Paragraph 11 of the *Advocates Remuneration Order* and all other enabling provisions of law. They seek the following orders:
  - a. Spent...
  - b. That the Applicant be granted leave to file an Objection and a Taxation Reference out of time into this court against the assessment of costs in the certificate of costs dated 4<sup>th</sup> November 2023.
  - c. That the prayer above operate as a stay of execution of the certificate of costs by the taxing officer aforesaid and any other consequential proceedings.
  - d. That the objection to the taxing officer and the Application for Reference annexed hereto be deemed as duly filed and served upon payment of requisite fees.
  - e. That costs be in the cause.



## background

2. The Applicant filed an application dated 27.09. 2023 (Nyeri Misc. 31 of 2023) seeking a court directive for the Respondents to pay storage fees following the lawful detention of motor vehicle KCQ 051L in Nyeri CMCC 77 of 2019. The disputed storage charges amounted to KSH. 79,344. The court dismissed the application and awarded costs assessed at KSH. 125,300, despite the subject matter being KSH. 79,344.
3. The Applicant contends that the court's practice of assessing bills without notice to the judgment debtor prevented them from challenging the assessment. The Applicant only became aware of the assessment on 20.09. 2024, when served with a notice to show cause why execution shouldn't issue. By then, the 14-day period to challenge the assessment had lapsed. Between September 2024 and the present, the Applicant's advocates requested a reassessment of the bill, but this was the wrong procedure, and time had already lapsed.
4. The Applicant argues that the bill is exaggerated on a prima facie basis. If the orders are not granted, the Applicant's directors will suffer substantial loss, as their freedom was at imminent risk of curtailment. They stated that the delay in making the application was reasonably explained. It was their case that there was no prejudice to be suffered by the Respondents.
5. The application was supported by the affidavit of E. Nyaga, who stated that the Court issued an ex parte judgment dated 10.05.2021. Mamalo Auctioneers instructed the Applicant to store motor vehicle KCQ 051L. They posited that warrants of attachment were issued in Nyeri CMCC 77 of 2019. The court in CMCC set aside the judgment giving rise to the attachment of the vehicle but did not refer to the release of the motor vehicle. Furthermore, there was no decision on who was liable to pay storage charges. This prompted the Applicant's former advocates to file Misc. 31 of 2023 for the determination of storage charges, which at the time were Ksh. 79,344. The application was dismissed with costs, and the court assessed the costs at Ksh. 125,300.
6. The Applicant now wishes to challenge the same. They posit that the unfortunate practice of the court below is for bills to be assessed without notice to the judgment debtor, disallowing them to challenge the same. The advocates had between September 2024 and now requested reassessment of the bill, which was the wrong procedure, and time had already lapsed, generating a letter decrying the inflated costs. The Applicant's director faces imminent arrest and committal to civil jail. they submit that there is a prima facie case with a high probability of success.
7. The Respondents filed a replying affidavit to the application wherein they stated that the application is misconceived and is blatant forum shopping. They stated that Application E31 of 2023 was dismissed on 13th October 2023, precipitating the filing of E072 of 2023 for stay of execution, which the court dismissed on 20.09.2024. The Applicant then filed E017 of 2023 in November 2023, which was dismissed again on 31.01. 2025. They then went ahead to legally execute orders of the decree, which, to their surprise, was met by the instant application. Their position was that Misc. HCCA of E072 of 2023 and Nairobi E017 of 2023 are seeking similar stay of execution orders. The Applicant has come to court with unclean hands. Court orders must be obeyed in the first instance.
8. They stated that the Applicant failed to disclose the aforementioned cases. Further, the orders of 13.10.2023 were negative orders and thus cannot be stayed. It was their case that the order of lodging a reference in Nyeri HCCA E072 of 2023 was dealt with therein. That he then was about to execute, then he got to learn of the instant application, another sign of bad faith that he was not served with pleadings, another sign of ill faith. The Applicant has ignored and concealed previous court orders,



sought to stay negative orders, and come to court with unclean hands, and thus being in contempt of court.

## Analysis

9. The court notes with concern that the Applicants have sought the same orders under Nyeri E072 of 2023, where the parties therein are the parties herein. The same was dismissed with costs on 20/09/2024. The same was before Lady Justice M. Odero. The same is now before me, seeking the exact orders in the dismissed application before Lady Justice M. Odero in flagrant snubbing of the dismissal by the said court.
10. The question before me is whether the court should grant a stay and, at the same time, extend the time to file a reference. The question was dealt with differently in earlier cases. The applicant had an opportunity to contest the orders they are challenging exhaustively.
11. The question before me is whether I have jurisdiction to issue the orders sought. This is because the applications substantially challenge the same decision that had hitherto been challenged. The Respondents maintain that the assessment was illegal and should be set aside. They presented their cases in court, and the court decided one way or another. Can the same court deal with the same questions? What if there is a differently worded application but with newly fashioned prayers? Section 7 of the *Civil Procedure Act*, Cap 21, Laws of Kenya defines the doctrine of Res Judicata in the following terms: -

“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.”

12. The *Civil Procedure Act* also provides explanations regarding applying the res judicata rule. section 7 provides as follows:

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.

Explanation.

1. The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.
2. For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.
3. The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.
4. Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.



5. Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.
  6. Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.
13. This matter follows under explanation 4. The matters raised were either grounds in the former suits or might and ought to have been made ground of defence or attack in such former suit, shall be deemed a matter directly and substantially in issue in such suit. There is no way one party raises grounds in a suit and later, reiterates the same grounds and brings them as a brand new and novel application. In the case of *Re Estate of Riungu Nkuuri (Deceased)* [2021] eKLR, the court stated as follows:
- The test for determining the Application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others* [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:
- “(a) The suit or issue was directly and substantially in issue in the former suit.
  - (b) That 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.”
14. The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court as stated in the case of *Attorney General & another ET vs (2012)* eKLR, where it was held that:
- “The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi s NBK & Others (2001) EA 177* the court held that “parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit”.
- In that case the court quoted Kuloba J, (as he then was) in the case of *Njanju vs Wambugu and another Nairobi HCC No. 2340 of 1991 (unreported)* where he stated: If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of res judicata.....”.
15. In essence, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those previously in dispute between the same parties and the same having been determined on the



merits by a court of competent jurisdiction. The court in the English case of *Henderson v Henderson* (1843-60) All E.R. 378, observed thus:

“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

16. Res judicata applies to applications just like suits. In the case of *Julia Muthoni Gitthinji v African Banking Corporation Limited* [2020]eKLR, the court stated thus:

14. After a careful reappraisal of the application for injunction before the lower court, I have come to the conclusion that the application was resjudicata and the entire suit was subjudice as there was an active pending suit before a court of competent jurisdiction being Nakuru ELC No. 272 of 2017. All issues raised in the suit before the subordinate court could be properly litigated in the suit pending before the ELC. The filing of the suit by the appellant in the subordinate court when she had a similar suit in the ELC Court was an abuse of the Court process which the Court cannot countenance.

17. In the case of *Maumbwa & 3 others v Kisemei* (Civil Appeal E009 of 2021) [2022] KEHC 10416 (KLR) (26 May 2022) (Judgment Maumbwa & 3 others v Kisemei (Civil Appeal E009 of 2021) [2022] KEHC 10416 (KLR) (26 May 2022) (Judgment) the court stated doth:

By comparing the two applications and the authorities on res judicata, it is clear to me that the issues being canvassed in the application dated 11<sup>th</sup> January 2021 is res judicata. The issues in issue in that application were directly and substantially in issue in the application dated 13<sup>th</sup> September 2017. These issues relate to the same parties and these issues have been tried by a competent court. To my mind to bring the same issues between the same parties that have been determined by a court of competent jurisdiction is an abuse of the court process.

18. This court cannot reconsider the High Court decision made on 20/09/2024 without offending rules related to res judicata. The Application is hereby dismissed for being res judicata. The next question is costs. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(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.
19. Costs are discretionary and such discretion should be exercised judiciously, meaning without caprice or whim. The Court of Appeal in the case of *Farah Awad Gullet v CMC Motors Group Limited* [2018] KECA 158 (KLR) had this to say:

It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

20. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

“(18) 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, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

21. The application being unmeritorious, the Respondent should have costs. The Respondent are awarded Ksh 15,000/= being the cost of the application

### **Determination**

22. In the circumstances, the court makes the following orders:
- a. The application dated is hereby dismissed with costs of Ksh 15,000/= payable within 30 days, in default execution to issue.
  - b. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 5<sup>TH</sup> DAY OF MAY, 2025.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:

Mr Kimani for Mr Ndichu for the Applicant



No appearance for the Respondent

Court Assistant – Michael

Ruling delivered through Microsoft Teams Online Platform.

