



Khamati Githinji Ashiruma & Chege Advocates v Matero (Miscellaneous Application E527 of 2023) [2025] KEHC 8629 (KLR) (Commercial and Tax) (13 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8629 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E527 OF 2023**

JWW MONG'ARE, J

JUNE 13, 2025

BETWEEN

KHAMATI GITHINJI ASHIRUMA & CHEGE ADVOCATES ADVOCATE

AND

JOSEPH NGAIRA MATERE CLIENT

RULING

1. On 9th October 2024 and by a Chamber Summons Application, the Client moved this Honourable court under a certificate application filed under Paragraph 11(2) of the Advocates (Remuneration Order) seeking the following reliefs:
 1. That this Honourable Court be pleased to set aside the decision of the taxing master as evidenced in the ruling delivered on 30th September 2024 in respect of the entire bill of costs.
 2. That the decision of the learned Taxing Master dated 30th September 2024 be set aside and the Applicant's Bill of Costs dated 9th July 2021 be dismissed.
 3. That Costs of this application be awarded to the Respondent.
2. On 16th October 2024 the Applicant vide a Notice of Motion filed under a certificate of urgency and brought under Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act and it seeks the following orders:
 1. Spent
 2. That this Honourable Court do proceed to adopt the Certificate of Taxation issued on 1st October, 2024 for Kshs. 539,922.50 as a Decree of this Court for purposes of execution.



3. That the firm of Bemac Auctioneers be issued with Warrants of Attachment and Sale of the Respondent's property in execution of the Decree herein.
 4. That costs of this application be provided for.
3. The Chamber Summons application of 9th October 2024 is supported by the grounds set out on its face and the supporting affidavit of JOSEPH NGAIRA MATERE sworn on 9th October 2024 while the Notice of Motion Application of 16th October 2024 is supported by the grounds set out on its face and the supporting affidavit of HERBET J. ASHIRUMA Advocate sworn on 16th October 2024, respectively. Both applications are opposed and parties filed replying affidavits to the respective applications. The Advocate alongside their own application and responses also filed a Notice of preliminary objection dated 6th February 2025 raising the following grounds; -
1. That the Chamber Summons herein by the Client/Applicant is incurably defective as it offends the Provisions of Section 7 of the Civil procedure Act(Cap 21) Laws of Kenya and the Consent orders of this Honourable Court issued on 26th February 202 by the Hon Lady Justice J. W. W. MONGARE which orders have not been vacated or set aside and the said application should be expunged from the Court Record.
 2. That the Chamber Summons herein is frivolous, vexatious, an abuse of the court process and a candidate for dismissal as this Honourable Court has already made a determination on a similar application and the same should be dismissed with costs.
4. It is the norm that where a party raises a preliminary objection the same should be dealt with in the first instance as it has the power to cause the entire suit to be determined. This is the position laid down in locus Classica case on Preliminary objections by the Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:

“....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

At page 701 paragraph B-C Sir Charles Newbold, P. added the following:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....”

5. The Advocate has raised an objection to the court's jurisdiction to hear the Reference filed by way of Chamber Summons Application and argues that the same offends the doctrine of res judicata as set out under section 7 of the Civil Procedure Act which provides as follows:-

“7. Res judicata

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.

Explanation. — (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.

Explanation. — (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.

Explanation. — (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.

Explanation. — (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.

Explanation. — (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."

6. The advocate argues that this court already pronounced itself on the issues raised by the client on 26th February 2024 in the Client's notice of motion application dated 29th August 2022 and by extension the Chamber Summons dated 30th August 2023 and also by the Client when consent orders were granted and the Advocate/Client Bill of costs dated 9th July 2021 referred to the Deputy Registrar for fresh taxation by consent of the parties and the Client's application stood withdrawn.
7. That both parties participated in the re-taxation exercise and the client did not raise any objection to the said consent order and that the same remains in force as it was never vacated or set aside. It is therefore the advocates position that the Reference filed on 9th October 2024 does not take into account that the order for re-taxation was by a consent of the parties that subsist to-date and have never been vacated and therefore there is no basis to file a Reference to a Bill that was retaxed by a consent order. The Advocate has urged the court to find that the application by the Client offends the doctrine of res judicata as set out under Section 7 of the [Civil Procedure Act](#) set out above.
8. I have perused the court record. I note that the Bill of costs was first taxed by the Court on 25th January 2022 and a ruling delivered by Hon. C Wanyama taxing the Bill at Kshs.754,988. On 26th April 2023, an application to have the Taxed Costs adopted a decree of the court was made orally by the Advocate in court and the same was allowed and the Advocate allowed to proceed to execute the same. On 26th September 2023, the client's counsel informed the court that they had filed an application dated 29th August 2023 and served it upon the Advocates. On 26th February 2024, this court made a determination of the said application and remitted the Bill back for re-taxation with the participation of the client. The other pending applications were marked as abandoned and the Bill was taxed a fresh with a ruling on the same being issued and the said re-taxation returned a finding that the costs were now assessed at Kshs.539,922.50. The said ruling was delivered by the taxing master on 30th September 2024.



- 9. I have carefully considered the application by the Client filed on 9th October 2024. I note that the objection to the taxed costs is premised on an application challenging retainership that was filed on 29th May 2023. I have examined the record and note that when parties appeared before this Honourable Court on 26th February 2024, parties consented to the Bill being sent back to the Taxing Master for re-taxation and all other applications were marked as abandoned by consent.
- 10. I therefore agree with the arguments of the Advocate on the preliminary objection that the Reference application of 9th October 2024 is res judicata as the issues being raised therein were considered before this Honourable Court and a determination on the same made. That parties having consented to the Bill being retaxed cannot seek to reopen the same on an issue that ought to have been determined before the said exercises commenced. I find therefore the Reference application is incompetent before this court and the same is hereby struck out with costs to the Advocates.
- 11. This therefore leaves for determination by the Court the Application of 16th October 2024 that seeks entry of judgment of the taxed costs. I note that there has been no opposition to the said application by the client. I allow the application as prayed and order that warrants of attachment be issued to Bemac Auctioneers as prayed for in the application. On this application, each party shall bear their own costs to the application. It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 13RD DAY OF JUNE 2025

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J.W.W. MONGARE

JUDGE

In the presence of:-

- 1. Ms. Wesonga holding brief for Mr. Kirimi for the Applicant.
- 2. Mr. Sichangi holding brief for Mr. Ashiruma for the Respondent.
- 3. Amos- Court Assistant

