



Thomas & another v Mohammed and Samnakay Advocates (Miscellaneous Cause E406 of 2022) [2025] KEHC 9264 (KLR) (Commercial and Tax) (23 June 2025) (Ruling)

Neutral citation: [2025] KEHC 9264 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CAUSE E406 OF 2022**

F GIKONYO, J

JUNE 23, 2025

BETWEEN

SHAMMI KANJIRAPPRAMBIL THOMAS 1ST APPLICANT

SPECTSAVER (K) LIMITED 2ND APPLICANT

AND

MOHAMMED AND SAMNAKAY ADVOCATES RESPONDENT

RULING

1. The applicant/ advocate's preliminary objection (PO) dated 6th March 2025, is taken out against the respondents/ clients' notice of motion dated 20th February 2025.
2. The PO raises two grounds, reproduced below:-
 1. Having issued final Judgment and decree in terms of the [Advocates Act](#) (Cap 16), this court has become *functus officio*.
 2. The [Advocates Act](#), which is a complete code, does not authorize this court to review and/ or modify its own Judgment nor sit on appeal against its own judgments.
3. The advocate therefore sought that the said application be struck out and dismissed with costs.
4. The PO was canvassed through written submissions. The advocate and the clients filed written submissions dated 25th March 2025 and 29th April 2025, respectively.
5. The advocate submitted that the court lacks jurisdiction to hear the clients' application for stay of execution. It argued that it is too late for the clients to seek revision of the amount of judgment, as they squandered their earlier opportunity to file a reference against the taxation ruling. It also argued that the court is *functus officio*, having issued a final judgment and decree in this matter.



6. The advocate relied on *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* (Civil Appeal 50 of 1989) [1989] KECA 48 (KLR) (17 November 1989) (Judgment) to argue that where a court has no jurisdiction, there would be no basis for a continuation of proceedings.
7. On the other hand, the clients submitted that the PO is misplaced as the court retains residual jurisdiction to ensure that its processes are not abused and to prevent injustice. They relied on Article 165 of the *Constitution*, which grants the court unlimited original jurisdiction and inherent powers to prevent abuse of the court process.
8. The clients highlighted the respondent's failure to account for funds received from or on their behalf, despite demands. They submitted that the duty to account persists beyond taxation and is enforceable by this court. They relied on Section 80 of the *Advocates' Act* to assert that the advocate owes them a fiduciary duty of transparency and fairness.
9. The clients contended that the advocate's reliance on the *functus officio* doctrine is inappropriate in the circumstances. They pointed out that the court's intervention is necessary to prevent an oppressive and unjust execution based on un-procedural taxation proceedings.

Analysis and Determination

10. Arising from the PO, is this court functus officio?
11. A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleading and which if argued as preliminary objection may dispose of the suit'. It is on the assumption that 'the facts pleaded by the other party are correct, and not blurred by factual details calling for evidence or requiring the court to exercise discretion.
12. According to *Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Ltd*. [1969] EA 696, Law JA: -

“ ... a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleading and which if argued as preliminary objection may dispose of the suit.

In other words, for a preliminary objection to succeed, the facts pleaded by the other party are assumed to be correct, it must be a matter of law which is capable of disposing off the suit, it must not be blurred by factual details calling for evidence and it must not call upon the court to exercise discretion.”
13. The advocate's PO is on jurisdiction. It argued that the court lacks jurisdiction to hear and determine the clients' application for stay of execution of the judgement because the clients did not challenge the taxation ruling before the judgment was entered.
14. In the application, the clients seek an order directing the advocate to account for the party and party costs issued to the clients in HCCC No. 38 of 2010, *Moses Mwangi Kimari v Shammi Kanjirapparambil Thomas & others* and Nairobi Civil Appeal No. 94 of 2015, *Moses Mwangi Kimari v Shammi Kanjirapparambil Thomas & others*. They also seek that the said costs be deducted from Kshs. 593,556, the amount stated in the advocate-client bill of costs. They further seek leave to settle the balance in instalments of Kshs. 100,000 per month until payment in full.
15. The following are relevant in answering the challenge on jurisdiction.



16. The application is made under Articles 10, 22, 23, 50, 159 & 165 of the *Constitution* of Kenya, Section 47, 51(2) and 80 of the *Advocates Act*, Sections 3 & 5 of the *High Court (Organization and Administration) Act*, Sections 1A, 1B, 3A and 38 of the *Civil Procedure Rules*.
17. The court has discretion to stay execution under Order 22 Rule 22 of the *Civil Procedure Rules*. It also has the discretion to order an amount decreed be postponed or paid by instalments under Order 21 Rule 12 of the *Rules*.
18. Section 3A of the *Civil Procedure Act* provides that nothing in this *Act* shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.
19. Section 80 of the *Act* also provides that a person aggrieved by a decree or order may apply for review of the judgment. The conditions to be met for a review are discovery of new or important matter, mistake or error apparent on the face of the record and any other sufficient reason. Order 45 Rule 1 (b)
20. From the above, I find that the court has the jurisdiction to hear and determine the clients' application.

Disposal

21. Accordingly, the advocate's PO fails and it is dismissed with no order as to costs.
22. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT ONLINE APPLICATION THIS 23RD DAY OF JUNE, 2025

F. GIKONYO M

JUDGE

In the presence of: -

Zul for Respondent

Michuki for Applicant

CA Kinyua

