



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwamu t/a Mwamu & Co Advocates v Adongo (Miscellaneous Application  
133 of 2017) [2025] KEHC 10574 (KLR) (21 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10574 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
MISCELLANEOUS APPLICATION 133 OF 2017**

**A MABEYA, J**

**JULY 21, 2025**

**BETWEEN**

**JAMES AGGREY MWAMU T/A MWAMU & CO ADVOCATES ..... APPLICANT**

**AND**

**ALFRED OKEYO ADONGO ..... RESPONDENT**

**RULING**

1. The applicant is a Firm of Advocates practicing as such in Kisumu and within the Republic of Kenya. By a Notice of Appointment dated 13/10/2000, the said firm (“the applicant”) took over the conduct of Ksm HCCC No. 110 of 1996 Thomas Adongo Onuko vs. Small Enterprises Finance Co. Ltd & Anor (hereinafter ‘the primary suit’) on behalf of the plaintiff. The applicant successfully prosecuted the said suit and had it determined in favour of the plaintiff at Kshs. 1,080,000/-.
2. The applicant also successfully prosecuted the appeals arising from the said suit being Ksm CoA 301 of 2014 Small Enterprises Finance Co. Ltd vs. Thomas Adongo Onuko t/a Expert Tailoring House, Ksm CoA Appln. No. 280 of 2002 and Ksm CoA 280 of 2008 Small Enterprises Finance Co. Ltd. vs Thomas Adongo Onuko t/a Expert Tailoring House.
3. In or about 2009, Thomas Adongo Onuko passed on and Alfred Okeyo Adongo (‘the respondent’) took up the representation of his estate. He took up these cases for and on behalf of the estate of his late father.
4. On 22/6/2017, the applicant lodged an advocate – client bill of costs in this cause dated the same day claiming Kshs. 7,258,246/22 for having successfully recovered Kshs.1,080,000/- for the plaintiff in Ksm HCCC No. 110 of 1996 Thomas Adongo Onuko vs. Small Enterprises Finance Co. Ltd & Anor. It also lodged two other causes being Misc Civ. Appln Nos. 130 & 131 in respect of the suits and applications that the applicant handled in the Court of Appeal.



5. A preliminary objection dated 17/8/2017 against the said bill of costs was raised on the basis that the parties had agreed on fees which had been fully settled. That in the premises the bill of costs should be struck out. The basis of the preliminary objection was a letter dated 25/11/2008 by the applicant to the late Thomas Adongo Onuko. The said letter was as follow: -

“Dear Sir,

Re: Kisumu HCCA No. 110 of 1996

Thomas Adongo Onuko vs. Small Enterprises Finance Co

The above matter refers.

Take notice that we have received Kshs. 400,000/- (Four Hundred Thousand Only) from adversaries. In the meantime, note that an application is coming for hearing on 3/12/2008 in court of appeal. (sic).

Our final legal fee for both the High Court and Court of Appeal is 100,000/- (One Hundred Thousand Only) plus V.A.T of 16% making a total of Kshs.116,000/- (One Hundred and Sixteen Thousand Only).

We shall deduct Kshs.100,000/- (One Hundred Thousand Only) from the amount paid leaving a balance of Kshs.16,000/= to be paid later. Kindly collect a cheque of Kshs.300,000/- (Three Hundred Thousand Only) from our office when the cheque is through.

Yours faithfully,

Signed”

6. After considering the objection, the taxing officer upheld the same and struck out the bill of costs. In arriving at the said decision, the taxing officer relied on a decision of this court (Waweru J) in *Abincha & Co. Advocates vs Trident Insurance Co. Ltd* [2013] eKLR, where the court held that where an advocate had presented what appeared to be a final fee note he was estopped in law and equity from turning around, between 8 and 11 years later to raise a ‘Final’ bill of costs.
7. The foregoing is the background to the Motion on Notice taken out by the applicant dated 14/10/2021 seeking to set aside that decision and either refer the said bill of costs for taxation afresh or for the Court to tax the same itself. This ruling therefore is for the determination of that reference. The same was brought under sections 1A, 1B and 3A of the *Civil Procedure Act*, sections 45 and 46 of the *Advocates Act* and Rule 11 (2) and 13 of the Advocates Remuneration Order.
8. The application was grounded on the grounds set out in the body thereof, supporting affidavit of James Aggrey Mwamu, Advocate and his Further Affidavit sworn on the 9/06/2025.
9. It was the applicant’s case that the taxing officer did not appreciate the provisions of section 45 of the *Advocates Act*. That she failed to discern that this was a matter not to fix a preliminary objection. That she failed to take into account that there were different matters in different courts and subsequently relied on the wrong principles to arrive at her impugned ruling.
10. That in essence, she failed to consider the applicant’s Bill of Costs dated 14/6/2017 and by ordering that the impugned ruling apply to Misc. Civil Case Nos. 130 of 2017, 131 of 2017 and 133 of 2017, she erred on principle as she made her determination without properly interrogating the Bill of Costs filed in those files.



11. That the alleged letter of retainer dated 25/11/2008 relied on by the taxing master in making her decision did not amount to a retainer agreement as it was not signed by both parties
12. The application was opposed vide the respondent's replying affidavit sworn on the 20/05/2025. The respondent contended that the application was fatally defective for want of form and substance as it ought to have been brought by way of Chamber Summons and not Notice of Motion.
13. That the court lacks jurisdiction to entertain the said application because, it had remained unprosecuted since September, 2020 until March, 2025, a period of over 2 years. That by virtue of the provisions of Order 17 Rule 2 (1), the same stood dismissed by operation of law on the 16/9/2022. That the applicant was only jolted into action after the respondent had lodged an application for accounts in Misc EO32 of 2025.
14. The respondent also filed Grounds of Opposition dated 19/6/2025 in which he contended that the application was res judicata as it was between the same parties and raises similar issues to the application dated 7/9/2018 which had already been determined. That the application was dismissed on 15/10/2023 by virtue of Order 17 Rule 2(5) as the applicant had failed to take any steps to prosecute the same since its filing on 15/10/2021.
15. That the respondent was being sued in his personal capacity yet the applicant did not render any legal services to him personally. It was finally contended that, by a letter dated 25/11/2008, the applicant had capped his fees at Kshs. 100,000/- and should estopped from renegeing on his word and that the same was instituted by way of Notice of Motion contrary to Order 11 (2) of Advocates Remuneration Order.
16. In rejoinder, the applicant swore a further affidavit on 9/6/2025 in which he urged the Court to strike out the respondent's replying affidavit of 20/5/2025 as it was filed without leave of Court and was responding to an application dated 7/9/2018 which had already been dispensed with by the Court.
17. The reference was disposed of by way of submissions that were highlighted on the 24/6/2025. The applicant submitted that the costs the firm sought from the respondent were for fresh instructions issued by the deceased in pursuit of 3 appeals and applications which could not be covered by the letter given earlier to the deceased on payment.
18. That the taxing officer ought to have been guided by Rule 13A of the Advocates Remuneration Order and called for the relevant files instead of striking out the said Bill of Costs.
19. That the taxing officer erred in ordering that the Misc. Case 130 of 2017 to apply in the instant matter whereas there was no order of consolidation by the Judge and as such, the court should look at the entire record and set aside the order striking out the bills of costs and thus allow the reference with costs.
20. That the issue of res judicata did not apply in the present case as the application dated 7/9/2018 was for stay and leave to file a reference which application was determined and was not similar to the current application. Finally, that the issue of whether to approach the Court by way of Chamber Summons instead of Notice of Motion was a technicality and that the application was against the respondent as administrator of the deceased's estate.
21. On his part, the respondent submitted that by virtue of Order 17 Rule 2 (5) of the Civil Procedure Rules, the application before Court stood dismissed as it had not been prosecuted for a long time. That the application was res judicata the application dated 7/9/2018.



22. That the application was brought against the respondent in his personal capacity yet he was representing the estate of the deceased. That it was brought by way of Notice of Motion contrary to Paragraph 11 (2) of Advocates Remuneration Order.
23. That the letter dated 25/11/2008 on agreed fees, covered all the cases inclusive of the appeals and as such, the applicant was estopped from reneging on the same as was held in James Mwamu v Odongo (2023) eKLR. That there were no independent instructions issued to the applicant so as to warrant independent fees.
24. I have considered the record and the submissions of the parties. The first issue for determination is whether there is a competent reference before this Court in light of the provisions of Paragraph 11 (2) of the Advocates Remuneration Order on the manner to approach Court.

25. Paragraph 11 (2) of the Advocates Remuneration Order provides: -

“2. The Taxing Officer shall forthwith record and forward to the Objector reasons for the decision on those items and the Objector may within 14 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 grounds of his.”

26. In Moses Mwicigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others [2016] eKLR, the Supreme Court of Kenya stated thus: -

“This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.

Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159(2)(d) of *the constitution*, which proclaims that, “... courts and tribunals shall be guided by ... [the principle that] justice shall be administered without undue regard to procedural technicalities”. This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the courts.”

27. In Vishisht Talwar v Anthony Thuo Kanai T/a A. Thuo Kanai Advocates [2014] eKLR, Aburili J stated: -

“The learned judge referring to a decision in the Court of Appeal in Machira & Co. Advocates – vs- Arthur K. Magugu & Another [CA 199/2002](#)[2012] eKLR stated that:

“Rule 11 thereof provides for ventilation of grievances from such decisions through references to a judge in chambers. The effect may be viewed as an appeal or a review but these being legal terms in respect of which different considerations apply, they should not be loosely used. Appeals require the typing



of proceedings, compiling of records of appeal and hearing of the same in open court. Reviews, however, would require provisions akin to those in Section 80 of the *Civil Procedure Act* of discovery of new and important matters, errors on the face of the record and so on. In our view the Rules Committee intended to avoid all that and provide for a simple and expeditious mode of dealing with decisions on Advocate's bill of costs through references under Rule 11 to a Judge in chambers."

28. The view of this Court that, an application cannot be defeated by mere failure to christen it a 'Notice of Motion' instead of 'Chamber Summons'. This is so because the only difference between the two formats is that, before 2010, a Chamber Summons was intended to be heard in Chambers whilst Notice of Motion was intended to be heard in open court.
29. Presently however, courts hear all applications in open court whether they be by Summons or Motion. In *Susan K. Baur v Shashikant Shamji Shah & Another* [2011] eKLR, the court held: -

"The difference between a Summons in Chambers and a Notice of Motion is today very much blurred. In the olden days, summons in chambers was heard in chambers unless the court adjourned it for good reason to be heard in open court. Similarly, Motions were heard in open court unless the court as stated in Order L, rule 1 directed that it be heard in chambers. Today, both Chamber Summons and Motions may and are heard in chambers, and in open court. So that christening an application a Chamber Summons or a Notice of Motion when the rules provide otherwise does not go to the root or basis of the claim, and is merely a matter of form not substance. It does not render the application fatally defective."
30. This Court wholly agrees with the foregoing authorities and hold that, Article 159 of *the Constitution* of Kenya mandates that justice be administered "without undue regard to procedural technicalities". This is the guiding principle for the exercise of judicial authority by the courts. This means that while procedural rules are important and often handmaidens of justice, they should not be used to prevent or delay the delivery of substantive justice.
31. The only time procedural rules are to be strictly up-held is where their breach results in an injustice or prejudice to the opposite party. In the present case, there was no evidence that the respondent was either misled or suffered any prejudice by the christening the application 'Notice of Motion' instead of Chamber Summons' Accordingly, the respondent's objection in that regard is rejected.
32. The second issue was that it was wrong for the Cause to have been brought against the respondent in his name yet no services were offered to him in his individual capacity. Mr. Mwamu, Learned Counsel appearing for the applicant, quite correctly agreed and clarified that the matter was as against the respondent as the personal representative of the estate of his deceased father and not him personally.
33. In this regard, the Court thinks that, nothing much arises out of that objection. It is not in dispute that all the services rendered by the applicant were for the deceased and his estate and that the respondent is a mere representative of that estate. The Cause is against the respondent as the personal representative of the estate of his late father.
34. The other issue for determination is whether the taxing officer was right in striking out the bill of costs. It was contended by the applicant that the matter before the taxing officer was not a proper matter to be determined by way of a preliminary objection. That she should have gone through the bills of costs and applied the principles applicable in matters taxation of costs. That the letter relied on did not apply to the services rendered after that date.



35. The Court has considered the record a length as can be seen at the beginning of this ruling. It is clear that there were 3 causes that the applicant lodged against the respondent in seeking to recover its costs. These were; Misc. Cause Nos. 130, 131 and 133, respectively. The first 2 were in respect of services offered by the applicant to the respondent before the Court of Appeal while the third is the present cause which is in respect of services offered in the primary suit this Court.
36. This Court doubts whether the taxing officer of this Court has jurisdiction to tax bills of costs in respect of work done before the Court of Appeal. That Court has its own Rules and Schedule of Costs. Indeed, when costs are awarded by that Court, the bills of costs are taxed by the taxing officer of that Court and not the High Court. That Court has a taxing officer in every Station that it operates, including Kisumu.
37. In this regard, the Court finds that, in so far as the applicant drew costs arising from services offered to the respondent before the Court of Appeal and lodged those bills in this Court, that was a misdirection. They should have been lodged before the Court in which the services were offered. That notwithstanding however, a matter arising from one of those bills of costs being Misc. Cause No. 130 of 2017 was dealt with and concluded by Aburili J. and is no longer live for consideration.
38. The present matter is in respect of the primary suit. It concerns costs that arose from services offered by the applicant to the respondent before this Court. The objection by the respondent was that the fees had been agreed upon and fully paid. That in light of the letter by the applicant dated 25/11/2008, fees had been agreed between the parties and fully settled.
39. In her ruling, the taxing officer agreed with the respondent and struck out the bill of costs dated 14/6/2017. The Court has already set out above the taxing officer's basis for the said decision.
40. This Court has carefully considered that letter. It is clear that the letter used the words "Our final legal fee for both the High Court and Court of Appeal is 100,000/- (One Hundred Thousand Only) plus V.A.T. 16% making a total of Kshs.116,000/- (One Hundred and Sixteen Thousand Only)". With those words, the applicant proceeded and deducted the said sum from the amount it had received on behalf of the deceased and released the rest to him.
41. The applicant contended that the bills of costs were not covered by that letter. That the bills were for fresh and additional services rendered. The Court does not agree with that submission. It should be noted that as at the time that letter was being written, the primary suit had been concluded, one of the appeals struck out and the substantive appeal was pending. The applicant very well knew that fact when writing that letter. Yet, in its bill of costs, at least in this matter, the same purports to charge fees from the inception of instructions in 2004!
42. When faced with the same letter in *James Aggrey Mwamu t/a Mwamu & Co. Advocates v Odongo (Miscellaneous Application 130 of 2017)* [2023] KEHC 3156 (KLR) (12 April 2023) (Ruling), Aburili J observed as follows: -

"A scrutiny of the aforementioned letter dated 25/11/2008 shows that it was not signed by the respondent/client, however, the letter was written by the applicant/advocate and was clear and unequivocal on the final fees that the advocate set to be settled by the client in the cited matter and in the appeal. ... The letter sated that the final fees was Kshs.100,000/- ...

I cannot agree more that in such circumstances, the applicant advocate is estopped from charging any other fees in the same matter wherein he made the client believe that, that was the final fees chargeable for the specified matters being the High Court matter and the matter pending before the Court of Appeal. It is also not lost to this Court that 2008 is 15 years ago and therefore the value of the Kenya Shilling then is not the same as today. ...



In my view, the applicant advocate bound himself on the final fees to be paid by the client charged and this court cannot interfere on terms that the applicant himself set. I am in agreement with the holding by the Taxing Master that having set the final legal fees and having retained the same, the applicant cannot seek to have another bite at the cherry to the detriment of the respondent. The applicant cannot approbate and reprobate.

If this court were to sanction the taxation of the advocate/client bill of costs, in the matter subject of the letter of 25/11/2008 and in the circumstances of this case, it would set a dangerous precedent where counsel would set legal fees to be settled by clients and after the clients have relied on that representation and settled the fees in question, the advocate would turn around and say that, that was not the legal fees that they made the client pay and believe that that was the full fees.

This case calls into this court the application of the doctrine of Equitable Estoppel. ... This rule prevents someone from going back on their word in a court of law.

The basic principle here is that a person cannot go back on a promise if the person to whom the promise was made has relied upon it to their detriment. ...”

43. I agree with the conclusions arrived at by Aburili J on the effect and tenure of the letter of 25/11/2025. Those sentiments made in Misc. Cause No. 130 of 2017 likewise apply in this matter. The doctrine of equitable estoppel will apply against the applicant for having led the deceased to believe that the final legal fees due from him to the applicant was Kshs.100,000/- plus 16% VAT. That is why he quietly picked the balance of Kshs.300,000/- cheque offered by the applicant from the recoveries made from the deceased’s adversary and kept quiet.
44. In view of the foregoing, the Court sees no grounds upon which to fault the taxing officer. The only error by the taxing officer was her decision that her order applied to the other two (2) Causes that she had not dealt with.
45. Accordingly, the application dated 14/10/2021 is found to be without merit and is hereby dismissed with costs.
46. As regards Miscellaneous Application No. 131 of 2017, the Court having found that it was wrongly filed before this Court and should have been filed in the Court of Appeal, the same is hereby ordered to be struck out with no order as to costs. This ruling be filed in that Cause.

It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 21<sup>ST</sup> DAY OF JULY, 2025.**

**A. MABEYA, FCI Arb**

**JUDGE**

