Republic v Nairobi City County & 4 others; KTK Advocates (Ex parte) (Judicial Review E173 of 2024) [2025] KEHC 11221 (KLR) (Judicial Review) (28 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11221 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW E173 OF 2024

JM CHIGITI, J

JULY 28, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

NAIROBI CITY COUNTY ..... 1ST RESPONDENT

CECM, FINANCE & ECONOMIC AFFAIRS, NAIROBI CITY COUNTY ..... 2ND RESPONDENT

CHIEF OFFICER, FINANCE NAIROBI CITY COUNTY ..... 3RD RESPONDENT

COUNTY ATTORNEY NAIROBI CITY COUNTY ..... 4TH RESPONDENT

COUNTY TREASURER NAIROBI CITY COUNTY ..... 5TH RESPONDENT

AND

KTK ADVOCATES ..... EX PARTE

RULING

1. The application before this court for determination is the one dated 8th April,2025 where in the Applicant is seeking for orders: -

    a. ... spent.

    b. That pending the hearing and determination of this Application inter-partes, this Honourable Court be pleased to review, vary and/or set aside the Order of 3rd April 2025.

    c. That upon the hearing and determination of this Application inter-partes, this Honourable Court be pleased to set aside the Judgement delivered on 3rdApril 2025.

d. That upon the hearing and determination of the Application inter-partes this Honourable Court be pleased to grant the Respondents unconditional leave to defend and/or file responses to the Notice of Motion Application dated 16th October 2024.

e. That this Honourable court do issue any such further and appropriate orders in the circumstances of this matter as it deems fit.

f. That the costs of this Application be provided for.

2. The application is supported by the Supporting and Supplementary Affidavit of affidavit of Christine Ireri.

3. The Applicant moved the court through Section 1A, 1B, 3A and 3B of the *Civil Procedure Act*, Order 51 Rule 1 and 15, Order 12 Rule 7 of the civil Procedure Rules and all other enabling provisions of the law.

4. The application is opposed by way of a Reply Affidavit by Mr. Donald Kipkorir.

5. Parties filed the exchange, robust submissions, which they seek to rely on.

The Applicants case;

6. Christine Ireri admits on oath that she is aware that the subject matter herein arises from the Advocate-Client bill of cost dated 1st October 2020 filed in Nairobi ELC Misc No. E056 of 2020; KTK Advocates vs. Nairobi City County on account of legal services rendered by the Exparte Applicant in Nairobi ELC Cause No. 282 of 2012; City Council of Nairobi vs The Attorney General and the Ministry of Defence.

7. She is aware that on 10th May 2022, the taxing master awarded the Exparte Applicant a colossal sum to the tune of Kenya shillings one billion three hundred and thirty-eight million eleven thousand five hundred and eighty-two and seventy-six cents (Kshs. 1,338,011,582.76) in Nairobi ELC Misc No. E056 of 2020 KTK Advocates vs. Nairobi City County.

8. She is aware that thereafter, the Exparte Applicant was issued with a Decree dated 3rd November 2023 pursuant to the Judgement delivered on 21st September 2023 entered in favour of the Exparte Applicant in the sum of Kenya shillings one billion three hundred and thirty-eight million eleven thousand five hundred and eighty-two and seventy-six cents (Kshs. 1,338,011,582.76) together with interest at 14% p.a from 10th May 2022 until payment in full.

9. She depones that she was aware that at the commencement of the taxation proceedings the firm of Miller & Company Advocates acting for and on behalf of the 1st Respondent failed to represent the same with due care, skill and diligence.

10. As a consequence, thereof the 1st Respondent instructed the firm of Okatch And Partners Advocates to take over the conduct of the matter. Through a Ruling delivered on the 15th day of February 2024, Hon. Lady Justice Anne Omollo allowed the 1st Respondent's Application dated the 30th October 2023 and thus granted the County leave to file a Notice of Objection and a Reference Application out of time.

11. It is her case that the 1st Respondent filed had served their Notice of Objection and a Reference both dated the 22nd February 2024. The 1st Respondent also filed a Notice of Motion Application dated 22nd February 2024 seeking to set aside the Judgment and decree dated 21st September 2023 and 3rd November 2023.

12. It is further her case that on 25th July 2024, the Hon. learned Judge delivered a Ruling not on the application for setting aside the Judgment and decree but on the actual Reference application which no party had submitted on neither had directions been issued.

13. She argues that the Court has never delivered a Ruling on the application for setting aside the Judgment and decree which was the application parties had canvassed by way of written submissions. It is its case that the Ruling of 25th July 2024 which gave rise to the proceedings herein is defective and flawed as the learned Judge addressed a Reference Application instead of the Notice of Motion Application for setting aside the Judgment and decree which was the Application parties had canvassed by way of written submissions.

14. The 1st Respondent being aggrieved by the said Ruling and Orders, filed an Appeal (Nairobi COA Civil Appeal No. E837 of 2024; Nairobi City county vs. KTK Advocates) based on the grounds that the Hon. learned Judge mistakenly did pronounce herself on the reference application being the 1st Respondent's Chamber Summons Application dated the 22nd day of February 2024 instead of the 1st Respondent's Notice of Motion dated the 22nd day of February 2024 for setting aside the Judgment and decree.

15. The said Judgement dated 21st September 2023 and decree dated 3rd November 2023 are closely intertwined and/or interwoven with the subject matter in Nairobi Civil Appeal No. E837 of 2024; Nairobi City County vs. KTK Advocates which is pending hearing and determination a fact well within the Exparte Applicant's knowledge but which was not disclosed to this Court according to her.

16. It's her case that despite the appeal being filed and the Exparte Applicant being served, the Exparte Applicant quickly proceeded with the process of execution by filing this instant suit. The 1st Respondent then instructed the Firm of M/s Okatch and Partners Advocates to represent all the Respondents in the instant suit who in turn filed Notice of Appointment dated 28th February 2025 on behalf of the Respondents.

17. There have been ongoing negotiations including as recently as last week and prior to the delivery of Judgement of 3rd April 2025 in respect of the subject matter herein. The Respondents' Advocates were given oral assurances that the Exparte Applicant would refrain from pursuing further execution proceedings herein as the parties were engaged in negotiations concerning the subject matter herein.

18. The Respondents non-participation in the proceedings herein leading to the Judgement of 3rd April 2025 was neither by design nor deliberate. This Application is brought with utmost good faith and without any malice whatsoever but is in fact intended to ensure that the ends of justice are met. The Respondents have a right of audience in proceedings that involve public interest and public money.

19. In her further affidavit Christine Ireri deposes as follows; The 1st Respondent herein filed Nairobi Civil Appeal No. E837 of 2024; Nairobi City County vs KTK Advocates in exercise of its right to appeal having been aggrieved by the Ruling of the Hon. Lady Justice Omollo delivered on 25th July 2024.

20. The said Ruling of 25th July 2024 dismissed the 1st Respondent's Reference Application despite the fact that the parties therein had not been afforded an opportunity to submit on the said Reference Application. Parties to the said Appeal have been engaging in bona fide negotiations aimed at resolving the matter amicably.

21. The 1st Respondent's actions in simultaneously pursuing appellate relief while engaging in good faith negotiation are both legally sound and appropriate. M/s Okatch and Partners Advocates did not have instructions to proceed with the instant matter. Accordingly, the said firm cannot be deemed

to have been on record for the Respondents as of 29th September 2023 particularly given that the current proceedings were only initiated sometime in 2024. M/s Okatch and Partners Advocates had instructions solely in relation to Nairobi ELC Misc No. E056 of 2020 KTK Advocates vs. Nairobi City County and not in respect of the current proceedings.

22. The Respondents have indeed annexed a draft Replying Affidavit to the Exparte Applicant's Notice of Motion dated 16th October 2024. The Certificate of taxation which formed the basis of the Judgement of 21st September 2023 and the subsequent Decree issued on 3rd November 2023 against the 1st Respondent was premised on flawed taxation process. The 1st Respondent seeks to have the process reconsidered in Nairobi ELC Misc. No. E056 of 2020 KTK Advocates vs. Nairobi City County subject to obtaining appropriate Orders in Nairobi Civil Appeal No. E837 of 2024; Nairobi City County vs KTK Advocates setting aside the Ruling of 25th July 2024.

The Respondent's case;

23. It is the Respondent's case that the application lacks legal substratum and is fatally defective.

24. It is the Respondent's case that, the Notice of Motion seeks to set aside the Judgment of 03.04.25 on principally two grounds that I failed to disclose: -

    i. That the Respondents filed appeal in Nairobi Civil Appeal No. E 837 of 2024.

    ii. That we are engaged in negotiations.

25. It is his case that, the above two principal grounds are spurious and without any legal or factual foundation. It is his case further that the firm of Duncan Okatch of Okatch & Partners have been acting for the Respondents since 29.11.23, and we have attended Court over twelve times.

26. It is argued that the application for Mandamus, was served upon the firm of Okatch & Partners with the Court process and Notices on 18.10.24, 30.01.25 and 11.02.25.

27. The Respondent is troubled because vide his e-mail dated 11.02.25, Duncan Okatch intimated to them that he has no instructions in the matter. Christine Ireri in support of the Notice of Motion, she depones that Okatch &Partners were instructed on 06.02.25.

28. It is the Respondent belief that Mr. Okatch has been on record since 29.11.23. The Respondent argues that it wrote to the Respondents vide my letters dated 28.10.24, 07.11.24 and 11.11.24 seeking amicable settlement. No response has been received. It is this case that the Applicant has not annexed their draft Replying Affidavit to our Notice of Motion dated 16.10.24 nor draft Submissions. It argues that once an Advocate/Client Bill of Costs has been taxed, Judgment entered and Decree issues, the only natural consequence flowing therefrom is issuance of the Writ of Mandamus.

29. It is his case that the following are self-evident in the file: -

    i. Advocate/Client Bill of Costs was taxed on 10.05.22.

    ii. Judgment entered on 21.09.23 and Decree issued on 03.11.23.

    iii. Reference dismissed on 25.07.24.

    iv. Mandamus issued on 03.04.25.

30. He argues that since the Advocate/Client Bill of Costs came up in Court the first time in 08.12.20, he has attended Court over 28 (twenty-eight) times.

31. The Respondents has never made any offer to settle the matter amicably since our Advocate/Client Bill of Costs was taxed on 10.05.22. He believes that the Respondents' Notice of Motion is a fishing expedition with no legal or factual basis or legal substratum.

Analysis and determination:

Upon looking at the application, the supporting and the supplementary affidavit, the replying affidavit, and the rival submission as filed by parties, I find the following to be the issues for determination;

i. Whether the application has merit.

ii. Who should be the costs.

Whether the application has merit.

32. In the case of Mureithi Charles & another v Jacob Atina Nyagesuka [2022] eKLR; in considering whether or not to set aside a judgement, a judge has to consider the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed. Hence the justice of the matter and the good sense of the matter, are certainly matters for the judge. It is, as I have held elsewhere in this ruling an unfettered discretion, although it is to be used with reason, and so a regular judgement would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a prima facie defence which should go to trial or adjudication.

33. The principle obviously is that, unless and until the court has pronounced a judgement upon the merits or by consent it is to have the power to invoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure.

34. It is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail. Indeed, there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter partes hearing, than the judge who acts Exparte. Moreover, the judge is not interfering with the findings made by a fellow judge but is making sure that injustice or hardship would not result from accident, inadvertence or excusable mistake or error.

35. The substance of his judgement would be that in view of the defence, there is prima facie defence. He may not be satisfied with the blunders or non-attendance of the defendant or his advocate, but nevertheless he may hold that it would be just to set aside the Exparte judgement. See Bouchard International (Services) Ltd vs. M'mwereria [1987] KLR 193; Evans vs. Bartlam [1937] 2 All ER 647.

36. The court is satisfied that the Applicant was all along aware of the existence of the Primary suits and the proceedings before this court.

37. This can be gleaned from the annexures and the evidence by way of affidavit of service and numerous correspondences as set out by the Exparte Applicant. The Applicant has admitted that it was served with the mention notice date that is January 2025 and written submissions dated seventh February 2025.

38. The Applicant does not challenge knowledge of the existence of this suit. The explanation as to why the Applicant did not engage in the suit is shaky. The Applicant indicates that they entered into bona fide negotiations towards settling the matter, amicably.

39. Negotiations cannot at any one-time amount to a suspension of the execution of a decree unless the same is by consent.

40. The court has also noted that the Applicants through an email dated 11th February 2025 address to the Exparte Applicant's counsel indicated that he had no instructions. The advocate thereafter filed a notice of appointment on 28th of February 2025.

41. The Applicant should demonstrate that they acted diligently in defending the suit. The argument by the Applicant that it had instructed the form of Miller and Company Advocates who failed to represent them with due care and diligence is not an excuse any more. Gone are the days when the argument of mistake of counsel can bail out a litigant.

42. The Supreme Court in Mohamed v Diamond Trust Bank Kenya Limited & another (Application E035 of 2024) [2025] KESC 17 (KLR) (11 April 2025) (Ruling)

> " It was held that whereas mistakes of counsel ought not to be visited upon a litigant as we held in George Kang'ethe Waruhiu v Munene & another (Civil Application 18 of 2020) [2021] KESC 42 (KLR); and Karinga Gaciani & 11 others v Kimanga & another(Application E004 of 2023) [2023] KESC 23 (KLR) (Karinga Gaciani Case) there must be cogent and credible evidence that the Applicant made concerted efforts or due diligence, through evidence or correspondence of the follow up with the advocates to pursue his rights. It is not enough for a party to simply blame the advocates on record for all manner of transgressions. As we held in Karinga Gaciani Case, "Courts have always emphasized that parties have a responsibility to show interest in and to follow up on their cases even when they are represented by counsel, and it does not matter whether the party is literate or not."

43. The Applicant in the instant suit has fallen into the same space.

44. Through the further affidavit of 29th April 2025, the Applicant points out that they filed an appeal number E837 of 2024 Nairobi city County versus KTK which was dismissed on 25th of July 2024.

45. The Applicant has furnished the court with a draft Replying Affidavit which the court has had the occasion to look at. It is clear from that affidavit at the same contents are the same ones that are regurgitated in the affidavit supporting the instant application.

46. The Applicant has not lodged an appeal. The Applicant has not made any efforts towards settling the decree.

47. The court has taken note that the Applicant has been engaging in a bid towards settling the decretal sum. The Replying Affidavit shows that the Applicant has a defence to advance and they should not be shut out.

48. Having found as I have above, in the spirit of promoting the interests of justice the court is of the view that the Applicant should be given a chance to ventilate its case. In order to balance the interests of the Applicant and the Respondent, the court has deemed it fit to issue a conditional order noting that the Applicant is at the same time willing to settle this matter.

Costs;

49. In Joseph Oduor Anode v. Kenya Red Cross Society, Nairobi High Court Civil Suit No. 66 of 2009; [2012] eKLR Odunga, J. thus observed:

> "...whereas this Court has the discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general rule as adumbrated in the aforesaid statute [the *Civil Procedure Act*] is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, where the Court decides not to follow the general principle, the Court is enjoined to give reasons for not doing so. In my view it is the failure to follow the general principle without reasons that would amount to arbitrary exercise of discretion ..." [emphasis supplied].

50. The *Civil Procedure Act* (Cap. 21, Laws of Kenya), the primary law of judicial procedure in civil matters, thus stipulates (Section 27(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 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" [emphases supplied].

51. In Justice Kuloba's words [Judicial Hints on Civil Procedure, at p.94]:

> "[T]he objects of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure...Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action."

52. In the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR [13] it was held, to the same intent Mr. Justice (Rtd.) Kuloba thus writes in his work, Judicial Hints on Civil Procedure, 2nd ed. (Nairobi: Law Africa, 2011), p. 94:

> "Costs are [awarded at] the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise: Chamilabs v. Lalji Bhimji and Shamji Jinabhai Patel, High Court of Kenya, Civil Case No. 1062 of 1973."

53. With the conduct of the Applicant as highlighted in the analysis, it is this court's finding that I can depart from the costs follow the event standard and award the Respondent costs.

Disposition;

54. The application has merit.

Order:

1. Prayers B, C and D of the application are allowed on condition that the 1st Respondent deposits the decretal amount in a joint interest earning account within 14 days of today's date.
2. Failure to do that then the judgment will stand as issued on 3rd April 2025.
3. The 1st Respondent shall file and serve their response to the application dated 16th October 2024 within seven days.
4. The Exparte Applicant shall thereafter have the liberty to file a supplementary affidavit and supplementary submissions within seven days of service.
5. The matter shall be mentioned to report compliance on 18th November 2025.
6. Cost to the Exparte Applicant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2025

.....

JUSTICE J. CHIGITI (SC)

JUDGE