



Ngombo t/a Steve Kithi & Co Advocates v Bezaken Limited (Miscellaneous Application E033 of 2024) [2025] KEHC 12915 (KLR) (19 September 2025) (Ruling)

Neutral citation: [2025] KEHC 12915 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS APPLICATION E033 OF 2024**

**M THANDE, J
SEPTEMBER 19, 2025**

BETWEEN

**STEPHENS KITHI NGOMBO T/A STEVE KITHI & CO
ADVOCATES APPLICANT**

AND

BEZAKEN LIMITED RESPONDENT

RULING

1. By an application dated 2.5.24, the Applicant seeks the following orders:
 1. Spent.
 2. That Judgment be entered in favour of the Plaintiff/ Applicant as against the Defendant/ Respondent in the sum of Kenya Shillings Six Million, Five Hundred and Sixty Seven Thousand, Four Hundred and Thirty-one Only (Kshs.6,567,432/=) only as per the duly filed Bill of Costs served upon the Respondent via Registered Post on the 26th March, 2024, together with Interest at Court Rates with effect from the date of service of the draft Bill of Costs until payment in full;
 3. That upon examination, the Veil of Incorporation be lifted and that the Directors/ Shareholders of the Defendant/ Respondent Company be held personally liable jointly and severally to satisfy the Decretal sum herein in full;
 4. That this Honourable Court do issue an Order for Attachment Before Judgment of all that Property known as Apartment 311, Simba Village, Diani, built On title Number: Kwale/ Diani Beach Block/ 547 and Registered under the Registered Lands Act (Repealed) as Certificate of Lease Dated 15/09/2020 in the name of Christian Theodor Freidrich Bezner, a Director/ Shareholder of the Defendant/ Respondent Company (hereinafter the "Sole



Traceable Property”) as Security For the Defendants’ Appearance herein, pending hearing and determination of this Application;

5. That in the alternative to Prayer four (4) above and without prejudice thereto, this Honourable Court do issue an Order that a Charge be registered in and over the Sole Traceable Property as hereabove defined as Security For the Defendants’ Appearance herein, pending hearing and determination of this Application;
 6. That upon hearing inter partes and determination of this Application, And consequent upon this Honourable Court, allowing Prayers one (1) through to five (5) hereabove, this Honourable Court do issue a Prohibitory Order to be registered against the aforementioned Sole Traceable Property And the Plaintiff/ Applicant be at liberty to commence Execution thereagainst;
 7. That the Defendant/ Respondent Company be condemned to pay the Plaintiff/ Applicant Costs herein.
2. The Applicant claims that he was instructed by the Respondent to represent it in a sale agreement in respect of a property known as Apartment 311, Simba Village, Diani, built on title Number: Kwale/ Diani Beach Block/ 547. Despite a draft bill of costs being served, the Respondent has failed to respond or raise any objection to the same before the expiry of 1 month from date of service. As such, the Respondent is by law, deemed to have agreed to the quantum of costs as set out in the draft bill of costs.
 3. The Application is opposed by the Respondent vide a notice of preliminary objection dated 6.5.24. The objections are:
 1. That no Advocate Client Bill of Costs has been taxed as between the Applicant and Defendant and as such, the present application has been made prematurely in total disregard and/or contravention of the provisions of Section 51 (1) of the *Advocates Act*.
 2. That there is currently no Certificate of Costs arising from any taxation process between the Applicant and the Respondent and as such, the Applicant's Application is fatally defective for contravening the provisions of Section 51 (1) of the *Advocates Act*.
 3. That the Plaintiff's Application is fatally defective in so far as it seeks the adoption of an untaxed Advocate-Client Bill of Costs as a judgment of the court, contrary to the provisions of Section 51 (2) of the *Advocates Act* which is a procedure alien in law.
 4. That in the absence of a Certificate of Costs from the Taxing Master, the Applicant's Application is fatally defective and the same ought to be dismissed with costs for contravening the provisions of Section 51 (2) of the *Advocates Act*.
 5. That in light of paragraphs 1-4 above, the Applicant's Application is fatally defective and a non-starter that ought to be dismissed with costs.
 4. The parameters for consideration of a preliminary objections are well settled. In the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, Sir Charles Newbold rendered himself thus:

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued 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. On his part, Law JA as he held:

[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.
6. A preliminary objection must be raised on a pure point of law. It cannot be raised if facts must be ascertained and what is sought must not be the exercise of judicial discretion. A preliminary objection should be argued on the assumption that all the facts pleaded by the other side are correct, and it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
7. The Applicant seeks that judgment be entered in respect of a draft bill of costs served upon the Respondent.
8. Section 51 of the *Advocates Act* provides as follows:
 1. Every application for an order for the taxation of an advocate's bill or for the delivery of such a bill and the delivering up of any deeds, documents and papers by an advocate shall be made in the matter of that advocate.
 2. The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.
9. It is clear from the foregoing provisions that for judgment to be entered as sought herein, a bill of costs must be taxed by the taxing officer. Such judgment is in respect of the sum so certified to be due with costs.
10. In *KTK Advocates v Baringo County Government* [2017] KEHC 9503 (KLR), Mativo, J. (as he then was) stated as follows regarding the jurisdiction of this Court to enter judgment in respect of costs:
 32. The law is very clear that once a taxing master has taxed the costs, issued a Certificate of costs and there is no reference against his ruling or there has been a ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter judgment. An applicant is not required to file suit for the recovery of costs. The certificate of costs is final as to the amounts of the costs and the court would be quite in order to enter judgment in favour of the Applicant against the Respondent for the taxed sum indicated in the Certificate of Taxation.
 33. The above section in my understanding, gives the court the jurisdiction to enter judgment for taxed costs where conditions are satisfied. The first condition is that there must be a certificate of the taxing officer by whom the bill has been taxed which certificate has not been set aside or varied by the court. Secondly there must be no dispute as to the retainer. If those two conditions are satisfied, the court has a discretion to enter judgment for the sum certified to be due with costs.
11. In this case, there is no certificate of the taxing officer by whom the bill of costs has been taxed. Indeed, the Applicant refers to a draft bill of costs in respect of which judgment is sought. As indicated, herein, the correct position in law is that a bill of costs must be taxed and a certificate of taxation issued. It is only then that a party may seek entry of judgment in terms of the certificate of taxation. Without such



certificate, the jurisdiction of this Court to enter judgment cannot be invoked. In the circumstances herein, the jurisdiction of this Court to enter judgment as sought by the Applicant, has not crystalized. As such, the application has been brought prematurely and in contravention of the clear provisions of Section 51 of the *Advocates Act*.

12. In light of the foregoing, the Court finds that the preliminary objection dated 6.5.24 which raises a pure point of law is merited and the same is upheld with the result that the Application dated 2.5.24 is struck out. The Respondent shall have costs.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 19TH DAY OF SEPTEMBER 2025

M. THANDE

JUDGE

