



Mwangi Keng'ara & Co Advocates v Mungai (Miscellaneous Civil Application E687 of 2021) [2024] KEHC 5384 (KLR) (Commercial and Tax) (14 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5384 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E687 OF 2021**

FG MUGAMBI, J

MAY 14, 2024

BETWEEN

MWANGI KENG'ARA & CO ADVOCATES ADVOCATE

AND

ZIPPORAH MUNGAI CLIENT

RULING

Background

1. This ruling determines the application dated 20th May 2022 filed by the client, seeking to have the ruling and taxation of the taxing master delivered on 28th April 2022 set aside and for the Bill of Costs dated 2nd September 2021 struck out. It is brought under the provisions of Rule 11(2) of the [Advocates \(Remuneration\) Order](#) (ARO).
2. The application is supported by an affidavit sworn by the client, Zipporah Mungai on 20th May 2022 and opposed vide a replying affidavit sworn by Mercy Nduta Mwangi, the proprietor of the advocate's firm herein, on 9th February 2023.
3. It is not in dispute that the impugned bill of costs herein arises from instructions given to the advocate to represent the client in CMCC 4673 of 2019 Zipporah Mungai V County Capital Limited and 2 Others, which matter was eventually referred to and settled in arbitration. The main bone of contention by the client is that instruction fees should not have been charged twice; at the time the matter was filed in Court and then again during the arbitration.
4. The client also argues that there was an error committed when the taxing master awarded the amount of Kshs. 446,880.89, which was higher than the amount of Kshs. 325,883.73 claimed by the advocate. This amount, the client argues, could not be supported by the pleadings before the Court.



Analysis and determination

5. I have carefully considered the pleadings, written submissions, evidence and authorities cited by the parties in support of their respective positions. The main issue for determination is whether the applicant is deserving of the prayers sought.
6. The advocate has drawn this Court's attention to a ruling delivered by this Court (Okwany, J), in HCCOMM. Misc. E353 of 2021, which arose from CMCC 4673 of 2019 Zipporah Mungai V County Capital Limited and 2 Others. The advocate submits that this Court had already determined the issues that the client seeks to raise in the present application, with finality. On that basis the advocate argues that the application before the Court is res judicata and brought in breach of the [Civil Procedure Act](#).
7. Section 7 of the [Civil Procedure Act](#) provides that:

“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.”
8. I note that the client has not put forward any rebuttal to this submission by the advocate. Misc. Application No E353 of 2021 was between the same parties that are before this Court, as is evident from a copy of the ruling of 28th July 2022. It is also clear from the said ruling that the client is seeking identical orders as those sought in the reference dated 10th November 2021.
9. In ground 6 of the 2021 reference the applicant told the Court then and is telling this Court now, that:

“The taxing officer fell into an error of principal when he failed to appreciate that to allow instruction fees in respect of Nairobi CMCC No. 4673 of 2019 and allow instruction fees in respect the Arbitral proceedings arising out of the same subject matter may amount to duplication of fees in respect of one instruction to the great detriment to the Client.”
10. After considering the issue on its merits the Court concluded at paragraph 12 of its ruling that:

“My finding is that the mere fact that the matter proceeded to arbitration should not bar the taxing master from ascertaining the value of subject matter from the pleadings. I find no error of principle herein to warrant this courts interference with the amount awarded to the advocate.”
11. It is therefore clear that the issues that the client seeks to have this Court determine are issues that have already been determined by this Court previously.
12. It is not clear why the client did not raise the issue that the taxing master had awarded an amount higher than the amount claimed by the advocate in the reference filed in 2021 yet this is an issue that should have been within the client's knowledge.



13. In this regard, the explanatory note no. 4 to section 7 of the Civil Procedure Rules provides as follows:

“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.”

14. The Courts have held with consistency that at some point, litigation must come to an end. This Court finds that the matter before Court is res judicata and cannot therefore be entertained.

Disposition

15. The application dated 20th May 2022 is devoid of merit and is dismissed with costs to the advocate/respondent.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 14TH DAY OF MAY 2024.

F. MUGAMBI

JUDGE

