



**Wandeto v Nderi t/a Nderi & Kiingati Advocates (Civil Appeal
5 of 2015) [2024] KEHC 14099 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14099 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL 5 OF 2015
DKN MAGARE, J
NOVEMBER 14, 2024**

BETWEEN

JOHN MWANGI WANDETO APPELLANT

AND

JAMES N NDERI T/A NDERI & KIINGATI ADVOCATES RESPONDENT

RULING

1. There are lies, damn lies and statistics, and now this case. The only reason the matter is in court is because, someone is unable to accept the words that ring true to date, as postulated in the American declaration of independence that they ‘hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.’
2. How can the truth be self-evident and it has refused to be in this matter? In another era, the French held to their firm believe in Libert ,  galit , fraternit , that is liberty, equality, fraternity. Liberty does not include the right to do whatever one needs, as doing so, will lead to a state of nature. According to Thomas Hobbes, the state of nature was like an existence where each man lives for himself characterized by extreme competition and where no one looks out for another. In that connection, the life of man will be solitary, poor, nasty, brutish, and short.
3. This matter has totally refused to go and has been unable to deal with what we knew, as a functus officio. The Court of Appeal in Telkom Kenya Limited vs. John Ochanda (Suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR held that: -

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon...

The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional



re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in *Jersey Evening Post Limited vs A1 Thani* [2002] JLR 542 at 550: also cited and applied by the Supreme Court;

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.”

4. The genesis of this application traces back to 22/3/2014 when the court entered judgment for Kshs. 22,000/= in Nyeri CMCC 227 of 2013. The applicant sought stay of execution vide an application dated 23/4/2014. The amount relates to a land sale agreement conducted on 3/5/2013 at a price of Ksh. 1,050,000/=. The court (Hon. Nyakundi) entered Judgment for the said amount and costs.
5. Subsequently the Applicant filed this appeal in 2015 pursuant to leave granted by Hon. Ngaah J, on 17/2/2015 in HC Misc. 1 of 2015. The High Court Mativo J, as he was then, allowed the appeal and found the Judgment in the court below a nullity. He stated as follows: -
 - i. I find that the learned magistrate incorrectly interpreted and misapplied the law and arrived at the wrong decision. The suit in the lower court clearly offended the clear provisions of the *advocates act* cited above.
 - ii. The upshot is that this appeal succeeds. I hereby set aside the judgment, decree and all consequential orders made in Nyeri CMCC No 227 of 2013. The Respondent shall bear the costs of this appeal and the costs in the lower court.
6. The Respondent appealed to the Court of Appeal vide Civil Appeal 14 of 2019. That appeal is reported as *James N. Nderi t/a Nderi & Kiingati Advocates v Wandeto (Civil Appeal 14 of 2019)* [2023] KECA 1058 (KLR) (22 September 2023) (Judgment). The Court of Appeal [J Mohammed, LK Kimaru & AO Muchelule, JJA] found the following facts;-
 17. According to the plaint, the respondent had refused to pay the agreed fees, and that was why the appellant had resorted to the Act. He had, in accordance with section 48 drawn and served an itemized bill of costs which he had sent to the respondent, demanding Kshs.22,000.
 18. It was therefore clear from the pleadings that the parties had agreed on fees in respect of drawing the sale agreement. The respondent said the fees was Kshs.4,000, but the appellant was silent on it. But it was clear that the agreed fees was not Kshs.22,000. He relied on the Act when the respondent did not pay the agreed fees.
 19. It was clear from the grounds in the appeal to the High Court that the respondent was complaining that the trial court had agreed with the appellant that the fees was as per the Advocates Remuneration Order, and had erroneously not considered his defence on the agreed fees. The respondent, as the appellant in the High Court, was entitled to have his grievance determined, and to have a decision on what the agreed fees was. He did not receive this determination.
7. The Court of Appeal ordered as follows: -



21. In the final analysis, we allow the appeal, and set aside the judgment and decree by the High Court. In its place, there shall be a judgment for the Appellant against the Respondent in the sum of Kshs.4,000 together with costs and interest.
 22. Costs follow the event, but, in the circumstances of this case, we order that each party pays his own costs.
8. It is instructive that the Court of Appeal was aware that the costs follow the event. However, each party was to bear its costs. Which costs were awarded? It is the Applicant who succeeded in the High Court at the long run. The Respondent had a decree in the lower court for 22,000/=. Had the Applicant lost, the decree of 22,000/= would have remained.
 9. A total of Ksh. 18,000/= was removed by the Court of Appeal from the lower court award of Ksh. 22,000/=. Nevertheless, the court of appeal did not award costs for the High Court appeal. It set aside the lower court award of 22,000/=. Without specifically mentioning the costs of the high court, the only costs awarded were lower court costs on the basis of Ksh. 4,000/=. Under the Advocates Remuneration Order, Rule 16, the taxing master has discretion as doth: -
SUBPARA 16.
Discretion of taxing officer notwithstanding anything contained in this Order, on every taxation the taxing officer may allow all such costs, charges and expenses as authorized in this Order as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but, save as against the party who incurred the same, no costs shall be allowed which appear to the taxing officer to have been incurred or increased through overcaution, negligence or mistake, or by payment of special charges or expenses to witnesses or other persons, or by other unusual expenses
 10. The deputy registrar ended taxing a sum of Ksh. 131,475,/= in a matter whose judgment sum was Ksh.4,000/=. There was no order granting costs in this matter.
 11. It also follows that given that the dispute was advocate client, the parties could not circumvent the process through awarding of instructions costs. Rule 13 of the Advocates (Remuneration)Orderprovides as follows:
 - (1) The taxing officer may tax costs as between advocate and client without any order for the purpose upon the application of the advocate or upon the application of the client, but where a client applies for taxation of a bill which has been rendered in summarized or block form the taxing officer shall give the advocate an opportunity to submit an itemized bill of costs before proceeding with such taxation, and in such event the advocate shall not be bound by or limited to the amount of the bill rendered in summarized or block form.
 - (2) Due notice of the date fixed for such taxation shall be given to both parties and both shall be entitled to attend and be heard.
 - (3) The bill of costs shall be filed in a miscellaneous cause in which notice of taxation may issue, but no advocate shall be entitled to an instruction fee in respect thereof.
 12. Even where the costs had been awarded, this is a matter that arose from advocate client fees. Instruction fees is not payable on a claim for professional Advocates fees. Nevertheless, had the costs been awarded, a sum of Ksh 1,900 would suffice as per paragraph 4 of the taxing master’s ruling. All the other items are related to execution and are not costs of defending the appeal.
 13. The end result is that I allow the application dated 26/9/2024. The Applicant shall have disbursements of Kshs. 3,500/-.



Determination

14. I therefore make the following orders: -

- a. The application dated 29/9/2024 is merited. I allow the same, set aside the ruling of the taxing master given on 28/8/2024 including the subsequent certificate of taxation.
- b. Consequently, the preliminary objection dated 13/5/2024 is allowed. The entire party and party bill of costs dated 11/10/2023 is struck out as there was no order awarding costs in the high court.
- c. For avoidance of doubt, the Applicant was the successful party in the High Court.
- d. The reference was filed in time having been filed one day after receiving reasons from the taxing master.
- e. The Applicant shall have disbursements of Ksh. 3,500/= payable within 15 days, in default execution do issue.
- f. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 14TH DAY OF NOVEMBER, 2024.

KIZITO MAGARE

JUDGE

In the presence of:-

Pro se Applicant

Kimunya & Co. advocates for the Respondent

Court Assistant – Jedidah

