



REPUBLIC OF KENYA



Kibunja t/a Kibunja & Associates v New Pilion Estates Limited (Miscellaneous Civil Application 79 of 2021) [2024] KEHC 15494 (KLR) (4 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15494 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS CIVIL APPLICATION 79 OF 2021
SM GITHINJI, J
DECEMBER 4, 2024**

BETWEEN

STEPHEN KINYAJUI KIBUNJA T/A KIBUNJA & ASSOCIATES ... APPLICANT

AND

NEW PILION ESTATES LIMITED RESPONDENT

RULING

1. For determination is the Notice of motion dated 19th September 2024 seeking the following orders;
 1. Spent.
 2. Spent.
 3. Spent.
 4. Spent.
 5. That pending inter-parte hearing of this Application, this honourable court be pleased to grant unconditionally leave to the Respondent/Applicants herein to have the issue of retainer determined by this honorable court.
 6. That costs of this application be provided for.
2. The Application is premised on the grounds set out on its face and the Supporting Affidavit of Anthony Waweru Kamau one of the directors of New Pilion Estates Limited who stated that he is a stranger to the Applicant/Advocate, never met him, never had a relationship with him and he does not know him on behalf of the Company. He stated that M/s Thairu and Company advocates have been their advocates for a long time and KKA Advocates. Further, that the pleadings served upon them by the Applicant, the replying affidavit dated 25 June 2024, makes an attempt to explain how an advocate/client relationship was established which narrative is to impose a retainer through a third party. In



addition, the said affidavit was never served upon them. He added that as a director of the Respondent, the company, they have no relationship with the Applicant nor his nephew Alex Kibunja and any taxation in this matter is strange to them and ought be stayed until the issue of retainer is determined.

3. In response, the Applicant filed a P.O dated 2nd October 2024 raised on the following grounds;
 1. The Application dated 19th September 2024 is bad in law as it offends the Provisions of Section 7 of the *Civil Procedure Act* as it is Res judicata.
 2. The averment made in the application are frivolous, vexatious and devoid of any probative value as it seeks to reopen issues that have been conclusively decided.
 3. The application dated 19th September 2024 should be struck out and expunged from court records.

Analysis and Determination

4. Both the Application and the P.O were concurrently canvassed by way of written submissions. I have considered the Application, the submissions by the parties as well as the authorities relied upon. The issue arising for determination is;

1. Whether the Notice of Motion dated 19th September 2024 is res judicata

5. The doctrine of res judicata is set out in Section 7 of the *Civil Procedure Act* as follow:

“Res judicata

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.”

6. The Court in *Invesco Assurance Company Limited & 2 others v Auctioneers Licensing Board & another; Kinyanjui Njuguna & Company Advocates & another (Interested Parties) [2020] eKLR* explained the said section 7 as follows:

“The doctrine will apply only if it is proved that:

- i. The suit or issue raised was directly and substantially in issue in the former suit.
- ii. That the former suit was between the same party or parties under whom they or any of them claim.
- iii. That those parties were litigating under the same title.
- iv. That the issue in question was heard and finally determined in the former suit.
- v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.”

7. On 16th September 2024, when the parties appeared before me in court, they both made oral arguments and more specifically on the issue of retainer. Upon hearing the parties, the court rendered itself as follows; the respondent given the ruling of 2/8/24 had the obligation to find out how to determine



the issue of retainer rather than seek directions of the court orally on how to do the same. Unless there is such an Application, given the dismissal of the P.O, the matter reverts back to taxation as directed.

8. This prompted the Respondent/Client to file the instant Application which in prayer number 4 of the Notice of motion, seeks leave of the court to determine the issue of retainer. Though there have been numerous Applications and Preliminary Objections, I must point out that the issue of retainer has never been expressly deliberated on, and put to rest. The Notice of Motion dated 19th September, 2024 is not therefore res-judicata. The instant application more or less seeks leave to introduce the issue of retainer. In the circumstance, the application is merited and the sought for leave is granted to the Applicant to have the issue of retainer fully deliberated and resolved by this honourable court.

Costs be in the cause.

Hearing on 3rd February, 2025.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 4TH DAY OF DECEMBER, 2024.

S.M. GITHINJI

JUDGE

In the presence of; -

Ms Lilian Mwaura for the Applicant

Ms Wanjiku Nyaga for the Respondent

