



Sare Developers Limited v Airo & another (Environment and Land Appeal E013 of 2022) [2025] KEELC 5089 (KLR) (18 June 2025) (Ruling)

Neutral citation: [2025] KEELC 5089 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL E013 OF 2022
FO NYAGAKA, J
JUNE 18, 2025**

BETWEEN

SARE DEVELOPERS LIMITED APPLICANT

AND

CHARLES ATIENO AIRO 1ST RESPONDENT

BARRACK OTIENO DACHE 2ND RESPONDENT

RULING

1. By way of a Chamber Summons dated 03/12/2024, the Applicant seeks the following orders;
 1. Spent
 2. That, this Honourable court be pleased to order an enlargement of time so as to enable the applicant file a taxation reference to the ruling of the taxing officer made on the 19th day of April 2023 in taxing the Respondents Bill of costs dated 2nd December 2022.
 3. That, this Honourable court be pleased to grant leave to the Applicant to file a taxation reference to the ruling of the taxing officer made on the 19th day of April 2023 in taxing the Respondents Bill of costs dated 2nd December 2022 as per the draft Chamber summons taxation reference annexed hereto.
 4. That, upon granting prayer 3 above, the annexed chamber summons taxation reference be deemed as duly filed.
 5. That, during the pendency of this Application, this Honourable court be pleased to grant stay of execution of the said Respondents bill of costs dated 2nd December 2022.
 6. That, costs be in the cause.



2. The Application was brought under sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 50 Rule 6 of the *Civil Procedure Rules*, and ‘all other enabling provisions of the law’. The phrase ‘all other enabling provisions of the law’ is meaningless in law. But the applicant relies on the grounds on the face of it and the contents of the affidavit sworn by Samwel Odingo.
3. In his affidavit, he stated that the applicant filed an Application dated 17/06/2022 which was dismissed with costs to the respondent. Further, that the Respondents filed their Bill of Costs dated 02/12/2022 which was taxed on 19/04/2023 at Kshs. 2,077,517/-. He argued that the bill was in error as it was taxed based on the appeal but not the dismissed Application. He additionally deposed that the bill of costs ought to have been filed in regard to the dismissed Application and not the appeal as it is yet to be disposed of.
4. The deponent explained the delay of the filing of the reference taxation, stating that counsel for the applicant had initially made a similar Application seeking extension of time and the court granted 21 days leave for counsel to file the taxation reference and consequently counsel filed a Notice of Objection to taxation. However, when the parties appeared before the taxing officer on 14/12/2023, the taxing officer declared herself *functus officio* and directed the file back to the judge. Relying on the ruling declaring herself *functus officio*, the applicant sought to rely on the same as the basis for the taxation reference. He deposed that it would be in the interest of justice that the application be allowed.
5. The 1st respondent filed a Replying Affidavit sworn 18/12/2024 in opposition to the Application. He urged that the Application is *res judicata* as a similar application was made by the applicant vide Chamber Summons dated 25/05/2023 and the court already deliberated on the matters herein and made a determination on the same. He further deposed that the applicant filed a Notice of Objection dated 14/11/2023 in breach of the orders of the court. He denied that he applicant appeared before the taxing officer on 14/12/2023 and urged that no ruling has emanated from the said court over the said Notice of Taxation.
6. The deponent averred that the delay in filing the application was unexplained and the applicant was abusing the court process as after the taxation officer declared herself *functus officio* on 14/12/2023, the applicant moved the court vide the Application dated 11/01/2024 seeking stay of execution pending the determination of the notice of objection dated 14/11/2023 before the very taxing officer. Further, that the Application is overtaken by events by dint of the ruling of the court dated 19/11/2024. Urging that the court is *functus officio*, the deponent urged the court to dismiss the Application with costs.
7. The parties filed submissions on the Application.

Analysis and Determination

8. I have considered the submissions, analysed the evidence and the law. The following issues arise for determination; Whether the Application is *Res Judicata*, and if so, whether the order for enlargement of time to file the appeal should issue, and who to bear the costs the application.

Whether the Application is Res Judicata

9. Section 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya defines the doctrine of *Res Judicata* in the following terms: -

“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.”

10. The *Civil Procedure Act* also provides explanations with respect to the application of the res judicata rule. *In re Estate of Riungu Nkuuri (Deceased)* [2021] eKLR the court stated as follows:

“The test for determining the Application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others* [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

- (a) The suit or issue was directly and substantially in issue in the former suit.
- (b) That former suit was between the same parties or parties under whom they or any of them claim.
- (c) Those parties were litigating under the same title.
- (d) The issue was heard and finally determined in the former suit.
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

11. The Respondents’ position is that the applicant made a similar application vide a Summons dated 25/05/2023 which was determined.

12. I have perused the record and there is a Chamber Summons dated 25/05/2023 by the Applicant seeking the following orders;

- a. That this Honourable Court be pleased to order an enlargement of time to enable the Applicant file a Reference and/or do an objection, albeit out of time, to the ruling of the Deputy Registrar made on the 19th day of April, 2023 in taxing the Respondents’ Bill of Costs dated 2nd December 2022.
- b. That costs of this Application be in the cause.

13. How was the matter res judicata? Vide the ruling delivered on 23/10/2023, the court rendered its decision on the application. It allowed the applicant to file the Reference against the ruling of the Deputy Registrar within 21 from the date of ruling.

14. The issues the present Application raises were directly and substantially in issue in the Application dated 25/05/2023, and they were heard and finally determined as illustrated above. Whether the Applicant added one or two other prayers to the one for leave, the main one was one seeking leave: the other prayers were supplementary to the one seeking leave. The Application is therefore *res judicata*.

15. The upshot of the foregoing is that I find as follows;

1. The Application dated 03/12/2024 is *res judicata* and is dismissed.
2. Costs to the respondents.

16. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 18TH DAY OF JUNE 2025



HON. DR. IUR FRED NYAGAKA,

JUDGE

In the presence of,

Watama Adv. holding brief for Odingo Adv. for Applicant

Singei Adv. For the Respondent

