



Nzioka & Co. Advocates v Harith Sheth Advocates; Otumba (Interested Party) (Civil Case 187 of 2015) [2025] KEHC 14528 (KLR) (Civ) (30 September 2025) (Ruling)

Neutral citation: [2025] KEHC 14528 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 187 OF 2015

LP KASSAN, J

SEPTEMBER 30, 2025

BETWEEN

NZIOKA & CO. ADVOCATES PLAINTIFF

AND

HARITH SHETH ADVOCATES DEFENDANT

AND

BRYAN YONGO OTUMBA INTERESTED PARTY

RULING

1. Before this Court is an application dated 06.11.2024, filed by Bryan Samuel Yongo Otumba Interested Party (hereinafter "the Applicant"), seeking orders to compel the firm of Harit Sheth Advocates (hereinafter "the Defendant") to honour the terms of a consent dated 04.05.2016, particularly concerning the payment of Kshs. 3,000,000/= to the Applicant. This sum is alleged to have been improperly disbursed by the Defendant to the firm of S.O. Owino & Associates Advocates from the proceeds of Kshs. 25,000,000/= purportedly due and payable to the Applicant as per the aforementioned consent.
2. This application arises within the broader context of Civil Case Number 187 of 2015 (OS) between Nzioka and Co. Advocates (Plaintiff) and Harit Sheth Advocates (Defendant), where a judgment was delivered on 03.11.2015. Subsequently, a consent order dated 27.04.2016, and filed on 04.05.2016, joined Bryan Samuel Yongo Otumba as an Interested Party and amended the judgment terms, including the payment of Kshs. 25,000,000/= to the Interested Party.
3. Crucially, there exists a prior Ruling by J. K. Sergon, Judge, delivered on 30.12.2021, in respect of the Interested Party's application dated 18.05.2021, seeking to execute and attach the Defendant for a sum of Kshs. 10,650,000/=. In that Ruling, the core issue revolved around a letter of discharge dated



18.05.2016, authored by the Interested Party. The Court specifically found that the Interested Party had admitted authoring the letter of discharge and, in the absence of credible evidence to prove he was duped, concluded that the Defendant had satisfactorily established that the Interested Party willingly authored the said letter discharging the Defendant from further liability. The Court further found that the language of the letter clearly indicated an irrevocable discharge of the Defendant from any liability under certain undertakings. Consequently, the Interested Party's motion dated 18.05.2021, was dismissed for lack of merit.

Applicant's submissions

4. The Applicant argues that the Defendant is in flagrant breach of the court orders, including those affirmed by the Court of Appeal in a judgment dated 22.05.2020. He contends that the payment of Kshs. 3,000,000/= to S.O. Owino & Associates was a fraudulent act and professional misconduct, as S.O. Owino & Associates was not his advocate in HCCC No. 187 of 2015 (OS), where he acted in person.
5. He further submits that the professional undertaking dated 03.05.2016, between the Defendant and S.O. Owino & Associates lacked consideration, was based on misrepresentation, and could not vitiate or alter the terms of the binding consent dated 27.04.2016. The Applicant emphasizes that the Defendant, as a stakeholder, had a fiduciary duty to him and could not disburse funds to strangers without his express written authority.
6. The Applicant highlights that the previous ruling by J. K. Serگون, Judge, and a subsequent one by Onger J., are distinct from this application and do not render it res judicata, as this application specifically targets the fraudulent payment of Kshs. 3,000,000/=. He asserts that the professional undertaking between the Defendant and S.O. Owino & Associates, being unfiled, unadopted by the court, and lacking his consent, cannot override the consent judgment.

Defendant's submissions

7. The Defendant opposes the Interested Party's application, relying on the Replying Affidavit sworn on 17.12.2024. The Defendant's primary argument is that the claim raised by the Interested Party is wholly and solely based upon the terms of a Consent Letter, which was adopted as an order of the Court.
8. The Consent Letter stipulated that the Defendant would pay a total judgment sum of K. Shs. 100,000,000/-, with K. Shs. 50,000,000/- designated for the Interested Party. The Defendant submits that the K. Shs. 25,000,000/= payable to the Interested Party under the Consent Letter has been fully and properly paid. Although the Interested Party now contends that K. Shs. 3,000,000/= remains unpaid, the Defendant had given a professional undertaking concerning this amount to the Interested Party's advocates. The Defendant later made a payment toward fulfilling this undertaking.
9. Following the payments, the Interested Party confirmed in a letter dated 18.05.2016 that all sums due and payable had been received and that the Interested Party unequivocally and irrevocably discharged the Defendant from any and all liability under the Consent. The Defendant asserts that based on this confirmation, there is nothing further due or payable.
10. The Defendant submits that the present application amounts to an attempt to enforce a consent from which the Defendant has already been discharged. The Court previously ruled on this matter on 30.12.2021, upholding the discharge of the Defendant from liability under the undertakings. This ruling was subsequently affirmed on 01.03.2024.



11. Therefore, the Defendant contends that the application is barred by the doctrine of res judicata, as the application seeks to re-litigate matters that have already been conclusively determined by the Court between the same parties. The application is characterized by the Defendant as wholly misconceived, untenable in law, and a gross abuse of the process of the Honourable Court, as it constitutes a duplication and relitigation of settled issues.
12. The Defendant argues that the law governing the variation of a consent judgment requires specific grounds, such as fraud, collusion, or mistake, which are not present here. The Defendant prays that the Interested Party's application be dismissed in its entirety for being res judicata, frivolous, vexatious, and an abuse of the court process.

Issues for Determination

13. This Court is called upon to determine:
 - i. Whether the Applicant's current claim for Kshs. 3,000,000/= is effectively precluded by the prior Ruling of 30.12.2021, regarding the letter of discharge.
 - ii. Whether, notwithstanding the prior Ruling, there are any new grounds or circumstances warranting a re-opening of the issue of payment from the consent dated 04.05.2016.
 - iii. Whether the Applicant is entitled to the orders sought in the application dated 06.11.2024.
 - iv. Who is to bear the costs.

Analysis

14. The Court has carefully considered the application, rival affidavits, prior rulings, and submissions by both parties.
15. On the first issue, whether the Applicant's claim for Kshs. 3,000,000/= is precluded by the ruling of 30.12.2021, it is evident that the earlier ruling directly addressed the effect of the discharge letter dated 18.05.2016. The Court found that the Applicant voluntarily executed the letter discharging the Defendant from further liability, and that finding was neither set aside nor appealed against. By the principle of estoppel, the Applicant cannot approbate and reprobate, having affirmed receipt of full payment and executed a discharge, he cannot now turn around to enforce further sums from the same consent. To permit such an attempt would amount to re-opening an issue conclusively determined and affirmed on appeal, contrary to the doctrine of res judicata under Section 7 of the [Civil Procedure Act](#).
16. On the second issue, whether there are new grounds warranting a re-opening, the Applicant argues that the payment of Kshs. 3,000,000/= to S.O. Owino & Associates was fraudulent and constituted professional misconduct. However, S.O. Owino & Associates is not a party to these proceedings, and allegations of professional impropriety cannot be conclusively resolved in this forum. The proper recourse would have been to institute a separate claim against the said firm, or to lodge a complaint with the Advocates Disciplinary Tribunal. The mere characterization of the payment as "fraudulent" does not, in itself, meet the threshold for disturbing the earlier finding, particularly where the Applicant has not demonstrated what has changed since the 2021 ruling. No fresh evidence of fraud or collusion has been adduced that could not have been placed before the Court earlier.
17. On the third issue, entitlement to the orders sought, the Applicant has failed to demonstrate any legal or factual basis for compelling the Defendant to pay an additional Kshs. 3,000,000/=. The Defendant has shown that the sums due under the consent were paid, and that the Applicant executed a binding discharge. The Applicant is thus estopped from raising further claims. Moreover, as already noted, this



Court cannot purport to reopen a matter conclusively determined. If the Applicant wished to pursue the allegations against S.O. Owino & Associates, the proper forum was by way of a distinct suit or complaint before the appropriate professional body.

18. In the circumstances, the Court finds that the present application is misconceived, frivolous, and amounts to an abuse of the court process.

Determination

19. Accordingly, the application dated 06.11.2024 is hereby dismissed. The Defendant is entitled to the costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF SEPTEMBER 2025

HON. L. P. KASSAN

JUDGE

