



**Nduati & Company Advocates v Mugo (Miscellaneous Application  
18 of 2021) [2025] KEHC 14142 (KLR) (Civ) (9 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14142 (KLR)

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

**CIVIL**

**MISCELLANEOUS APPLICATION 18 OF 2021**

**H NAMISI, J**

**OCTOBER 9, 2025**

**BETWEEN**

**NDUATI & COMPANY ADVOCATES ..... ADVOCATE**

**AND**

**MARY WAIRIMU MUGO ..... CLIENT**

**RULING**

1. The dispute herein arises from an Advocate-Client Bill of Costs dated 10 May 2021. The genesis lies in a professional relationship that has since soured. The Advocate was retained by the Client to act for her in her capacity as the Administratrix of the estate of her late husband in Nairobi HC Succession Cause No. 77 of 2019 and in a related conveyancing transaction for the sale of a property.
2. It is common ground that the course of the said conveyancing transaction, the Advocate received a sum of Kshs 19,640,000/= on behalf of the Client, which sum was to be held in trust and disbursed according to the Client's instructions. Subsequently, the Advocate-Client relationship deteriorated, leading to the termination of the retainer.
3. Following the termination, the Advocate filed two separate Bills of Costs for recovery of his fees. In this cause, upon hearing the parties, the Taxing Master taxed the Bill in the sum of Kshs 678,594/=. A Certificate of Taxation was issued on 5 August 2022.
4. A separate Bill of Costs dated 28 April 2021 was filed in HC Misc Application No E313 of 2021. The Bill was taxed and Certificate of Taxation issued for the sum of Kshs 1,612,510/=.
5. The Client alleges that despite the ascertainment of the fees through taxation, the Advocate has refused to release the balance of the trust funds, which the Client claims amounts to Kshs 6,386,630/-. The Advocate admits to holding a balance of Kshs 4,359,000/= over which he asserts he is exercising a lawful



Advocates' lien. The impasse over the funds withheld has spawned a multiplicity of legal proceedings. The Client instituted Nairobi HCCOM E589 of 2021 seeking, inter alia, an order compelling the Advocate to render a cash account and release the funds held in trust. That suit was subsequently dismissed for want of prosecution on 20 November 2024. The Client has since filed an Application dated 8 May 2025 seeking to reinstate the suit.

6. Furthermore, the Client lodged a complaint against the Advocate with the Advocates Complaints Commission. The Commission, after its initial inquiry, found merit in the complaint at the prima facie stage and referred the matter to the Advocates Disciplinary Tribunal for hearing and determination.
7. Presently, before the Court are two competing Applications. The Advocate filed Notice of Motion dated 7 March 2025, which was quickly followed by the Client's Notice of Motion dated 9 May 2025.

#### **Notice of Motion dated 7 March 2025**

8. The Advocate's Application seeks the following:
  - i. That the Certificate of Costs in respect of Taxation Order made on 17 June 2021 amounting to Kshs 678,594/- be adopted as judgement and decree of this Court;
  - ii. Any other orders as this Honourable Court may deem fit to grant in the circumstances;
  - iii. That the costs of the Application be provided for.
9. The Application, which is brought under section 51(2) of the *Advocates Act* and Rule 7 of the Advocates Remuneration Order, is premised on the grounds on the face thereof and supporting by the Affidavit sworn by Stanley Nduati, Advocate.
10. In response thereto, the Client filed a Replying Affidavit.

#### **Notice of Motion dated 9 May 2025**

11. The Client's application dated 9 May 2025 seeks the following orders:
  - i. That this Honourable Court be pleased to give directions on the issue of the Client's pending balance of Kshs 6,386,630/= being unlawfully held by the Advocate;
  - ii. That this Honourable Court be pleased to issue an order directing the Advocate to pay to the Client's account an amount of Kshs 4,105,526/=, being the balance of the money in the Advocate's custody held in trust for the Client less the taxed costs in Nairobi HCC Misc Cause No. 18 of 2021 and Nairobi HCC Misc No. E313 of 2021;
  - iii. That this Honourable Court be pleased to strike out the Advocate's Application dated 7 March 2025 together with the Supporting Affidavit sworn on 7 March 2025;
  - iv. That costs of this Application be in the cause
12. The Application is premised on the grounds thereof and supported by an Affidavit sworn by the Applicant as well as a Further Affidavit. In response thereto, the Advocate filed a Replying Affidavit and Grounds of Opposition.
13. Parties canvassed both applications by way of written submissions.



## The Advocate's Case

14. The Advocate argues that there is a clear statutory pathway to judgement. He relies on section 51(2) of the *Advocates Act*, arguing that the Certificate of Taxation is final as to quantum of costs. He submits that since the certificate has not been set aside, altered or challenged by way of a reference, and the retainer is not in dispute, the Court's role is simply to enter judgement as prayed.
15. The Advocate anchors his claim for interest on Rule 7 of the Advocates Remuneration Order, 2014, asserting an entitlement to interest at 14% per annum from 10 May 2021, being the date of the Bill of Costs.
16. In opposing the Client's Application, the Advocate raises several preliminary and substantive grounds. The Advocate contends that the Client's application is a procedurally flawed and surreptitious attempt to challenge the taxation decision at the execution stage. He argues that the proper recourse for a party aggrieved by a Taxing Officer's decision is to file a reference under Paragraph 11 of the Advocates Remuneration Order, a procedure that the Client failed to invoke.
17. The Advocate argues a plea of res judicata, as enshrined in Section 7 of the *Civil Procedure Act*. He submits that these very issues were directly and substantially in issue in HCCOMM E589 of 2021, which was dismissed by a competent court, and that such dismissal operates as a final determination.
18. It is the Advocate's contention that the Client is engaging in vexatious litigation and forum shopping. He points to the multiplicity of suits and complaints as evidence of a calculated strategy to delay and frustrate him from realizing his lawfully taxed fees. The Advocate maintains that he is lawfully exercising a retaining lien over the funds held in the client account. He claims this lien secures not only the taxed costs in this matter and in Misc Application E313 of 2021, but also the Party-and-Party costs he is entitled to in the dismissed suit, HCCOMM E589 of 2021.

## The Respondent's Case

19. The Client does not contest the quantum of the taxed costs as certified. Her opposition to the Advocate's Application and the foundation of her own application are rooted in principles of equity, the Court's inherent jurisdiction, and the fiduciary duties owed by an advocate to a client. The Client's central argument is that the Advocate is unlawfully withholding a sum of Kshs 6,386,630/= that is significantly larger than the total of his taxed costs from both matters. The Client argues that granting the Advocate a decree would be to aid his unjust enrichment and permit double recovery, as he already holds funds far in excess of what is due to him. She implores the Court to exercise its discretion to order a set-off of the taxed costs against the funds held.
20. The Client submits that as an officer of the Court, the Advocate stands in a position of trust. His refusal to account for and release the balance of trust funds, even after his fees were ascertained through taxation, constitutes a grave breach of this fiduciary duty. She invokes the maxim that "he who comes to equity must come with clean hands", arguing that the Advocate's conduct disentitles him to the relief he seeks.
21. The Client refutes the plea of res judicata, arguing that it is untenable for two main reasons. First, HCCOMM E589 of 2021 was dismissed for want of prosecution, not on its merits after a hearing. Second, there is a pending application for its reinstatement, meaning that the matter cannot be considered to be finally determined.
22. The Client contends that the Advocate's lien is being exercised unlawfully. She argues that a lien cannot be asserted for speculative or future costs that have not yet been taxed, specifically the Party-and-Party



costs in the dismissed suit. The Client submits that the lien for the taxed Advocate-Client costs was discharged the moment the costs were ascertained, as the funds held were more than sufficient to cover them. The Client further argues that the Advocate is estopped from claiming interest because he neither included a claim for interest in his Bill of Costs nor was interest awarded by the taxing Master in her Ruling. The Client relies on the decision in *Otieno, Ragot & Company Advocates -vs- Kenindia Assurance Co Ltd*, Civil Appeal 165 of 2019 KECA 1443 (KLR) to support this position.

### **Analysis & Determination**

23. I have keenly read the Applications, the Affidavits and submissions. The first question for this Court to determine is whether the Client's Application is *res judicata*. The Advocate claims that the Application raises issues substantially in issue in Nairobi HCCOMM E589 of 2021, which was dismissed for want of prosecution. The Advocate relied on the provisions of section 7 of the Civil Procedure Rules and the cases of *Peter Ngome -vs- Plantex Company Ltd* [eKLR] and *Njue Ngai -vs- Euphantus Njiru Ngai & Another* [eKLR].
24. The doctrine of *res judicata* is a fundamental pillar of our legal system, designed to ensure the finality of litigation and to protect litigants from being vexed twice over the same cause. The conditions for its application are well settled, as articulated by the Court of Appeal in *Uhuru Highway Devt Ltd -vs- Central Bank of Kenya & 2 Others*, eKLR. The critical question for this Court is whether a dismissal for want of prosecution under Order 17 Rule 2 of the Civil Procedure Rules amounts to a matter that has been heard and finally decided.
25. While it is correct that the Court of Appeal in *Njue Ngai* case (*supra*) affirmed that a dismissal for want of prosecution can, in appropriate circumstances, sustain a plea of *res judicata*, this principle is not absolute and must be applied with caution. A dismissal for want of prosecution is, by its very nature, a procedural dismissal. It does not involve the Court undertaking a substantive adjudication of the issues, hearing evidence, and making a determination on the merits of the claim. More importantly, the Client has deponed, and the Advocate has not denied, that there is an active application for reinstatement of HCCOMM E589 of 2021. The existence of this pending application fundamentally alters the legal landscape. A suit that is capable of being revived by the Court through a pending application cannot be said to have been finally decided. Finality, in the context of *res judicata* implies that all avenues for reviving the suit within the same court hierarchy have been exhausted or are unavailable.
26. In the premise, I find that the plea of *res judicata* is not sustainable at this juncture.
27. The next issue for determination is the scope of the Court's discretion under section 51(2) of the *Advocates Act*. This issue forms the gravamen of the dispute before this Court. The section provides as follows:

The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.
28. The Advocate urges a narrow application of the section, while the Client implores the Court to exercise its inherent and statutory discretion to achieve substantive justice.
29. The Advocate's interpretation treats the Court as a mere rubber stamp once a valid certificate of taxation is issued. In my considered opinion, this view is a misapprehension of the law. It completely ignores the deliberate and expansive wording "may make such order in relation thereto as it thinks fit". This phrase is not mere surplusage; it confers upon the Court a wide, albeit judicial, discretion. The



provision is permissive, not mandatory. The word “including” connotes that entering judgement is but one of the several orders the Court is empowered to make in relation to the Certificate.

30. The summary procedure under Section 51(2) is designed to provide Advocates with an expeditious method of recovering their duly earned and taxed fees, thereby avoiding the delay and expense of a full suit. However, this procedure does not operate in a legal or equitable vacuum. It is subject to the Court’s overarching duty to administer justice under Article 159 of *The Constitution* and its inherent powers, saved by section 3A of the *Civil Procedure Act*, to prevent the abuse of its process and to make such orders as are necessary to meet the ends of justice.
31. In the instant case, the Advocate has admitted under oath to holding a sum of the Client’s money that is substantially greater than the total of his two taxed Bills. He now asks this Court to arm him with a decree that would allow him to execute against the Client for Kshs 678,594/=, while he continues to hold a surplus of her funds amounting to over Kshs 2 million. This would be a patently unjust and unconscionable outcome. It would amount to the Court sanctioning a situation where the Advocate is unjustly enriched by retaining the surplus while simultaneously being empowered to execute against the very person whose money he holds. This is precisely the kind of mischief that the Court’s inherent jurisdiction and the discretionary language of section 51(2) are designed to prevent.
32. The Client’s prayer is, in essence, for an equitable set-off. The Advocate’s claim is liquidated and the Client’s claim for the return of her money is so closely and inextricably intertwined with the very same transaction – the Advocate-Client relationship – that it would be manifestly unjust to allow the Advocate to enforce his claim without taking the Client’s countervailing claim into account. To do otherwise would be to promote a multiplicity of suits, forcing the Client to execute against the Advocate for her surplus while the Advocate executes against her for his costs -a circuitous and absurd result.
33. I find that section 51(2) clothes the Court with sufficient discretion to look beyond the four corners of the Certificate of Taxation and consider the entire factual matrix of the relationship between the parties. This is particularly so where, as is the case herein, serious issues of breach of trust and unjust enrichment are raised against an Officer of the Court. The Court is not bound to enter judgement mechanically. It has the power, and indeed, the duty, in the interest of substantive justice, to order a set-off of the certified costs against the funds admittedly held by the Advocate.
34. Having said that, the next question that this Court must address is the extent of the Advocate’s lien. The Advocate seeks to justify his retention of the entire balance by claiming a lien not only for the two taxed Bills of Costs but also for prospective, untaxed Party-and-Party costs in the dismissed suit, HCCOMM E589 of 2021. The Client argues that a lien cannot be exercised for untaxed or speculative costs, citing persuasive authority in *Simon Njumwa Maghanga -vs- Joyce Jepatarus Kagongo t/a Chesaro & Co. Advocates KEHC 6096 (KLR)* and *Milinski -vs- Mokaya & Another, Civil Suit No E029 of 2020 KEHC 8 (KLR)*.
35. An Advocate’s retaining lien is a common law right to retain a client’s property – be it documents or money – that comes into their possession during the course of their professional engagement, as security for their costs. However, this lien is for costs that are due. Costs are not considered legally due and enforceable until they have been ascertained, either by agreement between the parties or by taxation by a Taxing Officer. The position was articulated in the *Simon Njumwa Maghanga* case (*supra*) as follows:

“The position therefore is that an advocate cannot exercise lien over client’s money on the basis of a bill of cost that is yet to be taxed. It is improper for an advocate to withhold a



client's money on account of fees that is yet to be ascertained through the taxation process. The Advocate should release the client's money to him.”

36. The Advocate's claim for Party-and-Party costs in HCCOMM E589 of 2021 is, therefore, untenable. Firstly, those costs have not been filed for taxation. They are, at this stage, entirely speculative. To allow an Advocate to hold a client's funds hostage for a future, uncertain, and untaxed amount would be to grant them an oppressive tool and would be gross abuse of the right of lien. Secondly, once the Advocate's costs in this matter and in Misc Application E313 of 2021 were taxed and certified, the Advocate's lien crystallised to the extent of that certified sum, Kshs 2,291,104/=. Since he held funds far in excess of this amount, the lien was, in effect satisfied from the moment of certification. The Advocate's continued retention of the surplus beyond this amount cannot be justified by the lien.
37. The Court of Appeal in *Waruhiu K'owade & Ng'ang'a Advocates v Mutune Investment Limited* [2016] KECA 835 (KLR) stated thus:

“To allow advocates to retain client funds for no reason at all would be a travesty of justice and would be an abuse of the fiduciary trust given and by extension would amount to conversion and criminal activity. It would amount to deceit and unjust enrichment and ultimately, would erode public confidence in the administration of justice.”
38. I, therefore, find that the Advocate's lien was only valid to the extent of the total taxed costs of Kshs 2,291,104/-. His attempt to extend the lien to cover potential, untaxed costs from a separate dismissed suit is improper and unlawful. His continued retention of the surplus funds after the ascertainment of his fees is unjustified and amounts to breach of his fiduciary duty to the Client.
39. The final issue for determination is that of interest. The Advocate claims interest at 14% per annum from 10 May 2021, being the date he filed the Bill of Costs. Notably, the prayer is not contained in the Application. The Client objects, stating that interest was neither claimed in the Bill of Costs nor awarded by the taxing Master, and the Advocate did not file a reference to challenge its non-award. The Client relies on the case of *Otieno, Ragot & Company Advocates -vs- Kenindia Assurance CoLtd* KECA 1443 (KLR).
40. The claim for interest under Rule 7 of the Advocates Remuneration Order is not an automatic entitlement that attaches at the execution stage. It is a substantive claim that must be properly pleaded and adjudicated during the taxation process itself. Rule 7 provides that an Advocate may charge interest, provided such a claim is raised before the amount in the bill shall have been paid or tendered in full.
41. In the *Otieno Ragot Case* (supra), the Court of Appeal provided a definitive and binding interpretation of this rule and its interplay with section 51(2) of the Act. The Court held, inter alia, that an advocate cannot claim the interest for the first time in an application to enforce the Certificate of Costs. The claim must be included in the Bill of Costs to give the Taxing Master jurisdiction to consider and award it, and to accord the client the opportunity to contest it. A perusal of the Ruling dated 17 June 2022 confirms that no award of interest was made by the Taxing Master. The Advocate did not file a reference under Paragraph 11 of the Order to challenge this omission. Therefore, to award interest now would be to impermissibly vary the final Certificate of Taxation, which this Court cannot do in this instance.
42. Furthermore, there is a more compelling equitable argument against the award of interest in this specific case. The Advocate has had the benefit of holding the Client's funds, which far exceed his costs,



since 2019. To allow him to earn interest on his costs while he has been enjoying the benefit of the Client's larger sum of money would be wholly inequitable.

43. For these reasons, the claim for interest is disallowed.

44. In view of the foregoing, I make the following orders:

- i. The Advocate's Notice of Motion dated 7 March 2025 is hereby dismissed.
- ii. The Client's Notice of Motion dated 9 May 2025 is allowed in the following terms:
  - a. An order is hereby issued directing the Advocate to pay to the Client an amount of Kshs 4,095,526/=, being the balance of the money in the Advocate's custody held in trust for the Client less the taxed costs in Nairobi HCC Misc Cause No. 18 of 2021 and Nairobi HCC Misc No. E313 of 2021 within 21 days of the date hereof;
  - b. Costs of the application are awarded to the Client.

**DATED & DELIVERED AT NAIROBI THIS 9 DAY OF OCTOBER 2025**

**HELENE R. NAMISI**

**JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

For Advocates: Mr. Njoroge

For Client: Ms. Minyiri

Court Assistant: Lucy Mwangi

