



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT

NAIROBI

ELC MISC E258 OF 2024

**KANGEMI RUMWE WOMEN GROUP (Sued through
its officials and legal representatives, namely
JANE WANJIKU JAMES (CHAIRLADY)
MARY WANJIRU MAINA (SECRETARY)
GRACE WAITHIRA NJUGUNA (TREASURER)
JOSEPHINE WAITHIRA NJUGUNA (DIRECTOR)
.....APPLICANT**

=VERSUS=

**AGWARA & MUTEGI ADVOCATES.....
....RESPONDENT**

RULING

1. Before me for determination is the Chamber Summons dated 18th November 2024, brought under Section 3A of the Civil Procedure Act, Orders 50, Rule 5 of the Civil Procedure Rules, and Rule 11(2) of the Advocates

Remuneration Order, in which the Applicant seeks the following orders:

- i) Spent.**
- ii) Spent'**
- iii) THAT the Honorable Court be pleased to grant the Applicant leave to file the instant reference out of time against the Taxing Officer's ruling delivered on 30th September 2024.**
- iv) THAT this Honourable court be pleased to review and set aside the Taxing Officer's ruling delivered on 30th September 2024.**
- v) THAT the costs of the application be provided for.**

2. The application is premised on the grounds appearing on its face together with the supporting affidavit of George Sakimpa Advocate, sworn on even date.

THE APPLICANT'S CASE

3. The deponent averred that on 13th October, 2024, the Applicant filed a reference, but uploaded an uncommissioned affidavit, resulting in the Reference

being struck out and the case file being marked as closed.

4. He contends that the Applicant is aggrieved by the Taxing Officer's ruling and intends to appeal the ruling.
5. He contended that the Taxing Officer erred in finding that an advocate-client relationship existed between the advocate and Jane Wanjiku, and in failing to distinguish between Kangemi Women Group Limited and Kangemi Self-Help Group. He further argued that the Taxing Officer misapplied the applicable legal principles and improperly exercised her discretion. He asserts that the tax amount is excessive and urged the court to allow the application as prayed.

THE RESPONDENT'S CASE

6. The Respondent filed a replying affidavit sworn by Brian Alex Ochieng on 12th May 2025, in opposition to the application.
7. The deponent contends that the application is res judicata as it seeks the same relief that was previously sought and determined in ELC MISC E024 OF 2024, AGWARA AND

MUTEGI ADVOCATES VS KANGEMI RUMWE WOMEN GROUP.

8. He further contends that the Applicant had previously sought identical orders in the Chamber Summons dated 11th October, 2024, which was struck out on 4th November 2024.
9. He argued that the persistent filing of multiple suits seeking similar remedies is intended to confuse the court and would result in inconsistent rulings, thereby constituting an abuse of the court process. He further contended that it is contradictory for the Applicant to deny the existence of an advocate-client relationship, given that the settlement agreement explicitly recognizes the advocate's role and provides for payment of legal fees.
10. He maintained that the court lacks jurisdiction to entertain the present application because it is res judicata.
11. In conclusion, he urged the court to dismiss the application with costs.

12. The Respondent filed a Notice of Preliminary Objection dated 16th January 2025, asserting that the court lacks jurisdiction to hear the application. It was argued that the application is res judicata pursuant to ELC MISC E024 of 2024, which addressed similar issues and was struck out on 4th November 2024. It was also contended that the case file had been closed, thereby rendering the court functus officio.
13. In response, the Applicant filed grounds of opposition dated 2nd March 2025, asserting that the preliminary objection is incurably defective because it does not raise a pure point of law. The Applicant argued that the doctrine of res judicata is inapplicable to the present case, as the issues raised were not determined on their merits.
14. Both the application and preliminary objection were canvassed by way of written submissions

THE APPLICANTS SUBMISSIONS

15. The Applicant filed its submissions dated 7th April 2025.
16. On behalf of the Applicant, Counsel outlined the

following issues for the court's determination:

- a) Whether the application is res judicata;*
- b) Whether the application is properly before the court;*
- c) Whether there existed an advocate-client relationship between the Applicant and the Respondent;*
and
- d) Whether the taxing officer erred in principle in arriving at the sum taxed.*

17. Regarding the first issue, Counsel submitted that the doctrine of res judicata does not apply to a matter that has been struck out because it has not been determined on the merits. To support this argument, reliance was placed on the case of **Florence Maritime Services Limited & another v Cabinet Transport Infrastructure & 3 others (Petition 17 of 2015) KESC.**

18. Regarding the second issue, Counsel submitted that the application is properly before the court, as the

Applicant has complied with all requirements. It was argued that the mistakes of an Advocate should not be visited upon the client. To support this point, reliance was placed on the case of **Belinda Murai & others v Amos Wainana (1979) eKLR.**

19. Regarding the third issue, Counsel submitted that the Advocate represented the company and its directors, not the Applicant or its members. It was further submitted that there were no retainer agreements or appointment of the Advocate by the self-help group. To support this argument, reliance was placed on the case of **Machira & CO Advocates v Arthur K Magugu (2012) eKLR.**

20. Regarding the fourth issue, Counsel submitted that the Taxing Officer erred in awarding excessive costs.

21. In conclusion, Counsel urged the court to dismiss the application with costs.

THE RESPONDENT'S SUBMISSIONS

22. The Respondent filed its submissions dated 27th May 2025.

23. On behalf of the Respondent, Counsel identified the

following issues for the court's determination:

a) Whether the application is res judicata and filed contrary to Order 11(3) of the Advocates Remuneration Order.

b) Whether the Applicant's denial of an advocate-client relationship is tenable in light of the documentary evidence and the conduct of the parties.

Counsel based his submissions on the contents of the replying affidavit.

ANALYSIS AND DETERMINATION

24. Having considered the application, the preliminary objection, the respective affidavits, and the rival submission, the following issues arise for determination:

a) Whether the preliminary objection is merited; and

b) Whether the Applicant is entitled to the orders sought.

25. The law on preliminary objections is well settled. A preliminary objection must be based on a pure point of law. In **Mukisa Biscuits Manufacturing Company Ltd**

vs West End Distributors Ltd (1969) EA 696, Law JA

stated as follows:

“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which, if argued as a preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

26. Further on, **Sir Charles Newbold JA** stated;

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but

unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

27. In **Oraro Vs Mbaja (2005) eKLR** Ojwang J (as he then was) described it as follows;

“I think the principle is abundantly clear. “A Preliminary Objection” correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and, in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”

28. For a preliminary objection to be valid, it must be based on a point of law and on facts that are not in dispute. It should not be proved by facts or evidence, nor should it address disputed facts.

29. The Respondent challenges this court’s jurisdiction on the ground that the application is res judicata. The issue of res judicata can resolve the matter preliminarily without determining the facts. The Respondent’s preliminary

objection aligns with the description of a preliminary objection in the Mukisa Biscuits case, supra.

30. The doctrine of res judicata is founded on Section 7 of the Civil Procedure Act, Cap 21, Laws of Kenya, which states as follows:

“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.”

31. **Black’s Law Dictionary, 9th Edition**, defines the doctrine of res judicata on page 1425 as follows:

“a thing adjudicated” 1. An issue that has been definitively settled by judicial decision. 2. An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions, and that could have been but was not raised in the first suit.”

32. The elements required to establish a defense of res judicata were outlined in **Independent Electoral &**

Boundaries Commission Vs Maina Kiai & 5 Others

[2017] eKLR, where the Court of Appeal stated that: -

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

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.”

The essence of the doctrine of res judicata is to bring litigation to an end, and a party should not be vexed twice over the same cause. That was the holding in **Omondi v. National Bank of Kenya Ltd and Others (2001) EA 177.**

33. In the matter at hand, it is not in dispute that the Applicant had filed an earlier reference that was struck out because the supporting affidavit was not commissioned.

34. The court neither examined the substance of the reference nor ascertained the rights of the parties.

35. In **D.T Dobie & Company (Kenya) Ltd v Muchina (1982) KLR 1**, the Court of Appeal held that:

“A suit which is struck out does not go to the merits of the case and does not operate as a bar to a subsequent suit.”

36. Similarly, in **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others (2015) eKLR**, the Court of Appeal held that:

“Res judicata applies where there has been a final determination of the issues in dispute.”

37. It therefore follows that a matter that has been struck out cannot be said to have been heard and determined within the meaning of Section 7 of the Civil Procedure Act.

38. Based on the foregoing, I find that the doctrine of res judicata does not apply to the present application. I therefore find that this court has jurisdiction to hear and determine this application.

39. Regarding the second issue, the Applicant seeks leave to file the reference out of time. Granting leave to file a reference out of time is a discretionary remedy. In **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others (2014) eKLR**, the Supreme Court held that:

“Extension of time is not a right of a party. It is an equitable remedy that is available to a deserving party at the discretion of the court.”

40. The Applicant explained that the delay in filing the reference was due to the earlier reference being struck out because of an affidavit that was not commissioned. The court is persuaded that the Applicant has offered a reasonable explanation for the delay. The defect that led to the striking out of the earlier reference was procedural and did not go to the substance of the dispute. The Applicant moved the court without undue delay. The Respondent has not demonstrated that it will suffer any prejudice that cannot be compensated by costs.

41. In light of the foregoing, I find the preliminary objection without merit and hereby dismiss it. I also find that the Applicant has met the threshold for leave to file the reference out of time.

42. The upshot of the foregoing is that the preliminary objection is dismissed with costs.

a) The Applicant is granted leave to file and serve the reference within 14 days from the date of this ruling.

b) The Respondent shall file and serve a response within 14 days of service by the

Applicant.

c) Costs in the cause.

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT
TEAMS THIS 21ST DAY OF JANUARY, 2026.**

.....
T. MURIGI
JUDGE

IN THE PRESENCE OF:

Sakimpa for the Applicant

Ochieng for the Respondent

Ahmed - Court Assistant