



**Nyamweya Osoro & Nyamweya Advocates v Sotik Tea Company Limited (Civil Appeal 283 of 2019) [2026] KECA 341 (KLR) (27 February 2026) (Judgment)**

Neutral citation: [2026] KECA 341 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 283 OF 2019  
MS ASIKE-MAKHANDIA, HA OMONDI & LK KIMARU, JJA  
FEBRUARY 27, 2026**

**BETWEEN**

**NYAMWEYA OSORO & NYAMWEYA ADVOCATES ..... APPELLANT**

**AND**

**SOTIK TEA COMPANY LIMITED ..... RESPONDENT**

*(Being an appeal from the ruling and order of the High Court of Kenya at Kisii (D.S. Majanja, J) dated 27th November, 2018 in Misc. Appl. No 51 of 2011)*

**JUDGMENT**

1. In March and April 2011, the firm of Bosire Gichana and Company Advocates, on instructions from the firm of Nyamweya Osoro and Nyamweya Advocates (“the Advocates”), filed applications to tax several bills of costs in respect of legal services rendered by the said Advocates to Sotik Tea Company Limited (“the Client”).
2. Before the bills of costs could be taxed, the Client disputed the jurisdiction of the taxing officer to tax the bill of costs by filing the Chamber Summons dated 15th December 2017.
3. The application was premised on the grounds that on or about 28<sup>th</sup> March 2003, the Client entered into a retainer agreement for the provision of legal services with the Advocates. The agreement was signed on behalf of the Advocates by Mr. Osoro, who was handling the client’s portfolio.
4. Unfortunately, Mr. Osoro passed away, causing the Client to write to the Advocates a letter dated 20th March 2007 requesting them to “hold any further action on all their matters pending in Kisii and Keroka courts”. The Client added that should any action be required; the Advocates were required to seek written instructions. On 29th March 2007, the Client followed up with a letter requesting the advocates to release files pending appeal to the firm of Ochillo and Company Advocates.



5. By a letter dated 15<sup>th</sup> April, 2008, George Omari Nyamweya, the surviving partner of the Advocates addressed a letter to the Client directing and authorizing the client to pay the late Advocate Osoro's family the balance of Kshs. 800,000/= owed to their firm.
6. Following that letter, on or about 26th April 2008, the Client entered into an agreement with the Advocates, by which they accepted payment of Kshs.800,000/= and acknowledged receipt by signing a Discharge Voucher. The Discharge Voucher was signed by George Omari Nyamweya, the surviving partner of the firm of Advocates and on behalf of the estate of the late Japhet M. K. Osoro, Advocate. It was an express term of the discharge agreement that by acknowledging receipt of the settlement, the Advocates declared that they had no further claim for legal fees against the Client.
7. It was submitted for the client that the agreement signed between the Advocates and Client was a valid agreement within the provisions of section 45(1) and (6) of the Advocates Act, and as such the bills ought not be taxed. He also contended that the bills of costs could not be filed as the matter had already been settled in terms of the Discharge Voucher.
8. The application was opposed through the replying affidavit sworn by Kennedy Bosire Gichana. He deponed that the Client instructed the Advocates, which was run and operated by two advocates, the late Japheth Mecha Kebaki Osoro and himself. During that period the Advocates rendered legal services to the Client who made deposits in respect of several files and also paid a quarterly fee to cater for operational expenses for handling their matters in various courts including Kisii, Keroka, Kericho and Eldoret. Mr Gichana deposed that on 7th May 2007, he demanded fees for services rendered, but in order and with intent to avoid payment and/or undercut the Advocates, the client opted to deal with other third parties.
9. It was argued for the appellants that the application before the court was incompetent as it merely sought to refer the matter to the High Court. As regards the agreement, he pointed out that it was not an agreement recognized by the Advocates Act and also argued that the settlement agreement was null and void as the parties who signed it lacked the capacity to bind the firm of Advocates. He indicated that the agreement was between George Omari Nyamweya and David Ogamba Osoro, who, as administrators of the firm of the estate of Japhet Osoro, lacked the capacity to bind the estate as the administrators of the estate could only act jointly.
10. It was averred that before 19th June 2007, the Advocates rendered services to the Client through two advocates as the firm had not been registered by then; and the advocates who did work were entitled to be paid; and that the advocate who signed the agreement, George Omari Nyamweya, was neither a partner nor qualified to act as an advocate. He added that the Discharge Voucher was an illegal contract as it was contrary to section 35 of the Advocates Act.
11. In his determination, the learned judge held that the Discharge Voucher was entered into between the Client and the surviving partner of the Advocates and the administrators of the deceased partner, Japheth Osoro. The Advocates knowingly represented to the Client that Kshs. 800,000/- was due to the firm of Advocates as legal fees. In consideration of the receipt of the said fee, the Client was discharged from any further liability to pay fees and in consideration, the Advocates undertook not to make any further claim for fees in the future.
12. The judge concluded that since the issue of fees was settled by the Discharge Voucher, the taxation of the client-advocate bill of costs between the Advocates and Client could not proceed as the Client had discharged all its obligations towards the Advocates. The bill of costs was accordingly struck out together with the bill of costs filed in Kisii Miscellaneous Civil Application Nos. 33, 34, 35, 40, 41, and 51 of 2011.



13. Dissatisfied, the appellants filed the present appeal, faulting the learned judge for failing to find the purported agreement null and void, holding that no agreement was reached between the appellant and the respondent, failing to analyse the evidence on record, finding that the respondent was part of the fraudulent scheme, validating an agreement in respect of professional fees less than what is provided under the *Advocates Act* and in holding that the appellant was bound by the discharge voucher.
14. In support of the appeal, it is contended that the Deputy Registrar's ruling of 14th February 2012 dismissing the Respondent's Preliminary Objection, addressed the same issues later raised before the Judge, which was never challenged by a reference or appeal as such it therefore remains valid. The decision expressly affirmed the Deputy Registrar's jurisdiction under the Advocates (Remuneration) Order, re-litigating the same issues before another court offends the doctrine of res judicata under section 7 of the *Civil Procedure Act*.
15. It contended that under paragraph 12 of the Advocates (Remuneration) Order, a reference to a Judge requires a case stated with the consent of both parties. No such consent or case existed therefore; the Deputy Registrar could not refer the matter suo motu. The Judge thus lacked jurisdiction to entertain or determine the purported reference.
16. The appellant argues that Sections 48 and 49 of the *Advocates Act* regulate lawsuits for recovering costs, while paragraph 13 of the Remuneration Order pertains only to taxation. No lawsuit for recovery has been filed, so issues like retainer, payment, partnership, validity of agreements, and alleged fraud can only be resolved through a full substantive trial and not through a reference.
17. The appellant argues that the Respondent relied on a purported fee-settlement discharge voucher that was invalid under sections 45 and 46 of the *Advocates Act* and Rule 3 of the Remuneration Order. The voucher purportedly fixed remuneration below the statutory minimum, was executed by individuals lacking proper authority, including the use of an unregistered power of attorney and co-administrators acting separately. It was based on misrepresentation by a former partner who was not an advocate at the relevant time, directed payment to individuals rather than the firm, and was procured through collusion designed to evade lawful fees for more than 190 matters handled by the Appellant.
18. The appellant contends that since the *Advocates Act* and Remuneration Order form a complete code governing remuneration, the Judge erred in invoking the Partnership Act. Reliance is laid on the case of Kimani Wanyoike vs. Electoral Commission of Kenya, Civil Appeal No. 213 of 1995[unreported] where the Court stated that where a statutory procedure exists, it must be strictly followed.
19. In rebuttal, the respondent contended that the Chamber Summons application dated 15<sup>th</sup> December 2017 was not barred by the doctrine of res judicata as the earlier proceedings before the Deputy Registrar in 2011–2012 concerned entirely different questions. The ruling of 14<sup>th</sup> February 2012 addressed a preliminary objection in which the Respondent challenged the Deputy Registrar's jurisdiction to tax the bills of costs under section 48 of the *Advocates Act*.
20. It is contended that the objection related solely to whether a taxing officer could entertain taxation in the absence of a suit for recovery of costs, an issue fundamentally distinct from the later question of whether the bills were fit for taxation in light of an alleged retainer agreement and discharge voucher while the ruling of 27<sup>th</sup> July 2012; on the other hand, dealt with the Respondent's application to join a third party, George Nyamweya, to the taxation proceedings.
21. It is argued that in the subsequent appeal, the High Court (Okwany J.), in a judgment delivered on 8<sup>th</sup> February 2017, expressly held that the Deputy Registrar had no jurisdiction to entertain such a substantive application, which ought to have been referred to a judge. The finding alone renders the



joinder issue incapable of grounding a plea of res judicata, as a decision made without jurisdiction cannot constitute a final determination for purposes of section 7 of the *Civil Procedure Act*.

22. The respondent argues that the Chamber Summons of 15<sup>th</sup> December, 2017 sought orders referring the Appellant's bills of costs in Kisii Misc. Application No. 27 of 2011 (consolidated with several others) to the High Court for a determination of whether the bills, as drawn, were amenable to taxation. This was a new and distinct issue which had never been placed before or adjudicated by the Deputy Registrar. Relying in the case of IEBC vs. Maina Kiai and John Florence Maritime Services [2017] eKLR, it is submitted that the matters raised in the Chamber Summons were neither directly nor substantially in issue in the prior proceedings, the earlier rulings were not final determinations on those questions, and the Deputy Registrar found to lack jurisdiction on the joinder issue could not have competently decided the matters now raised. Furthermore, the substantive issues of retainer and the effect of the discharge voucher fell squarely within the jurisdiction of a judge of the High Court and could not have been conclusively resolved in the taxation proceedings.
23. The respondent maintains that the plea of res judicata was unsupported by the procedural history or applicable legal principles, and the Judge properly held that the Chamber Summons was competently before the High Court for consideration.
24. Having considered the rival arguments set out above and the law, the main issues for determination are whether the learned Judge erred in holding that the Chamber Summons dated 15 December 2017 was not res judicata and in finding that the discharge voucher was valid and capable of barring taxation.
25. The doctrine of "res judicata" is provided for under Section 7 of the *Civil Procedure Act* in terms that:

"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 issue in which such issue has been subsequently raised, and has been heard and finally decided by such court."
26. According to Mulla, Code of Civil Procedure, 18<sup>th</sup> Edition (2012), the doctrine of res judicata is a judicial mechanism that upholds the finality of court decisions and may only be displaced in exceptional circumstances such as fraud, mistake, or absence of jurisdiction. The principle of finality is rooted in public policy and forms one of the foundational pillars of the judicial system. Once a judgment attains conclusiveness, the issues it determined cannot be reopened, save where it is directly challenged on the grounds of fraud, mistake, or want of jurisdiction, and this position holds irrespective of the merits of the original decision.
27. For res judicata to be invoked in a civil matter, the following elements must be demonstrated:
  - a. There is a former judgment or order which was final;
  - b. The judgment or order was on merit;
  - c. The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
  - d. There must be between the first and the second action identical parties, subject matter and cause of action. (See *Nicholas Njeru v Attorney General & 8 others Civil Appeal 110 of 2011 (2013) eKLR*).



28. The Supreme Court in *Communications Commission of Kenya & 5 others vs. Royal Media Services Limited & 5 others* [2014] eKLR expressed itself as follows on the issue:

(317) The concept of *res judicata* operates to prevent causes of action, or issues, from being re-litigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings....

(319) There are conditions to the application of the doctrine of *res judicata*:

- i. the issue in the first suit must have been decided by a competent Court;
- ii. the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and
- iii. the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title *Karia and Another v. The Attorney General and Others*, [2005] 1 EA 83, 89.

29. From the above, it is clear that the doctrine of *res judicata* bars courts from retrying matters that have already been substantially and directly determined previously by a court of competent jurisdiction involving the same parties under the same title. The major requirement for its application is the existence of a prior final determination of the same dispute, either directly or indirectly.

30. The appellant submitted that the Deputy Registrar had previously determined issues touching on the same bills of costs in rulings delivered on 14<sup>th</sup> February 2012 and 27 July 2012, thereby rendering the Chamber Summons *res judicata*. The respondent countered that those prior rulings concerned distinct questions and, in any event, were issued by a forum lacking jurisdiction to determine the issues that subsequently arose.

31. In *Independent Electoral and Boundaries Commission vs. Maina Kiai & 5 Others* [2017] eKLR, this Court reaffirmed the essential elements of *res judicata*: identity of issues, parties, a final determination, and issuance by a court of competent jurisdiction. The record demonstrates that the ruling of 14<sup>th</sup> February, 2012, was confined to a preliminary objection challenging the Deputy Registrar's jurisdiction under section 48 of the *Advocates Act*. It did not address the effect of any retainer or discharge voucher.

32. On the other hand, the ruling of 27<sup>th</sup> July, 2012, concerned an application for joinder of a third party. In a later appeal, the High Court (Okwany J.) expressly held that the Deputy Registrar lacked jurisdiction to entertain such an application. As this Court stated in *The Owners of Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Ltd* [1989] KLR 1, jurisdiction is everything; a decision rendered without it is a nullity and cannot ground a plea of *res judicata*.

33. The issues raised in the Chamber Summons concerned the validity of an alleged legal fee retainer agreement a matter that can only be decided by a High Court Judge. These issues were neither directly nor substantially addressed by the Deputy Registrar in the earlier proceedings. In *Nicholas Njeru vs. Attorney General & 8 Others* [2013] eKLR, the Court held that *res judicata* does not apply when the specific question raised was never judged on.



34. There was no error in the High Court’s holding that the application was not *res judicata*.
35. Turning on the second issue as to whether the discharge voucher constituted a valid retainer agreement, the bone of contention in the instant appeal is whether the discharge voucher relied upon by the respondent constituted a binding agreement under section 45 of the *Advocates Act*, thereby ousting the taxing officer’s jurisdiction. Section 45(1) requires any agreement on remuneration to be:
- i. in writing;
  - ii. signed by the client or an authorised agent; and
  - iii. made by an advocate qualified to enter into such an agreement.
36. This Court in *Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Ltd* [2006] eKLR held that only agreements compliant with section 45 can bar taxation. The Court further stated that because retainer agreements have the effect of waiving statutory safeguards, they are to be construed strictly.
37. In this appeal, it is common ground that a retainer agreement was entered between the respondent and the appellant firm of advocates on 28<sup>th</sup> March 2003. The retainer agreement was signed on behalf of the law firm by Hon. George Omweri Nyamweya. It is the same partner who signed the discharge voucher dated 26<sup>th</sup> April 2008 accepting, on behalf of the firm, the sum of Kshs.800,000/= in full discharge of the legal fees then owed to the firm by the respondent.
38. It is the applicant’s appeal that the said Hon. George Omweri Nyamweya did not have the authority of the law firm to execute the discharge voucher, and further that even if he had such authority, the agreement was illegal as it contravened the *Advocates Act* and the Advocates Remuneration Order as it pertains to retainer to be paid to an advocate by a client.
39. We are unable to agree with this line of submission by the appellant. The respondent’s position, which cannot be faulted, is that it entered into an agreement with a partner of the law firm who had ostensible authority to discharge it from legal liability in respect of legal fees owed to the firm. The respondent entered into the said agreement with the same partner who signed the initial retainer agreement. If the appellant had an issue with the manner in which the discharge voucher was executed between the said partner and respondent, its remedy lay in suing the partner and not renouncing a legally entered and binding retainer agreement that was legally executed on behalf of the law firm.
40. Further, we hold that whether or not the amount agreed in the discharge voucher accorded with the amount provided under the Advocates; Remuneration Order is not an issue for determination by this Court. In the case of *Njogu & Company Advocates vs. National Bank of Kenya Limited* [2016] eKLR, this Court stated as follows with regard to a retainer agreement that was entered similar to the one in this appeal:
- “(26) in our view an advocate who willingly and knowingly enters into an agreement in regard to the payment of his fees that is contrary to the Advocates Remuneration Order, cannot maintain proceedings whose purport is to avoid the illegal agreement by reverting to the Court to tax his advocate/client bill of costs in accordance with the Advocate’s Remuneration Order. We concur with the learned Judge that the appellant having made his bed he must lie on it. That is to say that, notwithstanding the illegality of the contract, this Court cannot come to the appellant’s aid as the appellant is estopped by his conduct from seeking the court’s intervention. We find no merit in this appeal as the



appellant's bill of costs was properly struck out. Accordingly, the appeal is dismissed with costs."

41. We hold that once the law firm agreed accepted to e paid the said sum of Kshs.800,000/= and signed the discharge voucher, it was bound by the terms of the said discharge voucher. It is immaterial to whom the amount was paid to as long as the appellant law firm consented to it. The appellant cannot in the circumstances resile from the retainer agreement. We cannot fault the trial court for upholding the retainer agreement.

42. It is clear from the foregoing that the appeal lacks merit and is hereby dismissed with costs.

**DATED AND DELIVERED AT KISUMU THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2026.**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**H. A. OMONDI**

.....

**JUDGE OF APPEAL**

**L. KIMARU**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**

