

**THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**MISC. CIVIL APPLICATION NO. 166 OF 2023**

**IN THE MATTER OF THE ADVOCATES ACT (REMUNERATION AMENDMENT)  
ORDER 1993 AND 1997**

**AND**

**IN THE MATTER OF THE SMALL CLAIMS COMMERCIAL CLAIM NO. 585 OF  
2022**

**IN THE MATTER OF TAXATION OF CLIENT/ADVOCATES COSTS**

**BETWEEN**

**MUTAI ODUOR & COMPANY  
ADVOCATES.....APPLICANT**

**VERSUS**

**DICKSON NYALIK OCHIENG.....  
RESPONDENT**

**RULING**

**1.** The Respondent, through **Messrs Mutai Oduor & Co. Advocates**, the Applicant herein, filed a claim on 3/11/2022 against one **Kevin Kiplagat** in **Eldoret Small Claims Court Commercial Claim No. 585 of 2022** for recovery of a sum of Kshs 960,000/- being alleged unpaid motor vehicle hire charges and damages, which claim was however dismissed on 3/02/2023. Thereafter, in a case of “*friends turned foes*”, the said Advocates-Applicant, on 10/08/2023, filed this Miscellaneous Cause seeking to recover their legal fees from the Respondent, which costs was then taxed by this Court’s Deputy Registrar on 21/01/2025, and assessed at the sum of Kshs 135,675/-. The Advocates then moved to execute, which execution was effected by way of the Proclamation made on 4/02/2025.

**2.** The Respondent had, apart from the said one claim, also filed 3 similar others against the same Defendant **Kevin Kiplagat**, through the same Advocates-Applicant, save that the motor vehicles involved were different in each case. All claims however suffered the same fate of dismissal, and all 4 ended up at the High Court for taxation of legal fees and in all the matters, the execution has been challenged in the same manner. For simplicity, I particularize all the 4 claims filed at the Eldoret Small Claims Court, and the resultant Miscellaneous Cause filed at the High Court at Eldoret in respect to each, as follows:

<b>i)</b>	<b>Small Claims Commercial Case No. E212 of 2023</b>	<b>Cause No. 165 of 2023</b>
<b>ii)</b>	<b>Small Claims Commercial Case No. E217 of</b>	<b>Cause No. 168 of 2023</b>

	2022	
iii)	Small Claims Commercial Case No. E167 of 2022	Cause No. 166 of 2023
iv)	Small Claims Commercial Case No. E166 of 2022	Cause No. 166 of 2023

3. By the consent of the parties recorded on 16/12/2025, it was agreed that I render my Ruling in only this one instant file, which was selected to be the lead file. The reasoning and findings made in this Ruling shall therefore apply *mutatis mutandis* to the rest of the Causes referred to above.

4. Back to this matter, the execution referred to above triggered the filing of two respective Applications in this Cause, both dated 12/02/2025. The first Application was filed by **Messrs Equipment Sales (Kenya Limited)** as Objectors, through **Messrs Teddy & Co. Advocates**, claiming ownership of the motor vehicle proclaimed and/or attached. This Application was not opposed but was referred to me by the Deputy Registrar by way of her Ruling delivered on 17/07/2025, upon appreciating her limitations on jurisdiction under **Order 49** of the **Civil Procedure Rules**. Pursuant thereto, the file was placed before me and by the consent orders recorded on 16/12/2025, that Application was then allowed with no order on costs, and is therefore no longer in issue.

5. The second Application was filed by the Respondent, through **Messrs Anassi Momanyi & Co. Advocates**. In the Application, the Respondent contended that the execution was premature because the Respondent owed the Applicant an amount in excess of the taxed costs on account of funds unjustly held and misapplied. This Application, the Deputy Registrar, by way of the same Ruling she delivered on 17/07/2025, also referred to me on account the same limitations on her jurisdiction. This, now is the Application that I am called upon to determine by this Ruling.

6. In his Affidavit in support of the Application, the Respondent deponed that he has sought reasons to enable him file a Reference but such reasons have not yet been given. He then contended that the Applicant holds his money meant for this matter, which money the Applicant has wrongly applied and claimed that the Applicant filed the Bills of Costs for Taxation hoping to justify the holding into the funds only to realize that it is the Applicant that holds funds in the Respondent's favour. According to him therefore, it is untenable and

unjustified for the Applicant to initiate execution proceedings while aware that it is the one indebted to the Respondent. He asserted that he had issued a letter to the Applicant over the same but the Applicant, instead, chose to address other issues that were incomprehensible. He further contended that the execution is premature because the Certificate of Costs is yet to be converted into a Decree

7. I note that in opposition to the Application, the Applicant had filed the Notice of Preliminary Objection dated 16/03/2025 which was crafted in terms that “***the Application dated 12<sup>th</sup> February 2025 is incompetent since the same has been filed in a Court that lacks jurisdiction to entertain the same***”. That objection on jurisdiction however appears to have been directed at the Deputy Registrar, who, in any event, has already referred the Application to me as the Judge. I do not therefore believe that the objection still stands.

8. The parties had also already filed respective written Submissions when the matter was still before the Deputy Registrar, which Submissions they opted to again adopt before me. The Respondent’s Submissions is dated 28/03/2025, while the Applicant’s is dated 28/05/2025. I will now highlight the respective Submissions, but only the portions relating to the matters still remaining for determination, noting that issues touching on the Deputy Registrar’s jurisdiction have since been overtaken by events.

9. In his Submissions, **Mr. Momanyi**, Counsel for the Respondent, apart from citing authorities, basically reiterated the matters already asserted in the Supporting Affidavit, namely, that the execution is premature as the Decree is yet to be converted into a Decree, and that the Applicant is holding the Respondent’s funds that exceed the taxed amount.

10. On his part, **Mr. Oduor**, Counsel for the Applicant, submitted that the Deputy Registrar, sitting as the Taxing Master, having already taxed the Bill of Costs, this Court is now ***functus officio*** there being no objection or Reference filed to challenge the decision. According to him therefore, the Respondent’s only avenue is to file an appeal to the Court of Appeal. He then made the curious claim that since the Certificate of Costs has not been set aside or altered, and that therefore even if the Applicant would file a suit to convert the Decree into a Judgment, a defence by the Respondent would be meaningless because such Judgment would be entered on the basis of the Certificate of Costs. He also interpreted **Section 51(2)** of the **Advocates Act** to mean that where an Advocate’s costs has been taxed and a Certificate issued, the only bar to entry of Judgment is if there is a dispute as to the retainer, which is not the case herein. Counsel does not however appear to have responded to

the Respondent's contention that the execution is also premature because the Applicant is holding the Respondent's funds that exceed the amount taxed.

**Determination**

**11.** The issues that call for determination in this matter are evidently the following:

- i) Whether execution for the costs taxed is premature because the Applicant is holding funds belonging to the Respondent that exceed the amount taxed.**
- ii) Whether the execution is also premature because the Certificate of Costs is yet to be converted into a Judgment and/or Decree.**

**12.** On the issue of the relevance, import or effect of a Certificate of taxed Costs issued by the Court after taxation, **Section 51(2) of the Advocates Act** 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.”** [Emphasis mine]

**13.** The first of the Respondent's contentions is that execution of the costs taxed in this matter is premature because the Applicant owes him an amount in excess of the amount taxed as costs, which funds, he claims, the Applicant unjustly held and misapplied. In effect, what the Respondent is asking this Court to do is carry out a reconciliation process of the amounts paid by the client to the Advocate for legal representation in various suits, determine whether those amounts were properly utilized or applied by the Advocates, and if satisfied, to order that the amount taxed in this matter be offset from the amounts paid to the Advocate.

**14.** A reading of the **Section 51(2)** above however clearly envisages that disputes of the nature now raised by the Respondent should have been raised before the Bill of Costs was taxed, and should have been dealt with at that stage, not after the taxation has been concluded. After the costs has been taxed, the only other issue that can be entertained and litigated upon, as dictated under **Section 51(2)** is the “**retainer**”.

**15.** In this case, the Respondent, represented by the same Counsel still appearing for him, fully participated in the taxation process before the Deputy Registrar, and there is no indication that he, at any time, raised the matters that he is now coming up with. He cannot

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now, at this late stage of execution, suddenly come up with objections of the nature raised. What he is asking this Court to do is to preside over a totally new cause of action on contested facts, which cause of action has nothing at all to do with the process of the taxation of costs carried out by the Deputy Registrar as the Taxing Master. This Court cannot at this stage engage in determining such contested facts, or begin to preside over litigation on whether the Respondent may offset monies against amounts paid to the Advocates for conduct of various suits. The Court cannot also at this late stage, begin engaging in determining and/or interpreting what retainer arrangements the Advocate and the client had over legal representation spanning over multiple briefs. In any case, to make such determinations, it means that this Court will now have to receive and interrogate new factual evidence. This, the Court cannot do in this Miscellaneous Cause, and clearly, this cannot be the correct forum for such litigation. This Court is also not presiding over any objection to the decision on taxation since the Respondent has not filed any recognized Reference under the provisions of **Paragraph 11** of the **Advocates' Remuneration Order 2009**. To that extent therefore, the Certificate of Costs is final "**as to the amount of the costs**" payable to the Applicant. Matters to do with recovery of monies paid to the Advocates may therefore have to be pursued through a different legal avenue, not in this Miscellaneous Cause.

**16.** For the above reasons, I decline to entertain the attempt by the Respondent, at this late stage, to draw the Court, in this Miscellaneous Cause, into making determinations on whether the Applicant is holding any funds paid to him by the Respondent for legal representation in various cases, or whether such amounts exceed the amount taxed as costs, or whether the Applicant misapplied the funds, or whether the Respondent is entitled to offset the amount taxed from payments made by the Respondent.

**17.** On the issue of whether the execution is premature because the Certificate of Costs is yet to be converted to a Decree, I have no hesitation in agreeing with **Mr. Momanyi** that indeed, execution of taxed costs cannot be undertaken before the Certificate of Costs has first been converted into a Decree after Judgment thereon has been entered. In other words, a Certificate of Costs is not by itself an executable instrument and must first be adopted as an order of the Court or incorporated into a decree before execution can proceed. While therefore a Certificate of Costs is final "**as to the amount payable**", it is not a Decree that can be executed. Initiating execution on the sole basis of a Certificate of Costs, without a Decree, therefore renders the execution premature.

**18.**The above position has been restated in a multitude of cases and is a long-settled position of the law and procedure. I am even surprised that Advocates still continue to get it wrong. I cite, for instance, the decision of **Ibrahim J (as he then was)** made in the case of **Rubo Kimngeich Arap Cheruiyot v Peter Kiprop Rotich [2006] eKLR**, in which, he stated as follows:

**“It is my view that a Decree duly approved and signed had to be on record for any execution to take place, whether for the eviction, costs or otherwise. As far as the parties in a suit are concerned, a certificate of costs is not an executable legal instrument. A certificate of costs is not capable of being “executed”. Warrants of attachment and sale cannot in law be issued on the basis of a certificate of costs. There must be a decree first. It is true that the Decree may not be necessarily or always contain the ascertained costs. Costs can be determined before a decree is issued or subsequently, after the Decree has been drawn. However, for one to recover costs, there must be a decree. Any money awarded by court including costs is only payable under a decree particularly, if it is through enforcement (see Order XXI, Rule 1).”**

**19.**There is also the decision of **J. Mulwa J**, case of **Lawrence Mwangi t/a Mwangi & Co. Advocates v John Mathiaka Kimundu [2016] eKLR**, in which she held that:

**“There is no dispute that there exists a certificate of costs issued by the Taxing Master in favour of the Respondent Advocates – in this application. The respondent has not demonstrated existence of a judgment or decree arising capable of being executed. The holder of the certificate of taxation ought to apply for judgment in the High Court in terms of Section 48, 49 and 51(2) of the Advocates Act to be entered based on the certificate of costs. Only after that would a decree issue and execution proceedings be undertaken. There having been no judgment and decree from the certificate of costs, the proclamation against the applicant’s property was procedurally irregular and illegal. The degree purportedly issued by the court on the 17th October 2014 has not been exhibited for the court’s consideration.”**

**20.** I also quote **Aburili J** in the case of **Oloo & Oloo Advocates LLP v Kenya Broadcasting [2026] KEHC 1190 (KLR)**, in which she stated as follows:

**“Thus, a certificate of taxation is not *per se* executable. only a decree is. Therefore, to execute, the certificate of taxation has to be followed by entry of judgment and issuance of a decree. ....”**

**21. Aburili J, again, in the case of M. Korongo & Company Advocates v Monarch Insurance Company Ltd, held that:**

**“6 ..... I observe that upon the issuance of the certificates of costs in the series of matters herein, the advocate proceeded to instruct the auctioneers to attach the properties believed to belonging to the Respondent to recover the said taxed Advocate/Client Bill of Costs.**

**7..... Section 51(2) of the Advocates Act stipulates that the Applicant holder of certificate of costs shall apply to court, once certificate of costs is issued, for the court to enter judgment adopting the certificate of costs and issuing a decree, capable of being executed. There is never a shortcut to recovery of costs in advocate client matters, following taxation. See *Rubo Kipngetch Arap Cheruiyot v Peter Kiprof Rotich Civil Case No. 193 of 1993.***

**8. In the absence of a judgment on taxed costs and decree, there would be no basis on which the warrants of attachment were issued. See *Njuguna Matiri & Company Advocates vs National Bank of Kenya Misc. Application No. 148 of 2014.***

.....

**12. This requirement for the court to enter judgment on taxed costs was also restated in Lubullelah & Associates v N. K. Brothers.**

**13. In this case, as earlier stated, it appears that the Applicant advocate was so much in a hurry to recover his taxed costs that he did not apply to this court under Section 51(2) of the Advocates Act for entry of judgment on the certificates of costs and a decree drawn upon which an application for execution could be made and instructions given to the auctioneers to proclaim the Respondents property.**

**14. The lapse renders the application for execution and the warrants of attachment or proclamation issued premature, null and void.**

**15. It is for that reason that I need not delve into the merits of the objection proceedings as the execution process was premature, irregular and unprocedural. As there was no decree capable of being executed, I hereby**

**vacate, set aside and raise any attachment of the property believed to belong to the Respondent, whether it is leased or owned.**

**16. As there is no valid decree, the auctioneers are not entitled to costs of an illegal process. As officers of this court, they ought to have known that they were taking out warrants, to execute a non-existent decree and ignorance of the law is no defence.**

.....”

**22.** I fully associate myself with the above positions taken by the various Judges, which, needless, affirm the correct position of the law.

**23.** In advancing the narrative that no Decree is required for the purposes of execution for recovery of taxed costs, **Mr. Oduor** cited authorities which, however, he obviously misinterpreted or applied out of context. In all the cases he cited, the Courts were addressing situations where the objections raised were in respect to the amount taxed or payable, not execution thereof. It is under this context therefore that the Courts correctly affirmed the correct legal position that a Certificate of Costs is “***final as to the amount of the costs covered thereby***” and that by reason thereof, the Advocate “***is not required to file suit for the recovery of costs***”. In none of the cases cited were the Courts addressing the issue whether execution can be undertaken in the absence of a Decree. Counsel therefore got it all wrong.

**24.** While therefore the Respondent’s Application fails on the first limb, it succeeds on the second limb, with the net effect that the Application is allowed and the execution undertaken herein declared premature.

**Final Orders**

**25.** In the end, I order as follows:

- i) the Respondent’s Notice of Motion dated 12/02/2025 is allowed but only on the ground that the execution by way of attachment and proclamation, initiated and undertaken herein to recover the taxed legal costs is premature and unprocedural, no Judgment having been entered on the Certificate of Costs and a Decree arising therefrom issued.

ii) Costs of the Application is awarded to the Respondent – **Dickson Nyalik Ochieng.**  
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iii) As there is no Decree in existence, the Auctioneer is not entitled to any costs or refunds since, as an Officer of the Court, that fact is presumed to have been within its knowledge.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24<sup>TH</sup> DAY OF APRIL 2026**

.....  
**WANANDA JOHN R. ANURO**  
**JUDGE**

**Delivered in the presence of:**

**Mr. Oduor for the Applicant**

**Ms. Manyara h/b for the Mr. Ochieng for Objector**

**N/A for the Respondent**

**Court Assistant: Brian Kimathi**