



**Njoroge & 2 others v Kiboo (Commercial Appeal E162 of 2025)
[2026] KEHC 6337 (KLR) (Commercial and Tax) (8 May 2026) (Judgment)**

Neutral citation: [2026] KEHC 6337 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E162 OF 2025**

JWW MONG'ARE, J

MAY 8, 2026

BETWEEN

**FRANCIS KUNG'U NJOROGE 1ST APPELLANT
REAL ESTATE CONNCET INVESTMENT LIMITED 2ND APPELLANT
REAUCO AGENCIES LIMITED 3RD APPELLANT**

AND

VINCENT GITHU KABI KIBOO RESPONDENT

(Being an appeal from the Ruling and Order of Hon. Musiega R.L., CM dated 2nd May 2025 at the Magistrates Court, Milimani in Civil Case No. E4830 of 2024)

JUDGMENT

Introduction and Background

1. Before the court for determination is an appeal filed by the Appellants that is grounded in their Memorandum of Appeal dated 27th May 2025 where they seek to set aside the ruling of the subordinate court dated 2nd May 2025 that found the suit before it was not res judicata and therefore the Appellants' preliminary objection was dismissed. The Appellants had argued that the suit was res judicata because the same parties and issues had already been determined in the Small Claims Court, SCCCOMM E3411 of 2023 and that the Magistrate's Court lacked jurisdiction. The Learned Magistrate dismissed the objection, ruling that the earlier Small Claims Court case had been dismissed for want of jurisdiction, not on the merits, so the doctrine of res judicata did not apply.
2. The Appellants state that the subordinate court erred in finding the suit was not res judicata, despite the earlier judgment involving the same parties and similar issues; assuming jurisdiction over a matter already dismissed by the Small Claims Court; failing to recognize that the dispute of an advocate-client



falls under the High Court's exclusive jurisdiction; ignoring that the Small Claims Court dismissal was not solely for lack of jurisdiction but included other reasons and; allowing a fresh suit instead of requiring the Respondent to appeal the earlier Small Claims Court decision. As such, the Appellants urge the court to allow the appeal, set aside the subordinate court's ruling and strike out the suit in the subordinate court.

3. The appeal has been canvassed by way of written submissions that I have considered and I will be making relevant references to the same in my analysis and determination below.

Analysis and Determination

4. Since this is the first appeal, this court is enjoined by the provisions of section 78 of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) to evaluate and examine the subordinate court record and the evidence presented before it in order to arrive at its own conclusion. I am in agreement with the Respondents' submission that this principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123 where the Court of Appeal outlined the duties of a first appellate court as follows:

"[An appellate court] is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

5. With the above in hindsight, the court is to determine whether the subordinate court arrived at the correct conclusion both in law and fact in its finding that the Appellants' preliminary objection lacked merit and that the suit before it was not *res judicata*. The principle of *res judicata* and the law in respect of the same is common ground and the parties have aptly submitted on the same. Germane is section 7 of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which provides 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 can 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."

6. Therefore, for the doctrine of *res judicata* to apply; the issue was directly and substantially in issue in the former suit; the former suit was between the same parties or parties under whom they or any of them claim; the parties were litigating under the same title; the issue was heard and finally determined in the former suit; and the court that previously heard and determined the issue was competent to try the suit in which the issue is raised (see *Gichuki v Gichuki* [1982] KECA 37 (KLR) and *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] KECA 477 (KLR)).
7. The Supreme Court, in *Kenya Commercial Bank Limited & another v Muiri Coffee Estate Limited & 3 others* [2016] KESC 6 (KLR) summed it all up by stating that the doctrine of *res judicata*, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts,



apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

8. It is not in dispute that the Small Claims Court, in a judgment dated 31st July 2024 expressly struck out the claim between the parties for want of jurisdiction. Going through the judgment, it is clear to me and the subordinate court rightly concluded that the Small Claims Court did not hear the merits of the case. The Court of Appeal, in *Tee Gee Electrics and Plastics Company Ltd vs. Kenya Industrial Estates Limited* [2005] KLR 97 held as follows:

“Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by *res judicata* when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. *Res judicata* bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of *res judicata*.”

9. As the Learned Magistrate correctly noted, a dismissal for lack of jurisdiction means the issues were never heard and finally decided as required for the plea of *res judicata* to apply. This conclusion is sufficient to settle the matter but for completeness, I will determine the other grounds of appeal raised by the Appellants.

10. I see that the Appellants have relied on section 13(1) and (2) of the Small Claims Act (Chapter 10A of the Laws of Kenya) which provides as follows:

13. Exclusion of jurisdiction

- (1) If a claim has been lodged with the Court, no proceedings relating to the same course of action shall be brought before any other Court except where the—
- (a) proceedings before that other Court were commenced before the claim was lodged with the Small Claims Court; or
 - (b) claim before the other Court has been withdrawn.
- (2) A claim shall not be brought before the Court if proceedings relating to that claim are pending in or have been heard and determined by any other Court.

11. My reading and simple interpretation of the aforementioned provision is that it prohibits parallel proceedings only where the earlier court had jurisdiction and determined the matter, which is not what happened in this case. They have also stated that under the *Advocates Act*, only this Court can handle advocate-client disputes by way of taxation, however, the dispute herein arises from a Debt Settlement Agreement and a Retainer Agreement, not merely an unpaid fee note. Under section 45 of the *Advocates Act*, a valid remuneration agreement in writing and signed by the client is binding and not subject to taxation unless challenged within the statutory timeframe set out therein. The Appellants did not challenge the remuneration agreement within the prescribed period and I am in agreement with the Respondent’s submission that the Court of Appeal, in *National Bank of Kenya Limited v Otieno Ragot & Company Advocates* [2020] KECA 828 (KLR) held that an advocate can sue under a retainer agreement without taxation. Thus, I find that the subordinate court was right to find that it had the jurisdiction to hear and determine the issue of enforcement of the retainer and debt settlement agreements.



12. The Appellants have also claimed that the Small Claims Court dismissed the suit for other reasons beyond jurisdiction but my reading of the judgment shows the dismissal was solely for lack of jurisdiction. The court's observations about the retainer agreement's nature were obiter and not a merits determination. On the Respondent not filing an appeal to this judgment, I find that he was really not obligated to do so. Since the dismissal was for lack of jurisdiction, the proper remedy was to file a fresh suit in a court with jurisdiction which is exactly what the Respondent did.
13. In the end, I find that the Learned Magistrate carefully and correctly applied the test for preliminary objections, analyzed the elements of res judicata, and correctly concluded that the earlier suit was not determined on the merits. This reasoning is both legally sound and consistent with settled principles and there is no error on the Learned Magistrate's part.

Conclusion and Disposition

14. The upshot is that this appeal is devoid of merit and is dismissed in its entirety with costs to the Respondent.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF MAY 2026

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J.W.W. MONGARE

JUDGE

In The Presence Of

Ms. Wainaina holding brief for Mr. Ngige for the Appellants

Mr. Kabi the Respondent in person

Amos- Court Assistant

