Wamanda & 2 others v Egoli Estateds Limited & another (Environment and Land Case Civil Suit 103 of 2020) [2024] KEELC 1416 (KLR) (14 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1416 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE CIVIL SUIT 103 OF 2020

OA ANGOTE, J

MARCH 14, 2024

BETWEEN

CECILIA NJERI WAMANDA ..... 1ST PLAINTIFF

BLUEBILL ENTERPRISES LIMITED ..... 2ND PLAINTIFF

RAWJA COMPANY LIMITED ..... 3RD PLAINTIFF

AND

EGOLI ESTATEDS LIMITED ..... 1ST DEFENDANT

R.J VARSANI LIMITED ..... 2ND DEFENDANT

RULING

Background

1. Vide Chamber Summons dated 27th March, 2023 brought pursuant to Sections 3A of the *Civil Procedure Act*, Rule 11(2) and 11(4) of the *Advocates Remuneration Order*, and Order 42 Rule 6 of the *Civil Procedure Rules,* 2010, the Applicant seeks the following reliefs:

    i. That this Honourable Court be pleased to re-tax the Bill of Costs dated 10th May, 2021("the Bill of Costs") in respect of the sum allowed on instruction fees.

    ii. That in the alternative to prayer 3 above, the Honourable Court be pleased to remit the Bill of Costs for re-taxation in respect of the sum allowed on instruction fees before a different Taxing Officer.

    iii. That the costs of this Application be provided for.

2. The application is based on the grounds on the face of thereof and supported by the Affidavit of Peter Magwa, the 3rd Plaintiff's/Applicant's Director of an even date.

3. Mr Magwa deponed that the Respondent's Party and Party Bill of Costs against the Applicant dated 10th May, 2016 was first taxed on 28th October, 2021; that the same was set aside vide a Ruling dated 24th November, 2022 and remitted for taxation before a different Taxing Master and that on 14th March, 2023, the Bill of Costs was re-taxed at Kshs 952,358 with instruction fees set at Kshs 900,000.

4. According to the 3rd Plaintiff, there is an apparent error with respect to how the Taxing Master handled instruction fees by failing to consider the nature of the claim and interest as set out in the pleadings; that the Applicants' claim was primarily for breach of contract as against the 1st Defendant, and as against the 1st and 2nd Defendants, for failure to comply with the legal pre-requisites for abstraction of ground water and boreholes pursuant to the *Water Act*.

5. Mr Magwa deponed that while the Taxing Officer noted the broader public interest motivated the Applicants' claims, they were not factored in the reasons substantiating the award of instruction fees; that an award of Kshs 900,000 is manifestly high considering the Applicants' claim, interests and the early withdrawal of the case and that the care and labour employed was not substantiated.

6. It was deponed that considering the nature of the claim, the *Advocate Remuneration Order* (2014) provides for Kshs 75,000 as the minimum fees chargeable as instruction fees and that the amount awarded is approximately 12 times more than what is prescribed which is not justified.

7. The deponent urged that he filed the suit in good faith on the basis that no checks were undertaken by the relevant authorities before issuance of abstraction of water by the 1st and 2nd Defendants; that he was constrained to litigate due to the Defendants' actions and that as soon as they discovered that the Defendants had obtained the requisite approvals, he immediately withdrew the suit.

8. It was deposed by the 3rd Plaintiff that despite the withdrawal aforesaid, he continues to suffer because he needs to drill a new borehole at the cost of Kshs 4,000,000; that the Taxing Master failed to address apportionment of costs by the three plaintiffs saddling him with the entire costs and that his application is merited and should be allowed.

9. In response, the Respondents filed Grounds of Opposition in which they averred that:

    i. The Application is res judicata, the same having been heard, adjudicated and determined because:

        a. The Application seeks orders of remittance of the 1st and 2nd Defendants' Bill of Costs dated the 10th May, 2021 for re-taxation which issues were conclusively dealt with by the Ruling delivered on the 24th November, 2022.

        b. The issues raised in the Application are directly and substantially similar to the issues raised in the 3rd Plaintiff/Applicants' Application dated 11th November, 2021 and the 3rd Plaintiffs/Applicant cannot avoid the doctrine of res judicata by purporting to file a similar Application in the same forum.

        c. It is in the interests of justice that there be an end to litigation and accordingly, parties or those claiming under then should not be allowed to re-litigate over the same issues.

10. The application proceeded by way of submissions which I have considered. I have also considered the filed authorities.

Analysis and Determination

11. Having considered the application, the Affidavits and submissions herein, the issues that arise for determination are;

    i. Whether the Application is res judicata, and if not,

    ii. Whether sufficient grounds have been demonstrated warranting interference with the Taxing Master's decision of 14th March, 2023.

12. The substantive law on res judicata is found in Section 7 of the *Civil Procedure Act*, 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 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."

13. In the case of *John Florence Maritime Services Limited & another vs Cabinet Secretary Transport & Infrastructure & 3 Others* (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), the Supreme Court delved into an in-depth discussion of the concept of res judicata thus;

> " This court in the case of *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another*Motion No 42 of 2014 [2016] eKLR (Muiri Coffee case) held as follows regarding the doctrine of res judicata:"
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> > Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights. Such a perception has a basis in comparative jurisprudence; in the Ugandan case of *Hon Norbert Mao v Attorney-General*, Constitutional Petition No 9 of 2002; [2003] UGCC3, the petitioner brought an action on behalf of 21 persons from his constituency, for declarations under article 137 of the Uganda Constitution, and for redress under article 50 of that Constitution. The matter arose from an incident in which officers of the Uganda Peoples Defence Forces attacked a prison, and abducted 20 prisoners, killing one of them. Unknown to the petitioner, another action had already been filed under article 50, seeking similar relief; and Judgment had been given in *Hon Ronald Reagan Okumu v Attorney-General*, Misc Application No0063 of 2002, High Court HCT 02 CV MA 063 of 2002. The Constitutional Court dismissed the petition, on a plea of res judicata, declining the petitioner's pleas that certain important constitutional declarations now sought, had not been accommodated in the earlier Judgment.
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> > In *Silas Make Otuke v Attorney-General & 3 others*, [2014] eKLR, the High Court of Kenya agreed with the Privy Council decision in *Thomas v The AG of Trinidad and Tobago* (1991) LRC (Const) 1001, in which the Board was "satisfied that the existence of a constitutional remedy as that upon which the appellant relies does not affect the application of the principle of res judicata".54.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.

It emerges that, contrary to the respondent's argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of res judicata is not affected by the substantial-justice principle of article 159 of *the Constitution*, intended to override technicalities of procedure. Res judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept.56.The learned authors of Mulla, Code of Civil Procedure, 18th Ed 2012 have observed that the principle of res judicata, as a judicial device on the finality of court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction (p 293):The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision."

The essence of the res judicata doctrine is further explicated by Wigram, V-C in *Henderson v Henderson* (1843) 67 ER 313, as follows:... where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time" [emphasis supplied].

Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in Bernard *Mugo Ndegwa v James Nderitu Githae & 2 others*, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.

> That courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in *ET v Attorney-General & another*, (2012) eKLR, thus:The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi v National Bank of Kenya Limited and others*, (2001) EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J, in the case of Njangu v Wambugu and another Nairobi HCCC No 2340 of 1991 (unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face-lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata"

14. By way of a brief background, the 1st-3rd Plaintiffs instituted this suit on 9th June, 2020 seeking, inter-alia, for permanent injunctive orders restraining the Defendants from excavating, erecting structures, and construction of multi-dwelling apartments on L.R Dagorreti/ Riruta/3094 and 3096 (hereinafter the suit properties), as well as drilling, construction and abstraction of water and its resources thereon. The Plaintiffs also sought for a declaration that the continual excavation and construction of the property was un-procedural and irregular.

15. Vide a Notice of withdrawal dated 30th September, 2020, filed on the 7th October, 2020, the Plaintiffs withdrew the suit against the 1st and 2nd Defendants in its entirety. This withdrawal came before the matter had proceeded for hearing. The Defendants filed a Party-Party Bill of Costs dated 10th May, 2021. The same was taxed at Kshs 3,181,048.46 on the 28th October, 2021.

16. Aggrieved by this taxation, the Applicant filed a reference dated 11th November, 2021, seeking inter-alia a review of the taxation ruling in respect of the instruction fees and getting up fees. The Court found merit in the reference and remitted the aforesaid Bill of Costs to another Taxing Master for taxation. Vide a Ruling dated 14th March, 2023, the Bill of Costs was re-taxed at Kshs 952,385.

17. The Applicant is still aggrieved by the Taxing Masters' decision of 14th March, 2023 and seeks to have this Court set aside the taxation and re-tax the bill in respect of the sum allowed as instruction fees. The Respondents assert that the present application is res judicata, the orders of remittance of the Bill of Costs dated 10th May, 2021 having been conclusively dealt with vide the ruling of 24th November, 2022 and that the application is an abuse of Court and should be dismissed.

18. As aforesaid, the doctrine of res judicata envisages sameness of the issues, parties and title/claim, concurrence of jurisdiction, and finality of the previous decision.

19. In the present circumstances, there can be no doubt that the parties are the same, litigating under the same title and in the same Court. The crux of the matter is whether there was finality of the previous decision, or simply put, whether the issues herein were conclusively dealt with in the Ruling delivered on 24th November, 2022.

20. Whereas indeed the Ruling of 24th November, 2022 dealt with a reference challenging the instruction fees, it was with respect to the decision of 28th October, 2021.The present application seeks to have the taxation of 14th March, 2023 set aside. These are two distinct decisions.

21. Further, the contention in the application of 11th November, 2021 was that the Taxing Master erred in setting out the contractual sum between the parties as the subject matter and relying on the same to calculate instruction fees. Indeed, the Court found that the Taxing Master's identification of the subject matter was marred by an error in principle.

22. The contention herein is that the Taxing Master's decision on instruction fees was manifestly excessive and was based on an error of principle, to wit, the failure to consider relevant factors and considering irrelevant factors. Ultimately, it is the finding of the Court that the present application is not res judicata and does not constitute an abuse process.

23. The legal parameters within which the Court can interfere with a Taxing Master's decision are well settled. The Court of Appeal in *Joreth Ltd vs Kigano & Associates* Civil Appeal No. 66 of 1999 [2002] eKLR was categorical that a judge sitting on a Reference against the Taxing Master ought not to interfere with the assessment of costs unless the Taxing Master had misdirected himself on a matter of principle.

24. Similarly, the Ugandan Supreme Court in *Bank of Uganda vs Banco Arabe Espanol* SC Civil Application No. 23 of 1999 (Mulenga JSC) stated as follows:

> " Save in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs are matters with which the taxing officer is particularly fitted to deal, and in which he has more experience than the judge. Consequently a judge will not alter a fee allowed by the taxing officer, merely because in his opinion he should have allowed a higher or lower amount.
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> Secondly, an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the taxing officer exercised, or applied a wrong principle. In this regard, application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or manifestly low.
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> Thirdly, even if it is shown that the taxing officer erred on principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties."

25. The subject of the Applicant's grievance is the instruction fees. He asserts that the same is manifestly high and the Taxing Master failed to consider relevant issues.

26. It is trite that instruction fees are to be determined from the value of the subject matter of a suit. It is also trite that the value of the subject matter of a suit is to be ascertained from the pleadings, judgment or settlement. Where the value of the subject matter cannot be ascertained from the pleadings, judgment or settlement, the Taxing Officer has discretion to assess the instruction fees taking into account various factors.

27. This position was affirmed by the Court of Appeal in *Peter Muthoka & Another vs Ochieng & 3 others* NRB CA Civil Appeal No. 328 of 2017 [2019] eKLR which expounded the principles in Joreth Ltd vs Kigano & Associates (supra) as follows:

> " It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject value. Once judgment has been entered, and for what seems to us to be an obvious reason,

recourse will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court.

It is only where the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, that the taxing officer is permitted to use his discretion to assess instructions fees in accordance with what he considers just bearing in mind the various elements contained in the provision we are addressing. He does have discretion as to what he considers just but that discretion kicks in only after he has engaged with the proper basis as expressly and mandatorily provided: either the pleadings, the judgment or the settlement. He has no leeway to disregard the statutorily commanded starting point. And we think, with respect, that the starting point can only be one of the three. It is not open to the taxing officer to choose one or the other or to use them in combination, the provision being expressly disjunctive as opposed to conjunctive. It is also mandatory and not permissive."

28. In this case, it is not in dispute that the value of the subject matter could not be ascertained from the pleadings. Indeed, the Taxing Master, guided by the decision of this Court on the 24th November, 2022 stated as much. Guided by the case of *Joreth Ltd vs Kigano & Associates* (Supra), it is apparent the Taxing Master was entitled to use her discretion to assess instruction fee.

29. In her Ruling, the Taxing Officer stated as follows before awarding the Respondent a sum of Kshs. 900,000 as instruction fees;

> " In assessing the instruction fees, I have considered the nature of the suit. The suit sought injunctive orders restraining the defendants from excavation, construction of 66 multi-dwelling residential apartments, or erecting any other structures on the suit properties, a declaration that the intended actions by the defendants were un-procedural and irregular and an order stopping and preventing the defendants from abstracting any water from the suit property. I have also considered the care and labour employed by Counsel up to the time the suit was withdrawn and considered the fact that the suit was withdrawn before proceeding for trial. I will award the sum of Kshs 900,000/ which I deem fair and reasonable."

30. There is no doubt from the above excerpt of the Ruling that several factors were considered before a determination was made on the appropriate instruction fees. The Court finds no fault in the factors considered. The Applicant substantially sought to protect his interests in his property and the Court does not find that the same was filed in the public interest.

31. However, it is noted that the Taxing Master did not set out the basic instructions fees before increasing the same, a pre-requisite as affirmed by the Court of Appeal in *First American Bank of Kenya vs Shah & Others*, 2002 VOL I E.A. 64. Similarly, the Court of Appeal of Uganda in *Makula International vs Cardinal Nsubuga & Another* [1982] HCB 11 held as follows:

> " The taxing officer should, in taxing a bill, first find the appropriate scale fee in schedule VI, and then consider whether the basic fee should be increased or reduced. He must give reasons for deciding that the basic fee should be increased or decreased. When he has decided that the scale should be exceeded, he does not arrive at a figure which he awards by multiplying the scale fee by a multiplication factor, but places what he considers a fair value upon the

work or responsibility involved. Lastly, he taxes the instruction fee, either by awarding the basic fee or by increasing or decreasing it."

32. This was recently re-affirmed by the Court of Appeal in *University of Nairobi & another vs Moses* (Civil Appeal 119 of 2020) [2022] KECA 45 (KLR) (4 February 2022) (Judgment) thus;

> " Turning to the applicable guidelines that the Taxing Master who rendered the impugned ruling was obligated in law to take into to consideration, the Judge adopted fully the guidelines enunciated by Ojwang. J. (as he then was) in *Republic vs. Ministry of Agriculture & 20 Others Ex parte Muchiri W'Njuguna & 6 Others* [2006] eKLR as approved by Odunga, J. in the case of *Nyangito & Co. Advocates vs. Doinyo Lessos Creameries Limited* [supra]. In summary, these may be rephrased that in purely public law proceedings, the consideration to be borne in mind by the Taxing Master is that the exercise of that mandate should be entirely free from any private business arrangements or income generated by the substratum of the proceedings; the advocate with the bill should seek no more than reasonable compensation for professional work done, the Taxing Master has to avoid any prospect of any semblance of an unjust enrichment for any particular party or parties, comparability should be applied in the assessment of advocate's instruction fees, objectivity should be sought when applying loose textures criteria in the taxation of costs, where complexity of the proceedings is a relevant factor, the specific elements of the same should be judged on the basis of the express or implied recognition and mode of treatment by the trial Judge where factors of the nature of the responsibility borne by an advocate and novelty of matters are taken into account, its nature is to be clarified; where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarized form and taken into account; and lastly, the Taxing Master must first recognize the basic instruction fee payable before venturing into consideration as to whether to reduce or increase the instruction fees."

33. In the present case, the matter having been filed in 2020, the relevant remuneration order is the *Advocates Remuneration Order* (2014). The value of the subject matter having not been ascertained, the instruction fees herein is as per Schedule VI Paragraph 1 titled 'Other Matters' which sets the sum at Kshs 75,000/=.

34. Upon awarding Kshs. 75,000 as dictated by law, Schedule VI Paragraph 1(b)provides as follows:

> " To sue or defend in a suit in which the suit is determined in a summary manner or in any manner whatsoever without going to full trial the fee shall be 75% of the fees chargeable under item 1(b)."

35. It follows that where a suit is withdrawn, or is dealt with in a summary manner without going to full trial like in this case, the fees of Kshs. 75,000 should be reduced by 25%, bringing the instruction fees to Kshs. 56,250/=. In as far as the Taxing Officer awarded the sum of 900,000/= being a figure substantially more than the minimum fee, and did not give any reasons justifying such as an increase, the Court finds that her decision was based on an error of principle.

36. Having found that the Taxing Master committed an error of principle, this Court has the discretion to remit the Bill to the Taxing Master with appropriate direction on how it should be taxed or

to proceed and tax the same. In *Kipkorir Titoo & Kiara Advocates vs Deposit Protection Fund Board*[2005]1KLR528 the Court stated as follows:

> " And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see – *D'Sonza v Ferrao* [1960] EA 602. The Judge has however a discretion to deal with the matter himself if the justice of the case so requires (see *Devshi Dhanji Naran Patel* (No. 2) [1978] KLR 243."

37. As the only disputed issue is the instruction fees, and considering that the matter has been twice before the Taxing Masters, the Court will proceed to re-tax the same.

38. The dispute herein involved construction and water abstraction activities undertaken by the Respondents on the suit property and their effects on the Applicant's adjoining property. The Applicant was also concerned that the activities were undertaken without the requisite approvals. The matter was filed in June, 2020 and the withdrawal of the suit by the Applicant was in September, 2020. That means the matter was in Court for less than five (5) months.

39. Taking into account the foregoing factors and the fact that the basic minimum instruction fees is Kshs. 56,250/=, the Court finds that an increase of the minimum chargeable fee by Kshs 200,000 is fair and reasonable in the circumstances and will tax the instruction fees at Kshs. 256,250.

40. In conclusion, the application dated 27th March, 2023 succeeds and is allowed on the following terms;

    i. The Ruling of the Taxing Master delivered on 14th March, 2023 is reviewed and varied to the extent that the taxation of the item on instruction fees is set aside and in its place, the instruction fees is taxed at Kshs 256,250.

    ii. The other items in the bill shall remain as taxed by the Taxing Master.

    iii. Each party shall bear its/his own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 14TH DAY OF MARCH, 2024.

O. A. Angote

Judge

In the presence of;

Mr. Odago for the 3rd Plaintiff/Applicant

Mr. Otieno for the 1st Defendants

Court Assistant – Tracy