



REPUBLIC OF KENYA



**Cheruiyot & 15 others v S.B.I. International Holdings (AG) Ltd (Cause  
141 of 2017) [2024] KEELRC 13456 (KLR) (17 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13456 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 141 OF 2017  
NZIOKI WA MAKAU, J  
DECEMBER 17, 2024**

**BETWEEN**

**RONO PETER CHERUIYOT ..... 1<sup>ST</sup> CLAIMANT  
PAUL KIPRONO ..... 2<sup>ND</sup> CLAIMANT  
KIRUI EDWARD KIPLAGAT ..... 3<sup>RD</sup> CLAIMANT  
HILLARY K. BOR ..... 4<sup>TH</sup> CLAIMANT  
DENNIS KIBET ..... 5<sup>TH</sup> CLAIMANT  
DANIEL MADAFU CHUMA ..... 6<sup>TH</sup> CLAIMANT  
GEORE GITAU CHIRA ..... 7<sup>TH</sup> CLAIMANT  
EDWARD KEMEI ..... 8<sup>TH</sup> CLAIMANT  
PETER MWANGI NJAGUA ..... 9<sup>TH</sup> CLAIMANT  
FRANCIS MUTUKU MUTUA ..... 10<sup>TH</sup> CLAIMANT  
KIPKORIR KOECH ..... 11<sup>TH</sup> CLAIMANT  
BENARD KIPKOECH ..... 12<sup>TH</sup> CLAIMANT  
ERIC KIPSANG KIRUI ..... 13<sup>TH</sup> CLAIMANT  
REUBEN KIBET KOSGEI ..... 14<sup>TH</sup> CLAIMANT  
KIPRONO FREDRICK KOECH ..... 15<sup>TH</sup> CLAIMANT  
CATHERINE KINANU KIRERA ..... 16<sup>TH</sup> CLAIMANT**

**AND**

**S.B.I. INTERNATIONAL HOLDINGS (AG) LTD ..... RESPONDENT**



## RULING

1. Before the Court is the Respondent/Applicant's notice of motion application dated 4<sup>th</sup> July 2024. The motion seeks the following orders:
  - a. Spent
  - b. The Honourable Court be pleased to stay the execution of the Ruling on taxation of costs delivered on the 24<sup>th</sup> June 2024 with respect to Bill of Costs dated 8<sup>th</sup> February 2021 against the Respondent/Applicant herein and all consequential, decree, orders and proclamation, attachment and execution process issued pending the hearing and determination of this Application.
  - c. The Honourable Court be pleased to set aside, in its entirety the Ruling on taxation of costs delivered on the 24<sup>th</sup> June 2024 with respect to Bill of Costs dated 8<sup>th</sup> February 2021 against the Respondent/Applicant herein and all consequential, decree, orders and proclamation, notices issued pursuant to the said Ruling.
  - d. The Honourable Court upon setting aside the said Ruling delivered on 24<sup>th</sup> June 2024 be pleased to issue directions on the Respondent/Applicants Preliminary Objection dated 17<sup>th</sup> February 2021 with respect to the bill of costs dated 8<sup>th</sup> February 2021 by the Claimant.
  - e. In the alternative to b, c, d above this Honourable Court be pleased to, strike out, quash and/or dismiss the Claimant's Party and Party Bill of costs dated 8<sup>th</sup> February 2021 as the same is misconceived, incompetent filed contrary to the *Advocates Act* and same upon taxation offended section 77 of the Advocates (Remuneration) Order.
  - f. Costs of this Application be awarded to the Applicant/Respondent.

The Application was supported by the Grounds on the face of it as well as the affidavit of Ms. Seline Opiyo.

2. The grounds in brief were that there was a preliminary objection made to the taxation and that the Taxing Officer in allowing the taxation of the Auctioneers bill of costs contravened the law. The Respondent asserts that upon perusal of their records it turns out that there were two sets of Preliminary Objections both dated the 17<sup>th</sup> February 2021 against both bills of costs dated 22<sup>nd</sup> December 2020 and 8<sup>th</sup> February 2021 filed with respect to the auctioneer and the Claimants' Advocate.
3. It was asserted on that basis the Advocates for the Respondent were of the view that the Court had delivered itself on the said Preliminary Objection and did not participate on the said taxation as result of the said ruling.
4. The Claimants were opposed and filed grounds of opposition to the effect that: the entire application is fatally defective, frivolous, vexatious, bad in law, an abuse of the court process, it is an afterthought, misconceived and time wasting; the application is unmerited, its full of half-truths, lies and blatant concealments of facts; the application is a perfect material for dismissal with costs; that the application and orders sought by the Respondent do not serve the ends of justice or at all and that pursuing the said application would only amount to an academic exercise and wastage of courts time.



5. The application was to be disposed of by way of written submissions and as the time of penning this Ruling, there were only submissions by the Respondent/Applicant on record. The Respondent submits that the general principle in a matter such as this is as was stated in the case of *Shah v Mbogo & another* [1967] EA 116 that the decision whether or not to set aside is discretionary and that the discretion is intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error. The Respondent cited the decision of the Court of Appeal in *CMC Holdings Ltd v Nzioki* [2004] KLR 173 where the Court stated that it would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. It was submitted that in the instant case, the error was on the part of the Court which delivered itself vide a clarification dated the 20<sup>th</sup> July 2024 where the Court sought to clarify that the ruling was in respect to the one of the Preliminary Objection but failed to state whether the Court ruling was in respect of both Objections as they were both heard on the same date. The Respondent submits that this was an inadvertence on both the court and the parties to the proceedings and certainly an excusable mistake which should not have been transferred to the Applicant and the learned Deputy Registrar should not have closed the doors of justice on the Respondent/Applicant and condemned it to suffer without being given a hearing on merit over their Preliminary Objection dated 8<sup>th</sup> February 2021.
6. The Respondent cited the case of *Philip Chemowolo & Another v Augustine Kubede* (1982-88) KAR 103 where the Court stated that:

“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. ”The Court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”

The Respondent further submitted that the Respondent/Applicant ought not be condemned unheard contrary to the principles of natural justice and with a background of cited case law. The Respondent submitted that the costs were recovered from the Respondent and granting the Claimant costs would be a matter that is already *res judicata* as a determination on the same had been made. The Respondent closed by submitting that had the Learned Magistrate addressed herself to the said Preliminary Objection dated 17<sup>th</sup> February 2021 then she would have arrived at a different finding and would not have entertained the Party and Party Bill of Costs dated 8<sup>th</sup> February 2021 and doing so will only prejudice the Respondent. The Respondent thus urged that the ruling delivered on the bill of costs dated 24<sup>th</sup> June 2024 be set aside and in its place order direction over the Applicants Preliminary Objection dated 8<sup>th</sup> February 2021.

7. The Respondent/Applicant also cites the Court of Appeal's holding in *Murai v Wainaina* (No. 4) [1982] KLR 38, where the court emphasized that a mistake remains a mistake regardless of whether it is made by Senior Counsel or Junior Counsel, and that the court must take necessary steps to correct the mistake if justice requires it, as even courts themselves can make errors in interpreting laws or legal viewpoints, which may be corrected by appellate courts. The Respondent further affirms that no party should be condemned unheard referencing the case of *Sangram Singh v Election Tribunal, Kotah, AIR*



1955 SC 664 at 711 as cited in *Gerita Nasipondi Bukunya & 2 others v Attorney General* [2019] eKLR in the following terms:

“ There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”

8. The Respondent/Applicant further submits that Order 12 Rule 7 of the Civil Procedure Rules along with the case of *Shah v Mbogo* (supra), grants the court the power to set aside any orders on terms it deems just. Moreover, the Respondent/Applicant contends that the Deputy Registrar lacked jurisdiction to tax the bill, as the amounts in question had already been paid out. It asserts that had she addressed the preliminary objection dated 17<sup>th</sup> February 2021 she would not have entertained the bill of costs dated 8<sup>th</sup> February 2021. The Respondent relies on the definition of res-judicata in section 7 of the *Civil Procedure Act* and in the Black's Law Dictionary 10<sup>th</sup> Edition. The Respondent/Applicant equally refers to the cases of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR and *Njangu v Wambugu* and another Nairobi HCCC No. 2340 of 1991 (unreported) which emphasize that the doctrine of res judicata serves the purpose of bringing finality to litigation, preventing the re-litigation of issues that have already been resolved.
9. The matter of taxation is what is the core of the case before the Court. It is clear there were objections to taxation and there was a determination of a preliminary objection resulting in the taxation of the costs. Res judicata is a legal doctrine that prevents the same parties from re-litigating a matter that has already been decided by a court. According to Black's Law Dictionary, res judicata is a Latin phrase that means "a thing adjudicated". It is a legal principle that states that once a court has made a final judgment on a matter, the same issue cannot be relitigated by the same parties. In as far as costs in the case before me go, it is my considered view there is finality on the matter as a taxation of costs issued and it matters not that there was another objection to taxation which the taxing master failed to determine. The costs were ascertained and therefore there is nothing for the Respondents to litigate over. There is no reference before me, there is no challenge to the award of costs. It would be an academic exercise, especially since its 3 years and counting since the preliminary objection was raised to attempt to consider it. It is thus a waste of precious judicial time to consider the merits or otherwise, of the preliminary objection. The Respondent's motion is dismissed with costs.

It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 17<sup>TH</sup> DAY OF DECEMBER 2024**

**NZIOKI WA MAKAU, MCIARB.**

**JUDGE**

