



**Musyoki Mogaka & Co. Advocates v Kiwipay (K) Limited & another (Commercial Appeal E233 of 2023) [2025] KEHC 489 (KLR) (Commercial and Tax) (28 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 489 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL APPEAL E233 OF 2023  
JWW MONG'ARE, J  
JANUARY 28, 2025**

**BETWEEN**

**MUSYOKI MOGAKA & CO. ADVOCATES ..... PLAINTIFF**

**AND**

**KIWIPAY (K) LIMITED ..... DEFENDANT**

**AND**

**ECOBANK KENYA LIMITED ..... PROPOSED DEFENDANT**

**RULING**

**Introduction and Background:-**

1. The Advocates filed the present suit on 29<sup>th</sup> May 2023 where they seek judgment against the Client in the sum of USD 1,934,900 plus costs and interest. They claim that they were retained by the Client to provide professional and legal services in various court matters and the Advocates now seek the aforementioned sum as legal fees for the same. Together with the Plaintiff, they filed an application dated 28<sup>th</sup> May 2023 seeking inter alia to be allowed to hold as lien, the said USD 1,934,900 in the custody of the Bank pending hearing and determination of the suit. However, this application was compromised and on 7<sup>th</sup> July 2023 it was marked as withdrawn with no order as to costs.
2. The Client then filed the Preliminary Objection dated 4<sup>th</sup> August 2023 stating that the suit is *res judicata* and incompetent and that the substratum of this suit is an issue already determined in HCACEC Misc. Application E053 OF 2022 and HCCOMM Misc Application No. E826 of 2022 where the court determined that there was no binding agreement between the Advocates and the Client and that this ruling has not been set aside nor has there been any appeal. The Client thus urges that this suit is an abuse of the court process and ought to be dismissed.



3. This was followed by an application dated 21<sup>st</sup> December 2023 by the Advocates where they sought to be allowed to hold as lien, the said USD 1,934,900 in the custody of the Bank in various accounts pending hearing and determination of this suit. The court, in a ruling dated 24<sup>th</sup> December 2023 allowed this prayer and this prompted the Client to file the application dated 26<sup>th</sup> December 2023 seeking to set aside or vary the ruling. The Advocates then filed the application dated 25<sup>th</sup> January 2024 seeking to enjoin the Bank and that the Bank deposits the claimed fees in court. From the court's Case Tracking System(CTS), the Advocates have since filed a notice dated 8<sup>th</sup> November 2024 withdrawing this application.
4. The court heard the parties' counsel on the aforementioned applications and I note that there are written submissions filed on the same.

#### **Analysis and Determination:-**

5. Having gone through the Objection, the applications and submission of the parties, I find that the following issues call for the court's determination:-
  - a. Whether the suit is *res judicata* HCACEC Misc. Application E053 of 2022 and HCCOMM Misc Application E826 of 2022
  - b. Whether the orders of 24<sup>th</sup> December 2023 ought to be varied and/or set aside

#### **Whether the suit is *res judicata* HCACEC Misc. Application E053 of 2022 and HCCOMM Misc Application E826 of 2022**

6. I note that the Client has argued out this issue through a Preliminary Objection where the facts pleaded by the other party are assumed to be correct, the objection must be a matter of law which is capable of disposing off the suit, the objection cannot be blurred by factual details calling for evidence and the objection must not call upon the Court to exercise discretion (see *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors*[1969] EA 696). Whereas the Client has stated that this suit is *res judicata* HCACEC Misc. Application E053 of 2022 and HCCOMM Misc Application E826 of 2022 it has not presented the pleadings or judgments/rulings of these suits in the Objection for the court to determine whether the current suit is *res judicata*. If it was to do so, then the Objection ceases to be on a pure point of law as the court will now be invited into a fact-finding mission based on evidence in determining whether the other suits are similar to the present one. This is a handicap to the Client's Objection as the court cannot accept evidence in determining a Preliminary Objection. Whereas there is no legal provision barring a party from raising the doctrine of *res judicata* by way of a Preliminary Objection, there is also none barring the ventilation of the same by way of a formal application. The advantage of an application is that the Applicant has the luxury and liberty of presenting evidence as opposed to a Preliminary Objection. It would have been prudent for the Client to raise the challenge of *res judicata* by way of a formal application where it could have annexed the pleadings and decisions of the former suits and such other evidence that would have guided the court in its determination. Actually, the court in *George Kamau Kimani & 4 others v County Government of Trans-Nzoia & another* [2014] KEELC 104 (KLR) aptly put it as follows:

“One cannot raise a ground of *res judicata* by way of Preliminary Objection. The best way to raise a ground of *res judicata* is by way of notice of motion where pleadings are annexed to enable the court to determine whether the current suit is *res judicata*. Professor Sifuna did not raise the issue of *res judicata* by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of raising the issue



of *res judicata*. The other points raised in the Preliminary Objection are issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection."

7. It is for this reason that the Client's Objection dated 4<sup>th</sup> August 2023 is not a Preliminary Objection in the pure sense of the law and the same is dismissed. However, the Client, in its application of 26<sup>th</sup> December 2023 has stated that this suit is *res judicata* as the issue of the legal fees due to the Advocates has already been determined in various taxation proceedings including HCACEC Misc. Application E053 of 2022 and HCCOMM Misc Application E826 of 2022 and the Client has attached the rulings of the same. Going through the said rulings, it is clear that the subject matter was in respect of taxation of various Bills of Costs involving the same parties in this suit and that the issue of whether there was a retainer agreement between the parties was determined and rightly so, as the Court of Appeal in *Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited* [2017] KECA 431 (KLR) held that a taxing officer has jurisdiction to determine whether an advocate/client relationship existed before a bill can be taxed. The Deputy Registrar then went ahead and determined that there was no retainer agreement between the parties and proceeded to tax the Bills. The rulings also indicate that the Advocates had sought the same USD 1,934,900 that they are now seeking before the court.
8. With the above, I am satisfied that the issues being raised by the Advocates now in this suit have already been determined when their various Bills of Costs were taxed and that this suit is a disguised appeal of the said taxed Bills, something that cannot be countenanced by the court. I am therefore in agreement with the Client that this suit is *res judicata* HCACEC Misc. Application No. E053 of 2022 and HCCOMM Misc Application E826 of 2022.

#### **Whether the orders of 24<sup>th</sup> December 2023 ought to be varied and/or set aside**

9. Having found that the suit is *res judicata* HCACEC Misc. Application E053 of 2022 and HCCOMM Misc Application E826 of 2022, it automatically follows that the orders of 24<sup>th</sup> December 2023 can no longer stand. In any event, the said orders cannot stand in light of the judgment in HCCC No. E484 of 2022 dated 19<sup>th</sup> December 2023 where the orders freezing the monies held in the same accounts as those subject of the present suit were set aside. It is clear that had the court had sight of this judgement at the time, together with the rulings of the taxed Bill of Costs, it could not have issued the orders of 24<sup>th</sup> December 2023. This application by the Client therefore has merit and I will allow it.

#### **Conclusion and Disposition:-**

10. In the foregoing, I find that the only order which commends itself to me is to dismiss the suit for being *res judicata* and an abuse of the court process. The Advocates are also liable to pay the attendant costs of the suit. Any interim orders issued herein are vacated forthwith. It is so ordered.

**DATED, SIGNED and DELIVERED VIRTUALLY at NAIROBI this 28<sup>th</sup> DAY OF JANUARY 2025.**

**J.W.W. MONG'ARE**

**JUDGE**

In the Presence of:-

1. Ms. Ngoizi holding brief for Mr. Elkana Mogaka for the Plaintiff/Applicant.
2. Mr. Kiprotich for the 1<sup>st</sup> Defendants.
3. Mr. Mwangi for the Proposed Interested Party- Ecobank.
4. Amos - Court Assistant

