



**George Gilbert & Mombo Advocates v Saimanga; Mayfair Auctioneers (Interested Party)
(Miscellaneous Civil Case E020 of 2021) [2025] KEHC 375 (KLR) (24 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 375 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
MISCELLANEOUS CIVIL CASE E020 OF 2021
AK NDUNG’U, J
JANUARY 24, 2025**

BETWEEN

GEORGE GILBERT & MOMBO ADVOCATES APPLICANT

AND

SIMEON LESRIMA SAIMANGA RESPONDENT

AND

MAYFAIR AUCTIONEERS INTERESTED PARTY

RULING

1. This ruling resolves the notice of motion herein dated 02/09/2024 brought under Section 44 of the Advocates Act, Rule 11(2) of the Advocates Remuneration Order, Section 1A, 1B and 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules for orders that;
 - i. Spent
 - ii. That the honourable court be pleased to issue an order staying the execution of the decree and the attendant proclamation dated 28/08/2024 and served on 29/08/2024 any other consequential orders arising from the ruling in Nanyuki Misc Case No E20 of 2021 George Gilbert & Mombo Advocates vs Simeon Lesrima Saimanga pending hearing and determination of this application.
 - iii. That the honourable court be pleased to issue an order setting aside the costs awards consequent to the proceedings in Nanyuki Misc Case No E20 of 2021 George Gilbert & Mombo Advocates vs Simeon Lesrima Saimanga and the resultant execution of the decree and the attendant proclamations dated 28/08/2024 and served on 29/08/2024 herein and any other consequential orders upon the hearing and determination of this application.
 - iv. That the costs of the application abide the outcome of the suit.



2. The application is grounded on the grounds on the face thereof and is supported by an affidavit of Simeon Lesrima Saimanga who averred that he had engaged Mr. Nicholas A. Mombo advocate to represent him in an election petition and he paid his agreed fees together with disbursements but he was later served with a bill of costs from the firm of George Gilbert & Mombo Advocates. That the Respondents are about to illegally execute a wrongly computed decree of Kshs.3,483,000/- and additional costs of Kshs.1,506,577/- and he stands to suffer gross harm having settled the sums with the Respondent through the duly instructed counsel Nicholas Mombo advocates. That there was material non-disclosure during taxation of the sum paid as he had settled his dues which have not been accounted for and he risks paying for the same services twice hence being exploited by the Respondent herein.
3. He deposed that the proclaimed items due for attachment are prohibited by third party interest and as such, they are not free properties of the Applicant. That Mombo conceded to be paid but during the pendency of the matter before the taxing master, Mr. Mombo joined the case and entered consent with his new advocates to compromise the matter which was done. Later on, Mr. Oginga applied to have the consent set aside without service to the advocates involved and proceeded to tax the bill which did not consider his lack of representation. He was thus denied representation and the court proceeded with taxation while he was in hospital and thereby the bill was unchallenged. That Mr. Oginga failed to acknowledge previous payments made to the firm and the fee agreement between Mr. Mombo and him and the effect of this is double taxation and unjust enrichment.
4. The failure to disclose caused errors in tabulation and led to demand of new fees and threats of auction and execution for a sum of kshs.4,986,000/- devoid of basis since the costs added on top of Kshs.1,506,777.84/- are yet to be taxed. That he risk being taxed three times. That the grounds cited calls for review of the evidence in support of taxation and its setting aside for too many mistakes being legal and factual apparent on the face of the record and amounting to unjust enrichment to the counsel. That the firm of Mr. Oginga did not represent him anywhere and cannot purport to claim from him any sums demanded in his claim for fee on 09/07/2024.
5. In rejoinder, the Respondent filed a replying affidavit dated 06/09/2024 sworn by George Gilbert. He averred that the application is scandalous, vexatious and an abuse of the court process and the Applicant has not made out a case to warrant grant of the orders sought as he has failed to disclose to court that he had filed a similar application which was dismissed by this court (Njagi J) and therefore this court lacks jurisdiction since the issues raised therein in regards to taxation are res judicata. More specifically, the issues raised in paragraph 10, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24 in the supporting affidavit were raised in a reference challenging the decision of the taxing master and by a ruling dated 23/05/2024, this court dismissed the same issues raised herein. That prayers number 2 and 5 in the instant application are the same prayers that were raised in an application dated 30/03/2022 which application was dismissed by this court.
6. He further deposed that the issue of representation by one Mr. Mombo, sickness of the Applicant and not being heard in the bill of costs are issues that this court determined on merit. Further, the issue of service was conclusively dealt with by this court and the issue of the award of the taxing master was confirmed by this court, the issue of stay of execution was dealt with, the issue of introduction of new evidence and materials was also dealt with, issue of consent by Mr. Mombo and the Applicant was an issue before this court and was heard and determined on merit and the Applicant has never sought to appeal or review the said decision. That the court is being invited to do a fresh evaluation of evidence and consider new evidence. Therefore, the application is res judicata and an abuse of the court process since the Applicant is inviting this court to sit on an appeal over its own decision.



7. Further that, through his supporting affidavit, the Applicant seeks to have review of the decision whereas the application has no prayer for review. A review of the taxing master decision can only go back to the same taxing master and that a legal mistake as cited by the Applicant can only be appealed and not reviewed. Further, the decision of the taxing master can only be challenged through a reference which reference was filed and dismissed by this court. Further, the application is devoid of evidence as the documents attached are not marked as exhibits and the stamps do not show who is producing the documents. That the Applicant has not made out a case for grant of stay since he has not demonstrated any willingness to deposit the decretal sum, has not demonstrated that he will suffer substantial loss, the application has been filed four months after the delivery of the ruling and no reasons have been given to justify the delay.
8. That the Applicant has never paid the Respondent the decretal sum and the proclamation notice issued was in regard to a sum of Kshs.3,480,000/- and he has not demonstrated illegality in the computed decree and figures. That the amount in regard to the costs of the proceedings awarded by this court in the ruling of 23/05/2024 are yet to be assessed and taxed. Further, no objection has been raised in regards to participation of Ochieng Oginga in these proceedings as they have been duly instructed by the Respondent herein and have not taken over representation from the Respondent but it is acting alongside it and therefore Order 9 Rule 9 of the Civil procedure Rules is inapplicable. Further, during negotiation of further costs, the Applicant and his advocate negotiated the terms with the firm of Ochieng Oginga & Co Advocates through Mr. Arnold Ochieng Oginga.
9. He deposed that the application herein is neither a review application nor an appeal and is an invitation to this court to seat over an appeal over its own decision and trigger an illegal review without a review application. That it has been seven years and the Applicant has curtailed the Respondent from enjoying the fruits of its judgment through frivolous applications hence the instant application should be dismissed with costs to the Respondent.
10. The interested party filed grounds of opposition dated 05/09/2024 opposing the application on account that the instant application is an appeal disguised as an application for stay and setting aside, it is not supported by any legal provision as Section 44 of the Advocates Act does not provide jurisdiction for court to stay or set aside a judgment and has not made out a case for grant of stay. That the issues raised in the application in regards to taxation were conclusively determined by Njagi J on 23/05/2024 and the proclamation issued is in regards to the decree of Kshs.3,480,000/- and Kshs.3,000/- the filing fees and no other proclamation has been issued in regard to any other costs. That there is no proclamation on costs awarded by this court on 23/05/2024 as asserted by the Applicant and the Applicant has not challenged the validity of the proclamation hence, there is no error disclosed to warrant grant of the orders sought.
11. The application was canvassed by way of written submissions. Regarding the order of stay, counsel for the Applicant submitted that the Applicant will suffer substantial loss since the decretal amount is colossal and substantial and he will be unable to recover the said amount from the Respondent if the execution is successful and hence, failure to grant stay will prejudice the Applicant. That stay is granted where special circumstances of the case so require as was held in *Butt v Rent Restriction Tribunal* (1979) eKLR. That the application was filed without undue delay considering the Applicant's health and old age which occasioned the delay of 3 months which is not inordinate. That the Applicant has been ready and willing to furnish security as evident by depositing of Kshs.1,000,000/- as ordered by the court. As to whether he has established sufficient cause, he submitted that the application is arguable and justice demands that stay be granted to preserve the subject matter and failure to grant the orders will lead to double execution occasioning an injustice to the Applicant.



12. The Respondent on the other hand submitted that the issues raised in the instant application are res judicata having been determined by this court, Njagi J vide a ruling dated 23/05/2024 hence the Applicant is guilty of material non-disclosure. The issue regarding taxation proceedings and certificate of costs were conclusively determined. Relying on several authorities on res judicata, the counsel submitted that the Applicant is inviting this court to re-open issues already heard and determined on merits and to have this court overturn its own decision over the same issues. As to setting aside, the counsel submitted that Section 44 of the Advocates Act relied upon by the Applicant does not provide for setting aside nor stay of execution hence the application is not supported by any legal provision.
13. Further, the application does not seek for review in the prayers but in the supporting affidavit, the Applicant asks this court to review the evidence in support of the taxation whereas he has not satisfied the principles for review and setting aside and he is merely using the application as an avenue to circumvent the ruling of this court. The prayers sought cannot be granted by this court on account that court cannot grant review which prayer was not sought for, that he is seeking to review the taxing master decision and can thus go back to the taxing master for review, a legal mistake as cited by the Applicant cannot be reviewed but appealed upon, and a decision by a taxing master can only be challenged by a reference which was already done.
14. On stay of execution, counsel submitted that the Applicant has not made out a case for stay as he has not demonstrated willingness to deposit the decretal sum, has not demonstrated that he will suffer substantial loss, and there was delay in filing the application. That it is the Respondent who stands to suffer loss and prejudice as a result of failure to realize the fruits of its judgment. As to proclamation, he submitted that the proclamation issued is in regards to a sum of Kshs.3,480,000/- together with Kshs.3,000/- the filing fees and no proclamation had been issued with regards to costs awarded on 23/05/2024 as asserted by the Applicant. The instant application is therefore an abuse of the court process and meant to vex the Respondent and to prevent the execution of this court's orders.
15. The Interested Party submissions were similar to that of the Respondent but briefly submitted that Applicant has not made out a case for review or setting aside and is using the application as an avenue to circumvent the ruling of this court dated 23/05/2024. On stay of execution, it was submitted that he has not met the threshold for grant of stay since no substantial loss has been demonstrated, there was delay of three months in filing the application and has not offered to deposit the decretal sum. Further submitted that the issues raised are res judicata having been determined by this court and he is guilty of material non-disclosure and for concealing material facts as the issue of taxation were conclusively dealt with vide a ruling rendered on 23/05/2024 by Njagi J. The proclamation is valid therefore the application is an abuse of the court' process.
16. I have read through the application, the replying affidavits, and I have considered rival arguments by the parties herein.
17. The Applicant seeks for stay of execution of the decree and the proclamation dated 28/08/2024 and any other consequential orders arising from the ruling in Nanyuki Misc Case No. E20 of 2021 pending the determination of this application and an order setting aside the costs awarded in the said proceedings.
18. The decree emanates from a certificate of costs passed on 16/03/2022. The Applicant sought to file a reference out of time but his application was dismissed with costs to the Respondent by this court in its ruling dated 23/05/2024 (Njagi J). In the said application, the Applicant had sought leave to lodge a reference out of time, that he be granted leave to file further bank documents which will show which advocate had been instructed, the court be pleased to stay certificate of costs and execution and that the decision of the taxing master be stayed, varied and/or set aside. In dismissing the application, the



Learned Judge found inter alia that there were no grounds on how the taxing master erred in awarding a sum of Kshs.3,480,000/-.

19. So technically, what the Applicant is now seeking is for this court to stay execution of the decree in respect of the sum of Kshs.3,480,000/- which amount emanated from a certificate of costs of the taxing master and that this court do set aside the order of costs awarded by the said Judge in his ruling of 23/05/2024.
20. It is noteworthy that in the impugned ruling, the Applicant had sought for stay of execution of the said certificate of costs and which was dismissed by this court.
21. It is worthy of note that the stay sought was in the nature of a temporary order pending the disposal of the application herein and it is mind boggling that the parties found it necessary to canvass the issue in the submissions yet this is a final ruling in respect of the main prayer in the application, that is, an order setting aside the costs awarded in the said proceedings. The prayer for stay is not available to the applicant.
22. The Respondent in opposing the application have submitted that the application herein is res judicata. That issues raised in paragraph 10, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24 in the supporting affidavit were raised in a reference challenging the decision of the taxing master and by a ruling dated 23/05/2024, this court dismissed the same issues raised herein.
23. As the Respondent has contended, the issues of taxation and whether the amount of Kshs.3,480,000/- as computed is illegal, non-disclosure of the amount paid and issue of representation were all dealt with by the Learned Judge in his ruling and therefore this court is estopped by the doctrine of res judicata to revisit the same.
24. The doctrine of “res judicata” is provided for under Section 7 of the Civil Procedure Act in 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 issue in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

25. The Supreme Court in the case of John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR) held thus;

“...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].⁵⁸Hence, 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.⁵⁹ 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...”

26. The Applicant has also sought for setting aside of the order of costs awarded by the Learned Judge (Njagi J) in his ruling dated 23/05/2024. For this court to set aside the ruling by the Learned Judge, it will be required to sit in its capacity as a review court. The Applicant in his application has not sought for review and has not pleaded any grounds for review as provided under Order 45 Rule 1 (1) of the Civil Procedure Rules.
27. A cursory look at the record bears it out that the issues raised in the present application were directly in issue between the same parties in the Notice of Motion dated 30/3/22 which motion was determined by this court (Njagi J) in the ruling dated 23/5/24. The court was categorical that the avenue available to the applicant to challenge the taxed costs which is through a reference before this court was closed as the court found no merit in the application for leave to file the reference out of time.
28. The court found no error on the award made by the Taxing Master, the court found no merit in the application to adduce additional evidence observing that the applicant had not adduced any evidence before the Taxing Master terming it a misnomer. The implication is that this court found the order by the Taxing Master remains valid.
29. The orders sought herein would in the circumstances be an attempt to circumvent the orders by going behind an already made determination of the issues by this court. However disguised the prayers would be by use of different terminology, this court resists the attempt to invite it to sit on appeal of its own orders. The issues raised are *res judicata* and must be let to lie.
30. In the supporting affidavit, a case has been made for the review of this court's orders. An order for a review must be sought specifically and supported by the established principles in the limited jurisdiction of courts to review their orders. The less said about this, the better.
31. On the whole, the application before court is without merit. The same is dismissed with costs to the Respondent and the Interested Party.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF JANUARY 2025.

A.K. NDUNG'U

JUDGE

