



**Sawe & 134 others v Rono & 3 others (Miscellaneous Civil Application  
31 of 2019) [2024] KEHC 4867 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4867 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
MISCELLANEOUS CIVIL APPLICATION 31 OF 2019**

**JRA WANANDA, J**

**APRIL 26, 2024**

**BETWEEN**

**RICHARD KIPTUM SAWE & 134 OTHERS ..... APPLICANT**

**AND**

**BENJAMIN RONO & 3 OTHERS ..... RESPONDENT**

**RULING**

1. There are two Applications the subject of this Ruling. Being related, the parties agreed that the two be ruled upon together.
2. The background of this matter is that by the Notice of Motion filed on 31/01/2019 through Messrs Melly & Co. Advocates, the 135 Applicants (for ease of reference, hereinafter referred as “the Plaintiffs”), suing as members of the 4<sup>th</sup> Respondent, Sirikwa Squatters Self-Help Group, sought orders that the Respondents (for ease of reference, hereinafter referred as “the Defendants”) be compelled to release to the interim officials, the Group’s books of accounts and that once the books of accounts are so released, the interim office be mandated to call for a general election. On the basis that the Application was not opposed, Hon. Lady Justice H. Omondi (as she then was) by her Ruling delivered on 14/08/2019, allowed the Application as prayed.
3. On 6/09/2019, through Messrs Arusei & Co. Advocates, the 1<sup>st</sup>-3<sup>rd</sup> Defendants filed aa Application seeking the setting aside of the orders made in the said Ruling. Among the grounds preferred was that the Application leading to the Ruling had never been served upon the Defendants. The Application seeking setting aside was then canvassed and fixed for Ruling for 29/05/2020. However, 2 days before the scheduled date for the Ruling, vide a Notice filed through Messrs Miyienda & Co. Advocates and adopted on 29/05/2020, the Plaintiffs withdrew these proceedings in entirety. By the further orders made vide the Ruling delivered on 17/12/2020, the Defendants were awarded costs of the proceedings. The Defendants then filed their Bill of Costs and which was then, by the Ruling delivered



- on 30/08/2022 by the Deputy Registrar, Hon. R. Onkoba, taxed and awarded at the sum of Kshs 12,064,355/-.
4. On 28/09/2022, through Messrs Miyienda & Co. Advocates, the Plaintiffs filed an Application by way of Notice of Motion faulting the quantum of costs awarded by the Deputy Registrar's (taxing master) and therefore sought a Review of the Ruling. The Application was heard by Hon. Justice E. Ogola who by his Ruling delivered on 29/11/2022 dismissed the Application.
  5. Now, the first Application herein is the Plaintiffs' Notice of Motion dated 19/01/2023 filed through Messrs Nelson Otieno & Associates Advocates and seeks the following orders:
    - i. Spent.
    - ii. That the Honourable Court do allow the firm of Nelson Otieno & Associates Advocates, Commerce House, 4<sup>th</sup> Floor, Suite 402, Moi Avenue to act for the Applicants as their duly appointed Advocates.
    - iii. Pending the hearing and determination of this Application, the Honourable Court be pleased to extend the time to allow the Applicants object to the decision of the taxing officer in regards to the taxation done in this matter.
    - iv. Pending the hearing and determination of this Application, the Honourable Court be pleased to discharge and/or set aside any order issued in this matter as from 27<sup>th</sup> May 2020 to the extent that as at the time the said orders were issued, the Applicants were not duly represented as the Advocate purportedly on record for the Applicants had no direct instructions from them to act on their behalf.
    - v. Pending the hearing and determination of this Application, the Honourable Court be pleased to allow the Applicants participate in the proceedings and as well defend the Application through the firm of Nelson Otieno & Associates Advocates.
    - vi. Pending the hearing and determination of this Application, the Honourable Court be pleased to reinstate the hearing of the Preliminary Objection dated 6<sup>th</sup> March 2020 filed by the firm of Arusei & Co. Advocates.
    - vii. That the costs of this Application be in the cause.
  6. The Application is expressed to brought under the provisions of Section 1A, 1B and 3A of the [Civil Procedure Act](#), Order 9 Rule 9, Order 40 Rule 1 and Order 51 of the Civil Procedure Rules and Article 159 of [the Constitution](#). The Application is based on the grounds set out on the face thereof and is supported by the Affidavit sworn by one Richard Kiptum Sawe, presumably the 1<sup>st</sup> Plaintiff herein.
  7. In the Affidavit, the deponent has stated that he is the Chairman of Sirikwa Squatters Group and he has the authority of the members to represent them herein, that sometime in January 2019, the group members appointed Messrs Melly & Co. Advocates to represent them in this matter, that there being no legal expert among the members, they trusted the steps the Advocates had undertaken and therefore could not know that the Advocates had made a wrong step by filing a Miscellaneous Application, that sometime in August 2019, the Advocates gave them an order from the Court allowing them to proceed with conducting an election of the Group and that the books of accounts be handed over to them, that on that basis, they proceeded to conduct the Group's activities as they were told that their Application was never opposed. He deponed further that sometime in the year 2022, upon passing away of their Advocate, they appointed new Advocates, that upon being so appointed, the new Advocates informed them that the proceedings in this matter had actually come to an end and taxation conducted against



them and that there was an Application for Review of the taxed amount which Application was dismissed, and that this information was contrary to what the former Advocate had all along told them, that they were informed further that another firm of Advocates, Miyienda & Co. had come on record to represent them alongside Messrs Melly & Co. and which firm had filed a Notice of Withdrawal of the Application, that at no point had they given Messrs Miyienda & Co. instructions to represent them in the suit and therefore, that firm had no authority to purport to withdraw the Application without the Plaintiffs' instructions, that as a result, the Plaintiffs have been prejudiced as there is an order against them to pay the Defendants the taxed amount which situation has been brought about by the Advocates without the Plaintiffs' knowledge.

8. The second Application is the Chamber Summons dated 24/01/2023 filed through Messrs Ngigi Mbugua & Co. Advocates and seeks the following orders:
  - i. That the Ruling of the taxing officer dated 30<sup>th</sup> August 2022 and any consequential orders and/or certificate of costs arising thereon be set aside and/or vacated.
  - ii. [.....] Spent
  - iii. That leave to file Reference out of time be issued.
  - iv. That the Respondent's Bill of Costs be taxed afresh by a differently constituted taxing Court or in the alternative and in the interest of justice, this Court be pleased to assess/tax the costs lawfully payable to the Applicant on the said Bill of Costs.
  - v. This Honourable Court do issue such other orders/directions as it may deem fit and just.
  - vi. That the costs of this Application be provided for.
9. The Application is expressed to brought under the provisions of Paragraph 11 of the Advocates Remuneration Order and Section 94 of the *Civil Procedure Act*. It is then based on the grounds set out on the face thereof and is supported by the Affidavit sworn by one David Kiptanui Yego.
10. In the Affidavit, the deponent described himself as the 1<sup>st</sup> Petitioner/Applicant and basically faulted the taxing officer erred for awarding costs that were so inordinately high as to amount to oppression and injustice. He deponed further that the taxing officer misapprehended and misapplied the law and principles of taxation in assessing the instruction fees.

### **Grounds of Opposition**

11. Through Messrs Arusei & Co., the 1<sup>st</sup>-3<sup>rd</sup> Defendants, on 8/02/2023, filed Grounds of Opposition. However, by its sheer length and the manner in which it is framed, though titled "Grounds of Opposition", the same appears and sounds more like written Submissions.
12. Be that as it may, the grounds preferred are that the Plaintiff should not be allowed to oscillate this case around corridors in perpetuity, that the Application is a lame duck with no legs to stand as the Miscellaneous Cause was withdrawn and therefore, it is not subsisting or existing and there is no substratum to hang it, that the matter is Res Judicata and this Court is functus officio since the Plaintiffs moved to the High Court and Justice E.K. Ogola dismissed their Application vide the Ruling dated 29/11/2022, that they ought to have moved to the Court of Appeal, which they did not, and any contrary proceedings would amount to this Court sitting on appeal on a matter conclusively handled by a Court of equal jurisdiction and that therefore it lacks the jurisdiction to entertain the Application, that entertaining the Application would waste this Court's time since the Plaintiffs did not invoke the provisions for reinstatement but instead, have disingenuously sought to reinstate the Defendants' Notice of Preliminary Objection that ceased to exist when the Miscellaneous Application



was withdrawn, that the Application is a backdoor approach on review of costs that were already taxed and a reference to the Judge dismissed, and that the Plaintiffs have exhausted Rule 11 of the Advocates Remuneration Order.

13. It was stated further that the Applicants are making the instant Application mala fide with the intention of disrupting the current genuine leadership of the Group as the deponent of the Supporting Affidavit, Richard Sawe, has filed another case, a pure case of multiplicity of litigation, that subsequent to the withdrawal of this Miscellaneous matter, the Applicants also lodged another suit in which the said Richard Sawe is one of the litigants. I however note that by their nature, these are matters that can only be properly raised through a Replying Affidavit. I will not therefore consider them.
14. It was contended further that it is the same Plaintiffs herein that have also filed the other Application herein dated 24/01/2023 through Messrs Ngigi Mbugua & Co. since the deponent therein has stated that he has the authority of the Plaintiffs to do so. It was stated further that the Plaintiffs should be candid with the Court as the record of 7/06/2022 reveals that the Plaintiffs all along knew that Messrs Miyienda & Co. was acting for them and way before the Ruling on the taxing master was rendered, the said Richard Sawe purported to appoint one Mr. Nyandoro to act for him and on the basis, the matter was adjourned and the Plaintiffs granted time to put their house in order and also file Submissions, that the same Richard Sawe cannot now purport to have been unaware of the proceedings before Court, that should the Plaintiffs have any grievance against their Advocate then this is not the forum to resolve the same. It was further contended that the said Richard Sawe, is neither in the register of the Group nor has he subscribed to its Constitution, that he and his team are busybodies trying to meddle in the affairs of the Group because they want to interfere with the land dispute which is currently before the Supreme Court. Again, I note that by their nature, these further matters, too, can only be properly raised through a Replying Affidavit.
15. It was also argued that the Plaintiffs have not met the threshold for extension of time as stipulated in the Supreme Court case of County Executive of Kisumu v County Government of Kisumu and 8 Others [2017] eKLR and that the Plaintiffs are on a “fishing expedition”.

### **Preliminary Objection**

16. The 1<sup>st</sup>-3<sup>rd</sup> Defendants, on 9/05/2023, also filed a Notice of Preliminary Objection. The same is based on the already set out basis of Res Judicata, functus officio and the allegation that this Court is being invited to sit on appeal on its own decision. I will therefore not again recount the same.

### **Plaintiff's Submissions (Ngigi Mbugua & Co.)**

17. Counsel submitted that being aggrieved with the taxing master's Ruling, the Plaintiffs through their then Advocates, filed an Application for Review as stipulated under Section 80 of the *Civil Procedure Act* instead of a Reference to the High Court as envisaged under Rule 11 of the Advocates' Remuneration Order, that nevertheless, the Judge made a determination based on Review and as a consequence, dismissed the Application upon finding that the Plaintiffs had not shown any new evidence that had been discovered to warrant Review, considering that even the Judge in his Ruling appreciated that the matter had an avenue different from that of Review, the Plaintiff engaged the services of the current Advocates to make a proper application before this Court.
18. On whether there was inordinate delay in filing the present Application, Counsel cited several cases and submitted that there has been no delay as the taxing master made her Ruling on 30/08/2022 and immediately, the Plaintiffs then mistakenly applied for Review instead of a Reference, that, the Plaintiff engaged the services of the current Advocates who immediately made the instant Application. He added that there shall be no prejudice to the Defendants if the Application is allowed as there is



currently another related suit before this Court in which the parties are contesting the leadership of Sirikwa Squatters Self-Help Group and another one before the Supreme Court and that this is what informed the withdrawal of the suit as an act of good faith and to save the Court's precious time and resources, that there would be no prejudice as the parties are agitating for the same course and the Plaintiffs should not be seen as being punished for their magnanimous act of withdrawing the suit.

19. Regarding Rule 11 of the Advocates Remuneration Order, Counsel cited several authorities and submitted that the Rule was not intended to be ritualistically observed even where reasons for the disputed taxation are already contained in the formal and considered Ruling and as such the Court has discretionary powers to extend time for filing the Reference.

#### **Plaintiff's Submissions (Nelson Otieno & Associates)**

20. Counsel submitted that since no Replying Affidavit was filed by the Defendants, the facts stated in the Application remained uncontroverted and unchallenged. He cited several authorities. On whether the Preliminary Objection raises pure point of law, Counsel also cited several authorities and submitted that the first limb of the Respondents' Preliminary Objection raises the issue of Res Judicata and which will require ascertaining of the facts thus disqualifying the same as a pure point of law.
21. Regarding extension of time to object to the decision of the taxing officer under Paragraph 11 of the Advocates (Remuneration) Order, Counsel cited Sections 1A, 1B, 3A and 79G of the Civil Procedure Act on the Court's obligation to ensure that the overriding objective of civil litigation is observed and also Article 159 of the Constitution on administering the law "without undue regard to technicalities of procedure". He also cited several authorities and submitted that the taxing officer's Ruling was made on 30/08/2022 and the instant Application was filed on 19/01/2023, after a period of about 4 months and 20 days, that when the Plaintiffs learnt of the demise of their Counsel, they immediately appointed the new Advocate, that by the time that the Advocates perused the file, the taxation had already been concluded as was the Application to Review the decision. In conclusion, Counsel reiterated that the appeal is merited as the taxing master awarded instruction fees of Kshs 9,000,000/- on a matter that was withdrawn and did not proceed to hearing on merits, that it raises triable issues and also that the Plaintiffs shall suffer prejudice if the extension is not granted.

#### **Defendants' Submissions**

22. Counsel for the Defendants submitted that the Plaintiffs have engaged in a most unsatisfactory state of affairs by filing one application through one law firm and another application through a different law firm in what is clearly "forum shopping". He then recounted the proceedings of 7/06/2022 as already stated in the Grounds of Opposition to the effect that when the matter came up before the taxing master, one Richard Sawe instructed one Mr. Nyandoro Advocate to come on record in place of Mr. Miyianda Advocate. He then submitted that Justice E. Ogola having already dismissed an earlier application for Review of the taxing master's decision, the Plaintiffs are seeking a second and a third bite at the cherry.
23. In respect of the Application and Submissions filed by Messrs Nelson Otieno & Associates, Counsel contended that the Preliminary Objection filed by the Defendants raises pure points of law. On the omission by the Defendants to file a Replying Affidavit, Counsel submitted that despite the same, the Court is still duty bound to look at the merits of the Application. Regarding the Plaintiff's prayer seeking reinstatement of the Defendants' Preliminary Objection that was filed against the already withdrawn Miscellaneous Case, he submitted that one "cannot place something on nothing and expect it to stand". According to Counsel, the Plaintiff's only option is to apply for Review of Justice E. Ogola's decision or appeal to the Court of Appeal. Regarding the merits of the Application, Counsel



- submitted that the Plaintiffs, though feigning ignorance of Court processes, have not tabled any evidence that they lost communication with the firm of Melly & Co. Advocates and that if there was any, it only shows that the Plaintiffs were indolent since the Courts have repeatedly held that the case belongs to the litigants and not their Lawyers. He observed that the deponent of the Plaintiff's Affidavit is the 131<sup>st</sup> Plaintiff and also faulted the Plaintiffs for filing an "omnibus" Application which the Courts have decried against. Regarding the Defendant's Preliminary Objection, Counsel reiterated the arguments already set out including that the Application is Res Judicata, that this Court is being invited to sit on appeal on its own decision, and also that there is no provision for reinstating a withdrawn case.
24. In respect to the Application filed by Messrs Ngigi Mbugua & Co., Counsel observed that unlike in the Application filed by Messrs Nelson Otieno & Co., the Advocates have not even sought leave to come on record. He again reiterated the arguments already set out relating on Res Judicata and that this Court being functus officio. He then submitted that the "oxygen principle" and/or Article 159 of *the Constitution* on the Court being required to determine matters "without undue regard to technicalities" cannot be invoked herein. Regarding the Defendant's Preliminary Objection filed against the Application, Counsel reiterated the arguments already set out.
25. In conclusion, Counsel submitted that both Applications have not attempted to explain the delay in lodging them. He also cited several authorities in support of the various points that he has raised hereinabove.

### **Determination**

26. Upon considering the record, including the Pleadings, Affidavits, Submissions and authorities presented, I find the issues that arise for determination to be as follows:
- i. Whether the Preliminary Objection herein raises pure points of law.
  - ii. Whether the Applications are Res Judicata and this Court functus officio.
  - iii. Whether this Court should enlarge time to enable the Plaintiffs file a Reference or References against the assessment of costs by the taxing master.
27. The first issue that has disturbed my mind is the fact both the two Applications have been filed by the same Plaintiffs herein yet the Applications seek basically the same Reliefs. Neither of the Advocates' firms has alleged that it is acting for only part or some of the 135 Plaintiffs which therefore means that each of the two law firms is representing all the same 135 Plaintiffs. It has not been explained why the two law firms have each filed separate Applications. There is, of course, nothing wrong with a party being represented by multiple Advocates' firms in the same matter but in such circumstances, the Advocates must act in unison and as one unit. The practice is even that one Advocates' law firm would be appointed to act as the lead firm. We cannot have several Advocates acting for the same parties in the same matter and each one filing its own separate Applications. Entertaining such practice is to create complete disorder. The Plaintiffs had already filed the Application dated 19/01/2023 filed by Messrs Nelson Otieno & Co. seeking enlargement of time to challenge the taxation of costs made by the taxing master. It is beyond me, and there is no explanation given, as to why the firm of Ngigi Mbugua & Co. found it necessary to subsequently file the second Application dated 24/01/2023 seeking basically the same orders.
28. Further, regarding the Application filed by Messrs Ngigi Mbugua & Co., I note that the Affidavit filed in support thereof is sworn by one David Kiptanui Yego who describes himself as the "1<sup>st</sup> Petitioner/ Applicant". However, looking at the record, the 1<sup>st</sup> Applicant is one "Richard Kiptum Sawe". "David Kiptanui Yego" describing himself as the 1<sup>st</sup> Applicant is therefore a misleading statement which goes



to the core of the Application. In fact, I have perused the record and cannot find the name of the said “David Kiptanui Yego” among the 135 Plaintiffs. In the circumstances, the said “David Kiptanui Yego” has not connected his nexus to this case nor has he demonstrated the legal basis upon which he has purported to swear the Affidavit. In the circumstances, the Supporting Affidavit cannot be admitted in this matter.

29. Another concern that I have to pick with the Application filed by Messrs Ngigi Mbugua & Co., is that it has no prayer seeking leave to come on record. In regard thereto, Order 9 Rule 9 of the Civil Procedure Rules is premised as follows:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

- (a) upon an application with notice to all the parties; or
- (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

30. It is true that in this case, there was no Judgment per se but in my understanding, to avoid descending into an absurdity, it is only logical to presume that “judgment” in the context of the said provision would connote any final order that concludes proceedings. In short, the requirement to seek leave would always arise where an Advocate seeks to come on record in a suit of any nature that has already been substantively concluded. Such an Advocate would be coming on record to make applications such as for setting aside of orders or for Review or for post-Judgment reliefs such as enforcement of a decree or orders or taxation of costs or to seek stay of execution or leave to appeal or other similar remedies. In this case, the Cause having been withdrawn and even costs taxed, it means that the substantive proceedings were concluded. I believe it is on the basis of appreciation of this scenario that the firm of Nelson Otieno & Co., on its part, found it fit to include a prayer for leave to come on record. The firm of Ngigi Mbugua & Co., in failing to include a similar prayer, remains a stranger in this matter and cannot be entertained herein.

31. On a different point, as regards the Application filed by Messrs Nelson Otieno & Co., although the Plaintiffs seek that orders made herein be set aside and the time within which to object to the decision of the taxing master be enlarged, they do not state the grounds which they intend to raise in the objection or Reference once the time is enlarged. The Plaintiffs claim that the Advocate, Mr. Miyianda, who purported to act for them during the taxation was never instructed by them and thus had no authority to represent them. They therefore claim that they were not heard. It is good practice that anytime a party seeks to set aside an order on the ground that he was not heard, he needs to also demonstrate the defence or response that he would have raised had he been given such hearing. In other words, he must demonstrate that there are triable issues to be determined. This is what was stated in the case of *Patel vs East African Cargo Handling Services* [1974] EA 75 where Sir William Duffus, P. held that:

“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean in my view, a defence that must succeed. It means as Sheridan J put it “a triable issue” that is, an issue which raises a prima facie defence and which should go to trial for adjudication”



32. Although in the above authority, the Judge was dealing with an Application seeking to set aside an ex parte Judgment and to allow a Defendant to file a Statement of Defence, the logic remains the same. Insofar as the Application filed by Messrs Nelson Otieno & Co. does not even state what “defence on merits” it seeks to advance in the Reference, the same cannot succeed.

33. Regarding the Preliminary Objection raised by the Defendants, the Plaintiffs submitted that the same should not be entertained as it does not raise a pure point of law since the matters pleaded require to be ascertained by facts. What constitutes a Preliminary Objection was explained in the locus classicus case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696, in the following terms:

“...a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit.”

.....

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion .....

34. The Preliminary Objection raised is basically that the Application is Res Judicata, that the Court is functus officio and that entertaining the Applications will amount to this Court sitting on appeal on its own decision. Basically, the Preliminary Objection is in relation to the Ruling delivered herein on by Hon. Justice E. Ogola on 29/11/2022. According to the Plaintiffs, the Ruling fully and conclusively dealt with the issue of costs taxed by the Deputy Registrar. From my assessment, I find that determination of the said matters is reliant on findings that are apparent from the record and proceedings. The chronology of events in this case is clear and to determine the Objection, this Court will not need to receive or consider evidence from outside the record or even need to look at the facts deponed in the Affidavits filed in relation to the instant Applications. The several Rulings already made in this matter are clear and self-explanatory. In short, there are no facts outside the record that the Court will need to ascertain. In view thereof, I find that the circumstances of this case allow the challenges raised to be argued as a Preliminary Objection. This ground therefore fails and I now therefore proceed to determine the Preliminary Objection on its merits.

35. Regarding the point that the Applications are Res Judicata, the principles applicable are set out in Section 7 of the [Civil Procedure Act](#) as follows:

“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.”

36. On its part, the Black’s Law Dictionary 10<sup>th</sup> Edition defines “Res Judicata” in the following terms.

“An issue that has been definitely settled by judicial decision ... the three essentials are

- (1) an earlier decision on the issue,
- (2) a final Judgment on the merits and



(3) the involvement of same parties, or parties in privity with the original parties...”

37. The doctrine of Res judicata therefore exists to protect parties from being endlessly dragged into litigation over the same issue or subject matter that has already been conclusively determined by a Court. In determining whether a matter or suit is Res Judicata, the Court of Appeal in the case of *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR, pronounced itself as follows:

“[F] or the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit.
- b) That former suit was between the same parties or parties under whom they or any of them claim.
- c) Those parties were litigating under the same title.
- d) The issue was heard and finally determined in the former suit.
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

38. The Court went further to state as follows:

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

39. From the foregoing, it is clear that for a matter to be termed Res Judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same have been determined on merits by a Court of competent jurisdiction. To determine whether the Applications herein are Res Judicata, there is need to recap what Justice Ogola held. This is what he stated:

“12. First, it must be noted that the Applicants have filed an Application for review while there exists a process in law with regard to taxation rulings. The Advocates Remuneration Order sets out the procedure for an aggrieved party to object to the decision of the taxing officer. Rule 11 of the said Order stipulates as follows:

.....

13. The Applicants did not file a Notice of Objection within 14 days after the Ruling and for that reason, this application should not be entertained. But for the avoidance of doubt, I will assess the merits of the Application as prayed.



- .....
16. The Applicants are basing their application for review on the first condition. The impugned bill was taxed at Kshs 12,064,335/-. The basis of the application is that the basis of the claim of the sum of Kshs 35,000,000/- as instruction fees and the reference to ELC Petition No. 4 of 2016 to the application was not established. Further, that the subject of the application forming the basis of the taxation is the leadership of the group which does not have any nexus with the ELC Petition No. 4 of 2016. In a nutshell, the Applicant's contention is that the value of the subject matter was to be based on the leadership of the squatter's group which has not been determined.
  17. The Applicant has not established whether this is new evidence. A perusal of the impugned ruling reveals that the taxing master, acknowledged that the value of the subject matter was unascertainable and therefore she used her discretion. There is no reference to the ELC Petition in the ruling and I am puzzled as to where the Applicants arrived at this conclusion.
  18. The upshot is that the Applicants have failed to show that the application for review is merited as there is no new evidence that has been discovered.
  19. The application is hereby dismissed with costs to the 1st-3rd Respondents"

40. As aforesaid, the Application filed by Messrs Nelson Otieno & Co. does not disclose the triable issues that the Plaintiffs intend to raise if the enlargement of time to file a Reference is granted. The Application filed by Ngigi Mbugua & Co. however makes an attempt to do so although the grounds are couched in very general terms without specificity and may as well also suffer the same fate as the one filed by Nelson Otieno & Co. However, it at least discloses that the Plaintiffs fault the taxing master for awarding an excessively high amount. Considering that apart from making general averments, the instant Applicant does not reveal the specific grounds that the Plaintiffs intends to raise if given a chance to argue the Reference, my presumption is that there is no new ground envisaged and the grounds preferred in the Application ruled upon by Justice Ogola are the same that the Plaintiffs still intend to advance in the Reference. If there were any new or different grounds, then the Plaintiffs would have expressly mentioned them, not make general averments which by themselves, cannot assist the Court. Parties have a duty to clearly set out their grievances, not impose upon the Court the burden of speculating or trying to unravel the specific grievances complained against.
41. It is evident from the excerpt of the Ruling of Justice Ogola above that although the Judge found that the earlier Application was defective in that it invoked the wrong procedure, he still nevertheless proceeded to determine the Application on merits and eventually "dismissed", not "struck out", the Application. In regard thereto, the portion of the Ruling that I have underlined is very relevant. This is because there is need to make a comparison between the holding of Justice Ogola and the "triable issues" now stated to be intended to be raised at the hearing of the intended Reference.
42. Since Justice Ogola made an express finding that "the taxing master, acknowledged that the value of the subject matter was unascertainable and therefore she used her discretion". It follows that the Judge already ruled on the manner in which the taxing officer determined the instruction fees. This Court is therefore evidently functus officio and has no mandate to re-consider the issue. I therefore come to the considered finding that the issues raised in the two Applications are Res Judicata and cannot be re-litigated upon.



43. Regarding the Plaintiffs' allegation that the firm of Miyenda & Co. was never at any time instructed or authorized to act for the Plaintiffs, I agree with the Defendants' submissions that the Plaintiffs should be candid since the record of proceedings of 7/06/2022 reveals evidence that the Plaintiffs all along knew that Messrs Miyenda & Co. was acting for them, way before the Ruling on the taxing master was rendered subsequently on 30/08/2022. This is because the record of the said date shows that on that date, Mr. Miyenda was present in Court but one Mr. Nyandoro Advocate also appeared seeking to come on record for the Plaintiffs and on such basis, the matter was adjourned and the Plaintiffs granted time to regularize Mr. Nyandoro's appointment and to then file Submissions. However, Mr. Nyandoro never showed up again in the subsequent Court sessions. The Plaintiffs did not seek the Court's leave to file a Supplementary Affidavit to rebut the presumption that indeed they had intended to appoint Mr. Nyandoro and that it is they who had instructed him to appear in Court. In the circumstances, I infer that position to be correct. My conclusion is therefore that the Plaintiffs all along knew that Messrs Miyenda & Co. was on record for them yet they never took any action about it.
44. In any event, the Affidavit sworn in support of the Notice of Motion dated 23/09/2022 filed by Miyenda & Co. was sworn by one David Kiptanui Yego whom I presume is the same person who has now sworn the Affidavit in support of the instant Application filed by Messrs Ngigi Mbugua & Co. Although I have raised questions regarding the capacity of the said David Kiptanui Yego to swear Affidavits in this matter, I note that the Plaintiffs have not denied knowledge of him. In the circumstances, the Plaintiffs cannot now purport to have been unaware of the representation by Messrs Miyenda & Co. and cannot disown him. The Plaintiffs have not explained why they never sought for his removal when they had the opportunity. This ground therefore also fails.
45. Regarding the prayer for extension of time to file the Reference or References out of time, that this Court has power to enlarge time is not in doubt. There are various provisions donating such power to this Court. For instance, Section 95 of the Civil Procedure Act provides as follows:
- “where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may in its discretion from time to time enlarge such period, even though the period originally fixed or granted may have expired.”
46. There is also Order 50 Rule 5 of the Civil Procedure Rules 2010 which also deals with the power to enlarge time and also gives unfettered power to the Court in the following terms:
- “Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:
- Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”
47. Paragraph 11 of the Advocates' Remuneration Order 2009 also permits extension time for lodging a Reference notwithstanding the expiry of the 14 days period prescribed. It provides as follows:
- “ 11. Objection to decision on taxation and appeal to Court of Appeal.
- (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.



- (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by Chamber Summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

.....

- (5) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by Chamber Summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired."

48. The discretion of this court to enlarge time is elaborately discussed in the case of the County Executive of Kisumu v County Government of Kisumu and 8 Others [2017] eKLR where the Supreme Court of Kenya held thus:

"(23) It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The Court delineated the following as "the underlying principles that a Court should consider in exercise of such discretion:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

49. It is therefore clear that the length of delay and the reasons for non-compliance with the set timelines are factors to be considered by the Court in the exercise of its discretion while handling applications seeking enlargement of time. In this case, the Deputy Registrar's Ruling on taxation was made on 30/08/2022. An Application was then filed to Review the Ruling but which Application was



dismissed by Justice Ogola on 29/11/2022. Pursuant thereto, the two instant Applications were then filed on 19/01/2023 and 24/01/2023, respectively. This is after a period of about 2 months. Although there is no explanation whatsoever in both Applications addressing this 2 months' delay, since each case must be determined on its own facts, I am prepared to excuse it and find the same as reasonable and not amounting to inordinate delay. However, having already made findings against the Plaintiffs on all the other grounds raised and which findings are so substantial, this one finding in favour of the Plaintiffs cannot salvage the two Applications.

### **Final Orders**

50. In light of the above, it is clear that both Applications filed herein cannot succeed. Accordingly, both the Notice of Motion dated 19/01/2023 and the Chamber Summons dated 24/01/2023, both filed by the Plaintiffs, are dismissed with costs to the Defendants.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 26<sup>TH</sup> DAY OF APRIL 2024**

.....

**WANANDA J.R. ANURO**

**JUDGE**

