



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 308 OF 2006

MBIGI NJUGUNA & CO. ADVOCATES.....APPLICANT

-VERSUS-

THE TOWN CLERK, CITY COUNCIL

OF NAIROBI.....RESPONDENT

RULING

1) The subject matter of this ruling is the Notice of Preliminary Objection dated 20th September 2012 in which the respondent put forward the following grounds:

i. THAT Hon. Justice K. H. Rawal vide her ruling of 22nd November 2011 already ruled that Decree herein is fully satisfied and ordered restitution to the respondent of kshs.244,627.70.

ii. THAT the costs awarded thereafter were to the respondent and not the applicant.

iii. THAT the matter of any payments that ought to be due to the applicant is thus res judicata.

iv. THAT the belated attempt to tax a bill on a matter that is res judicata is total abuse of the court process.

v. THAT the applicant is merely attempting to delay and frustrate compliance with the Order of Restitution granted by the honourable court.

2) Both the applicant and the respondent filed written submissions over the preliminary objection.

3) I have considered the grounds stated on the body of the Notice of Preliminary Objection and the rival written submissions.

4) It is the submission of the respondent that this court, K.H. Rawal J, (as she then was) rendered its decision on this matter vide her ruling she delivered on 22.11.2011 whereof she expressly stated that the decree is fully satisfied and proceeded to *inter alia*, set aside the consequential action taken. It is said that this court from then became *funtus officio*. The respondent further argued that this suit is resjudicata and an abuse of the court process.

5) The applicant opposed the Notice of Preliminary Objection stating that the respondent has not laid out any facts to support its contention and that it merely restated the history of this litigation.

6) The applicant pointed out that there is no record indicating that the applicant has ever filed party and party costs arising out of these successful enforcement proceedings. The applicant further argued that contrary to the respondent's assertion in the preliminary objection, the applicant's Bill of Costs is not resjudicata within the meaning of Section 7 of the Civil Procedure Act for the following reasons:

7) **First**, that the party and party Bill of Costs dated 29th May 2012 is not directly and substantially the same as any other issue of costs filed by the parties.

8) **Secondly**, that no court prior to this matter has made a decision with regard to these costs, therefore the bill of Costs dated 29.5.2012 is not resjudicata.

9) It is not in dispute that the respondent filed an application dated 8th March 2011 in which it sought for inter alia an order declaring that the decree is fully satisfied. The application was heard and determined in favour of the respondent by K. H. Rawal J (as she then was). The

learned judge in her ruling delivered on 22.11. 2011 stated in part as follows:

“I do find and declare that the decree herein is fully satisfied and all the consequential actions taken by the respondent are set aside.”

10) The matter now pending before this court is the applicant’s Party and Party Bill of Costs dated 29th May 2012. The applicant avers that he filed the aforesaid Bill of costs following a successful enforcement of the payment of the decreed costs by way of mandamus.

11) It is the applicant’s submission that the respondent has not shown that he has before ever filed party and party costs arising out of these successful enforcement proceedings.

12) With respect, I am persuaded by the applicant’s argument that he had never before filed party and party costs. The Bill of costs dated 29th May 2012 is in respect of costs arising out the application for mandamus. The application was allowed by Gacheche J(as she then was) with costs. The aforesaid party and party Bill of Cost therefore cannot be said to be resjudicata.

13) In the end the Preliminary Objection is found to be without merit. It is dismissed with costs to the applicant.

Dated, signed and delivered online via Microsoft Teams at Nairobi this 24th day of September, 2020.

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J. K. SERGON

JUDGE

In the presence of:

..... **for the Applicant**

..... **for the Respondent**