**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CIVIL SUIT NO. 20 OF 2015**

**CHRISTOPHER ORINA KENYARIRI T/A**

**KENYARIRI & ASSOCIATES ADVOCATES…..APPLICANT/DEFENDANT**

**VERSUS**

**SALAMA BEACH HOTEL LIMITED…1ST RESPONDENT/1ST PLAINTIFF**

**HANS JUERGEN LANGER………….2ND RESPONDENT/2ND PLAINTIFF**

**TOURIST AND TECHNOLOGY GMBH**

**(TOUR AND TECH GMBH)……….....3RD RESPONDENT/3RD PLAINTIFF**

**ACCREDO AG……………………..…..4TH RESPONDENT/4TH PLAINTIFF**

**RULING**

**[Chamber Summons dated 5th June, 2017]**

1. In the Chamber Summons application dated 5th June, 2017 brought under Order 1 Rule 14 of the Civil Procedure Rules, 2010 (CPR) and Section 7 of the Civil Procedure Act, Cap. 21 (CPA), the Applicant, Christopher Kenyariri T/A Kenyariri & Associates Advocates prays that the **"1st, 2nd, 3rd and 4th Plaintiffs be struck out and suit be dismissed with costs to the Defendant."** He also prays for costs of the application. The application is supported by the grounds on its face and an affidavit sworn by the Applicant on the date of the application.

2. In summary, the Applicant avers that the plaintiffs' claim is *res judicata* as per the ruling of this Court (Chitembwe, J) dated 19th June, 2015. Secondly, that the 3rd Respondent/3rd Plaintiff, Touristic & Technology GMBH (Tour & Tech GMBH) was not a party to the taxation cause that allegedly resulted in excess payment to the Applicant and cannot thus claim under the taxed costs.

3. Salama Beach Hotel Limited, the 1st Respondent/1st Plaintiff, Hans Juergen Langer, the 2nd Respondent/2nd Plaintiff, Touristic & Technology GMBH (Tour & Tech GMBH), the 3rd Respondent/3rd Plaintiff and Accredo AG, the 4th Respondent/4th Plaintiff opposed the application.

4. The advocates for the parties made oral submissions. On behalf of the Applicant it was contended that the 3rd Respondent was never a party to the taxation proceedings and even the reference arising therefrom. It is the Applicant's case that it is only during the second taxation that the 3rd Respondent

started appearing in the matter. It is the Applicant's position therefore that the 3rd Respondent is a stranger to this suit.

5. On the issue of *res judicata*, the Applicant asserts that in a ruling delivered on 19th June, 2015 Justice Chitembwe determined that this matter was *res judicata*. According to the Applicant, the said ruling has never been challenged through an appeal or review.

6. Further, that prayer number (e) of the plaint herein was dealt with in paragraphs 69 and 70 of the ruling delivered on 26th September, 2014 by Angote, J. The Applicant contends that through the said ruling the 3rd Respondent was told to file a separate suit.

7. The Applicant asserts that the Court of Appeal in its ruling of 10th March, 2017 had clearly indicated that the issue of *res judicata* had not been determined in this matter.

8. The Respondent opposed the application through their grounds of opposition dated 21st July, 2017. Apart from the grounds of opposition, the respondents also placed reliance on the pleadings previously filed in response to applications that had been filed by the Applicant to either have this matter struck out or transferred to Nairobi.

9. On the question of the 3rd Respondent being a stranger to the suit, the respondents rely on Order 1 Rule 9 of the CPR and assert that no suit shall be defeated by reason of misjoinder or non-joinder of parties. They also contend that the court may in every suit deal with the matter in controversy so far as regards the rights of the parties actually before it.

10. Turning to the Applicant's allegation that this matter is *res judicata*, the respondents contend that a plain reading of the heading clearly shows that the parties in this suit are different from the parties in Misc. Application No. 16 of 2013 as consolidated with Misc. Applications Nos. 13, 14, 15, 17, 41 and 42.

11. It is the respondents' position that the matter herein is a proper suit whereas the other proceedings were not proper suits as they related to a reference against taxation and an application for accounts as provided by the Advocates Act and Order 53 of the CPR. Further, that the claim herein is very different from what was brought in the aforementioned applications.

12. The respondents hold the view that the Applicant does not want this suit to be heard. They urge the court to dismiss this application and have the main suit listed for hearing.

13. In support of their submissions, the respondents rely on two rulings delivered on 5th October, 2015 and 7th April, 2016 by Chitembwe, J in this suit. They also rely on the decisions in **Nancy Mwangi T/A Worthin Marketers v Airtel Networks (K) Ltd (formerly Celtel Kenya Ltd) & 2 others [2014] eKLR** and **Skair Associates Architects v Evangelical Lutheran Church of Kenya & 4 others [2015] eKLR.**

14. The instant application is premised on two grounds namely that the 3rd Respondent is a stranger to the claim and that the matter is *res judicata*.

15. Order 1 Rule 14 CPR is one of the rules upon which the application is premised. It provides that:

> **"Any application to add or strike out or substitute a plaintiff or defendant may be made to the court at any time before trial by chamber summons or at the trial of the suit in a summary manner."**

16. The cited provision provides the applicable procedure for making an application for the striking out or substitution of a plaintiff or a defendant.

17. From the Applicant's pleadings and submissions, it is clear that the Applicant wants the 3rd Respondent struck out of the suit for being a stranger to the claim. In such a situation, the applicable rule of the CPR is Order 1 Rule 10(2) which provides that:

> **"The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as a plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."**

18. In order to determine whether a party is or is not properly before court, one has to look at the pleadings. Even before looking at the pleadings, it is important to note that non-joinder or misjoinder of a party should not automatically result in the striking out of a suit-see **Skair Associates Architects** (supra). Curative measures should first be applied in order to comply with the constitutional imperative that procedural technicalities should not be deployed in determining disputes before the courts.

19. The subject of this litigation is the respondents' claim as contained in the plaint amended on 18th October, 2015. The Applicant has annexed the said amended plaint to his further affidavit sworn on 7th July, 2017.

20. The respondents' claim as per the said amended plaint is that the 1st and 2nd respondents entered into an advocate-client relationship with the Applicant in 2012. The monthly retainer fee was initially Kshs. 120, 000 but later increased to Kshs. 250, 000. After sometime, the relationship collapsed resulting in the Applicant filing bills of costs which were taxed at Kshs. 5, 034, 095.95

21. It is the respondents' averment that the 3rd Respondent paid a total of Kshs. 7, 874, 799 as legal fees to the Applicant on behalf of the 1st and 2nd respondents. The respondents' case is that when the amount paid to the Applicant is taken into account, it will emerge that the Applicant has been overpaid to the tune of Kshs. 2, 840, 703.05 and this is the amount he should refund to them.

22. Among the orders sought by the respondents in their claim is an order compelling the Applicant to refund them the sum of Kshs. 2, 840, 703.05 plus interest.

23. I will reproduce paragraph 9 of the amended plaint in order to show the nexus between the respondents. In that paragraph the respondents state:

> **"The 3rd Plaintiff avers that on instruction from the 1st and 2nd Plaintiffs, it remitted a total of Kshs. 7, 874, 799/= on diverse dates to the Defendant's bank account through electronic transfer. The 3rd Defendant** [read Plaintiff] **further avers that the money remitted to the Defendant's account was solely to cater for legal fees for services rendered by the Defendant to the 1st, 2nd and 4th Plaintiffs."**

24. It cannot therefore be said that the 3rd Respondent/ 3rd Plaintiff is a stranger to this litigation. The amount being claimed by the respondents is said to have originated from the 3rd Respondent's account. In the circumstances the Applicant's prayer to have the 3rd Respondent struck out of these proceedings has no merit. The same is dismissed.

25. The remaining question is whether this matter is *res judicata*. The principal of *re judicata* is found in Section 7 of the CPA which provides 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 the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."**

26. The doctrine of *res judicata* as stated in the said Section has been explained in a plethora of decided cases. I only need to cite one of those cases. In the recent case of **The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR),** the Court of Appeal held that:

> **"Thus, for 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 disinjunctive 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."**

27. The Court explained the role of the doctrine thus:

> **"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."**

28. My understanding of the *res judicata* principle is that it is meant to lock out from the court system a party who has had his day in a court of competent jurisdiction from re-litigating the same issues against the same opponent. Surely it would be a waste of the courts' valuable time if there was no tool for arresting such mischief. This is the tool the Applicant has deployed through the instant application.

29. The question therefore is whether the Applicant has satisfied the conditions for the application of the principle of *res judicata* in view of the facts of this case.

30. For the record it is important to reproduce in this ruling, the reasons as captured in the grounds on the face of the application, as to why the Applicant believes that this suit is *res judicata.* The grounds on the face of the application disclose that:

> **"THIS APPLICATION is premised on the grounds THAT:**
>
> **This honourable Court has already determined in this suit that the claim by the 1st, 2nd, 3rd and 4th Plaintiffs are *res judicata* under Section 7 of the Civil Procedure Act Cap.21 Laws of Kenya.**
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> **In his ruling dated 19th June, 2015 (Annexture COK 1 herein), the Hon. Justice Said J. Chitembwe stated:**

**“…the issue of costs between the parties has already been determined by the High Court and is therefore *Res Judicata*. Section 7 of the Civil Procedure Act, Cap.21 applies. The inclusion of the Plaintiff does not change the situation as the amount allegedly paid by the 3rd plaintiff was also considered by Justice Angote.”**

31. In reply to the Applicant’s submissions, Mr. Ndegwa for the respondents submitted that the instant application is *res judicata* in itself as the Applicant has raised the issue of *res judicata* in his precious applications and the court has always found that the respondents’ suit is not *res judicata*.

32. Since the application is premised on the statement of Justice Chitembwe in the ruling delivered on 19th June, 2015, it is important to reproduce the relevant part of that ruling. He stated that:

**“Further, the issue of costs between the parties has already been determined by the High Court and is therefore *Res Judicata.* Section 7 of the Civil Procedure Act, Cap 21 applies. The inclusion of the 3rd plaintiff in this matter does not change the situation as the amount allegedly paid by the 3rd plaintiff was also considered by Justice Angote.**

**In the case of Henderson…**

**I do find at the moment that there is no taxation of costs going on.**

**The court cannot stay the execution process that is based on the taxed costs. Any amount that is being claimed by the plaintiffs against the defendant can be the subject of a different litigation but cannot be the reason for stay of execution. That amount has to be proved independently in a different suit. It might be proved or disproved.”**

33. The background to the cited ruling is that the respondents herein had filed an application seeking stay of execution in respect of Nairobi Miscellaneous Application Numbers 769 and 770 of 2013, 298, 299 and 300 of 2013, and Malindi Miscellaneous Application No. 16 of 2013 consolidated with Misc. Application Numbers 13, 14, 15, 17, 41 and 42 of 2013. The Applicant herein, who was the respondent in the application, raised a preliminary objection contending *inter alia* that the matter was *res judicata*. In his ruling the learned Judge was clear that the taxation of costs had been addressed to its logical conclusion and if the respondents herein had any claim against the Applicant then they should take it up through a separate suit.

34. The Applicant’s assertion that Chitembwe, J had determined that the issue of the taxation of costs was *res judicata* is therefore correct. However, the Judge did not specifically state that the claim herein is *res judicata*. The Applicant must surely know that had the Judge made such a finding then this matter should have been brought to an end thereby making it unnecessary for him to file the instant application.

35. I have also had the benefit of perusing the judgement delivered on 10th March, 2017 by the Court of Appeal at Malindi in **Civil Appeal No. 62 of 2016 Christopher Orina Kenyariri & Associates Advocates v Salama Beach Hotel Limited & 3 others.** The appeal was filed against a ruling delivered on 7th April, 2016 by Chitembwe, J dismissing the Applicant’s application dated 11th November, 2015. In the judgement, the Court of Appeal observed that:

**“Starting with the appellant’s complaint that the learned judge failed to determine the question whether the suit was *res judicata* and therefore an abuse of the process of the court, we have no hesitation in holding that the complaint is bereft of substance… The appellant did not raise the issue of *res judicata* and could not have legitimately expected the learned judge to address or pronounce himself on it. The matter is being raised for the first time in this appeal, which we cannot entertain.”**

36. I have reproduced part of the judgement of the Court of Appeal in order to demonstrate that the issue of *res judicata* was not addressed in the ruling delivered by Chitembwe, J on 7th April, 2016. I have also

shown that the issue as to whether this suit is *res judicata* was not addressed by Chitembwe, J in his ruling of 19th June, 2015.

37. There is another ruling delivered by Justice Chitembwe on 5th October, 2015 in respect of an application by the Applicant seeking that this suit to be struck out for failing to disclose a cause of action. In that ruling the learned Judge found that the respondents' pleadings disclosed a viable cause of action.

38. Looking at the rulings so far delivered in this matter I do not find anything to support the respondents' claim that the Applicant has previously raised the issue of *res judicata.* Even if such the issue has been raised there seems to be no ruling that has specifically addressed the question as to whether the respondents' claim herein is *res judicata.* The respondents' contention that the instant application is *res judicata* is therefore untenable.

39. The Applicant has told the court that one of his defences is that this matter is *res judicata.* The respondents assert that the principle of *res judicata* is not applicable to this case. The starting point is to reproduce at length the ruling delivered by Angote, J on 17th April, 2015 in **Kenyariri & Associates Advocates v Salama Beach Hotel Ltd & 4 others, ELC Misc. Application No. 16 of 2013 as consolidated with Misc. Applications numbers 13, 14, 15, 17, 41 and 42.** This is what the learned Judge stated at paragraphs 9 to 17 of his ruling:

> **"9. Counsel submitted that the current Application is solely based on my Ruling dated 26th September 2014 in which I held as follows:**
>
> **"The taxing officer of this court has already determined, on the basis of the documents that were produced by the clients, the amount of money that was paid to the advocate. It might be true that as at the time of the taxation, the Applicants/Clients were not in possession of all the documents to prove their claim, but that is water under the bridge, unless an application for review is done and allowed by the taxing officer."**
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> **10. In the said decision, I held that the issue of whether the client has additional documents that was not placed before the taxing officer was "water under the bridge". The Application for review of the decision of the taxing officer on the grounds that the clients had additional documents which they wanted the taxing officer to consider could only be entertained by the taxing officer herself and before the taxing officer delivered her Ruling and certainly not by this court.**
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> **11. Having not presented all the documents before the taxing officer, even after being given an opportunity to do so, the Clients cannot at this stage claim that this court should review and or set aside the ruling of the taxing officer so as to allow them to produce the same documents in evidence.**
>
> **12. In fact, when I referred the consolidated Bills of Costs to the taxing officer for re-taxation in my Ruling dated 20th February, 2014, I stated that the taxing officer should direct the production of books, papers and documents to ascertain the claim of both parties.**
>
> **13. When the matter was referred to me by way of a Reference the second time, I stated as follows:**
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> **"In any event, the Respondents (Clients) produced documents showing how much they had paid to the Applicant, which documents were considered by the taxing officer. The proved amount was deducted from the final Bill of Costs."**
>
> **14. In the circumstance, this court does not have jurisdiction under the Advocates Act or the Advocates Remuneration Order to order for a review or setting aside of its own Ruling or the Ruling of the taxing officer after hearing and determining the Reference pursuance to the**

**provisions of Rule 11(2) of the Advocates Remuneration Order.**

> **15. It therefore does not matter, as alleged by the Clients/Applicants, that they have now come across documents showing that indeed the Advocate had been paid his legal fees in full. The provisions of Order 45 of the Civil Procedure Rules are not applicable in this case.**
>
> **16. In the absence of a competent Reference before this court, I find and hold that I do not have the requisite Jurisdiction to entertain an Application for review or setting aside the Certificate of Costs issued on 12th November, 2014 or the taxing officer's decision of 5th June 2014."**

That ruling brought to an end the litigation between the respondents and the Applicant relating to the Applicant's legal fees.

40. Justice Angote's ruling most likely informed the statement by Justice Chitembwe in the ruling delivered in this matter on 19th June, 2015 that:

> **"Further, the issue of costs between the parties has already been determined by the High Court and is therefore *Res Judicata.* Section 7 of the Civil Procedure Act, Cap 21 applies. The inclusion of the 3rd plaintiff in this matter does not change the situation as the amount allegedly paid by the 3rd plaintiff was also considered by Justice Angote."**

41. The foundation of the respondents' suit is that the 3rd Respondent on the instruction of the 1st and 2nd respondents remitted a total of Kshs. 7, 874, 799 to the Applicant to cater for legal fees for services that the Applicant had rendered to the 1st, 2nd and 4th respondents. The amended plaint herein shows that the respondents are asking for a refund from the Applicant on the ground that he had been paid beyond and above what the taxing master had found to be his entitlement. In essence, the present suit seeks to set aside the decision of Angote, J so that the respondents are given an opportunity to adduce evidence showing that they had paid the Applicant some money on top of the taxed amount. This issue was clearly addressed by Justice Angote in the ruling I have reproduced above.

42. Angote, J had directed the respondents herein who were the clients of the Applicant to place all the necessary material before the taxing master for the same to be taken into account during taxation. Any attempts to introduce evidence of alleged payments through this suit is indeed an abuse of the court process and in breach of the *res judicata* principle. Litigation must come to an end and attempts to litigate the same issues through surrogates cannot be accepted by the court.

43. The introduction of the 3rd Respondent as a plaintiff in this matter does not change the design of the respondents' claim. The fact that the respondents' claim is *res judicata* cannot be upset by bringing on board the 3rd Respondent. Litigating a concluded matter under surrogates or uploading more parties to a claim does not change the conclusion already reached by the court in the former trial. In any case, the 3rd Respondent was a party at some point in the taxation proceedings. The 3rd Respondent is therefore not a new party as such.

44. In **E.T. v Attorney General & another [2012] eKLR** Majanja, J correctly warned that:

> **"The courts must be vigilant to guard against 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 a new cause of action which has been resolved by a court of competent jurisdiction."**

45. The learned Judge went ahead and cited the case of **Omondi v National Bank of Kenya Limited & others [2001] EA 177** where it was stated that **"parties cannot evade the doctrine of *res judicata* by**

**merely adding other parties or causes of action in a subsequent suit."**

46. In **Gurbacham v Yowani Ekori [1958] EA 450**, the Court of Appeal of Eastern Africa, while considering the doctrine of *res judicata*, cited at page 453 a passage from the Judgement of the Vice-Chancellor in **Henderson v Henderson (1), 67 E.R.313** at page 319 wherein it was stated that:

> **"In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of 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 judgement, 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."**

47. Applying the stated law to the facts before me, it is clear that the respondents ought to have placed before the taxing master the evidence of the alleged payment of some money to the Applicant by the 3rd Respondent so that the amount could be taken into account during the taxation. The said payment was allegedly made on behalf of the 1st, 2nd and 4th respondents who were parties to the taxation proceedings and they must have been aware of such payments. Their attempt to claim a refund of the alleged payments through these proceedings amounts to reopening a matter that was adjudicated and determined by a court of competent and concurrent jurisdiction. In fact it is an attempt to appeal against the decision of Angote, J. The taxation of the bills of costs between the Applicant and the respondents is a matter that has been settled.

48. I am therefore in agreement with the Applicant that this suit touches on issues that have been litigated before a competent court by the same parties. This suit run afoul of Section 7 of the CPA. The Applicant's prayer that this court finds that this suit is *res judicata* is allowed. This suit is struck out with costs to the Applicant/Defendant.

**Dated, signed and delivered at Malindi this 28th day of Sept., 2017.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**