REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 633 OF 2015

INVESCO ASSURANCE COMPANY LIMITED…PLAINTIFF/RESPONDENT

VERSUS

MERCY NDUTA MWANGI T/A

MWANGI KENG'ARA &CO.ADVOCATES……DEFENDANT/APPLICANT

RULING

Introduction

1. The sole question for determination currently is as encompassed in the prolix Notice of Preliminary Objection filed by the Defendant on 20 July 2016. Stripped to the bone, the objection is two-fold. First, it is asserted that this suit is *res judicata*. Secondly, is that, contrary to the established and laid down procedure, the Plaintiff is seeking to vary or vacate orders made by courts of concurrent jurisdiction by way of an ordinary suit rather than through an appeal or an application for review.

2. The Plaintiff contends that the suit together with the intermediary applications is well founded.

Background facts

3. The factual background has been outlined in a few previous decisions involving the parties. There is somewhat of a history between the parties to this suit and it would be better to reprise the background again.

4. In 2003 the Plaintiff retained the Defendant as one of the law firms to render legal services to the Plaintiff. The Defendant was later to be severally instructed to represent the Plaintiff as well as the Plaintiff's insured in various court claims. The Defendant was however not remunerated leading to the Defendant's withdrawal of services in June 2006. The Defendant also then filed various Bills of Costs with a view to recovering both her profit charges (legal fees) and actual expenses (disbursements).

5. Four months later, the parties struck a settlement and executed an agreement. The Defendant agreed to resume the provision of legal services. The Plaintiff agreed to pay the outstanding profit charges as well as actual expenses and VAT. An amount was agreed upon for some identified 300 legal briefs. The parties also agreed on how to handle other legal briefs which had not been finalized and were still subject of litigation. Payment of agreed amount was to be by way of agreed equal monthly installments, with a default provision also included.

6. Somewhat and somehow, the Defendant still ended up not only receiving various payments from the Plaintiff but also filing various Bills of Costs- still claiming profit charges and actual expenses.

7. In the meantime, in early 2008 the Plaintiff was placed under statutory management pursuant to the provisions of *s.*67C of the Insurance Act (Cap 487) Laws of Kenya due to an unhealthy financial patch the Plaintiff was going through. A moratorium was imposed and the parties herein were apparently forced into a statutory truce.

8. The statutory management was ultimately lifted in 2010 and the rather rough relationship between the Plaintiff and the Defendant resumed. The Defendant continued to file and tax her Bills of Costs and the Plaintiff sought to variously challenge the same on the basis, inter alia, that the Defendant had not accounted for the amount of Kshs. 16,605,283/= paid by the Plaintiff to the Defendant as fees and disbursements. Additionally, various suits were also filed by the parties. All involved the issue of the costs payable, costs to be taxed or already taxed and the agreement between the parties.

This suit

9. The last of the litigation causes filed by either party was the instant suit.

10. The suit was prompted apparently by the Defendant's threat to initiate winding-up proceedings. Besides seeking orders to restrain the Defendant from commencing winding up proceedings, the Plaintiff seeks to have this court declare that there is in existence a valid agreement on fees between the Plaintiff and the Defendant. The Plaintiff also seeks to stay all proceedings in all causes filed by the Defendant contrary to the alleged agreement on fees. Additionally, the Plaintiff seeks to set aside all previous taxation proceedings and orders consequential thereon.

11. Essentially, the Plaintiff challenges the Bills of Costs as filed by the Defendant on the basis of an allegedly valid agreement on fees. This comes out clearly under paragraph 25 of the Plaint when it is pleaded thus:

> *25.* ***The Plaintiff contends that by dint of executing the agreement aforesaid and receiving substantial payment on account thereof, the Defendant expressly agreed to charge fees under schedule 7 of the advocate's remuneration order then prevailing, and is legally bound thereby, and contractually estopped from pleading to the contrary or filing Bills of Costs to be taxed in a contrary manner. The Plaintiff shall during the hearing of this case, make reference to the agreement aforesaid for its full import, tenure and meaning.***

12. It is also not lost to the court that the suit was prompted by the Defendant's letter of 3 July 2015 which demanded from the Plaintiff payment of the amount of Kshs. 4,387,756/32 within 21 days. In default, the Plaintiff was threatened with winding-up proceedings. The letter was stated to have been issued under the provisions of Section 220 of the Companies Act (Cap 486)(now repealed) of the Laws of Kenya. I may safely refer to it as a statutory demand for purposes of insolvency proceedings.

13. The Plaintiff contends that the debt in question has been discharged and that there is malice on the part of the Defendant.

The application of 16 December 2015

14. This was a Notice of Motion filed simultaneous with the instant suit.

15. The Motion sought to restrain the Defendant from taking out any winding-up proceedings on the basis of the default by the Plaintiff in heeding the statutory demand. The Motion also sought orders to stay taxation and execution proceedings in various matters taken out by the Defendant.

16. A response to this application was filed by the Defendant on 29 January 2016. In her opposing affidavit, the Defendant confirmed having issued the statutory demand of 3 July 2015. The response was

filed also pursuant to the directions of the court (Farah J) on 18 December 2015. The court directed that the Defendant also sets out all payments demanded as well as those paid and disputed besides those in relation to which there were court proceedings. Farah J also ordered the Defendant to exhibit all documents necessary in support of the defense case.

17. In her response, the Defendant contended that the statutory demand of 3 July 2015 was as a result of the default on the part of the Plaintiff to satisfy the various decretal amounts and garnishee orders which originated from the Defendant's taxed Bills of Costs. The Defendant availed a list of thirty three cases.

18. The Defendant then also contended that in both HCCC. NO. 504 of 2013 and HCCA No. 65 of 2015 the Plaintiff had sought to stay the taxation of over three hundred cases on the basis of a lump-sum payment having been made to the Defendant by the Plaintiff but both cases were dismissed by Hon. Lady Justice R.E. Ougo and Mr. Justice A. Mabeya on 26 September 2014 and 22 May 2015 respectively, with the later decision directing that the issue of accounts be pursued pursuant to Order 52 of the Civil Procedure Rules. The former decision (by Ougo J) had earlier ordered that the taxations do proceed. In the circumstances the Defendant contended that the instant application was res judicata.

19. Additionally, it was the Defendants contention that the issue of the Agreement on costs of 19 October 2006 was the subject of litigation in HCCC No. 504 of 2013 as well as in the various taxation matters where the Plaintiff had caused affidavits to be sworn seeking that the various Bills of Costs filed by the Defendant be struck out on the basis of the Agreement on costs.

20. In her response to the application of 16 December 2015, the Defendant also contended that in High Court Miscellaneous Application No. 49 of 2013 (at Murang'a) , Hon. Mr. Justice Waweru had directed that various taxations do proceed. This was on 18 June 2015. The Defendant contends that Waweru J also rejected a prayer to stay the taxations.

Application of 23 March 2016

21. Launched by the Plaintiff, the application also sought orders to restrain the Defendant from proceeding with the various taxation matters and or execution pending determination of this suit. The Plaintiff once again contended that structured accounting had not been undertaken, while also asserting that it had settled the Defendant's claims in full. Again, the Plaintiff specifically made reference to and relied upon the Agreement on fees of 19 October 2006. The Plaintiff worried that it was being pushed to pay fees twice over.

22. A response to this application was filed on 13 April 2016.

23. In her opposing affidavit, the Defendant denied the existence of any agreement or contract on the total fees. The Defendant also insisted that the issues raised had been determined by the court in HCCC No. 504 of 2013 (Ougo J) and in HCCA No. 65 of 2015 (Mabeya J). Finally, the Defendant contended that the matter was *sub judice* in view of the application of 16 December 2015.

Application of 21 April 2016

24. Filed by the Defendant, this application sought to have the suit dismissed on the basis of the res judicata principle and an allegedly defective verifying affidavit. The Defendant placed reliance on the decision of Ougo J in HCCC No. 504 of 2013 and Mabeya J in HCCA No. 65 of 2015.

25. There is no record in the court file of any response to this application [of 21 April 2016].

The preliminary objection

26. Filed on 20 July 2016, the first objection raised in limine is to the effect that the application of 23 March 2016 raises the same issues as those raised by the application of 16 December 2015, as they both seek to challenge and or stay the taxation proceedings currently before the court. The preliminary

objection is also to the effect that the court in HCCC No. 504 of 2013 had allowed the taxations to go on and the same orders were replicated in Muranga HC Misc. Appl. No. 49 of 2013 (Consolidated) as well as in both Nakuru HC Misc. Appl. No. 410 of 2013 and in HCCA No. 65 of 2015. Accordingly, the Defendant contends that the instant suit and applications amount to abuse of process in so far as they seek to vary orders of courts or even or concurrent jurisdiction and also in so far as they seek to re-litigate the same issue of an Advocate/Client agreement on costs.

27. The Preliminary Objection replicated the application of 21 April 2016.

The Defence

28. The Defence statement filed on 29 January 2016 was essentially replicated in the Notice of Preliminary Objection of 20 July 2016 and the application filed slightly earlier on 21 April 2016.

29. While admitting the existence of a Client/Advocate relationship the defence statement denies the existence of any agreement on fees. The Defendant also denied having been paid the amounts alleged by the Plaintiff. Additionally, the Defendant contended that the statutory demand was founded on unsatisfied monetary decrees and court orders.

Previous litigation

30. There has been a myriad of suits and applications between the parties. Mostly, they were prompted by the Defendant's attempts at having her costs assessed and subsequent applications to recover through execution. The instant suit too was prompted by the Defendants threat to commence winding up proceedings on the basis of the alleged non payment by the Plaintiff of the Defendant's assessed costs.

31. It is unnecessary to detail each application or suit filed. Of import however is HCCC No 504 of 2013, which as I understood the parties to agree on, is still pending before this court. Again, in HCCC No 504 of 2013, the Plaintiff sought to challenge the taxation of Bills of Costs filed by the Defendant. The Plaintiff also cried foul over the Defendant's unwillingness to account for the amount of over Kshs 20,000,000/= paid to the Defendant by the Plaintiff. The Defendant in reply to the suit, which was commenced by way of an originating summons, raised the Defense of *res judicata* and jurisdiction. Hon Lady Justice R. A Ougo on 26th September 2014 agreed with the Defendant at an intermediary stage and declined to grant interim measures whilst also directing the Plaintiff to wait and challenge any taxation awards by way of references. The issue of accounts still pends in the same suit as is the issue of the alleged agreement on fees.

32. Next came HCCA No 65 of 2015 where the Plaintiff again sought to restrain the Defendant from recovering taxed costs. The court (Mabeya J on 22 May 2015) declined to grant the Plaintiff any reprieve, whilst also urging the Plaintiff to pursue the issue of accounts through an originating summons.

The Issue(s)

33. The core issue is whether the applications before me, as made by the Plaintiff and the suit are *res judicata* and consequently an abuse of the court process. This is the gist of the Preliminary Objection.

34. I must hasten to add that as the resolution of the above issue will also dispose of the application of 21 April 2016 launched by the Defendant and which has the extra limb that the challenge to the taxation proceedings ought not be through a suit but rather by way of a reference or through objections raised before the taxing master.

Discussion and Determination

The Parties' positions

35. The Defendant's submissions and the statements (of law and principle) outlined in the Preliminary

Objection were consubstantial.

36. Mr. Brown Kairaria contended that the same issues now raised by the Plaintiff had been earlier determined by courts of competent jurisdiction. Counsel also stated that there were adequate and specific appellate and reference provisions to which the Plaintiff ought to resort to if dissatisfied with the decisions of the court or of any taxing master. Counsel specifically referred to HCCC No. 504 of 2013, which he stated was yet to be finally and wholly determined. Counsel pointed out that in HCCC No. 504 of 2013 the Plaintiffs had disowned the agreement on fees only to now seek to embrace the same.

37. In response, Mr. Bush Wanjala asserted that the issues raised were not *res judicata*. Mr. Wanjala contended that the issues in HCCC No. 504 of 2013 dealt with the validity of the agreement on fees, while the instant suit deals with accounts and whether the Defendant's claims have been fully settled. Then, counsel pointed out that the instant suit was simply seeking to challenge the statutory demand while also seeking that the Defendant do account for the global amount paid to her.

38. It is to be noted that the Defendant, in literally all claims by the Plaintiff has been consistently raising the issue of res judicata.

Res judicata

39. The principle of *res judicata* has been the subject of judicial scrutiny over decades the world over and local courts have not been left behind: see ***Pop-in (Kenya) Ltd v Habib Bank A.G Zurich CACA No. 80 of 1988*** *and also* ***Independent Electoral & Boundaries Commission v Maina Kiai, Khelef Khalifa, Tirop Kitur, Attorney General, Katiba Insitute & Coalition for Reforms and Democracy [2017]eKLR***.

40. The expression itself literally means that the matter has been decided. As embodied under *s.*7 of the Civil Procedure Act (Cap 21), the requirements of *res judicata* are that proceedings are in respect of a dispute between the same parties (and then privies) on the same cause of action for the same relief as has been previously been dispositively adjudicated by a court of concurrent or superior jurisdiction. It then cannot be litigated again.

41. When raised by the defence, *res judicata* does not constitute an enquiry whether the previous decision or judgment was right or wrong but simply whether there is a final decision or judgment. The inevitable presumption is that the previous decision is correct and proof to the contrary is excluded. The principle as well as the presumption is founded on public policy that litigation must come to an end and the same litigation is not to be visited twice. Essentially, the principle proverbially prevents a party from having a second bite at the cherry. Rather, finality to court judgments and decisions is given effect on the basis as well of fairness and equity.

42. The principle does not only cover express judicial declarations but also points and issues that should have been raised but were omitted. The presumption is that when a judgment or decision is given it has determined an issue as well in the particular manner of the judgment. In the clear words of Wigram V.C in the case of **Henderson –v- Henderson 67 E.R 313**

> ***"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 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."***

43. The *Henderson principle* accords with Explanation 4 of *s.*7 of the Civil Procedure Act which reads as follows:

> ***"Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit".***

44. Explanation 7 is actually an expression of how strictly the res judicata doctrine may be applied. The doctrine is well intensified. It gains support from the flow of issue estoppel, which is to the effect that where there is a commonality of parties but no commonality of the relief claimed or cause of action then the question is whether the same issue arises.

45. It is also to be noted that an order or decree recorded and obtained by the consent of the parties, may also lead to the matter and issue being *res judicata*: see the Court of Appeal in **Ramaben Ramniklal Patani *v* Garden Chambers Ltd [2017]eKLR**.

46. *Res judicata* is itself a common law principle not to be limited to *s.*7 of the Civil Procedure Act : see the Court of Appeal decision in ***Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996]eKLR***. It is based on fairness and equity and public policy. It brings an end to legal proceedings. It also brings an end to a party's right to approach the court under Article 48 and 50(1) of the Constitution to have a dispute resolved. The court has a duty in applying or invoking it to also develop or relax it if the interest of justice so requires. The court must be prepared to relax it where overall fairness and equity demand so. This is to be done on a case by case basis, but in my view the rigidity of *s.*7 of the Civil Procedure Act has no place in the court's administration of justice.

47. In the peculiar circumstances of this case, should the doctrine of *res judicata* be applied or relaxed ?

48. The Defendant's counsel has sought to fetch the doctrine upon both applications filed by the Plaintiff as well as upon the suit.

49. I would foremost point out that the doctrine of *res judicata* applies to interlocutory applications with equal measure. Support may be found in the thinking of Ringera J (as he then was) in **Kanorero River Farm Ltd & 3 others *v* National Bank of Kenya Ltd [2002]2 KLR 207** where (at 213) he stated as follows:

> ***"As I understand the law, the doctrine of res judicata applies to both suits and applications, whether they be final or interlocutory. Indeed, Section 2 of the Civil Procedure Act defines a suit to mean any civil proceedings commenced in any manner prescribed. And 'prescribed' is defined as prescribed by the rules. Applications for temporary injunction are prescribed for by the Civil Procedure Rules. It follows that the determination of such an application by a court of competent jurisdiction would <u>in appropriate circumstances</u> operate as the plea in bar called res judicata. And I would have no difficulty in accepting that even a determination on the basis of a consent of the parties would have the same effect as a determination made after hearing and arguments"* (emphasis mine)**

See also the Court of Appeal decision in **Uhuru Highway Development Ltd *v* Central Bank of Kenya & 2 Others (supra) eKLR.**

50. *In casu*, the Defendant contends that the two applications of 16 December 2015 and 23 March 2016 are *res judicata* as both applications seek to stay taxation proceedings on the basis of an agreement on fees and further that the Plaintiff had already paid to the Defendant an amount yet to be accounted for. The Defendant points to HCCC No. 504 of 2013 and contends that a similar application was filed and dismissed on merits on 26 September 2014 by Ougo J. The Defendant also points to HCCA No. 65 of 2015 wherein a ruling was rendered by Mabeya J on 22 May 2015. Finally, the Defendant points to other decisions of the court allowing either the taxations or the execution proceeding to be prosecuted.

51. I have perused all the rulings alluded to in the preceding paragraph. They were annexed to the Defendant's Replying Affidavit. They related to interlocutory applications. The applications were all filed by the Plaintiff in substantive suits also commenced by the Plaintiff. The Defendant was the opposing party in all the cases.

52. The applications either sought to stay taxation proceedings commenced by the Defendant or sought to stay execution of court decrees which had originated from the taxations initiated by the Defendant. The grounds were all too similar. Either the Plaintiff contended that there was an agreement on fees and payment had been made to the Defendant or the Plaintiff simply contended that the bills could not be taxed or execution proceeded on with as payment had been made. In all the instances, the Plaintiff's pleas were dismissed. The courts ordered the assessment of the Defendant's fees and disbursements to continue

53. I am satisfied that in so far as the Plaintiff seeks the same reliefs on the same or substantially the same grounds against the Defendant the matter is res judicata. This court should not at an interlocutory stage re-visit the matter.

54. One limb of the Plaintiff's applications however still subsists.

55. It is the prayer which seeks relief from possible winding-up proceedings. This prayer also constitutes the core of the suit. The Defendant has, in her defence statement, contended that she was justified in issuing the statutory demand. The Plaintiff on the other hand contests the statutory demand claiming inter alia that the amounts under the decrees and court orders (Certificates of taxation) were long settled. The Plaintiff seeks of the Defendant to provide accounts.

56. The issue of a statutory demand intended to ultimately prompt liquidation proceedings had never been an issue before the court as far as the parties to this litigation are concerned. I am aware that the Plaintiff was within its rights to challenge the statutory demand if the debt claimed was substantially in dispute. The challenge was initiated through an ordinary suit prior to the commencement of the Insolvency Act No. 18 of 2015 which now dictates that a challenge to a statutory demand be by way of originating Notice of Motion: see **Regulation 10(4) of the Insolvency Regulations 2016**. In this regard, I do not see how logically or in equity it may be argued that the doctrine of *res judicata* militates against the mere existence of the instant suit.

57. It leaves me with the aspect of issue estoppel.

58. The facts relied upon to challenge the statutory demand are stated to have been settled. It was submitted on behalf of the Defendant that previous court determination had authorized the taxations and also rejected attempts to stay the execution of judgments obtained pursuant to *s.*51 of the Advocates Act (judgment on certified costs). Mr. Kairaria added that the Plaintiff could not possibly challenge decrees unless by way of appeal.

59. I understood the Plaintiff's challenge on the statutory demand to proceed along these lines: the bills could have been taxed and decrees obtained but we (the Plaintiff) have paid these amounts. A detailed account will reveal this.

60. While it is true that the issue of accounts has previously been alluded to, it has in my view never been resolved with finality. Mabeya J, directed that the Plaintiff proceed under the appropriate provisions. The matter before Mabeya J (HCCA No. 65 of 2015) was an appeal. Then on 18 December 2015, Farah J made directions on the filing and possible content of the opposing Affidavit by the Defendant to the application of 16 December 2015. The directions hinged on provision of accounts. I doubt that the Defendant complied even though she filed an opposing Affidavit on 29 January 2016 alongside a Defence Statement.

61. I am not convinced that with regard to the challenge on the statutory demand, all the issues raised have been determined with finality as between the parties.

62. Additionally, the circumstances of this case are also unusual.

63. Bills of Costs, Bills of Costs and Bills of Costs have been filed and continue to be filed by the Defendant. There appears no end in sight. The courts have consistently also allowed the Bills to be taxed and rejected attempts to stay execution (or recovery process) of the decrees originating from such taxed Bills. In the meantime, the Plaintiff claims to have paid the Defendant. The Defendant admits receipt of some amount. There is no clarity on how much has been paid and how much is outstanding. It is an issue yet to be resolved by any court. Neither has either party rendered clear and proper accounts to the court, yet such a process of accounting would, in my view, bring to a close the multiplicity of suits being filed by the Plaintiff.

64. I would in the circumstances decline to invoke the application of the doctrine of *res judicata* to this suit whilst also making it clear that this court will however not determine issues which are already pending before this court albeit in separate and different proceedings. In this respects, it would be inappropriate to proceed with the substantive trial of this suit whilst HCCC No. 504 of 2013 is still pending. The issue of the accounts being rendered ought to be resolved in HCCC No 504 of 2013.

65. I note that the Defendant admits that the Plaintiff has since settled the amount the subject of the statutory demand of 21 July 2015. I also note that the issue of accounts is still pending in HCCC No. 504 of 2013. The issue has also been raised herein in a completely different context. There is thus no issue preclusion.

Conclusion and disposal

66. By way of wrap up, I find that the suit herein is not res judicata in so far as it seeks to restrain the Defendant from commencing winding-up proceedings. In so far as it raises the issue of accounts and asserts that there is substantial ground to dispute the statutory demand, I also find that the issue has not been previously determined with finality and thus there is no issue preclusion.

67. In so far as the Plaintiff seeks to stay any taxation proceedings or execution proceedings, there is issue preclusion as; previously, courts of competent jurisdiction have answered the question in the negative. The Plaintiff can only contest the execution in the causes which seek it. The Plaintiff may however not ask this court to re-visit the issue as to whether or not the taxation proceedings may be prosecuted.

68. In the circumstances, it would be apposite to stay (not strike out) this suit and direct the expeditious prosecution of HCCC No. 504 of 2013 where the issue of accounts may be determined in a dispositive manner.

69. By way of disposal, I make the following orders,

> **a. The suit herein is stayed pending hearing and final determination of HCCC No. 504 of 2013 which the Plaintiff is hereby directed to expeditiously set down for trial.**
>
> **b. The Plaintiff's applications dated 16 December 2015 and 23 March 2016 are struck out. I also strike out the Defendant's application dated 21 April 2016 which was subsumed in the Preliminary Objection. The taxations by the Defendant may be prosecuted without any further hindrances.**
>
> **c. There shall be liberty to either party to apply.**

70. As to costs, the preliminary objection has largely succeeded and I see no reason to deny the Defendant the costs of the objection as well as of the Plaintiff's two applications which I have struck out. The Defendant will get the costs of the objection and of the two applications. Orders accordingly

Dated, signed and delivered at Nairobi this 28th day of September, 2017.

J.L.ONGUTO

JUDGE