



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL SUIT NO.20 OF 2015

SALAMA BEACH HOTLE LIMITED..... 1ST PLAINTIFF

HANS JUERGEN LANGER.....2ND PLAINTIFF

TOURISTIC AND TECHNOLOGY GMBH

(TOUR AND TECH GMBH).....3RD PLAINTIFF

ACCREDO AG.....4TH PLAINTIFF

VRS

KENYARIRI & ASSOCIATES

ADVOCATES.....DEFENDANT

RULING

The Notice of Motion dated 20th may 2015 seeks stay of execution or orders in respect to Nairobi Miscellaneous Applications Numbers 769 and 770 of 2013, 298, 299 and 300 of 2013 and Malindi Miscellaneous Application Number 16 of 2013 (consolidated with Misc. Application Numbers 13, 14, 15, 17, 41 and 42 of 2013) pending the hearing and determination of this suit. The application is supported by the affidavit of the 2nd respondent sworn on the same date.

The defendant filed a notice of preliminary objection dated 29th May 2015. The main issue being raised in the objection is that this court lacks jurisdiction to entertain the application. It is contended that this court has no supervisory over other High Court Judges and that the issue being raised are *Res Judicata*.

I have gone through the entire application by the plaintiffs as well as the supporting affidavits. I have equally gone through the preliminary objection together with all the documents filed by the defendant including the several rulings from other judges. Mr. Kenyariri contends that there was a similar application by the plaintiffs seeking to have all the issues relating to execution determined. Prayer number 4 of the current application is similar to prayer no.6 of the previous application that was determined by Justice Angote.

Having gone through the pleadings herein, I do find that there is no need to belabour so much on this matter. The parties herein have litigated in court in several cases and this has taken a lot of judicial time. The summary of the dispute is that the defendant, Kanyariri & Associates Advocates acted for the plaintiffs in several court cases. It is clear that the advocate leased acting for the plaintiffs and opted to tax his costs. The taxing officers taxed the costs and certificates of taxation issued. The plaintiffs filed

references to the High Court and all of them have been determined.

The defendant has obtained warrants to execute for his fees. The main issue being raised by the plaintiff is that there was a payment of Ksh.7,874,799/= to the defendant that was not taken into account. I have read the ruling of Justice Angote of 26/9/2014 in Misc Application 16 of 2014. The Judge noted that the taxing master did set off a sum of Ksh.5,784,550/ against the taxed costs. It is also indicated that the plaintiffs failed to prove that they had paid Ksh.2,320,000/= Japanese Yen for the purchase of a motor vehicle for the defendant. Justice Angote made reference to the amount of Ksh7,874,799/= and concluded that the amount was paid directly to T & T Tour & Tech Company of Germany and not to the defendant.

The correct procedure is for the one who is claiming the sum of Ksh.7,847,799/= to sue the defendant separately. The taxed costs were not involving the 3rd plaintiff, Touristic and Technology GMBH (Tour & Tech GMBH): This party seems to have been introduced in this suit. The issue of taxation of costs has been dealt by the taxing master as well as by Justice Fred Ochieng, Justice Mumbi as well as by Justice Angote. This court cannot stay the execution proceedings that are based on the taxed costs in those suits on the basis that some amount paid by the 3rd plaintiff had not been taken into account. The taxed costs are not against the 3rd plaintiff. This court lacks jurisdiction to entertain the application. 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 V Henderson [1843] 3 Hare 100** the court explained the doctrine of *Res Judicata* as follows:

“... the court requires that 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 or 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.”

I do find that at the moment 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. The court cannot at this moment conclude that the amount of Ksh.7,874,799/= was paid to the defendant which payment is being denied to stay execution of already determined costs on the basis of an amount that is yet to be proved is not permissible under the law.

The plaintiffs are quite aware of the consideration of the alleged amount by the Judges and have continuously come to court on the same issue. The preliminary objection is hereby upheld. I do find that the application dated 25th May 2015 is an abuse of the court process and is hereby dismissed. With costs.

Dated, signed and delivered at Malindi this 19th day of June, 2015.

SAID J. CHITEMBWE

JUDGE

