REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 1947 OF 2000

PASCHAL JUMA MANYURU ……..…… PLAINTIFF

VERSUS

TOTAL KENYA LIMITED …….. DEFENDANT

R U L I N G

1. The Plaintiff herein has filed a Notice of Motion dated 24th May 2013 in which it seeks a declaration that the Defendant's claim for costs in the suit was wholly adjusted by a compromise between the parties entered into in 2008. As a result, the Plaintiff seeks a permanent injunction restraining the Defendant herein from making any claim for recovering its costs of this suit. The Application is brought under the provisions of **Order 25 rule 4 and Order 51 rule 1** of the *Civil Procedure Rules, 2010* as well as under the general provisions of **sections 1A, 1B and 3A** of the *Civil Procedure Act*. The Application is grounded on the following:

   > **"(a) The parties reaching a lawful compromise after the dismissal of the suit whereby the Defendant agreed to waive its claim to costs in this case.**
   >
   > **(b) Acting on the faith of the said compromise and induced thereby, the Plaintiff acted to his detriment and did not challenge the dismissal order by way of Appeal or review.**
   >
   > **(c) Having reached the said compromise with the Plaintiff not to recover the said costs, and having complied with the said compromise for over four (4) years and six (6) months, the Defendant is estopped by law from claiming the said costs.**
   >
   > **(d) It is otherwise oppressive and unfair for the Defendant, five (5) years after the said compromise and its implementation, to demand the said costs, in breach thereof".**

2. The Plaintiff's Application before Court was supported by the Affidavit of **Desterio Oyatsi** dated 24th May 2013, the deponent being the advocate having conduct of the suit on behalf of the Defendant. In his said affidavit, Mr. Oyatsi noted that the case was dismissed on 15th July 2008 when the Court had declined to grant an adjournment of the hearing of the suit as requested by the Plaintiff for the reasons stated in the Court's Ruling. The deponent went on to say that after the dismissal of the said suit, he had spoken with the advocate on record for the Defendant Mr. Thang'ei of the firm of Waruhiu, K'Owade & Ng'ang'a, advocates and it was agreed that the Defendant would not pursue the costs of this suit as against the Plaintiff as ordered by the Court.

He went on to say that relying on the said compromise or representation, the Plaintiff upon counsel's advice, did not file an Appeal as against the said Court's Order. On 25th September 2012, the deponent was surprised to receive a Taxation Notice which effectively revived the closed case. Upon receipt of such, Mr. Oyatsi stated that he had telephoned Mr. Thang'ei a second time and had reminded him of the agreement/compromise. That telephone discussion was followed up by a letter to the Defendant's advocates dated 8th November 2012. There was no response thereto until 6 months later on 2nd May 2013 when the Defendant's advocates indicated that the client had given them instructions to recover the costs of the suit from the Plaintiff. This position was conveyed to Mr. Oyatsi some four years and 10 months after the agreement/ compromise had been reached. This was after the Plaintiff had relied upon the agreement reached and waived his right to appeal. In Mr. Oyatsi's view, it would be unlawful, oppressive, unfair and prejudicial to the Plaintiff for the Defendant to be allowed to depart from the said compromise and insist upon the payment of costs by the Plaintiff.

3. The Defendant filed a Replying Affidavit on 11th July 2013 through its said advocate having the handling of the suit upon its behalf – Mr. Thang'ei. The deponent noted that the suit had been dismissed on the 15th July 2008 with costs to the Defendant. He denied that he had ever at any one time agreed or compromised the Order for costs as alleged by Mr. Oyatsi. He maintained that the suit belonged to the Defendant and that he would not have given any such alleged compromise without instructions from his client. He maintained that the repeated reference to the passage of time by Mr. Oyatsi in his Supporting Affidavit had no legal relevance and did not defeat the Defendant's right to pursue its costs. The Plaintiff had taken no steps to disturb the Order for costs for four years. Service of the Bill of Costs and the Taxation Notice had been made upon the Plaintiff's advocates on 25th September 2012. Mr. Thangei noted that the Plaintiff's advocates had participated in and attended Court for the taxation proceedings including attendance on 22nd February 2013 when the Taxing Officer's Ruling was delivered and the Defendant's Bill of Costs taxed at Shs. 2,657,022/-. The deponent went on to say that a Certificate for Costs had now been issued by the Court and, as a result, this Court lacked the jurisdiction to grant the Orders sought in the Plaintiff's Application before it.
4. The Plaintiff filed his written submissions as regards the Application before Court on 14th October 2013. He was relying upon the legal principle that a promise or assurance made by one party intended to be binding and intended to be acted upon and in fact acted upon, was binding so far as its terms properly apply. The Plaintiff referred to the well-known case of **Hughes v Metropolitan Railway Company (1874-1880) All ER 187** as well as **Central London Property Trust Ltd v High Trees House Ltd (1956) All ER 256**. The Plaintiff then went on to record what he maintained were the facts not in dispute in this matter as follows:

"a) the case was dismissed on 25th July 2008, which is five (5) years ago;

b) the Plaintiff had a right in law, if aggrieved with the dismissal order to challenge it in the manner prescribed.

c) the parties held discussions as stated in paragraph 4 of my affidavit.

d) from these discussions, the Plaintiff was led to understand or believe that the parties had reached an agreement that the Defendant would not pursue costs.

e) relying on the said promise or assurance by the Defendant and/or in consideration thereof, the Plaintiff abandoned his right to challenge the dismissal Order.

f) the Plaintiff's Advocates infact closed their file.

g) tor a period of four (4) years the Defendant kept or acted on its promise and did not pursue the claim for costs.

h) after four (4) years, the Defendant went back on its promise and filed its Bill of

Costs.

i) even at this date, (6th September 2012), the Defendant did not provide any explanation to the Plaintiff as to why there was a change of mind, four (4) years down the line.

j) the first explanation came on 2nd May 2013, (exhibit 'D02'), after the Bill of Costs had been taxed.

k) this is notwithstanding the fact that the Plaintiff had, seven months earlier, and upon being served with the Bill of Costs requested for this explanation as evidenced by exhibit 'D01'.

l) the explanation given in exhibit 'D02' by the Defendant's Counsel is that they had been instructed, five years down the line, by their clients to recover these costs.

m) no explanation was given as to why it took five (5) years to get these instructions, taking into account that both the Defendant and its Advocates carry on business, and they reside in Nairobi and could have easily communicated this decision to the Plaintiff in 2008 after the discussions referred to above.

n) pending the said explanation, the Plaintiff did not file submissions in the Bill of Costs because the Plaintiff's position was that the matter had been closed following the above assurance and promise made by the Defendant for over five years ago.

5. The Plaintiff continued with his submissions by outlining what he saw as the issue for determination. Such was simply to stop the Defendant from going back on its word in seeking to recover its costs of this case. As far as the Plaintiff was concerned, it was not so much whether the parties had reached an agreement or otherwise. The point was whether the Defendant had made a promise or assurance which led the Plaintiff to suppose that the strict right of the Defendant in the dismissal Order (being the right to recover costs) would not be enforced by the Defendant. The Plaintiff agreed that he had not taken any steps to challenge the dismissal Order. However and in turn, the Defendant had taken no steps to enforce the costs Order for a period of 4 years. Referring to the Defendant's advocates' letter of 2nd May 2013 exhibited as "DO 2" to the Affidavit in support of the Application, the Plaintiff submitted that the Defendant's advocates had acknowledged that there had been discussions which were now for review after 5 years. As at that date, the Plaintiff could not exercise his right to challenge the dismissal Order as he was out of time.
6. The Defendant's written submissions were filed herein on 1st November 2013. The Defendant's very clear position was that there was no promise made to the Plaintiff (or his advocates on record) not to pursue the costs of the suit. There was no evidence of such promise or compromise that had been placed before this Court. In the absence of such evidence, the Defendant on submitted that the Application before Court must fail and should be dismissed *ex debito justitae*. The Defendant noted that its Bill of Costs was filed on 7th September 2012 and served upon the Defendant 25th September 2012. The Plaintiff's advocates had participated in the taxation proceedings and were present when the Ruling thereof was delivered on 22nd February 2013. The Certificate of Costs was issued on 11th March 2013. The Defendant maintained that the only way of disturbing a Certificate of Costs was through the filing of a taxation reference. None had been filed by the Plaintiff and the time therefore had run out. In its view, the Court lacked the jurisdiction to disturb the Certificate of Costs in the manner sought by the Plaintiff. Thereafter, the Defendant referred this Court to **section 27 (1)** of the *Civil Procedure Act*. It maintained that it was within the discretion of the Court to award costs and determine by whom, out of what property and to what extent such costs are to be paid. It reminded the Court of the finding in the case of **Davda v Ahmed & 2 Ors (1987) KLR 665** in which the Court had held:

"Under the Civil Procedure Act (cap 21) section 27, costs are in the discretion of the court or judge

provided that the costs of any action shall follow the event unless the court or judge shall for good reason otherwise order."

7. I have perused the record of this Court for the 15th July 2008 before my learned sister **Lesiit J.** The Judge recorded her decision after hearing Ms Ng'ang'a for the Plaintiff and Mr. Thang'ei for the Defendant as follows:

"I have looked at the file and note that this is the fourth consecutive time that the Plaintiff is seeking an adjournment. Today, no good cause is shown why the Plaintiff chose to travel abroad instead of coming for the hearing of the case. This is an old matter. Two weeks ago, the Plaintiff's Advocates confirmed it for hearing. The Advocate did not inform the Defendant's Advocates of his difficulty today. The Plaintiff has lost interest in the suit and same is dismissed with costs."

There is no further entry on the record of the suit until 7th September 2012 when the Defendant's advocates filed their client's Bill of Costs dated 6th September 2012. Then on 26th October 2012, the matter came before the Taxing Officer who noted that the parties had agreed to file submissions as regards the said Bill of Costs. The Taxing Officer's Ruling was reserved for delivery on 22nd November 2012. However, the Ruling was not delivered until 22nd February 2013 when both parties were represented by advocates. The next note on the Court's record is the filing of the present Application on 27th May 2013. Interestingly, there is no record of either party filing written submissions as regards the taxation of the said Bill of Costs. However, the Certificate of Taxation is on the file dated 11th March 2013.

8. It is unfortunate that what this case comes down to is a choice between the word of one senior advocate and another. There is no record placed before this Court of any file note either on the part of the Plaintiff's advocates or the Defendant's advocates as regards the discussions as per paragraph 4 of the Supporting Affidavit as between Mr.Oyatsi and Mr. Thang'ei. Mr. Oyatsi has annexed to his Supporting Affidavit to the Application as Exhibit "DO 1" a copy of a letter dated 8th November 2012 addressed by his firm to the advocates for the Defendant marked for the attention of Mr.Thang'ei. There is no evidence of delivery of that letter. In his said Affidavit, Mr.Oyatsi expresses surprise that no answer was received from Mr. Thang'ei until the latter's letter of 2nd May 2013. It should be noted however, that by the 8th November 2012, Mr. Oyatsi's firm had been served with the Defendant's said Bill of Costs and, indeed, had its brief held before the Taxing Officer at the hearing of the taxation on 26th October 2012. On that day, Mr. Oenga, who held Mr. Oyatsi's brief, informed the Taxing Officer that Mr. Oyatsi wished to put in submissions which the Taxing Officer directed should be filed within 10 days with a similar period being allowed to Mr. Thang'ei to respond. However, and as noted above, no submissions were filed by either party as regards the taxation of the Defendant's Bill of Costs.
9. Despite Mr. Oyatsi's protests at the delay in the Defendant filing its Bill of Costs for taxation, it is my belief that his firm was just as dilatory in filing this Application before Court. Having been served with the Defendant's Bill of Costs for taxation purposes on 25th September 2012 one would ask why it has taken the Plaintiff until 24th May 2013 to file his Application and why wait until the said Bill of Costs had actually been taxed? It is interesting to note that the response of the Defendant's advocates, presumably to Mr. Oyatsi's said letter of 8th November 2012 (although such is not referred to), is dated 2nd May 2013 not only after the Bill of Costs had been taxed but also after the Certificate of Costs had been issued by this Court on 11th March 2013.
10. I have taken full cognizance of the two authorities cited by counsel for the Plaintiff as regards the reliance on promises made and cases of estoppel. I have no dispute with the Plaintiff as regards the wise words of **Lord Denning** in the **High Trees case (supra).** Indeed, the learned Judge's words in that case as regards breach of promise are worth repeating here:

"At common law, that would not give rise to an estoppel, because, as was said in Jorden v. Money (2) (1854) (5 H.L. Cas. 185), a representation as to the future must be embodied as a contract or be nothing. So at common law it seems to me there would be no answer to the whole claim.

What, then, is the position in view of developments in the law in recent years? The law has not been standing still even since Jorden v. Money (2). There has been a series of decisions over the last fifty years which, although said to be cases of estoppel, are not really such. They are cases of promises which were intended to create legal relations and which, in the knowledge of the person making the promise, were going to be acted on by the party to whom the promise was made, and have in fact been so acted on. In such cases the courts have said these promises must be honoured. There are certain cases to which I particularly refer: Fenner v. Blake (3) [1900] 1 Q.B. 426), Re Wickham (4) (1917) (34 T.L.R. 158), Re William Porter & Co., Ltd. (5) ([1935] 1 Q.B. 426), Re William Porter & Co., Ltd. (5) ([1937] 2 All E.R. 361) and Buttery v. PPickard (6) (1946) (174 L.T. 144). Although said by the learned judges who decided them to be cases of estoppel, all these cases are not estoppel in the strict sense. They are cases of promises which were intended to be binding, which the parties making them knew would be acted on and which the parties to whom they were made did act on. Jorden v. Money (2) can be distinguished because there the promisor made it clear that she did not intend to be legally bound, whereas in the case to which I refer the promisor did intend to be bound. In each case the court held the promise to be binding on the party making it, even though under the old common law it might be said to be difficult to find any consideration for it. The courts have not gone so far as to give a cause of action in damages for breach of such promises, but they have refused to allow the party making them to act inconsistently with them. It is in that sense, and in that sense only, that such a promise gives rise to an estoppel. The cases are a natural result of the fusion of law and equity; for the cases of Hughes v. Metropolitan Ry. Co. (7) (1877) (2 App. Cas. 439), Birmingham & District Land Co. v. London & North Wester Ry. Co. (8) (1888) (40 Ch.D. 268), and Salisbury v. Gilmore (9) ([1942] 1 All E.R. 457), show that a party will not be allowed in equity to go back on such a promise. The time has now come for the validity of such a promise to be recognized. The logical consequence, no doubt, is that a promise to accept a smaller sum in discharge of a larger sum, if acted on, is binding, notwithstanding the absence of consideration, and if the fusion of law and equity leads to that result, so much the better. At this time of day it is not helpful to try to draw a distinction between law and equity. They have been joined together now for over seventy years, and the problems have to be approached in a combined sense.

It is to be noticed that in the sixth interim report of the Law Revision Committee, it was recommended that such a promise as I have referred to should be enforceable in law even though no consideration had been given by the promisee. It seems to me that, to the extent I have mentioned, that has now been achieved by the decisions of the courts.

I am satisfied that such a promise is binding in law, and the only question is the scope of the promise in the present case".

11.In the final words of Lord Denning in the extract quoted above:

"….. The only question is the scope of the promise in the present case."

As I have indicated above, there is nothing before this Court which evidences that a promise was made to Mr. Oyatsi by Mr. Thang'ei that the Defendant would not pursue its entitlement to the costs of this case. The Affidavits of the 2 Counsel differ on the point. I am of the view that the correspondence attached to Mr. Oyatsi's Supporting Affidavit does not assist this Court in arriving at its decision as to which evidence of the two Counsel it prefers. However, I take the point made by the Defendant that there has been no challenge by the Plaintiff either by reference as regards the taxation of the Defendant's said Bill of Costs or the Certificate of Costs issued by this Court on 11th March 2013. **Section 51 (2)** of the *Advocates Act (Cap 16, Laws of Kenya)* reads as follows:

"The certificate of the taxing officer by whom any Bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not

disputed, an order that judgement be entered for the sum certified to be due with costs."

The Certificate of Costs dated 11th March 2013 has not been set aside or altered by this Court. As a result, it is final as to the amount of costs therein certified. Can it be set aside or altered on the strength of the Plaintiff's said Application before this Court or the Supporting Affidavit thereof? I do not think so. In my view, once the costs have been assessed and/or taxed under the provisions of the Advocates (Remuneration) Order, the proper procedure to follow in challenging or disputing the same is as provided for under **Rule 11** of the said Order. The Plaintiff has not chosen to come before Court thereunder.

12. In conclusion therefore, I find no merit in the Plaintiff's Application dated 24th May 2013 and the same is hereby dismissed with Costs to the Defendant.

DATED and delivered at Nairobi this 24th day of April, 2014.

J. B. HAVELOCK

JUDGE