



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO.544 OF 2013

**IN THE MATTER OF: SECTION 58 OF THE CIVIL PROCEDURE ACT, CAP 21 LAWS
OF KENYA**

**IN THE MATTER OF: INTERPLEADER FOR A DECISION ON WHO IS
ENTITLED TO THE SUBJECT AMOUNT AND HOW MUCH IF AT ALL AND INDEMNITY TO THE APPLICANT**

BETWEEN

GIKERA & VADGAMA ADVOCATES.....PLAINTIFF/RESPONDENT

AND

ALBINO MATHOM ABOUG.....1ST DEFENDANT/APPLICANT

GARANG DENG AGUER.....2ND DEFENDANT

RULING

(1) Before Court is the Notice of Motion dated **7th November 2018** by which **ALBINO MATHOM ABOUG** (the **1st** Defendant/Applicant) seeks the following Orders:-

“1. THAT there is no longer an issue for decision on the interpleader in the present suit.

2. THAT the suit be dismissed with costs.

3. THAT the Plaintiff do release and pay to the 1st Defendant the sum of USD 350,000 plus interest thereon at court rates from 11th December 2013 to the date of payment in full.

4. THAT the costs of this application be granted to the 1st Defendant.

(2) The application which was premised upon **Section 1A, 1B and 3A** of the **Civil Procedure Rules, 2010**, was supported by the Affidavit of even date sworn by **DESTERIO OYATSI** an Advocate of the High Court of Kenya and Partner in the firm of **M/s Shapley Barrett and Company**, the Advocates for the **1st** Defendant/Applicant.

(3) The Plaintiff/Respondent **GIKERA & VADGANIA ADVOCATES** opposed the application by way of the Grounds of Opposition dated **9th April 2019** as well as the Replying Affidavit dated **26th April 2019** sworn by **Stephen Njoroge Gikera** the Managing Partner of the Plaintiff/Respondent. The **2nd** Defendant **GARANG DENG AGUER** did not participate in these proceedings.

(4) The application was canvassed by way of written submissions. The **1st** Defendant/Applicant filed its written submissions on **23rd May 2019** whilst the Plaintiff/Respondent filed their submissions on **21st June 2019**.

BACKGROUND

(5) This suit was filed on **11th December 2013** as an interpleader under the provisions of **Section 58** of the **Civil Procedure Act Cap 21**, laws of Kenya. The Plaintiff/Respondent were holding funds as neutral parties, pursuant to a consent dated **17th July 2013** between the **1st** and **2nd** Defendants. The said consent was not satisfied by the **2nd** Defendant in terms of full payment of the amount reserved therein, hence triggering the default clause which the **1st** Defendant fully exercised. The Plaintiffs alleged that they were in doubt as to the rightful owner of the monies in question and therefore filed this suit seeking a determination of that issue. However the Plaintiff did not serve the **1st** Defendant with any summons nor did the Plaintiff bring to the notice of the **1st** Defendant the existence of their suit.

(6) The **1st** Defendant commenced disciplinary proceedings against the Plaintiff vide **Misc Disciplinary Tribunal Cause No.74 of 2014** before the Advocates Disciplinary Committee. It was at this point that the **1st** Defendant came to learn of the existence of the present suit.

(7) The Plaintiffs request the Disciplinary tribunal to allow them time to prosecute the suit or to obtain orders staying the Tribunal proceedings. The Plaintiff did not prosecute the suit and did not obtain any orders staying the proceedings before the Disciplinary Tribunal. Accordingly the matter proceeded before the Tribunal who rendered their decision on **21st November 2016**.

(8) The **1st** Defendant/Applicant submits that on the basis of that decision by the Tribunal which is a final and binding decision of a competent tribunal, the funds in question have been found to belong to the **1st** Defendant. The Applicant further submits that in the circumstances there is no longer need for a decision by the court on the inter-pleader, hence the prayer that the suit be dismissed and the funds in question be released to the **1st** Defendant.

(9) The Plaintiff/Respondent opposes the present application terming the same incompetent misconceived and an abuse of court process. They further submit that the present application is **“Res Judicata”**

ANALYSIS AND DETERMINATION

(10) I have carefully considered the rival submissions filed in this matter. Two issues arise for determination namely:

(i) Should the suit filed on **11th December 2013** be dismissed?

(ii) Should the funds in question be released to the **1st** Defendant/Applicant?

DISMISSAL OF SUIT

(11) In order to have the suit dismissed it must be shown that there no longer exists any issue for determination between the parties. The Plaintiff has admitted that being instructed by the **1st** Defendant it recovered a sum of **USD 2.5 Million** from the **2nd** Defendant arising from the consent judgement recorded in court on **18th July 2013** (Annexure **SNG 1** to the Replying Affidavit dated **26th April 2019**). The Plaintiff conceded that to date it has not released these funds to either the **1st** or the **2nd** Defendant as the Plaintiff contends it did not know who between the two Defendants was entitled to the monies in question.

(12) The Plaintiff filed the present suit seeking that the Court determine who between the **1st** and **2nd** Defendant was the rightful owner of the funds. However that suit was never prosecuted. Instead the **1st** Defendant instituted **Disciplinary Tribunal Case No.74 of 2014** against the Plaintiff seeking release of the funds to itself. The matter was heard by the Tribunal who rendered their decision vide the judgment dated **21st November 2016**.

(13) During the pendency of the proceedings before the Tribunal the Plaintiff took no steps to either prosecute the suit or to obtain a stay of the proceedings before the Tribunal. In their judgment the **Advocates Disciplinary Tribunal** found as follows:-

“We now turn to the complaint that the Respondents have retained and failed to account for the sum of USD 350,000.00 which they recovered on behalf of the 2nd Complainant. We find curious the Respondents’ contention that they are holding onto the funds in the interest of the persons from whom they recovered the funds. By their own admission, the Respondents recovered the funds upon instructions and on behalf of the 2nd Complainant. Thus, the interest of the 2nd complainant should be the priority interest of the Respondents as opposed to the interest of persons from whom the funds were recovered. Having recovered the funds upon the instructions and on behalf of the 2nd Complainant, the funds ordinarily belong to the 2nd Complainant. It is, therefore, incumbent upon the Respondents as the 2nd Complainants’ advocates to account for those funds to the 2nd Complainant. Having failed to account, the Respondent stand guilty of unjustifiably retaining funds belonging to their client and failing to account for those funds and we find the Respondents so guilty and convict them accordingly.”

(14) Following this decision of the Tribunal the Plaintiffs filed **Judicial Review Misc Application No.349 of 2016** seeking to quash the Tribunal's decision which found the Plaintiff firm guilty of professional misconduct. The High Court dismissed the said application and declined to quash the proceedings of the Disciplinary Tribunal. No appeal has been preferred against that Ruling which in effect upheld the validity of the proceedings before the Disciplinary Tribunal.

(15) Consequently it is manifest that the Plaintiff is no longer holding the funds for a party it does not know. The funds were declared by the Tribunal to rightfully belong to the Defendant. The **2nd** Defendant has never claimed the funds and all proceedings in this matter have been between the Plaintiff and the **1st** Defendant. The decision of the Tribunal is as binding as a decision from a subordinate Court. Therefore it

would be futile and amount to a waste of judicial time for the Court to proceed to hear this present suit.

(16) The Plaintiff/Respondent submit that the present application is “**Res Judicata**” in light of the Ruling by **Hon Lady Justice Sewe** dated **26th September 2018** in respect of the Plaintiff’s application dated **18th July 2016**.

(17) The principal of “**Res Judicata**” is only applicable in situation where a court of competent jurisdiction has previously determined the same issues(s) in contention between the parties. The 1st Defendant’s application dated **18th July 2016** sought for orders that suit be dismissed on grounds that there was no service of the Originating Summons upon themselves and in the alternative that the validity of any summons issued had expired on **11th December 2014**. The present application seeks dismissal of the suit on grounds that there is no longer an issue for determination on the interpleader filed by the Plaintiff. Clearly the two applications have raised issues which are separate and distinct. I find that the present application is therefore not “**Res Judicata**”. The Ruling of **26th September 2018** did not deliver a final and conclusive decision on the matter - that final and conclusive decision was delivered by the High Court on **9th December 2016** in **JR No.349 of 2016** which upheld and validated the proceedings before the **Disciplinary Tribunal**. This Court being a court of concurrent jurisdiction has no jurisdiction to review or re-open that decision.

(18) I am mindful of the fact that dismissal of a suit is an extreme measure but I am satisfied that there no longer exists an issue for determination in the interpleader. The issue of the ownership of the monies held by the Applicant has been determined. Following a full hearing attended by both parties before a competent Tribunal it was determined that the funds in question belonged to the 1st Defendant. An attempt to quash the decision of the **Tribunal Vide JR No.349 of 2019** was unsuccessful. No further appeal and/or review has been filed in the matter. Accordingly I am satisfied that the question of ownership of the funds being held by the Plaintiffs has already been determined. Accordingly the Chamber Summons dated **11th December 2013** is hereby dismissed with costs to the 1st Defendant/Applicant.

CONCLUSION

Finally this court makes Orders as follows:-

- (i) The suit filed on **11th December 2013** is hereby dismissed with costs to the 1st Defendant.

- (ii) The sum of **USD 350,000.00** plus interest thereon at court rates from **11th December 2013** until payment in full be released forthwith to the 1st Defendant.

- (iii) Costs of this application are awarded to the 1st Defendant/Applicant.

Dated in **Nairobi** this **14th** day of **February 2020**.

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Justice Maureen A. Odera