



**REPUBLIC OF KENYA**

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

**COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO.533 OF 2016**

**KTK ADVOCATES.....ADVOCATE/APPLICANT**

**AND**

**CPF FINANCIAL SERVICES LTD.....CLIENT/RESPONDENT**

**RULING**

(1) Before this Court for determination is the Preliminary Objection dated **4<sup>th</sup> July 2010**. The objection which was filed by **KTK ADVOCATES**, (the Advocate) relates to the Notice of Motion dated **28<sup>th</sup> June 2019** filed by **CPF FINANCIAL SERVICES LIMITED** (the Client). The Objection was premised upon the following grounds: -

- “i. The application has no substratum as it violates Rule II of the Advocates (Remuneration ) Order, 2014.**
- ii. On the issue of Jurisdiction of the Taxing Master, the same was already determined by the High Court in its ruling of 5.10.18 by Hon. Lady Justice Maureen A. Odero.**
- iii. On the issue of Stay pending appeal, the same was determined by the said Judge on 07.12.18, and in any event the appeal isn't in respect of the ruling of 30.05.19.**
- iv. The two rulings of the High Court have not been appealed against or set aside.**
- v. The Client's application is therefore an extreme abuse of the Court process by doctrine of res judicata.”**

(2) The Preliminary Objection was opposed vide the Grounds of Opposition dated **9<sup>th</sup> July 2019**. The matter was canvassed by way of written submissions. The Advocate filed his written submissions on **1<sup>st</sup> August 2019** whilst the Client filed their submissions on **27<sup>th</sup> September 2019**.

**BACKGROUND**

(3) The Advocate on **23<sup>rd</sup> November 2018** filed in Court their Advocate/Client Bill of Costs. The said Bill was taxed by **Hon Sammy Opande Deputy Registrar** in the amount of **Kshs.48,589,629.43**. Subsequently the Advocate filed the Notice of Motion dated **17<sup>th</sup> June 2019** seeking,

- “1. THAT Judgment be entered against the Client/Respondent in the sum of Kshs.48,589,629.43 plus interest at Court rates from 30.05.2019.**
- 2. THAT the costs for this application ad all other incidental costs be provided for.”**

(4) Before that application could be heard and by way of response to the same the Client filed the Notice of Motion dated **28<sup>th</sup> June 2019** seeking the following Orders:-

- “1. THAT if leave is required, the instant reference be admitted out of time.**
- 2. THAT the taxation orders made on 30<sup>th</sup> May 2019 wherein the Advocate/ Respondent's bill of costs dated 23<sup>rd</sup> November**

2016 was taxed in the sum of **Kshs.48,489,629.43** be vacated and/or set aside.

3. THAT consequent to grant of prayer I hereinabove, the court be at liberty to determine the issue of the taxing master's jurisdiction *and/or in the alternative*, further proceedings in the instant matter including any application filed by the Advocate/Respondent pursuant to the said taxation orders be stayed pending the hearing and final determination of *Nairobi Civil Appeal No.91 of 2019 – CPF FINANCIAL SERVICES LTD VS. KTK ADVOCATES*.

4. THAT the Honourable court be at liberty to make such other or further orders as it shall deem just and expedient.

5. THAT costs of this application be provided for.

The Advocate then filed the present Notice of Preliminary Objection against this application of **28<sup>th</sup> June 2019**.

#### ANALYSIS AND DETERMINATION

(5) I have carefully considered the rival submissions filed in this matter together with as the relevant law. The definition of what constitutes a Preliminary Objection was set out in the cited case of **MUKISA BISCUIT MANUFACTURING CO. LTD –VS- WEST END DISTRIBUTORS LTD [1969] E.A.**, in which it was held that:-

**“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit...”**

(6) The Preliminary Objection before this Court raises three main issues as follows:-

- (i) Whether the application of **28<sup>th</sup> June 2019** is competent.
- (ii) Whether the issues raised in the Notice of Motion dated **28<sup>th</sup> June 2019** are “**Res Judicata**”.
- (iii) Whether the Notice of Motion dated **28<sup>th</sup> June 2019** amounts to an abuse of court process.

#### (i) Competency of the Application dated 28<sup>th</sup> June 2019

(7) The Notice of Motion dated **28<sup>th</sup> June 2019** sought for prayers inter alia:-

**“1. THAT** if leave is required the instant reference be admitted out of time.

**2. THAT** the taxation Orders made on **30<sup>th</sup> May 2019** wherein the Advocate/Respondent's Bill of Costs dated **23<sup>rd</sup> November 2016** was taxed in the sum of **Kshs.48,589,629.43** be vacated and/or set aside.

(8) Firstly, the procedure for seeking enlargement of time within which to file a reference against a taxation is clearly set out in **paragraph 11(4)** of the **Advocates (Remuneration) Order**. If the Client was of the opinion that it required an extension of time within which to put in a reference, then they ought to have followed the procedure set out in Paragraph 11(4).

(9) Prayer (2) of the Notice of Motion dated **28<sup>th</sup> June 2019** is synonymous to a reference as it seeks to have the taxation of **30<sup>th</sup> May 2019**, set aside. Clearly this prayer denotes that the Client was in some way aggrieved by that Ruling. Once again the procedure to be followed in challenging a taxation is clearly set out in **paragraph 11(1)** and **II(2)** of the **Advocates (Remuneration) Order** which provide as follows:-

**“(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.**

**(2) The taxing officer shall forthwith record and forward to the Objector the reasons for his decision on those items and the Objector may within fourteen days from receipt of the reasons apply to a judge by Chamber Summons, which shall be served on all parties concerned, setting out the grounds of his objection.”**

(10) The Client Bill of Costs was taxed and a Ruling was delivered on **30<sup>th</sup> May 2019**. A certificate of taxation was issued on **6<sup>th</sup> June 2019**. The application challenging the taxation dated **28<sup>th</sup> June 2019** was filed in Court on **1<sup>st</sup> July 2019**.

(11) I have carefully perused the Ruling delivered by **Hon Opande** on **30<sup>th</sup> May 2019**. I note that it was comprehensive and did include the reasons for the taxation. As such the Client did not need to make a request to be finished with the reasons for the decision. In **EVANS THIGA GATURU –VS- KENYA COMMERCIAL BANK LIMITED, Odunga J.** held as follows: -

**“In most cases the Court is aware that the taxing officers in their decision on taxation do deliver comprehensive rulings which are self-contained thus obviating the necessity to furnish fresh reasons thereafter. In such circumstances it would be foolhardy to expect the taxing officer to redraft another ruling containing the reasons.”**

(12) The Client did not in any event seek reasons for the taxing master's decision. They had 14 days from **6<sup>th</sup> June 2019** to file a reference. The Client failed to do so. The eleven (11) day period expired on **17<sup>th</sup> June 2019**. No application was made to enlarge the time. Instead twenty two (22) days later the Client files a reference couched as an application. It is obvious that this application is nothing but an attempt to circumvent the time lines provided for in paragraph 11 of the **Advocates (Remuneration) Order**.

(13) The Courts are not however entirely unreasonable and where valid persuasive reasons are advanced for the failure to adhere to the given timelines then a court may disregard those timelines and admit the reference. In **REPUBLIC –VS- KENYATTA UNIVERSITY & ANOTHER Ex Parte WELLINGTON KIHATO WAMBURU [2018] eKLR, Hon Justice Mativo** held thus:-

**“....The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the Court to disregard the delay and admit the reference out of time. This discretion has been deliberately conferred on the Court in order that Judicial power and discretion in that behalf should be exercised to advance substantial justice.**

However, it is necessary to emphasize that even after sufficient case has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the court. If sufficient cause is not proved nothing further has to be done; the application for excusing delay has to be dismissed on that ground alone. If sufficient cause is shown then the Court has to enquire whether in its discretion it should condone the delay. This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party of its bona fides may fall for consideration....”[own emphasis]

(14) It could be argued that rules of procedure ought not be used to shut out a litigant seeking to file a reference. Rules of procedure are not set out as mere suggestion which a party can decide to adhere to as and when they wish. In **MOSES MWICIGI & 14 OTHERS –VS- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 5 OTHERS**, the Supreme Court in discussing the importance of adherence to procedure stated as follows: -

**“This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it benefits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.**

Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159(2)(d) of the Constitution, which proclaims that,“*..Courts and tribunals shall be guided by...[the principle that] justice shall be administered without undue regard to procedural technicalities.* This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the courts.”[own emphasis]

## **RES JUDICATA**

(15) The Advocate submits that the matters being raised by the Client in the Notice of Motion dated **28<sup>th</sup> June 2019** are “Res Judicata” Section 7 of the Civil Procedure Act which defines the principle of “Res Judicata” provides as follows:-

**“7. 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, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”**

(16) The Court of Appeal expounded further on this principle in the case of **IEBC –VS- MAINA KIAI & 5 OTHERS Civil Appeal No.105 of 2017**, where it was stated:-

**“Thus for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive, 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.”

(17) In the same case the Court went on to state 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 for a to obtain at last, outcomes favourable to themselves. Without it, there would 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.”

(18) Vide Prayer (3) of the Notice of Motion dated 28<sup>th</sup> June 2018, the Client sought that “the Court be at liberty to determine the issue of the taxing master’s jurisdiction...” Whereas the Advocate submits that the question of jurisdiction was conclusively dealt with by this Court in the ruling of 5<sup>th</sup> October 2018, the Client counters that the cited ruling dealt only with the question of the jurisdiction of the High Court to entertain the Reference. What is being questioned in the present application is the jurisdiction of the Taxing Master.

(19) This is a matter in which taxation has already taken place. The question of jurisdiction of the taxing master is one that ought to have been raised as a preliminary point and cannot be raised the tail end of the process.

(20) The Client sought to stay the hearing and determination of the Advocates Notice of Motion dated 17<sup>th</sup> June 2019 seeking judgment in his favour. This stay was being sought on the grounds that there is an appeal pending in the matter before the Court of Appeal. The stated appeal was filed to challenge the ruling of this court delivered on 5<sup>th</sup> October 2019 by which the Court declined to grant orders staying the taxation of the Advocates Bill of Costs. That issue has now been overtaken by events given that taxation of the Bill of Costs did take place and a Ruling thereon was delivered on 30<sup>th</sup> May 2019. The Client cannot seek a stay relying on an appeal over a matter that has already occurred. That appeal having nothing to do with the now concluded taxation is a non-starter. The orders for stay cannot be made in “vacuo”.

(21) Finally, I find that the present application is but one in a string of application which have been brought by the Client in an attempt to avoid setting this Bill. This application is clearly an abuse of court process. I can do no better than to quote my learned brother **Hon Justice George Odunga** who in **REPUBLIC –VS- SACCO SOCIETIES REGULATORY AUTHORITY Ex Parte JOSEPH KIPRONO MAIYO & 3 OTHERS [2017] eKLR**, held as follows:-

“45. Instances that constitute abuse of the Court process were set out in *Muchanga Investments Limited Vs Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No.25 of 2002 [2009] KLR 229* as including the following cases:

(a) “Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.

(b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.

(c) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent’s notice.

(d) (sic) meaning not clear)

(e) Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness.”

76. It is therefore clear that a party cannot invoke two jurisdictions at the same time merely because he is relying on different grounds in both matters. As was held in *Mitchell and others Vs. Director of Public Prosecutions and Another [1987] LRC (Const)128*

“...in civilized society legal process is the machinery used in the courts of law to vindicate a man’s rights or to enforce his duties. It can be used properly, it can be used improperly, and so abused. An instance of this is where it is diverted from its proper purpose, and is used with some ulterior motive, for some collateral one or to gain some collateral advantage, which the law does not recognize as legitimate use of that process. But the circumstance in which the abuse of process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes extrinsic evidence only. But if and when it is shown it happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instance. Others attract the res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop proceedings, or put an end to it. The inherent power has been used time and again to put a summary end to a process which seeks to raise and have determined an issue which has been decided against the party issuing it in earlier proceedings between the parties.”[emphasis added].

(22) Based on the above, I find that this application dated 23<sup>rd</sup> June 2010 amounts to an abuse of Court process. I find merit in this Preliminary Objection dated 4<sup>th</sup> July 2010. Accordingly, I strike out the notice of Motion dated 28<sup>th</sup> June 2019 and award costs to the Advocate/ Respondent.

Dated in Nairobi this 21<sup>st</sup> day of May 2020.

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Justice Maureen A. Odera