REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO.111 OF 2016

MERCY NDUTA MWANGI T/A

MWANGI KENG'ARA & CO. ADVOCATES.....APPELLANT

VERSUS

INVESCO ASSURANCE COMPANY LIMITED.....RESPONDENT

(Being an appeal from Ruling/Decision of the Chief magistrate's Court at Nairobi

delivered by the Honourable Chief Magistrate L. Mbugua (Mrs) on 5th October 2016

in the Chief Magistrate's Court Civil Case Number 292 of 2016, Mercy Nduta

Mwangi T/A Mwangi Keng'ara & Co. Advocates Versus Invesco Assurance

Company Limited, whereby the Ruling dated 5th October 2016 was delivered)

BETWEEN

MERCY NDUTA MWANGI T/A

MWANGI KENG'ARA & CO. ADVOCATES.....PLAINTIFF

AND

INVESCO ASSURANCE COMPANY LIMITED.....DEFENDANT

JUDGEMENT

1. The genesis of this appeal was a plaint filed by the Appellant was the Plaintiff before Machakos CMCC No. 292 of 2016 in which she pleaded that she was instructed by the Respondent to defend the Respondent's interests in Machakos CMCC No. 295 of 2004 – **Gerald Maingi Ngomo vs. Allan Karanja Njenga** (hereinafter referred to as "the primary suit"). Although she submitted her itemised fee note to the Respondent for settlement, the Respondent failed to honour the same thus compelling her to file Machakos High Court Miscellaneous Application No 249 of 2013 against the Respondent (hereinafter referred to as "the Miscellaneous Application") in which the Appellant's costs were taxed in the sum of Kshs 215,611.00. The Respondent however, failed to make good the said claim despite the Appellant's demand thus provoking the filing of Machakos CMCC No. 292 of 2016 (hereinafter referred to as "the subject suit").

2. In its defence of the subject suit, the Respondent pleaded that it had already paid the Appellant her legal fees in respect of the primary suit in accordance with a global agreement entered into between the parties herein which provided that the Appellant would be paid in accordance therewith as opposed to a file by file basis. Based on the said agreement the Respondent contended that it paid the Appellant a sum of Kshs 20,018,336/- and though the Appellant admitted the same, it failed to account for it and continued to file numerous enforcement suits against the Respondent including the said Miscellaneous Application. The Respondent set out in the body of its defence the said

schedule of payment.

3. However, the Respondent averred on a without prejudice basis that in fact according to the said schedule, the fees for the primary suit was fully paid.

4. Stung by this defence, the Appellant filed a Notice of Motion dated 24th May, 2016 seeking that the said defence be struck out and judgement be entered in the Appellant's favour as prayed in the plaint as well as the costs of the application and the suit.

5. In the supporting affidavit, the averment in the plaint were reiterated and it was averred that the issue of the monies paid towards fees in the primary suit was dealt with by the taxing master and that once a certificate of taxation is issued which has not been varied or set aside, the issue is res judicata. The appellant however denied that she had been paid the alleged Kshs 20,018,336/= and contended that the trial court had no jurisdiction to deal with the agreement for fees as the same was res judicata in view of the ruling in Milimani HCCA No. 65 of 2015 between the Respondent herein and the Appellant.

6. The Appellant noted that there was neither a counterclaim nor a set-off in the defence filed in the subject suit and the Respondent had not moved the trial court with respect to the said sum of Kshs 20,018,336/=. It was however disclosed that since the issue of the agreement for fees was also the subject of a pending litigation in HCCC No. 504 of 2013 it was a gross abuse of the court process to seek to re-litigate the same issue.

7. On its part the Respondent contended that its defence raised triable and arguable issues with high probability of success. It was averred that in the year 2006 the parties entered into a legal fee agreement in respect of 370 files in which a sum of Kshs 39,320.00 was to be paid by the Respondent to the Appellant hence the total fees for the said cases was Kshs 11,796,000.00 and that the Respondent had as on 6th June paid to the Appellant the sum of Kshs 3,572,821.00 leaving a balance of Kshs 8,223,179.00. In respect of the subject matter, it was averred that it was part of the agreement appearing as number 151 of the list attached to the agreement and that monies were advanced in honouring of the fee agreement and which monies were capable of being set off against any order of the court. It was further deposed that the Appellant had also been paid the interim fees which amount ought to be considered in settling the decretal amount which monies the Appellant had not acknowledged.

8. The Respondent therefore argued that since the overriding objective of the court is to do substantive justice without regard to procedural technicalities, they should not be locked out by mere technicality.

9. Upon hearing the application, the learned trial magistrate found that in light of the statement alluding to existence of an agreement pursuant to which fees in Machakos CMCC No. 925 of 2004 were paid, the matter was not one suitable for finalisation without tendering of evidence in a full trial. Accordingly, the court proceeded to dismiss the application.

10. It is that ruling that has provoked the present appeal in which the Appellant has raised the following grounds of appeal:

> **1. That the learned trial magistrate erred in law and in fact in finding that the defence of an agreement on fees entered into prior to taxation, and alleged payments made on the basis of the agreement were triable issues, requiring a full hearing.**
>
> **2. That learned trial magistrate erred in law and in fact in failing to find that the replying affidavit having been sworn by a non-officer of the Respondent, which is a corporation was incompetent and could not controvert the Notice of Motion dated 24-2-2016.**
>
> **3. That the learned trial magistrate erred in law and in fact in failing to find that the ruling delivered in High Court Civil Suit No. 504 of 2013 (Originating Summons) Invesco Assurance Company Limited –VS- Mercy Nduta Mwangi t/a Mwangi Keng'ara & Co. Advocates rendered the defence of an agreement on fees and payments made thereunder *Res Judicata.***
>
> **4. That the learned trial magistrate erred in fact and in law by failing to find that the subordinate court had no jurisdiction to determine the issue of agreement on fees after a successful taxation by the Appellant.**
>
> **5. That the learned trial magistrate erred in fact and in law by failing to find that the issue of accounting for payments allegedly made pursuant to a global fees agreement could not be determined by the subordinate court in view of the ruling delivered in High Court Appeal No. 65 of 2015, Invesco Assurance Company Limited –VS- Mwangi Keng'ara & Co. Advocate on 22-5-2015.**
>
> **6. That the learned trial magistrate erred in fact and in law by failing to enter judgment for the assessed costs of Kshs. 215,116/= plus interest thereon at the rate of 14% per annum from 28-8-2013 until payment in full.**
>
> **7. That the learned trial magistrate erred in fact and in law by failing to find that due to credit for amounts paid before taxation were entered as Nil before the taxing officer and the issue was therefore *Res Judicata* after issuance of certificate of taxation.**
>
> **8. That the learned trial magistrate erred in fact and in law in entertaining the Respondent's claim of payments under the global fees agreement, when there was no counterclaim or set of relief sought in the defence with respect to the same.**
>
> **9. That the learned trial magistrate erred in law and in fact in failing to find that no evidence of payment was presented before the honourable court by the Respondent, and in failing to find that the allegations of payment were unsubstantiated thereby rendering the defence scandalous.**

10. That the learned trial magistrate erred in law and in fact in failing to evaluate all the documentary evidence and submissions by the Appellant, and hence arrived at a wholly unjust decision.

11. That the learned trial magistrate erred in fact and in law by failing to award the costs of the application and the suit to the Appellant.

11. It is therefore sought that:

1. The entire ruling of the subordinate court delivered on 5-10-2016 be set aside and be substituted with an order striking out the statement of defence dated 24-5-2016 and judgment be entered against the Respondent in favour of the Appellant for the sum of Kshs. 215,116/= plus interest thereon at the rate of 14% per annum from 28-8-2013 until payment in full.

2. The costs of the Notice of Motion dated 24-5-2016 and the entire suit in Machakos CMCC No. 292 of 2016, be awarded to the Appellant.

3. The costs of this Appeal be awarded to the Appellant.

12. In her submissions, the Appellant contends that the agreement of 19/10/2006 was the cause of action and subject of litigation in Nairobi H.C.C No. 504 of 2013 (Originating Summons), in The Matter of the Advocate/Client Relationship between Invesco Assurance Company Limited and Mercy Nduta Mwangi T/A Mwangi Keng'ara & Co. Advocates, where the Respondent sought to impeach the said agreement and to bar the taxation of the Appellant's costs in other matters including the costs of the Appellant in the primary cause but that the application was dismissed. It was submitted that in H.C.C.C No. 504 of 2013 the Respondent sought an order for the rendering of an account of all monies already paid to the Appellant and further apportions the same to the various files in her possession in relation hereto. The said claim was based on the allegation that the Appellant had failed, refused and/or declined to account for the sum of over Kshs. 20,000,000/= paid to her on account of the suits contained in the schedule among others or give credit for the payment received. It was therefore submitted that the Respondent is mischievous in asking this Honourable court to enforce an agreement it sought to impeach in H.C.C No. 504 /2013 (originating summons) on the ground that the said agreement was harsh and unconscionable.

13. It was submitted that an application for stay of execution pending appeal in Milimani High Court of Kenya, Civil Appeal No. 65 of 2015 was dismissed on the ground that if it was true that the Respondent paid over to the Appellant the alleged sum of Kshs.20 million and the same had not been accounted for, the law provides for a remedy by way of accounts and that the Appellant cannot be hamstrung or prevented from enjoying the fruits of legally obtained judgments on the ground that there is money that had been received but not yet accounted for by her. It was therefore the Appellant's case that in light of the aforesaid, the defence and Replying Affidavit filed before the trial court alluding to an agreement on fees and previous payments was clearly scandalous and an abuse of the court process as the issue of the agreement on fees had been previously litigated in H.C.C NO. 14 of 2013 where the Respondent's claims had been dismissed.

14. According to the Appellant when the taxation of the Advocate's costs took place on 19th April, 2016 it was expressly indicated that no amount had been paid by the client meaning that as at that date, the Respondent had not paid any fees to the Appellant in relation to the primary suit. In those proceedings, the Respondent defended the taxation through the firm of Gichuki King'ara & Co. Advocates.

15. The Appellant drew the court's attention to the fact that despite alleging huge payments of Kshs.20, 018, 336/= no relief is sought with respect to the same in the defence and neither has the Respondent filed a counter - claim or a set - off of the alleged interim fees that was paid. No evidence of the Appellant acknowledging payment or a bank statement to support the alleged payments was adduced contrary to Order 7 Rule 5 of the ***Civil Procedure Rules***. It was further submitted that the issue of Kshs. 20,000,000/= was subsequently dealt with by a ruling delivered on 11th May, 2017 by **Kemei, J** in **Machakos High Court Miscellaneous Application No. 51 of 2015, Mwangi Keng'ara & Co. Advocates Versus Invesco Assurance Company Limited.**

16. It was further submitted that under section 45(6) of the ***Advocates Act***, there can be no taxation where there is an agreement under section 45 thereof. Therefore, Section 45(6) envisages that an objection under section 45 should be raised prior to taxation. In this respect the Appellant relied on **Ahmednasir Abdikadir & Company Advocates vs. National Bank Kenya Limited [2006] eKLR**.

17. According to the Appellant, the doctrine of *res judicata* is embedded in section 7 of the ***Civil Procedure Act***, and also discussed in the text book and reference was made to ***Res Judicata, Estoppel, and Foreign Judgments*** by **Peter R. Barnett** on page 9 and in light of the aforesaid facts, it was submitted that the trial court lacked jurisdiction to hold a trial on the defence of a fees agreement or to vary the certificate of taxation. It therefore erred in fact and in law when it held that due to the allegations of the existence of an agreement on fees, this was not a suitable case to be finalized without tendering evidence in a full trial

18. According to the Appellant, Order 2 Rule 15 (1) provides for striking out of pleadings at any stage of the proceedings on the ground that it is scandalous, frivolous or vexatious, may prejudice, embarrass or delay the fair trial of the action; or it is otherwise an abuse of the process of the court. Section 1B of the ***Civil Procedure Act***, behoves the court to embrace the overriding objective specified in section 1A, through the efficient disposal of the court business and timely disposal of the proceedings at a cost affordable by the respective parties. In this regard reference was made to **H.C.C.C NO. 2185 of 2001, Horkan Investment Limited vs. Namayuk Self Help Group,** where reference was made to order 13(1)(b) which is similar to order 2 Rule 15 herein on page 4 where the court held a matter is frivolous if it has no substance or it is fanciful or where party is trifling with court; when to put forward the defence would be wasting court's time; and when it is not capable of reasoned argument. The said decision also defines what is vexatious and a pleading that tends to prejudice, embarrass or delay fair trial. It was therefore submitted that the defence filed herein is vexatious, frivolous and meant to delay the fair trial of this matter since in the ruling delivered on 26th September, 2014, by the **Ougo, J** in H.C.C.C NO. 504/2013 (O.S) dismissed the prayer for accounting for the alleged payment of Kshs 20,000,000/=.

19. It was in any event submitted that the certificate of taxation is final as provided by section 51(2) of the ***Advocates Act*** based on **High**

Court Misc. Civil Application 382 of 2004, Owino Okeyo and Company vs. Fuelex Kenya Limited, **High Court Civil Application No. 729 of 2006 - Ochieng Onyango, Kibet and Ohanga Advocates vs. Adopt Alight Limited**, **Invesco Assurance Co. Limited vs. Gachiri Kariuki & Co. Advocates eKLR** and **Lubullellah And Associates Advocates vs N.K Brothers Limited [2014] eKLR**, Misc. Application No. 52 of 2012.

20. On the issue of interest, the Appellant relied on Rule 7 of the ***Advocates Remuneration Order*** and submitted that the Appellant served a notice to interest in accordance with the ***Advocates Remuneration Order*** on 29/7/2013 hence she is entitled to interest on the unpaid fees at the prescribed statutory rate. This position was based on **Milimani Commercial Court High Court Misc. Application No. 1048 of 2005 - Sankale Ole Kantai T/A Kantai & Company Advocates Versus Kenya Bus Services Limited** and **Francis Joseph Kamau Icatha vs. Housing Finance Company of Kenya Limited [2015] eKLR.**

21. In the instant case it was submitted that the Respondent is an insurance company which handles colossal sums of money as premiums who has unlawfully deprived the Appellant the use of her money. Since the Appellant has been kept away from her fees since 29/7/2013, it is only fair that interest is granted at court rates until payment in full. In the plaint paragraph 4 and prayer (a) the Appellant seeks interest on the taxed costs of Kshs. 215,116/= at 14% per annum from 28/8/2013 until payment in full.

22. It was therefore submitted that the ruling of the trial court is bad in law hence the prayers sought herein.

23. On its part, it was submitted on behalf of the Respondent that the Trial Magistrate's ruling delivered on 5th October 2016, hereinafter referred to as "the ruling" should remain in force. According to the Respondent, summary judgment can only be obtained where the matter is straight forward as stated in Order 36 and thereunder, there are only 2 separate areas in respect of which summary judgment may be obtained. where the relief sought by the Plaintiff is for a debt or a liquidated claim; and where the claim is for recovery of land with or without a claim for rent and profits. It is for very straightforward cases. In this regard the Respondent relied on **Capital Construction Co. Ltd vs. National Water Conservation and Pipeline Corporation [2013] eKLR** and **Transcend Media Group Limited vs. Independent Electoral & Boundaries Commission (IEBC) [2015] eKLR**.

24. In this case, it was submitted that the matter was not straight forward, evidence had to be furnish to prove payment of legal fees. It would have therefore been prejudicial to the Respondent if the honourable court would have made orders without hearing the defence. According to the Respondent, since the Appellant the seeks to unjustly enrich herself as the monies she claims have already been paid, the court should not reward a person unjustly and referred **Chase International Investment Corporation and Another vs. Laxman Keshra and 3 Others [1978] eKLR**.

25. In relation to the appeal herein, it was reiterated that the appellant seeks to unjustly enrich herself by demanding a second time pay even after evidence has been furnished proving clearance of legal fees. To the Respondent, the double payment of the legal fees claimed by the appellate will cause a correspondent deprivation towards the Respondent which will lead to miscarriage of justice. Therefore, there are no justifiable reasons why the appellate should be awarded the sum claimed. It invited the court to be guided by the authority in **Moronge & Company Advocates vs. Kenya Railways Authority. Civil Appeal No. 262 of 2012**.

26. It was therefore submitted that the appellant had already received her justified pay and should not demand for more than required or necessary.

27. In the Respondent's view, if the Appellant does not raise new issues of law or fact that were overlooked by the Trial Court the Appellate Court should endeavour not to interfere with the decision of the Lower Court and reliance was placed on **Mbogo vs Shah [1968] EA 93 at 96 G**.

28. According to the Respondent, based on Article 22(3)(d) of the Constitution barring the Defendant/Respondent from filing his defence which provided triable issues would have been an unreasonable restriction based on a mere technicality that would have caused a miscarriage of justice. To the Respondent, the triable issues are clearly stated in the Defence. It clearly shows the Global Agreement Scheme paid the Plaintiffs/Appellant legal fees. Further, support of the payment are in the witness statement of **Paul Gichuhi** in which he states the sum of money the appellant has received. The Respondent's case was further grounded on **ICDC vs. Daber Enterprises Ltd (2000) 1 EA 75, Sanoner Ltd vs. George Samuel Eshiwani HCCC No. 97 of 2003 Orbit Chemical Industry Ltd. vs. Mytrade Ltd, HCCC No. 631 of 1998**, **Postal Corporation of Kenya vs. Inamdar & 2 Others [2004] 1 KLR 359** and **Olympic Escort International Co. Ltd & 2 Others vs. Parminder Singh Sandhu & Another (2009) eKLR,**

29. It also relied on ***Black's Law Dictionary*** 8th Edition by **Bryan A Garner** page 186 which defines the word "***Bona fide***" as:

> ***"[Latin in good faith"] 1. Made in good faith; without fraud or deceit. 2. Sincere; genuine.***

30. In conclusion, it was submitted that the decision of the lower court should be upheld as the Appellant raises no issues of fact or law that were overlooked and that the appeal should therefore be dismissed with costs to the Respondent.

Determination

31. I have considered this appeal and the various submissions made on behalf of the parties herein.

32. As already indicated the application before the trial court was brought under Order 2 rule 15 of the ***Civil Procedure Rules***. Subrule (1) of the said provision provides as follows:

> ***At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—***

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court,

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

33. In the exercise of its powers under the said provision there are certain well established principles that a court of law is to adhere to. Whereas the essence of the said provisions is the striking out of an action or defence, that is a jurisdiction that must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit tried by a proper trial. The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case or striking out a defence for not disclosing a reasonable cause of action defence for being otherwise an abuse of the process of the court.

34. The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. If a pleading raises a triable issue even if at the end of the day, it may not succeed then the suit ought to go to trial. However, where the suit is without substance or groundless of fanciful and or is brought is instituted with some ulterior motive or for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process, the court will not allow its process to be a forum for such ventures. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack *bona fides* with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

35. The grounds upon which the application was based were that the defence filed was scandalous, frivolous, vexatious and was otherwise an abuse of the process of the Court.

36. A pleading is scandalous if it states (i) matters which are indecent; or (ii) matters that are offensive; or (iii) matters made for the mere purpose of abusing or prejudicing the opposite party; or (iv) matters that are immaterial or unnecessary which contain imputation on the opposite party; or (v) matters that charge the opposite party with bad faith or misconduct against him or anyone else; or (vi) matters that contain degrading charges; or (vii) matters that are necessary but otherwise accompanied by unnecessary details. See **Blake vs. Albion Life Ass. Society (1876) LJQB 663; Marham vs. Werner, Beit & Company (1902) 18 TLR 763; Christie vs. Christie (1973) LR 8 Ch 499.**

37. However, the word "scandalous" for the purposes of striking out a pleading under Order 2 rule 15 of the ***Civil Procedure Rules*** is not limited to the indecent, the offensive and the improper and that denial of a well-known fact can also be rightly described as scandalous. See **J P Machira vs. Wangechi Mwangi vs. Nation Newspapers Civil Appeal No. 179 of 1997.**

38. But they may not be scandalous if the matter however scandalising it is relevant and admissible in evidence in proof of the truth of the allegation in the plaint or defence so that when considering whether the matter is scandalous regard must be had to the nature of the action.

39. A matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the Court; or (iv) when to put up a defence would be wasting Court's time; or (v) when it is not capable of reasoned argument. See **Dawkins vs. Prince Edward of Save Weimber (1976) 1 QBD 499; Chaffers vs. Golds Mid (1894) 1 QBD 186.**

40. Again a pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense. See **Bullen & Leake and Jacobs Precedents of Pleading (12th Edn.) at 145.**

41. A matter is said to be vexatious when (i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the defence (pleading) is brought merely for purposes of annoyance; or (iv) it is brought so that the party's pleading should have some fanciful advantage; or (v). where it can really lead to no possible good. See **Willis Vs. Earl Beauchamp (1886) 11 PD 59**.

42. Pleading tend to prejudice, embarrass or delay fair trial when (i) it is evasive; or (ii) obscuring or concealing the real question in issue between the parties in the case. It is embarrassing if (i) It is ambiguous and unintelligible; or (ii) it raises immaterial matter thereby enlarging issues, creating more trouble, delay and expense; or (iii) it is a pleading the party is not entitled to make use of; or (iv) where the defendant does not say how much of the claim he admits and how much he denies. See **Strokes Vs. Grant (1878) AC 345; Hardnbord vs. Monk (1876) 1 Ex. D. 367; Preston vs. Lamont (1876).**

43. A pleading which tends to embarrass or delay fair trial is described as a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses, trouble and delay and that which contains unnecessary or irrelevant allegations which will prejudice the fair trial of the action and lastly a pleading which is abuse of the process of the court really means in brief a pleading which is a misuse of the Court machinery or process. See **Trust Bank Limited vs. Hemanshu Siryakat Amin & Company Limited & Another Nairobi HCCC No. 984 of 1999.**

44. A pleading is an abuse of the process where it is frivolous or vexatious or both.

45. Where the pleading as it stands is not really and seriously embarrassing it is wiser to leave it un-amended or to apply for further

particulars. See **Kemsley vs. Foot (1952) AC 325.**

46. However, in **The Co-Operative Merchant Bank Ltd. vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999** the Court of Appeal stated as follows:

> **"The power of the Court to strike out a pleading under Order 6 rule 13(1)(b)(c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong...Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court. The defence raises a fundamental issue, namely, whether there was any misrepresentation as alleged by the respondent, a question which, cannot possibly be answered at the stage of an application for striking out; nor will it be competent for the court of appeal to try to answer it as its jurisdiction only extends to identifying whether, if any, there are issues which are fit to go for trial. The court has no doubt whatsoever, that the above is a fundamental triable issue...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment. The appellant's defence cannot be said to fall into that category and had the trial Judge considered fully all the matters alluded to, he would not have come to the same conclusion as he did."**

47. In **Yaya Towers Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000** the same court expressed itself thus:

> **"A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved...If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits... It is not the length of arguments in the case but the inherent difficulty of the issues, which they have to address that, is decisive... The issue has nothing to do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the Court or is unarguable...Where the plaintiff brings an action where the cause of action is based on a request made by the defendant he must allege and prove inter alia, both the act done and the request made for doing such an act. In the absence of any request shown to have been made by the defendant in the particulars delivered of such allegation, it would not be possible for the plaintiff to prove any request made by the defendant and without this the essential ingredient of the cause of action cannot be proved and the plaintiff is bound to fail...No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment."**

48. In this case it is clear that the reason why the trial court declined to allow the application for striking out the defence was that:

> *"in paragraph 5 of the statement of defence a schedule of payment to Mwangi Kengára & Co. Advocates has been set out. Further defendant/respondent avers that the fees in Machakos CMCC 925 of 2004 were paid pursuant to an agreement. The agreement appears to be the one annexed to Paul Gichuhi's affidavit as (sic) page 1. In her affidavit of 22.6.16, the applicant herself has alluded in paragraph 12 to the issue of an agreement for fees which is a subject of litigation in HCCC No. 504 of 2015 (OS). In light of the foregoing, I find that this is not a suitable case to be finalised without tendering evidence in full."*

49. It is however clear from the said ruling that the learned trial magistrate did not consider the effect of the decision of **Mabeya, J** Milimani High Court of Kenya, Civil Appeal No. 65 of 2015 in which the Learned Judge expressed himself as hereunder:

> **"The Applicant complained and produced documents to show that it had paid the Respondent over the year's fees deposit exceeding Kshs.20 million that unless stay was granted until the Respondent accounted for the said sum, the applicant may never have any recompense. On the other hand, the Respondent submitted that the Application before the court was not one for an account by the Advocate that such an application should be by way of originating summons under order 52 of the civil procedure rules. I think I agree with the Respondent if it be true and the applicant paid over to the Respondent the alleged sum of Kshs.20 million and the same has not been accounted for, the law has provided for a remedy by way of accounts. The Respondent cannot be hamstrung or prevented from enjoying the fruits of legally obtained judgments on the ground that there is money that had been received but not yet accounted for by her."**

50. What the learned judge was saying was that the issue of the fee deposit cannot be a ground for denying the Appellant herein her pursuit of her taxed fees and that the said issue belonged to a different forum. There is no evidence that the said decision has been set aside. In fact, it was as a result of the said decision that **Kemei, J** in **Machakos High Court Miscellaneous Application No. 51 of 2015, Mwangi Keng'ara & Co. Advocates Versus Invesco Assurance Company Limited,** stated that:-

> **"As noted in all the cases involving the Client and Advocate herein, the issue had been about the Client's claim that a sum of Kshs. 20 million had been paid to the Advocate which is denied by the Advocate. The Client had been using the issue of the Kshs. 20 million to seek orders of stay but which were rejected by the courts and the Client directed to file suit for taking of accounts. The issue of the payment of Kshs .20 million by the Client to the Advocate as a ground for stay appears to have been substantially determined by the various courts. Hence the Client now raising the same is barred and or estopped by the doctrine of Res judicata. It is my finding that the Client's Application herein is Res judicata.''**

51. Since this Court had found that the issue of the deposit alleged to have been made by the Respondent to the Appellant for fees was *res judicata* in so far as the recovery of the Appellant's taxed fees from the Respondent was concerned section 7 of the ***Civil Procedure Act*** bars any Court from relitigating over the same. As was held by **Emukule, J** in **Koinange vs. Commission of Inquiry into The Goldenberg Affair Nairobi HCMCA No. 372 of 2006 [2006] 2 KLR 529**.

> **"The doctrine of *stare decisis* is predicated upon the principle of precedent under which it is necessary for a court to follow earlier judicial decisions when the same facts arise again in litigation. The phrase *stare decisis* literally means, "stand by things decided". This doctrine is simply that when a point or principles of law has been once officially decided or settled by the Ruling of a competent court in a case in which it is directly and necessarily invoked, it will no longer be considered as open to examination or to a new ruling by the same tribunal or by those which are bound to follow its adjudications, unless it be for urgent reasons and exceptional cases."**

52. In my view, if the law bars the court from relitigating a matter, the raising of such an issue as a defence cannot be termed as a triable issue. The learned trial magistrate was clearly bound by the said decisions. As was appreciated by **Musinga, J** as he then was in **Rift Valley Sports Club vs. Patrick James Ocholla Nakuru HCCA No. 172 of 2002 [2005] eKLR**:

""The learned magistrate trashed such a forceful decision of the Court of Appeal by failing to give it any consideration at all and proceeded to grant an injunction in a ruling which was devoid of any legal reasoning. A judicial decision must be based on proper legal grounds but never on feelings alone, no matter how strong such feelings may be. The doctrine of *stare decisis* is very important in our judicial system and must be respected as much as possible otherwise judicial decisions would be chaotic and unpredictable. It was unfortunate that the learned magistrate totally disregarded a five judge binding decision without citing any reasons for doing so."

53. A similar position was taken by the Supreme Court in **Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others Petition No. 4 of 2012 [2013] eKLR** when it held that:

> **"Adherence to precedent should be the rule and not the exception...the labour of judges would be increased almost to breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."**.

54. The issue of the deposit was clearly unarguable in light of the said decisions. It had no foundation as its foundation had been removed by the doctrine of res judicata; it had no chance of succeeding; it was therefore brought merely for purposes of annoyance or for some fanciful advantage; and it could certainly really lead to no possible good. In other words, it was vexatious. To quote **Omollo, JA** in the case of **J P Machira vs. Wangethi Mwangi & Another Civil Appeal No. 179 of 1997**, although disputes ought to be heard by oral evidence in court, there is no magic in holding a trial and receiving oral evidence merely because it is normal and usual to do so since a trial must be based on issues; otherwise it may become a farce.

55. It is therefore clear that the purported defence raised by the Respondent herein could not see the light of the day. It ought to have been struck out.

56. In the premises, I allow this appeal, set aside the decision of the trial court made in Machakos CMCC No. 292 of 2016 dismissing the application dated 24th May, 2016 and substitute therefore an order allowing the said application. I also award the Appellant the costs of this appeal.

57. It is so ordered.

Read, signed and delivered in open Court at Machakos this 16th day of July, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nzavi for Ms Mwangi for the appellant

CA Geoffrey