REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CAUSE NO. 40 OF 2015

GEORGE MIYARE T/A MIYARE & CO ADVOCATES.....DECREE HOLDER/RESPONDENT

VERSUS

EVANS GOR SEMELANGÓ.....JUDGMET DEBTOR/APPLICANT

RULING

1. Before me for determination is a Notice of Motion dated 26th February 2019 filed by Evans Gor Semelangó (herein after referred to as the applicant) seeking the following orders:-

a. Spent.

*b. **That** leave be granted to the firm of Odhiambo Oronga & Co Advocates to come on record for the judgment debtor/applicant in place of Nyangito & Associates.*

*c. **That** pending the hearing and determination of this application, the warrants of arrest issued on 26th February 2019 be stayed.*

*d. **That** pending the hearing and determination of this application there be a stay of execution of the taxation ruling delivered on 22nd December 2016 by the Honourable E.W. Mburu (Mrs)- Deputy Registrar in Miscellaneous Cause No. 40 of 2015.*

*e. **That** leave be granted to the applicant to file a reference against the Taxation ruling delivered on 22nd December 2016 by the honourable E.W. Mburu, Deputy Registrar in Miscellaneous Cause No. 40 of 2015 out of time.*

*f. **That** the honourable court be pleased to set aside the Taxation ruling delivered on 22nd December 2016 by the Honourable E.W. Mburu Deputy Registrar in Miscellaneous Cause No. 40 of 2015 and the certificate of taxation upon such terms as are just.*

2. The application stands on the grounds stated on the face of the application and the applicant's supporting Affidavit annexed thereto. Briefly, the applicant states that the Respondent took out a Notice to Show Cause seeking to enforce a taxation ruling delivered on 22nd December 2016 which taxed the Respondent's bill of costs *ex parte* at Ksh. 3,602,704/=.

3. In addition, the applicant states that he applied for stay through his former advocates and that the said application was dismissed on grounds that the applicant did not follow the proper procedure to challenge

the taxation. He also states that he intends to file a reference against the taxation, but the time for filing a reference lapsed.

4. The applicant further states that warrants of arrest were issued against him on 26th February 2019, hence, if the stay is not granted, he risks going to jail. He also states that the intended reference has high chances of success and that he stands to suffer prejudice if the application is not allowed

5. Save for prayer two of the application in which the applicant seeks leave of this court to come on record in place of the applicant, the rest of the prayers are fiercely opposed.

6. On record is the Replying affidavit of Sheilla Oriwo, advocate in which she averred *inter alia* that on 22ndDecember 2016, the Respondent's bill was taxed and a Certificate of Costs issued. She further averred that on 23rdJanuary 2017, the applicant filed a reference dated 20th January 2017 seeking the following orders:-

> *i. The ruling and reasons for taxation by the learned taxing Master dated 22nd December 2016 be set aside and or varied and the Respondent's advocate/client bill of costs be taxed afresh;*
>
> *ii. That there be a stay of the learned taxing Masters ruling and reasons for the taxation dated 22nd December 2017, pending the hearing and determination of the reference herein.*

7. M/s Oriwo deposed that the said application was heard together with the Respondents Notice of Motion dated 10th February 2017 in which the Respondent/decree holder applied for judgment to be entered as per the Certificate of Taxation. She stated that in a Ruling disposing the two applications delivered on 8th November 2017, the applicants application was dismissed while the Respondent's/decree holders application was allowed. She averred that aggrieved by the said dismissal, the applicant moved the court by way of an application dated 11th December 2017 seeking to review and or set aside the said ruling. She deposed that the said application was dismissed on 9th March 2017. She added that aggrieved by the said ruling, the applicant herein filed a Notice of Appeal but he has never filed the appeal.

8. She averred that instead of pursing the intended Appeal, the applicant filed the present application. She deposed that this application is *res judicata* since it seeks the same orders as the earlier application. Further, she averred that it is meant to circumvent the ruling dated 8thNovember 2017.

9. In addition, M/s Oriwo averred that no security has been provided, and, that, the application offends the provisions of paragraph 11 of the Advocate Remuneration Order. Further, she averred that it offends the overriding objective of the civil procedure, public policy on finality of litigation, and, that it was filed two years after the ruling sought to be set aside.

10. At the hearing the applicants counsel relied on the grounds on the face of the application and the supporting affidavit, while Miss Oriwo's submission was essentially a reiteration of her replying Affidavit.

Determination.

11. Upon considering the opposing facts presented by the parties herein, I find that one core issue stands out. This is whether this application is *res judicata*. It is common ground that on 23rd January 2017, the applicant moved this court seeking to set aside or vary the ruling and reasons for taxation. He also sought to stay the said ruling pending the hearing and determination of "the reference." In a ruling rendered on 8th November 2017, Aburili J observed as follows:-

9. This court notes that the costs which are being challenged were advocate/client taxed costs which were taxed by the Taxing Master on 22nd December 2016 Honourable E. Mburu (Deputy Registrar) of this court.

10. The challenge by way of chamber summons, to the said taxation was filed on 23rd January 2017 which is one month (30) days and one day thereafter. Paragraph 11 of the Advocates Remuneration Order provides for References in respect to the taxing officers' decisions.

11. The paragraph states:

> *1) Any party who objects to the decision of the taxing officer may within 14 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 the decision on those items and the objector may within 14 days from the objector may within 14 days from the 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.*
>
> *3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under Sub paragraph (2) may, with the leave of the judge, but not otherwise, appeal to the Court of Appeal.*
>
> *4) The High Court shall have power in it discretion by order to enlarge the time fixed for in Sub paragraph (1) or Sub paragraph (2) for taking of any step: Application for such order may be made by chamber summons upon giving to every other interested party not less than 3 clear days notice in writing or as the court may direct and may be so made not withstanding that the time sought to be enlarged may have already expired*

12. The taxing officer's ruling made on 22nd December 2016 was detailed with reasons for taxation. Therefore, it was not difficult for the client to simply file an objection and thereafter a reference without asking for reasons for taxation within the stipulated period.

13. In addition, there is no application for enlargement of time within which the reference ought to have been filed as stipulated in paragraph 11(4) of the Advocates Remuneration Order.

14. Between 22nd December 2016 and 23rd January 2017 when the chamber summons for challenging the taxation was filed, there was no objection filed with regard to any specific items that the respondent/client wished to challenge in the subsequent reference by way of chamber summons.

15. Such objection ought to have been filed within 14 days after the decision by the taxing officer, by giving notice to the taxing officer of the items of taxation to which the client objects.

16. In the instant case, the applicant simply filed an application challenging the taxation made on 22nd December 2016 and urging the court to vary/set aside the said taxation.

17. Although it would be superfluous to ask for reasons for the taxation where such reasons, as is in this case, were given by the taxing officer in her detailed ruling on taxation, the respondent/client was obliged to file an objection to the specific items of taxation that he had issues with, within 14 days of the date of taxation.

18. In other words, before one files a reference, he must have lodged a notice of objection to the specific items within 14 days of the date of ruling on taxation and where such time of 14 days has elapsed then an application for enlargement of time can be filed to the judge for consideration.

19. In this case, no such objection was filed with the taxing officer and no application for enlargement of time for filing objection was filed with the judge. It follows that the Reference herein as filed is fatally incompetent as it is not filed on the basis of any objected to items. It is also filed outside the stipulated timeframe.

20. Accordingly, the reference is amenable for striking out. The same is hereby struck out as filed on

23rd January 2017 with an order that each party do bear their own costs.

12. The above ruling warrants no explanation. The applicant was challenging the same taxation.

13. The applicant also filed the Notice of Motion dated 11thDecember 2017 urging the court to "make a determination that the orders made on 8th November 2017 were erroneous on account of mistake of fact that the applicant had filed the application dated 20th January 2017 out of time." In dismissing the said application, the the learned judge in a subtle but forceful manner had the following to say:-

12. I have carefully considered the client/applicant's Notice of Motion dated 8th November, 2017, the grounds, the supporting and further affidavit thereof; and the Replying affidavit filed by the advocate/Respondent in opposition thereto.

13. I have given equal consideration to the parties' advocates' oral submissions for and against the motion for review of the ruling of this court delivered on 8th November, 2017.

14. The impugned ruling determined what the client/applicant considered to be a Reference challenging the taxing master's ruling and reasons for taxation given on 22nd December, 2016 in an advocate/client bill of costs.

15. This court at paragraph 8 of the said decision first explained the applicable law in matters of taxation between client and advocate on costs and held that the applicable law was the Advocate's Remuneration Order and more specifically, paragraph 11 thereof which sets out the procedure for filing of References, starting with an objection to the decision of the taxing officer within 14 days of the decision by giving notice in writing to the taxing officer, of the items of taxation to which he objects and upon getting the reasons or if the reasons are in the ruling on taxation, then the objector may, within 14 days apply to a Judge by chamber summons, a reference setting out the Reference or challenge. In other words, the applicant must first file an objection stipulating what items he objects to before filing a chamber summons.

16. In this case, the court was categorical at paragraph 14 of the decision that between 22nd December, 2016 and 23rd January, 2017 when the chamber summons for challenging the taxation was filed, there was no objection filed with regard to any specific items that the Respondent/client wished to challenge in the subsequent reference by way of chamber summons. And that such objection ought to have been filed within 14 days after the decision by the taxing officer, by giving notice to the taxing officer of the items of taxation to which the client objects.

17. The court at paragraph 16 was also clear that in this case, the applicant simply filed an application challenging the taxation made on 22nd December, 2016 and urging the court to vary/set aside the said taxation.

18. At paragraph 17, the court further made it clear that the applicant was obliged to file an objection to the specific items of taxation that he had issues with, within 14 days of the decision.

19. At paragraph 18, the court even claimed further that an enlargement of time could be sought where the 14 days had lapsed before filing of objection.

20. Paragraph 19 of the decision sought to be reviewed stipulates that no such objection or application for enlargement of time was even sought hence the Reference as filed was fatally incompetent as it was not filed on the basis of any objected to items and was filed outside the stipulated time frame hence it was struck out at paragraph 20.

21. From the above excerpts of the impugned decision, it is clear that this court did consider the issue of filing of objection to taxation to be an important factor in filing of References. On the other hand, whereas the court did not consider the issue of time stopping from 21st December to 13th January as

stipulated in Order 50 Rule (4) of the CPR, nonetheless, in my view, that was not a relevant factor for my consideration for the reasons that No objection to taxation was filed whether within the 14 days from 22nd December, 2016 or thereafter. What was filed was a Reference without any objection being first lodged to the specific items objected to. It is for that reason that this court found and I would still find that the application as a Reference was incompetent because it was not preceded by an objection to any items of the taxation ruling by the taxing master.

22. The applicant simply filed a Reference without following the procedure laid out in paragraph 11 of the Advocates Remuneration Order.

*23. Now on the question of time stopping to run, Order 50 of the Civil Procedure Rules is on **'TIME'** Under Rule (4) thereof, it is stipulated that:*

> *"except where otherwise directed by a Judge for reasons to be recorded in writing, the period between the twenty first day of December in any year and the thirteenth day of January in the year next following both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act: provided that this rule shall not apply to any application in respect of a temporary injunction."*

24. The applicant's Counsel Mr. Nyangito avers that the above provision is of universal application to all matters before the court because matters of taxation are civil in nature hence the Civil Procedure Act and Rules are applicable and that therefore the court overlooked Order 50 Rule (4) of the CPR when it found that the Reference was filed out of time stipulated in paragraph 11 of the Civil Procedure Rules. The Respondent advocate submitted that the procedure and law applicable in matters of advocate/client taxation is the Advocates Remuneration Order under the Advocate's Act, not the Civil Procedure Rules.

25. The question is whether the Civil Procedure Rules in which time does not run applies to matters of taxation between client and advocate which are governed by paragraph 11 of the Advocates Remuneration Order.

26. Section 3 of the Civil Procedure Act stipulates that;

> *"In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred or any special form or procedure prescribed by or under any other law for the time being in force."*

*27. Although Mr. Nyangito dismissed the relevance of the **Hezekiel Oira case** to this case, it is clear that he was oblivious of the principles espoused in that case. The court was clear that the applicant cannot invoke the Civil Procedure Act and Rules made thereunder to circumvent the procedure provided under the Advocates Act and Remuneration Order in regard to review of the decision of the taxing officer in advocate/client bill of costs, where the taxing officer exercises the special jurisdiction conferred upon him or her under the Advocates Remuneration Order and not in their capacity as the Deputy Registrar of this court.*

*28. The court also made it clear that the Advocates Act is the legal regime governing taxation of costs whether party and party or Advocate/client and that the Advocates Act is a complete statute in itself on matters of taxation of costs and as such, a party cannot invoke the provisions of the Civil Procedure Act or Rules made thereunder for purposes of challenging any decision of the taxing officer. The court was fortified by the Court of Appeal in **Machira & Co. Advocates vs. Arthur K. Magugu [2012] eKLR** where the Court of Appeal referring to the High Court decision between the same parties as was held by Hon. Justice Ringera (as he then was) stated, inter alia:*

> *"----with regard to the advocates bill of costs, we agree with the decision of Judge Ringera in Machira vs. Magugu (1) that the Advocates Remuneration Order is a complete code which does not provide for appeals from the taxing officer's decision. Rule 11 thereof provides for ventilation*

of grievances from such decisions though references to a Judge in chambers - the effect may be viewed as an appeal or a review but these being legal terms in respect of which different considerations apply, they should not be loosely used ---"

29. Section 3 of the Civil Procedure Act as cited above is also clear that where there is a special procedure provided by any other written law, then that special procedure would be applicable and therefore the Civil Procedure Act and Rules cannot be said to be of universal application to all matters which appear to be civil in nature as asserted by Mr. Nyangito.

30. In *Kimani Wanyoike vs. ECK CA 213/95* the Court of Appeal was clear that

"where there is a law prescribed by either a constitution or an Act of Parliament governing a procedure for the redress of any particular grievance, that procedure should be strictly followed."

31. The same position was stated by the Court of Appeal in ***speaker of the National Assembly vs. Kamme [2008) Klr 425.***

21. Similarly, in ***Mutanga Tea & Coffee Company Ltd Vs Shikara Limited & Another [2015] e KLR*** *the Court of Appeal reiterated the foregoing as follows:*

"…….This court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of particular disputes (Speaker of the National Assembly V Karume)(supra), was a 5(2) (b) applicant for stay of execution of an order of the High Court issued in Judicial Review proceedings rather than in a petition as required by the Constitution. In granting the order, the court made the often –quoted statement that:

"[W] here there is a clear procedure for the redness of any particular grievances prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.(see also Kones v Republic & Another exparte Kimani Wa Nyoike & 4 Others [2008] e KLR (ER) 296).

"It is readily apparent that in those cases the Court was speaking to issues of the correct procedure rather than of the correct forum for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the Court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court. (Emphasis added).

The basis for that view is first that Article 159 (2) (c) of the Constitution has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word "including" leaves no doubt that Article (159(2)(c) is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of the Constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3)(a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms. (Emphasis added).

Secondly, such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost effective manner.…

…..We are therefore satisfied that the learned judge did not err by striking out the appellant's suit and application which sought to invoke the original jurisdiction of the High Court in circumstances whereas the relevant statutes prescribed alternative dispute resolution mechanisms and afforded the appellant the right to access the High Court by way of appeal, which mechanisms he had refused to invoke. To hold otherwise would, in the circumstances of this appeal, be to defeat the constitutional

objective behind Article 159(2)(c) and the very raison d'etre of the mechanisms provided under the two Acts……"(emphasis added).

32. On Mr. Nyangito's reliance on the overriding objectives of the law, the case of ***Karuturu Networks Ltd & Another vs. Daily Figgis Advocates*** ***CA 293/2009*** *is relevant. In that case, the Court of Appeal made it clear that:*

> *"The application of the overriding objections principle does not operate to uproot the established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness and that in interpreting the law or rules made there vide the court is under a duty to ensure that the application or interpretation being given to any rule will facilitate the first expedition, proportionate and affordable resolution of appeals."*

33. It follows that the question of whether Order 50 Rule 4 of the Civil Procedure Rules is applicable to these proceedings is a foregone conclusion. It does not apply. Paragraph 11 of the Advocate Remuneration Order is so elaborate on the time frames for filing of objection to taxation, the Reference and even provides for enlargement of time that there is no gap capable of being filed by Order 50 Rule 4 of the Civil Procedure Rules.

34. Furthermore, the import of Section 3 of the Civil Procedure Rules is to acknowledge laws like the Advocates Act and Remuneration Order in matters of taxation of costs such that parties would be bound by the applicable law to the circumstances of their case and not to import Order 50 Rule 4 which is not a rule of general application to all matters before the court, irrespective of whether such matters were of civil nature or not.

35. In my humble view, therefore, there was no mistake, error or overlooking by this court of the provisions of Order 50 Rule 4 of the Civil Procedure Rules in making of the decision of 8th November, 2017 which is sought to be reviewed. The court was conscious of the provisions of Section 3 of the CPA and Order 50 Rule (4) of the CPR but did not have to allude to them because they were not in issue at that time. What was in issue was paragraph 11 of the Advocates Remuneration Order which sets out the procedure for challenging decisions on taxation.

36. In addition, the decision which is impugned also entered judgment for the advocate in terms of the certificate of costs. The applicant client has not sought to vacate that judgment. It would serve no useful purpose to purport to review a ruling which review would not have the effect of vacating the judgment entered into against the client applicant herein.

14. It was submitted that the applicant filed a Notice of Appeal seeking to appeal against the above decision, but the appeal has never been filed. Instead, the applicant filed the present application seeking substantially the same orders.

15. Its trite law that if any judicial tribunal in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, the judgment or ruling is *res judicata*. If in any subsequent proceedings (unless they be of an appellate nature) in the same or any other judicial tribunal, any fact or right which was determined by the earlier judgment is called in question, the defence of *res judicata* can be raised. This means in effect that the judgment can be pleaded by way of estoppel in the subsequent case.

16. As **Somervell L.J**. stated [1] *res judicata* covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. All the grounds raised in this application are matters, which were raised or could have been raised in the previous application. The instant application is founded on the same grounds, same issues, same facts, and same circumstances.

17. It is an elementary principle of law that a litigant will not be allowed to litigate a matter all over again once a final determination has been made. Generally, a party will be estopped from raising issues that

have been finally determined in previous litigation, even if the cause of action and relief are different. The purpose is obviously to prevent the repetition of lawsuits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by the different courts on the same issue.[2]

18. The requirements for *res judicata* are that the same cause of action, for the same relief and involving the same parties, was determined by a court previously. In assessing whether the matter raises the same cause of action, the question is whether the previous judgment involved the 'determination of questions that are necessary for the determination of the present case and substantially determine the outcome of the case.

19. *Res Judicata* is one of the factors limiting the jurisdiction of a court. This doctrine requires that there should be an end to litigation or conclusiveness of judgment where a court has decided and issued judgment then parties should not be allowed to litigate over the same issues again. This doctrine requires that one suit one decision is enough and there should not be many decisions in regard of the same suit. It is based on the need to give finality to judicial decisions. *Res Judicata* can apply in both a question of fact and a question of law. Where the court has decided based on facts it is final and should not be opened by same parties in subsequent litigation.[3]

20. A judicial decision made by a court of competent jurisdiction holds as correct and final in a civilized society. *Res judicata* halts the jurisdiction of the court and that is why it is one of the factors affecting jurisdiction of the court. The effect of this is that the court is prevented from trying the case *in limine* i.e. from the beginning.[4] The rule of *res judicata* presumes conclusively the truth of the decision in the former suit.[5]

21. Also known in the US as claim preclusion, *res judicata* is a Latin term meaning "a matter judged." This doctrine prevents a party from re-litigating any claim or defence already litigated. The doctrine is meant to ensure the finality of judgments and conserve judicial resources by protecting litigants from multiple litigation involving the same claims or issues.

22. The doctrine of *res judicata* is provided for in Section 7 of the Civil Procedure Act.[6] Its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of Section 7 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The conditions are:-

> ***i. the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit;***
>
> ***ii. the former suit must have been between the same parties or privies claiming under them;***
>
> ***iii. the parties must have litigated under the same title in the former suit;***
>
> ***iv. the court which decided the former suit must have been competent to try the subsequent suit; and***
>
> ***v. the matter in issue must have been heard and finally decided in the former suit.[7]***

23. In ***Gurbachan Singh Kalsi vs. Yowani Ekori[8]*** the East African Court of Appeal stated as follows:-

> ***"Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the 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 a 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 of 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 judgement, 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…No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all…A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

24. Even mere addition of parties in a subsequent suit or omission of a party does not necessarily render the doctrine of *res judicata* inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. If the added party or the subsequent application pegs the claim under the same title or grounds as in the earlier suit, or substantially similar grounds as has happened in this case, the doctrine will still be invoked since the addition of the party, or a cosmetic surgery on the subsequent pleading would in that case be for the sole purpose of decoration and dressing and nothing else.[9]

25. The civil justice system depends on the willingness of both litigants and lawyers to try in good faith to comply with the rules established for the fair and efficient administration of justice. When those rules are manipulated or violated for purposes of delay, harassment, or unfair advantage, the system breaks down and, in contravention of the fundamental goal of the Civil Procedure Rules, the determination of civil actions becomes unjust, delayed, and expensive. The instant application, the third in a row, presents a worrying trend on increase in cases of abuse of the judicial process.

26. Clearly, the application is founded on grounds that have been dealt with in the previous applications. To me this application constitutes abuse of court process. It is trite law that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black law dictionary defines abuse as "Everything, which is contrary to good order established by usage that is a complete departure from reasonable use. Abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use.[10]

27. The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.[11]

28. The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions 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 court 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 respondent notice.

d. Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.

*e. Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.**[12]***

f. Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

g. Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.

*h. Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.**[13]***

29. Abuse of court process is a term generally applied to a proceeding which is wanting in *bona fides* and is frivolous vexations and oppressive. Abuse of process can also mean abuse of legal procedure or improper use of the legal process.[14] Abuse of court process creates a factual scenario where a litigant is pursuing the same matter by two or more court process. In other words, a litigant by the two of more court process is involved in some gamble, a game of chance to get the best in the judicial process.[15]

30. A litigant has no right to purse *paripasua* two processes which will have the same effect in two courts either at the same time or at different times with a view of obtaining victory in one of the process or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks.

31. It is not open for the applicant to institute numerous applications based on the same grounds. The applicant ought to have appealed after his application for review was dismissed. The Applicant cannot lawfully file the instant application seeking substantially similar reliefs relying on substantially the same grounds as the earlier application. The instant application constitutes and amounts to abuse of court/legal process."[16]

32. Multiplicity of actions on the same matter between the same parties even where there exist a right to bring the action is regarded as an abuse.[17] The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right *per se*. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice.[18]I find no difficulty in concluding that the instant Application is based on similar grounds as the earlier application.

33. This obstacle to the efficient administration of justice is not immovable. Courts need not and should not wait for lawyers and litigants to initiate proceedings where there is substantial reason to believe that the processes of the court have been abused. Tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which such abuse cannot complacently be tolerated consistently with the good order of society. Surely, it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception, fraud and blatant abuse of judicial processes.

34. All courts have an inherent or implied jurisdiction to prevent their processes from being used as an instrument of oppression. Courts are able to modify their procedures to avoid such prejudice and take any steps that are necessary to prevent an abuse of process.[19]The concept of abuse of process extends to the use of the court's processes in a way that is inconsistent with two fundamental requirements arising in court proceedings. These are, *first*, that the court protects its ability to function as a court of law by ensuring that the State and citizen use its processes alike. The *second* is that unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence. The court's

processes will be seen as lending themselves to oppression and injustice.[20]

35. The concept of abuse of process overlaps with the obligation of a court to provide a fair trial. The content of these obligations cannot, however, be stated exhaustively or analytically. These obligations rely on intuitive judgments formed by experience.[21]The obligation on a court is to provide a fair trial *in accordance with law*. The due administration of justice is a continuous process. Courts must be vigilant to ensure that public confidence in the administration of justice is maintained.[22]

36. The U.S. Supreme Court asserted in *Nix vs. Whiteside*[23] that a trial is a search for the truth. The rules governing the legal profession recognize that a lawyer must be a zealous advocate for the client, putting that person's interests ahead of all others. As Lord Brougham famously described the lawyer's role in 1820:- An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client."[24] Some have argued that advocacy must be limited if it obstructs the search for the truth because the lawyer's paramount obligation is to the court's ascertainment of the truth and not the client's interest in a favorable outcome.[25] However, lawyers must deal with a conundrum because they are required to act as officers of the court-presumably working to advance the truth-while providing loyal representation to clients who may have little to gain from its ascertainment.

37. My above analysis leading me to the conclusion that the application before me offends the doctrine of *res judicata*. It is also an abuse of court process.

38. Notwithstanding my finding on *res judicata*, I proceed to address myself briefly on the merits of the application or lack of it. In this regard, I cannot do better than to adopt the passages cited above from the Rulings by Aburirili J. who with sufficient eloquence, clarity and detail discussed the provisions of paragraph 11 of the Advocates Remuneration order and the steps prescribed under the said provision. It will not serve any useful purpose for me to spent ink and paper repeating the same principles, save to state that this application lacks merit.

39. Having concluded as herein above stated, I find and hold that the application dated **23rd** February 2019 is fit for dismissal. I hereby dismiss it with costs to Advocate/Respondent.

Orders accordingly.

Signed, Dated and Delivered at **Nairobi** this **17th** day of **September** 2019.

John M. Mativo

Judge.

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[1] In *Greenhalgh vs Mallard* (1) (1947) 2 All ER 257.

[2] *Caeserstone Sdot-Yam Ltd vs World of Marble and Granite 2000 CC and others* 2013 (6) SA 499 (SCA) paras 20-21.

[3]http://www.kenyalawresourcecenter.org/2011/07/res-judicata.html -Accessed on 16 December 2017.

[4] Ibid.

[5] Ibid.

[6] Cap 21, Laws of Kenya.

[7] See ***Lotta vs. Tanaki* {2003} 2 EA 556.**

[8] **Civil Appeal No. 62 of 1958.**

[9] *Republic vs Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 others* [2017] eKLR.

[10]Black Law Dictionary, Sixth Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11.

[11] *Public Drug Co V Breyerke cream Co*, 347, Pa 346, 32A 2d 413, 415.

[12] *Jadesimi vs. Okotie Eboh* (1986) 1NWLR (Pt 16) 264.

[13] (2007) 16 NWLR (319) 335.

[14] As per **Oputa J.SC** (as he then was) in the Nigerian case of *Amaefule & other Vs The State.*

[15] *See* Justice Niki Tobi JSC *Agwusin vs Ojichie*

[16] Supra.

[17]Ibid.

[18] Ibid.

[19] *Clyne vs New South Wales Bar Association* (1960) 104 CLR 186; *Barton v R* (1980) 147 CLR 75; *Connelly vs DPP* {1964} AC 1254; *Neill vs County Court of Victoria* {2003} VSC 328.

[20] *Clark vs R* {2016} VSCA 96 at [14].

[21]*Jago vs District Court of NSW* (1989) 168 CLR 23; {1989} HCA 46; *Ridgeway vs R* (1995) 184 CLR 19; [1995] HCA 66).

[22] *Moevao vs Department of Labour* {1980} 1 NZLR 464; *Jago vs District Court of NSW* {1989} 168 CLR 23; {1989} HCA 46.

[23] 475 U.S. 157, 171 (1986) ("[U]nder no circumstance may a lawyer either advocate or passively tolerate a client's giving false testimony. This, of course, is consistent with the governance of trial conduct in what we have long called 'a search for truth.'"); see *Williams vs. Florida*, 399 U.S. 78 (1970), stating: The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as 'due process' is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence. Id. at 82; see also Kenneth Pye, The Role of Counsel in the Suppression of Truth, 1978 DuKE L.J. 921, 926 ("Efforts aimed at the ascertainment of truth must be central to the role of counsel in any system for the resolution of disputes.").

[24] 2 Trial of Queen Caroline 8 (J. Nightingale ed., 1821)

[25] See, e.g., Marvin E. Frankel, The Search for Truth: An Umpireal View, 123 U. PA. L. REv. 1031, 1032 (1975) ("[O]ur adversary system rates truth too low among the values that institutions of justice are meant to serve."); Harry I. Subin, The Criminal Lauyer's "Different Mission ": Rejlections on the "Right" to Present a False Case, 1 GEO. J. LEGAL ETHICS 125, 128 (1987) ("[I]f stricter limits on truth-subversion were instituted, the rights of persons accused of crimes generally would be enhanced.").