REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

MISC CAUSE NO. 298 OF 2015

NYAMBENE COFFEE ESTATES.....1ST DEFENDANT/APPLICANT

NYAMBENE COFFEE MILLS LTD.....2ND DEFENDANT/APPLICANT

LAWRENCE NJERU.....3RD DEFENDANT/APPLICANT

VERSUS

KTK ADVOCATES .....RESPONDENT

NJERU INDUSTRIES LIMITED.....OBJECTOR/APPLICANT

RULING

1. The dispute between KTK Advocates on the one hand and Nyambene Coffee Estates, Nyambene Coffee Mills Ltd and Lawrence Njeru (jointly the applicants) on the other hand enters yet another phase.

2. In the Notice of Motion dated 3rd September 2018 the applicants seek the following remaining prayers:-

> iii. THAT this Honourable Court be pleased to set aside the Bill of Cost taxed on 24th February 2016 AND OR ALTERNATIVELY grant leave to the Defendants/Applicants to file their objection to the Bill of costs taxed on 24th February 2016 out of time.

3. An abridged chronicle of this matter in so far as relates to the current application is as follows.

4. On 25th June 2015, the Advocate filed an Advocate/client Bill of Costs against the Applicants. On 24th February 2016, the taxing officer allowed the Bill as drawn being in the sum of Kshs.11,631,039.28. Noteworthy, and this is discussed later in this decision, is that the Applicants were absent in the proceedings before the Taxing Officer.

5. Following the taxation, the Advocates took out a certificate of Taxation dated 28th June 2016. The Advocates, who have shown greater fidelity to procedure in this matter, followed up that certificate with a request for judgment to be entered against the Applicants in the sum of Kshs.11,631,039.28 plus interest at court rate from 24th February 2016. The request was in the Notice of Motion dated 20th July 2016.

6. It was only after the filing of the said application that the Applicants, for the first time, appeared in these proceedings. In responding to the Motion, the Applicants basically took up two issues. That the 1st and 2nd Applicants had not instructed or retained the Advocates. Secondly that all of them had not been served with the Bill of Costs or invited to attend the Taxation.

7. After considering the nature of the proceedings before it, this Court allowed the Motion on 31st May 2018.

8. The substantial ground to the current application is contained in paragraphs 3 and 9 of the affidavit by Henry Paul Njeru sworn on 3rd September 2018;

3. THAT in relation to the Bill taxed on 24th February 2016, we contend that were never served with the Bill of costs taxed on 24th February 2016 neither were we served with any mention or hearing notices by the Plaintiff so that we could participate in the same, as seen from annexture "HPN1".

9. THAT during the hearing and determination of the taxation of the Plaintiffs Bill of Costs, we were not served with the notices to attend Court on the taxation of the same and we did not therefore participate in the proceedings.

9. The Advocates response is that both issues of retainer and service of the Bill of Costs were dealt with in the Ruling of 31st March 2018 and the same are *res judicata*. Secondly that the application to set aside the taxation and/or file an objection out of time to the Bill of Costs has no foundation in law.

10. To be fair to the Advocates, the Applicants are out of step on procedure and the timing of the current application.

11. If it is accepted that the Applicants first came to learn of these proceedings upon being served with the application for the certificate of costs to be entered as judgment, then what option was open to them?

12. Other than the question of retainer, the Applicants other substantial grievance is that they were neither served with the Bill of Costs nor with notice to attend the Taxation. Now, proceedings brought pursuit to Section 51(2) are narrow in nature. The provision reads:-

51 (2) The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.

The Court in considering an application under Section 51(2) simply satisfies itself as to retainer and whether or not the certificate of the taxing officer has been set aside or altered by the Court. On limited occasion the Court may refuse to enter Judgment because other issues which ought to be investigated and ventilated in a proper trial such as a claim for accounts by the client have arisen(See Waweru J in Meenye & Kirima Advocates –vs- Kenya Commercial Bank [2005] Eklr) . These considerations are what precisely preoccupied the Court in its ruling of 31st May 2018.

13. I would think that what the Applicants should have done was to seek the setting aside of the certificate of costs by going back to the taxing officer with the argument that they were not served. Contemporaneously, they would have asked the Judge to stay the proceedings under Section 51(2) until their application for setting aside is heard and determined by the taxing officer. By failing to do so and simply responding to the Section 51(2) application, the Applicants misapprehended the procedure available to them.

14. If that was all to the matter then I would have unhesitatingly upheld the argument by the Advocates and dismissed the application before me without much ado. But before coming back to the issue that sways me towards considering the matter further, let me first deal with whether the issue of non-service of the Bill and the hearing notice is *res judicata*.

15. As to what the doctrine of res judicata entitles, I am content to cite the Court of Appeal decision of John Florence Maritime Services Limited and Another –vs- Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR which was referred to this Court by the Advocates. There the Court of Appeal observed:-

The doctrine of res judicata in Kenyan law is embodied or anchored on Section 7 of the Civil Procedure Act. It is in these terms:-

"*7. Res judicata*

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, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

From the above, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit.

Res judicata is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indention of the doctrine many centuries ago as captured in the case of **Henderson v Henderson [1843] 67 ER 313:-**

"….where a given matter becomes the subject of litigation in and 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 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 parties to form an opinion and pronounce a judgment, 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….."

Simply put *res judicata* is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.

The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, *res judicata* being a fundamental principle of law may be raised as a valid defence.

The doctrine of *res judicata* has two main dimensions: cause of action *res judicata* and issue *res judicata*. *Res judicata* based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action *res judicata* extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue *res judicata* may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue.

16. This is how the Court dealt with the issue of service in its ruling of 31st May 2018;

"If it is true that the 3rd Respondent was not invited for the Taxation before the Taxing officer, then the proper cause for the 3rd Respondent was to seek the setting of aside of the Taxation".

17. What the Court was saying was that given its limited jurisdiction in Section 51(2) matters, and in so far as the certificate of the Taxing officer had not been altered or set aside, it was not open to it to go behind the certificate to find out whether the Applicants were duly invited to the Taxation. The merit or otherwise of the assertion of non-service was neither considered nor determined. In that sense the issue of service is not *res judicata* and I find so.

18. This Court has looked at the proceedings of 24th February 2016 when the Bill was taxed. On service upon the Applicants, the Taxing officer remarked:-

"The Affidavit of service dated 20th January 2016 shows that the respondents were duly served with the Bill of Costs and Notice of Taxation. The matter to proceed as scheduled".

19. The Court has looked at the affidavit of 20th January 2016 which is sworn by one Peter O. Adhiambo. This is what he said about service of the Bill of Taxation and Notice:-

4. THAT, vide a letter dated 11th September 2015 the firm of Mutuma & Kosgei Advocates wrote to KTK Advocates informing them that they did not trace the Respondents in Meru and therefore returned the Notices and Bill of Costs unserved. Annexed herewith is a copy of the letter marked "*POA 2*".

5. THAT, on 16th December 2015 the firm of KTK Advocates instructed me to go to Coffee Plaza, Haile Selassie Avenue, Nairobi and find out if the Respondents were based there with a view to serving them, BUT on enquiring from the security guards at Coffee Plaza, they informed me that the 1st and 2nd Respondent companies were not based there and that they did not know the 3rd Respondent, Lawrence C. Njeru.

6. THAT, having failed to effect personal service on the Respondents despite diligent efforts to do so, I caused the Notices of Taxation attached with Bill of Costs to be served on them by "*Registered Post*" on 21st December 2015 at their last known postal addresses of service. Annexed herewith, is a copy of the postal article marked "*POA 3*".

7. THAT, I also confirmed the Respondents' postal addresses of service from their letterhead in one of the correspondences they had with Equatorial Commercial Bank Ltd. Annexed herewith is a copy of the letter marked "*POA 4*".

20. In essence what the process server is saying is that upon one failed attempt to trace the Applicants (referred to as Respondents then) he effected service by way of Registered Post. Order 5 Rule 3 is on service on a corporation such as the 1st and 2nd Applicants herein and reads:-

[Order 5, rule 3.] Service on a corporation.

3. Subject to any other written law, where the suit is against a corporation the summons may be served —

(a) on the secretary, director or other principal officer of the corporation; or

(b) if the process server is unable to find any of the officers of the corporation mentioned in rule 3 (a) —

(i) by leaving it at the registered office of the corporation;

(ii) by sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or

(iii) if there is no registered office and no registered postal address of the corporation, by leaving it at the place where the corporation carries on business; or

(iv) by sending it by registered post to the last known postal address of the corporation.

21. It is alleged by the process server that he effected service by registered Post. Registered Post is one mode of service contemplated by Rule 3(b) but only when the process server is unable to find the secretary, director or other principal officer of the corporation. The words used in the subsidiary registration is "unable to find". It must be demonstrated by the process server that he has made sufficient effort to trace the officers of the corporation but in vain. One attempt like in this case is not sufficient. At any rate the process server depones of a failed attempt to "effect personal service on the Respondents", not the officers of the two corporations as required by law. I would have to find that the service was not proper and the taxation should not have proceeded in the Applicant's absence.

22. While I do for a moment suggest that the Advocates are not deserving of fees of Kshs.11,631,039.28, this is not an unsubstantial sum and it may be unjust for the Respondents to be condemned to pay it without being heard. It is true that the Applicants did not use the early opportune available to them to seek the setting aside of the Award and this has led to loss of substantial time. However, this Court is willing to overlook the procedural infraction and loss of time so that substantial justice can be achieved. The Court shall be making an order that the Bill be retaxed and so both sides will have a chance to make their full representations in that respect.

23. While I will allow the Application, the Applicants must meet the costs incurred by the Advocates as a result of their procedural ineptitude. The effect of the order I make is to return the matter back to fresh taxation and all other proceedings that the Advocates had engaged in post the taxation will have to be discarded or 'thrown away'. In fairness the Applicants must meet costs of all those proceedings.

24. The Court's final orders:-

24.1 The taxation of the Bill of Costs made on 24th February 2016 is hereby set aside.

24.2 The Bill of Costs shall be retaxed on priority basis by a taxing officer other than Hon. Tanui.

24.3 Costs of the proceedings after the issuance of the certificate of Taxation of 28th June 2016 including those of the present application shall be to the Advocates.

Dated, Signed and Delivered in Court at Nairobi this 18th Day of October 2019.

F. TUIYOTT

JUDGE

PRESENT:

Muiruri for Kipkorir for Advocate

No Appearance for client

Court Assistant: Nixon