REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISCELLANEOUS APPLICATION NO. 29'B' OF 2016

IN THE MATTER OF THE ADVOCATES ACT,

CHAPTER 16 OF THE LAWS OF KENYA

-BETWEEN-

PROF. TOM OJIENDA & ASSOCIATES.....APPLICANT

-AND-

NATIONAL LAND COMMISSION.....RESPONDENT

RULING

[1] The Notice of Motion that is the subject of this Ruling is the one dated **12 September 2017**. It was filed herein on **14 September 2017** by National Land Commission, the 1st Respondent herein, for orders that:

> **[a]** Spent
>
> **[b]** Spent
>
> **[c]** there be stay of execution of the Judgment of the High Court at Eldoret delivered in **Eldoret Miscellaneous Application No. 29'B' of 2016** on the **21 June 2017** pending the lodging, hearing and determination of the intended appeal therefrom in the Court of Appeal.
>
> [d]That the costs of and incidental to the application be in the cause.

[2] The application is expressed to have been filed under **Section 75** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya, Order 51 Rule 1** and **Order 43 Rule 1(3)** of the **Civil Procedure Rules, 2010**, and all other enabling provisions of the law, on the grounds that the Court (**Hon. D.O. Ogembo, J.)** delivered a ruling/judgment on the **21 June 2017** disregarding the 1st Respondent's application dated **24 November 2016,** seeking the setting aside of the Applicant's taxed costs and extension of time to file a reference; and consequently entered Judgment in favour of the Applicant as prayed.

[3] It was further the contention of the 1st Respondent that its operations as a constitutional body are likely to be curtailed and brought to a standstill should it be compelled to pay the Judgment Sum of **Kshs. 220,735,840.88**; and that the Court is obliged to keep in mind that any execution against it would not only affect the 1st Respondent, but would also occasion irreparable loss and damage to the public at large. It was also the contention of the 1st Respondent that it has an arguable appeal which would be rendered nugatory should the order of stay not be granted to it as prayed.

[4] The application was supported on the affidavit of **Edmond Gichuru**, sworn on **12 September 2017**, wherein it was averred that the 1st Respondent is aggrieved and dissatisfied with the ruling dated **21 June 2017** and has subsequently filed and served a Notice of Appeal, in addition to requesting for typed copies of the proceedings and Ruling. It was the contention of the 1st Respondent that the amount taxed is exceptionally high and amounts to unjust enrichment by an officer of this court who ought to be at the forefront of protecting public interest. It was further averred that the proposed appeal has good chances of success, granted that Taxing Master failed to take judicial notice of the provisions of **Section 45 and 48** of **the Advocates (Remuneration) Order** in connection with the retainer relationship that existed between the Applicant and the 1st Respondent; and therefore ought not to have proceeded with the taxation. According to the 1st Respondent, the

Applicant will not be prejudiced in any way by an order of stay as the said firm continues to be retained as its lawyer in the ensuing appeal and other matters.

[5] The application was opposed by the Applicant and, to that end, a Replying Affidavit sworn by **Prof. Tom Ojienda** was filed herein on **3 October 2017** in which he reiterated that the Applicant is entitled to its costs, which were taxed and certified in accordance with the **Advocates (Remuneration) Order** and Judgment entered pursuant to the Certificate of Costs. He averred that the costs were in respect of litigation whose subject matter was valued at **Kshs. 8,369,012,707.72;** and are therefore justly due to it. He further averred that the application for stay has been made in the wrong forum as the same ought to have been filed before the Court of Appeal; and that in any event, the 1st Respondent had failed to satisfy the conditions for stay, in that it had not furnished security; had failed to show that in the event the Applicant obtains the funds and uses them it will not be able to refund the same; or shown that the appeal would be rendered nugatory if stay is not granted. It was further averred that the 1st Respondent had failed to show that the proposed appeal has high chances of success.

[6] The application was canvassed by way of written submissions. Hence, the 1st Respondents submissions were filed herein on **27 June 2018;** while the Applicant's written submissions were filed on 3 **October 2017**. Having considered the application, the pertinent affidavits as well as the written submissions, it is manifest that the parties are in agreement as to the background facts, namely that the Applicant acted for the 1st Respondent in **Eldoret E&L Petition No. 1 of 2013: Nathan Tirop Koech & Another vs. National land Commission & Others**; and that the Applicant thereafter lodged its Bill of Costs herein for taxation as against its client, the 1st Respondent. In a Ruling delivered on **20 September 2016**, the Taxing Master taxed the Advocate-Client Bill of Costs at **Kshs. 220,735,840.88.** Thereupon the Applicant filed the Notice of Motion dated **3 November 2016**, seeking for Judgment pursuant to **Section 51(2) of the Advocates Act,** and for leave to execute. The 1st Respondent, on its part, filed an application herein dated **24 November 2016** by which it sought for stay of the decision of the Taxing Master pending reference.

[7] The record further confirms that the two applications were prosecuted simultaneously before **Hon. Ogembo, J.** and a Ruling delivered on **21 June 2017** by which the Applicant's application for Judgment was allowed, while the 1st Respondent's application dated **24 November 2016** was dismissed with costs, having been found lacking in merits. In the last paragraph of the Ruling dated **21 June 2017**, the Court stated thus:

> **"...I am not convinced that the Respondent's application dated 24th November, 2016 and filed on 8th December, 2016 has any merits. I dismiss it wholly with costs to the Applicant firm. I otherwise allow the application of the Advocates dated 3rd November, 2016 in terms of prayer 1 and 2. I also award costs of this application to the applicant firm..."**

[8] It was therefore a misrepresentation for Counsel for the Applicant to assert, as he did on **30 May 2018,** that the 1st Applicant's application dated **24 November 2016** was the one coming up for hearing, or that the 1st Respondent had lost interest in the said application; noting that the said application had already been disposed of vide the Ruling dated **21 June 2017.** Thus, having pronounced itself on the 1st Respondent's application for stay, the Court became *functus officio* and cannot be required to reconsider another application for stay, based on more or less the same grounds. Accordingly, having lost its application dated **24 November 2016**, the proper course for the 1st Respondent to take was to either apply for review of the Ruling dated **21 June 2017** or move to the Court of Appeal for stay, having opted to appeal the Ruling by filing a Notice of Appeal. By filing another application for stay, the 1st Respondent has in effect approached the Court for the re-opening of the matter of stay, for the re-hearing of the application and for the reconsideration of its initial decision with a view of possibly coming to a different conclusion. This would, to my mind, offend the *functus officio* principle, in respect of which the Court of Appeal had the following to say in **Telkom Kenya Limited vs. John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR:**

> **"... *functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century. In the Canadian case of CHANDLER vs ALBERTA ASSOCIATION OF ARCHITECTS [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);**
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> **"The general rule that a final decision of a court cannot be re- opened derives from the decision of the English Court of Appeal** *In re St. Nazaire Co., **(1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division..."***

[9] The foregoing being my view of the matter, it is my finding that the 1st Respondent's application dated **12 September 2017** is altogether misconceived. The same is accordingly hereby struck out with an order that each party shall bear own costs of that application.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH DAY OF JULY, 2018

OLGA SEWE

JUDGE