REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS CAUSE NO. 3 OF 2016

IN THE MATTER OF TAXATION OF ADVOCATE CLIENT BILL

BETWEEN

PROF TOM OJIENDA ASSOCIATES.....ADVOCATE/APPLICANT

VERSUS

NAIROBI CITY COUNTY.....CLIENT/RESPONDENT

RULING

Background

1. Prof. Tom Ojienda Associates (hereinafter "the Advocate") filed an Advocate -Client Bill of Costs herein on 23rd June 2016 that was dated 20th June 2016. The said Bill of Costs was in relation to services rendered by the Advocate to the Nairobi City County, (hereinafter "the Client), in **Judicial Review Application No 109 of 2014 - Hon. Gideon Mbuvi alias vs Nairobi City County**. The Bill of Costs was taxed at Kshs 75,000,000/=, in a ruling dated and delivered on 5th July 2016 by the taxing Master after hearing the parties, and the taxing Master also issued a certificate of taxation against the Client dated 5th October 2016.

2. The Advocate subsequently filed for judgment against the Client for the sum of Kshs 75,000,000/= relying on the said certificate of costs, in an application dated 17th January 2017 that was filed herein on 18th January 2018. On 30th January 2017, this Court (Aburili J.) ordered that judgment be entered against the Client for the said sum, and a decree to this effect was issued on 14th March 2017.

3. The Advocate thereupon filed **Judicial Review Misc. Case No. 123 of 2017 – Prof Tom Ojienda & Associates vs The County Secretary, Nairobi City County & Another** on 16th March 2017, and was granted leave to file an application seeking mandamus orders to enforce the said judgment and decree, which the Advocate did by filing a Notice of Motion dated 28th June 2017 therein. The Client then also filed an application in **Judicial Review Misc. Case No. 123 of 2017** by way of a Notice of Motion dated 29th June 2017, seeking stay of execution of the Certificate of Costs issued herein

4. After hearing the parties on both applications, Odunga J. on 2nd October 2017 granted the Advocate orders of mandamus as against the Client and dismissed the Client's application dated 29th June 2017 on the ground inter alia that the Client's application was incompetent as it was brought in a matter other than the one in which the decree was issued. A decree to this effect was issued on 17th October 2017 in **Judicial Review Misc. Case No. 123 of 2017.**

The Applications

5. The above background has been extracted from the pleadings filed by the parties in this matter, and explains the context of the two applications that are before this Court for ruling. The first application before this Court is a Chamber Summons dated 27th July 2017 filed by the Client under Rule 11 of the Advocates (Remuneration) Order, in which it seeks the following substantive orders:

> **a. That this Court enlarges the time within which to file a reference against the decision of the Taxing Officer made on 5th July 2016.**
>
> **b. That the costs of this application be provided for.**

6. The application was supported by an affidavit sworn on 27th July 2017 by Karisa Iha, the Client's Director of Legal Affairs.

7. The second application is also filed by the Client, and is a Notice of Motion dated 10th October 2017 which seeks the following orders:

> **a. That this Court be pleased to stay execution of all the proceedings and other consequential orders to enforce the certificate of taxation be issued on 5th October 2016 and decree issued on the 14th March 2017 pending the hearing and determination of this application.**
>
> **b. That this Court be pleased to stay execution of all the proceedings and other consequential orders to enforce the Certificate of Taxation issued on 5th October 2016 and decree issued on the 14th March 2017 pending the hearing and determination of the application dated 27th July 2017.**
>
> **c. That the costs of this application be provided for.**

8. The application was supported by the affidavit sworn on 10th October 2017 by Violet A. Oyangi, the Client's acting Deputy Director of Legal Affairs.

9. The grounds for the two applications are similar, and are that on 30th January 2017, the Advocate obtained an *ex pa*rte judgment of Kshs 75,000,000/= which is excessive in the circumstances and against the Advocates Remuneration (Amendment) Order 2014. Further, that if the orders are granted, the Client will be forced to incur taxpayers' monies without any lawful justification. In addition, that while Advocates are entitled to remuneration, the same should be reasonable to the professional work done, and ought not to be determined on the value of the subject matter merely mentioned in the pleadings lest it leads to frivolous suits.

10. The Client alleged that it became aware of the matter on 22nd May 2017, when it was served with the Chamber Summons dated 16th March 2017 in **Judicial Review Misc. Case No. 123 of 2017.** Further, that when the Client was served with the Advocate's Bill of Costs, it delegated the same to an in-house Advocate to handle the matter on its behalf, who never advised it about the proceedings and outcome of the taxed Advocate/Client Bill of costs. The Client stated that it is dissatisfied with the ruling and reasons for taxation dated 5th July 2016, and that it is in danger of being condemned unheard due to failure by the in-house counsel to update on the progress and outcome of the matter.

11. The Client also filed a supplementary affidavit sworn by Violet Oyangi on 29th March 2018, wherein it was stated that the Advocate has introduced a new ground in his further affidavit, namely, that this court does not have jurisdiction to stay a ruling of a similar court. It was deponed in this regard that the application to enlarge time was made way back on 25th July 2017 before the delivery of the ruling by Odunga J. in **Judicial Review Misc. Case No. 123 of 2017,** and was scheduled for hearing on the 11th October 2017.

12. The Client also refuted the allegation that it had not disclosed the existence of the decision in **Judicial Review Misc. Case No. 123 of 2017** made on the 2nd October 2017, and stated that it was attached to the application for stay of execution. She averred that the reasons for delay and chances of success of the appeal have been well explained in the pleadings before court, hence the grounds upon which the application is sought constitutes sufficient reason to allow the court to exercise unfettered discretion in determining in their favour.

The Response

13. The Client's application of 10th October 2017 was opposed by the Advocate by way of a Notice of Preliminary Objection dated 17th October 2017 on the following grounds:

> **a. This matter herein has already been determined and an order for Mandamus issued under JR Misc Application No. 122 of 2016 by Justice Odunga in a ruling delivered on the 2nd October 2017.**
>
> **b. The Respondents herein were heard on merit on a similar application and submitted their grounds before the Mandamus Orders were issued.**
>
> **c. That the instant application has already been dealt with by a similar court of competent jurisdiction making this instant application *Res Judicata***
>
> **d. An order in the nature of Mandamus under Order 53 of the Civil Procedure Act cannot be stayed.**

14. The Advocate also filed a further affidavit sworn on 2nd February 2018 by Prof. Tom Ojienda Advocate, wherein it was averred that he filed a Bill of Costs requiring the Client to pay Kshs 363,070,718/=, which they were dully served with. Furthermore, that the Client was represented throughout the taxation proceedings; and all parties were heard and were given an opportunity to put in their submissions which were dully taken into account by the taxing master. That the Bill of Costs was taxed at Kshs 75,000,000/= , and a ruling was delivered on the 5th July 2016 and a certificate of costs issued on the 5th October 2016 by the Taxing master.

15. It is his case that the Client did not pay the taxed amounts and the Advocate thereby resorted into converting the certificate of costs into a decree to enable them compel the Client to pay, by way of a Notice of Motion dated 17th January 2017 seeking judgment. He contended

that on 30th January 2017, Aburili J. entered judgment for the said amount in the presence of the counsel for the Applicant and Client, and a decree was issued on 14th March 2017. Prof. Ojienda detailed out the proceedings that thereafter followed in **Judicial Review Misc. Case No. 123 of 2017,** culminating in the ruling delivered therein on 2nd October 2017 when the Advocate was awarded an order of mandamus compelling the officers of the Client to pay them Kshs 75,000,000/= with interest at 9 %.

16. It was his case that if a reference has been filed, it is out of time after an entry of judgment allowing execution to proceed against the Client; further, that the extension of time is being sought in respect of a ruling and taxation delivered on 5th July 2016, leading to inordinate delay which cannot be explained; and that if stay is granted it will deny the Advocate the fruits of his judgment.

17. According to the Advocate, the application herein has been dealt with by the ruling by Odunga J. delivered on the 2nd October 2017 and decree issued on 17th October 2017 in **Judicial Review Misc. Case No. 123 of 2017**. That this court therefore does not have jurisdiction to stay the ruling of a similar court, and that the proper recourse available to the applicant was appeal. He therefore averred that the application dated 10th October 2017 is a gross abuse of the court process and should be struck out with costs for being *res judicata.*

The Determination

18. The applications herein were initially canvassed by way of oral submissions before Aburili J. on 22nd November 2017, when the arguments made in the foregoing were reiterated in Court by the counsel for the Client and Advocate. Mr. Mugoye for the Client further submitted that the delay in filing the applications was because of the pending rulings by J. Odunga, and there was no explanation why the Bill of Costs in two other related matters were also taxed at Kshs 75,000,000/= each.

19. The learned Judge reserved the applications for ruling on the said date. While the said ruling was pending, the Advocate filed an application by way of Notice of Motion dated 7th February 2018, seeking to provide additional evidence on the pending applications. This Court (Aburili J.) granted the Advocate and Client leave to file further affidavits and recalled the pending rulings. The applications was then set down for mention for further directions.

20. When the applications subsequently came up for mention before this Court, the parties were directed to file written submissions on the issue of this Court's jurisdiction to hear and determine the pending applications, arising from the Advocate's Preliminary Objection.

21. Prof. Ojienda and Associates for the Advocate submitted that the issue of stay of decree and certificate of costs had already been dealt with and relied on the Court of Appeal decision in **John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others ,(2015) e KLR** on the application of the plea of *res judicata*. Further, that this Court lacks jurisdiction as the said issues have been determined conclusively and with finality in the decision by Odunga J. in **Judicial Review Misc. Case No. 123 of 2017 .**

22. Reliance was also placed by the Advocate on the redress offered by an order of mandamus as held in **Republic vs Kenya National Examinations Council ex parte Gathenji & Others, Civil Appeal No. 266 of 1996,** and on the decision in **Nyamogo and Nyamogo Advocates vs Mwangi (2008) 1. E.A 283** for the position that a Court cannot stay taxed costs.

23. Mugoye & Associates for the Client on the other hand submitted that this Court has jurisdiction to grant the orders it seeks pursuant to Order 42 rule 6(2) of the Civil Procedure Rules. They relied on the decisions in **Antoine Ndiaye vs African Virtual University, (2015) e KLR** and **James Wangalwa and Another vs Agness Naliaka Cheseto (2012) e KLR** on the requirements of the said order as regards substantial loss and delay. It was their position that the taxed costs are of a colossal amount of taxpayers monies that the Advocate will not be able to refund if the decision of the taxing Master is reversed, and that the delay in canvassing their applications has been explained.

24. The circumstances in which a preliminary objection may be raised were stated in the case of **Mukisa Biscuit Manufacturing Co.Ltd vs West End Distributors Ltd,[1969] E.A.969 by Law J.A.** as follows:

> "**.....so far as i am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit….. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.''**

25. The fact that there was a ruling delivered by Odunga J. on 2nd October 2017 in **Judicial Review Misc. Case No. 123 of 2017** is not disputed. The issue raised by the Advocate as regards this Court's jurisdiction is also a pure question of law, and this finding is best explained in the often cited decision of the Court of Appeal in **Owners of the Motor Vessel"Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** as follows:

> **"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given"**

26. The statute that determines this Court's jurisdiction in the circumstances of the present applications arising from the Advocate's Preliminary Objection that the Client's applications are *res judicata*, is the Civil Procedure Act, which provides as follows under section 7:

> **"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, 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."**

This position was restated by the Court of Appeal in **John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others (supra).**

27. When a plea of *res judicata* is raised, the doctrine of estoppel becomes applicable, and in particular estoppel by record, as is explained in **Halsbury's Laws of England, Fourth Edition (2001 Reissue) Volume 16(2)** at paragraph 976:

> **"A prior judgment may give rise to cause of action estoppel or issue estoppel. In order to prove cause of action estoppel it is necessary to show that the subject matter in dispute is the same, namely that everything that is in controversy in the second suit as the foundation of the claim for relief was also in controversy or open to controversy in the first suit; while in order to prove issue estoppel it is necessary to show that an issue which arose in the previous proceedings has been raised in the current proceedings.**
>
> **The cause of action or the issue must have come in question before a court of competent jurisdiction; the result must have been conclusive (or final) so as to bind every other court; and the parties to the judicial decision or their privies must have been the same persons as the parties to the proceedings in which the estoppel is raised or their privies.**

28. I have had the liberty to peruse the ruling by Odunga J. delivered on 2nd October 2017 in **Judicial Review Misc. Case No. 123 of 2017,** which was on two applications that both dealt with the enforceability of the certificate of costs and decree issued herein. The learned Judge first considered the Client's application dated 29th June 2017 seeking a stay of execution of the Certificate of Costs issued herein on 5th October 2016 and held as follows in this regard:

> **"25. ……In this case even if the reference was to be equated to an appeal, there is no reference pending. Further, pursuant to the provisions of rule 11(1) of the *Advocates (Remuneration) Order*, if any party should object to the decision of the taxing officer he should within 14 days after the decision give notice of the items of the taxation to which he objects. It is true that rule 11(4) of the *Advocates (Remuneration) Order* gives the court power to enlarge time if the same lapses before a step needed to be done is done or taken. However, the decision whether or not to enlarge time is discretionary and this Curt (sic) cannot speculate as to how that discretion will be exercised assuming an application for extension of time will be made in the first place.**
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> **26. In my view, the only way in which the Respondents can avoid payment where there is a valid judgement of a Court of competent jurisdiction is to show that the judgement has been set aside on appeal or on review or that an order of stay has been issued suspending the execution of the said judgement. The order staying execution must however be made in the matter in which the judgement was issued. To that extent the Respondents' application, brought as it is in a matter other than one in which the decree was issued, is in my view incompetent."**

29. On the Advocate's application dated 28th June 2017 seeking orders of mandamus to compel the Client's officers to pay it the decretal sum and accrued interest of the decree on taxed costs granted herein, the learned Judge held as follows**:**

> **"29. With respect to the applicant's application dated 28th June, 2017, in High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the Republic vs. The Attorney General & Another ex parte James Alfred Koroso, this Court expressed itself as hereunder:**
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> **"…in the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from *mandamus*, he has no option of ensuring that the judgement that he has been awarded is realised. Unless something is done he will forever be left baby sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the**

fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit…..The institution of judicial review proceedings in the nature of *mandamus* cannot be equated with execution proceedings. In seeking an order for *mandamus* the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do. The relief sought is not "execution or attachment or process in the nature thereof". It is not sought to make any person "individually liable for any order for any payment" but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Accounting Officer is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognised that when statutory duty is cast upon a Public Officer in his official capacity and the duty is owed not to the State but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. In other words, *mandamus* is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform. Where therefore a public officer declines to perform the duty after the issuance of an order of *mandamus*, his/her action amounts to insubordination and contempt of Court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are nolonger execution proceedings but are meant to show the Court's displeasure at the failure by a servant of the state to comply with the directive of the Court given at the instance of the Republic, the employer of the concerned public officer and to uphold the dignity and authority of the court."

30. Having disposed of the Respondents' application there is no justifiable reason why the applicant's application cannot succeed.

31. In the premises I issue an order of mandamus directed to the County Secretary and the Chief Officer, Finance/County Treasurer, Nairobi City County directing them to pay to the applicant herein the sum of Kshs 75,000,000.00 with interests at the rate of 9% pursuant to rule 7 of the *Advocates (Remuneration) Order* from the date of the judgment till payment in full."

30. The applications by the Client herein were filed on 27th July 2017 and 10th October 2017 respectively, after the applications that were the subject of the ruling by Odunga J. had been filed. The ruling by Odunga J. in **Judicial Review Misc. Case No. 123 of 2017** was also delivered on 2nd October 2017, before determination of the applications herein. In addition, the application dated 10th October 2017 seeks the exact orders as those in the Client's application in **Judicial Review Misc. Case No. 123 of 2017.** Lastly, the parties in the current applications were the same parties in, or were litigating under the same title, and participated in the hearing of **Judicial Review Misc. Case No. 123 of 2017** . These facts are not disputed by the parties. The only issue of contention is whether he cause of action and/or issues raised in the current applications were determined with finality in the ruling by Odunga J. in **Judicial Review Misc. Case No. 123 of 2017**.

31. The requirement that a judgment must be final for the plea of *res-judicata* to arise was explained in **Halsbury's Law of England, Fourth Edition (2001 Reissue) Volume 16(2)** at paragraph 966 as follows:-

"When the word "final" is so used with reference to a judgment, it does not mean a judgment which is not open to appeal, but merely a judgment which is "final" as opposed to "interim". A judgment which purports finally to determine rights is none the less effective for the purposes of creating an estoppel because it is liable to be reversed on appeal, of because an appeal is pending, or because the judgment includes an order for damages to be assessed and inquiries or accounts have to be taken for the purpose of such assessment…..

The proceedings must have resulted in a final judgment or decree; a pending action without judgment creates no estoppel. Where a case has been commenced and subsequently an earlier case comes to judgment that earlier case can give rise to an estoppel in the later case. However, where the verdict has been given in the earlier case but no judgment has yet been delivered the earlier case will not create an estoppel, the reason being that there is nothing to show that the verdict may not have been set aside, or that the court has not declined to act upon it…."

32. It is my view in this regard that the orders granted by Odunga J. in **Judicial Review Misc. Case No. 123 of 2017** were final as regards the issue of enforceability and execution of the judgment and decree on the Certificate of Costs issued herein, as the effect of mandamus as noted by the learned judge in the said ruling is to compel a public officer to do a duty imposed upon him by the law, at the pain of being cited for contempt of court for non-observance of such order. Therefore, the ruling of the taxing officer delivered on 5th July 2016 and Certificate of Costs issued on 5th October 2016 are now merged and included in the orders granted by Odunga J. on 2nd October 2017, and cannot be the subject of separate proceedings that are independent of the judicial review orders granted in **Judicial Review Misc. Case No. 123 of 2017**.

33. This Court thus finds that for these reasons, the Client and its officers are estopped from challenging the enforceability of, and/or preventing execution of the ruling by the taxing officer delivered on 5th July 2016 and certificate of costs issued on 5th October 2016 that are the subject of its applications dated 27th July 2017 and 10th October 2017.

34. I also reiterate, as noted by Odunga J. in the aforementioned ruling, that the Client will only be able to challenge the said ruling and certificate of costs upon review and/or appeal of both the orders and decree herein granting judgment on the said certificate of costs, and the orders and decree of Odunga J. in **Judicial Review Misc. Case No. 123 of 2017** for mandamus against the Client and its officers compelling them to execute the Certificate of Costs dated 5th October 2016.

35. Before I conclude, I would also like to address the arguments by the Client about the public interest nature of its applications, as what is at stake are public funds. I acknowledge that this is a valid reason that is being put forward by the Client, albeit in the wrong proceedings. This was noted in **Halsbury's Law of England, Fourth Edition (2001 Reissue) Volume 16(2)** at paragraph 983, the wider public or public interest should not be prejudice by the failure of a public authority to place all the relevant material and arguments before the court on the first occasion or if that authority reconsiders in the light of the previous decision but arrives at conclusions which do not in every respect mirror the court's conclusion on the first occasion.

36. Thus, the proper forum to raise this argument are in the proceedings seeking judicial review orders against a public body, as these are the proceedings in which the wider public as an affected party are normally not present. In the circumstances of the present applications, the public interest arguments by the Client therefore ought to be put forward in proceedings to reopen the orders of mandamus compelling it to pay the costs and interest awarded against it. Such proceedings as noted hereinbefore can only be by way of appeal against or review of the order of mandamus granted by Odunga J. in **Judicial Review Misc. Case No. 123 of 2017**

37. In the premises I find that the Preliminary Objection dated 17th October 2017 by the Advocate is merited, and hereby strike out the Client's Chamber Summons dated 27th July 2017 and Notice of Motion dated 10th October 2017 with costs to the Advocate.

38. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF JULY 2018

P. NYAMWEYA

JUDGE