REPUBLC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

WINDING UP PETITION NO. 29 OF 2006

IN THE MATTER OF UMOJA SERVICES STATION LIMITED

AND

IN THE MATTER OF A PETITION BY MINORITY SHAREHOLDERS

RULING

1. This Ruling relates to a Preliminary objection dated 11th April 2017 and filed in Court on the same date, in respect to an Application dated 4th April 2017 filed herein.

2. It is based on the grounds as here below reproduced:-

a. The entire Application is time barred, having been brought outside the time limits set out in the ruling of 1st February 1997 and by Rule 11 of the Advocates Remuneration Order;

b. That prayers 2, 3 and 4 are res-judicata in view of the Ruling of this Court dated 1st February 2017;

c. No proper grounds have been set out to support the setting aside of the taxing master's decision;

d. The Application is mischievous and aimed at frustrating the Respondents from obtaining the costs awarded and taxed;

e. The Applicant is merely trifling with the Court;

f. There is no valid reference, the reasons for the taxation having been furnished in the typed Ruling by the Court on 30th September 2016;

g. The reference is filed out of time without leave and is incompetent;

h. The Applicant has not deposited the sum of Kshs 1,568,106 to an interest earning account as ordered and is in contempt of Court orders and cannot be heard before purging its contempt;

i. The Applicant has not filed its record of Appeal within the time prescribed by the mandatory provisions of Rule 82 of the Court of Appeal Rules and given the circumstances, the Appellant has failed to take an essential step in the proceedings;

j. The Application as the Intended Appellant is enjoying a stay of execution but taking no effort to file the Record of Appeal;

k. Having not filed any Appeal within the prescribed time, the Intended Appeal is deemed to have been abandoned under the provisions of Rule 83 of the Court of Appeal Rules and there is neither a competent Appeal nor a competent reference;

l. The Respondent reserves to argue these grounds either in limine or in opposition to the Application and will rely on the Replying affidavit of James Njenga already filed and served in opposition to the earlier application.

3. The Preliminary objection was disposed of through written submissions filed herein and highlighted on 18th September 2017. The Respondent submitted that; *Section 82 (1) of the Court of Appeal Rules states that; "subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged;*

a. A memorandum of appeal, in quadruplicate;

b. The record of appeal, in quadruplicate;

c. The prescribed fee; and

d. Security for the costs of the appeal"

4. That under Section 83 of the Court of Appeal Rules, if a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order.

5. That in that regard the court in the cases of; *Patrick Kiruja Kithinji vs Victor Mugira Marete (2015) eKLR,* *and Hon. Lemanken Aramat vs Harun Meitambei Lempaka & 2 Others* *, the Court expressed itself as follows:-*

> "The court's authority under Article 159 of the Constitution remains unfettered, especially where procedural technicalities pose an impediment to the administration of justice. However, there are instances where the Constitution links certain vital conditions to the power of the Court to adjudicate a matter. This is particularly true in the context of Kenya's special electoral dispute resolution mechanism.
>
> Those who filed election petitions outside the 28 day requirement of the Constitution cannot, in our perception, avoid the consequence of their dilatoriness; for it is the prescribed time-frame that opens the jurisdiction of the Courts. And this being such an elemental constitutional requirement, it stands out by itself, irrespective of the averments made by parties in their pleadings. To this question, the general discretion provided for in Article 159 would not apply, as this is not an ordinary issue of procedural compliance."

6. The Respondent argued as aforesaid that, the Applicant has not made any effort to serve the record of Appeal long after filing the notice of Appeal and although it is in the discretion of the Court of Appeal, to extend time, failing to follow procedure with the hope of invoking the mercies of Article 159 is a misconceived notion. That the Applicants should show some seriousness in pursuing justice, for the "display of sluggishness and lack of vigor and zeal" is a clear indication that the Applicants just want us to go in circles and not conclude this matter in a timely manner.

7. The Respondents further submitted that paragraph 11 of the Advocates Remuneration order of the Advocates Act, Cap 16, requires a reference to be filed within fourteen (14) days from the date the taxing master gives reasons for his taxation. That the chamber summons was filed on 5th April 2017; a period of 7 months after reasons for taxation had been furnished in a typed ruling by the Court on 30th September 2016. Therefore it is blatant abuse of the Court process and even if the court has the discretion to pardon, this conduct by the Applicants cannot be termed as a technicality, as it goes to the root of the court's jurisdiction. More so, the Applicants never sought leave for extension of time, a situation which can neither be tempered nor remedied. Consequently, the entire reference is a nullity ab initio and ought to be dismissed. Reliance was again placed on the case of; *Patrick Kiruja Kithinji vs Victor Mugira Marete (supra),* where the Court of Appeal said:-

> "it ought to be clearly understood that the courts have not belittled the role of procedural rules. It is emphasized that procedural rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike, are, thus, enjoined to abide strictly by the rules. Parties and lawyers ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules. And while the court, in some instances, may allow the liberal application or interpretation of the rules that can only be done in proper cases and under justifiable causes and circumstances. That is why the Constitution and other statutes that promote substantive justice deliberately use the phrase that justice be done without "undue regard" to procedural technicalities."

8. Further that the case of; *James Mangeli Musoo vs Ezeetech Limited (2014) eKLR* stated that;

> "A technicality, to me is a provision of law or procedure that inhibits or limits the direction of pleadings, proceedings and even decisions on court matters. Undue regard to technicalities therefore means that the court should deal and direct itself without undue consideration of any law, rules and procedures that are technical and or procedural in nature. It does not, from the onset or in any way, oust technicalities. It only emphasizes a situation where undue regard to these should not be had. This is more so where undue regard to technicalities would inhibit a just hearing, determination or conclusion of the issues in dispute."

9. It was submitted that prayer 2, 3 and 4 of the Chamber summons are res judicata in view of the ruling of this Court dated 1st February 2017. In the said reference, the Applicants made the following prayers in prayers 2, 3 and 4 respectively;

2) that the court holds that it is functus officio as far as the issue of costs is concerned;

3) that the court did not award the Petitioners costs in its judgment delivered herein on 14th May 2014 and consequently no valid bill of taxation;

4) that the court dismisses the bill of costs herein dated 27th April 2015

10. The Respondents also referred to the Ruling dated 1st February 2017 by Hon. Justice G.L. Nzioka, where the position of the above prayers was clearly and categorically made in the reference.

(a) under paragraph 19 the Honourable judge acknowledged that in the Judgment dated 14th May 2014, the Honourable Judge E.K. Ogola indeed ordered that "(c) the costs of the Petition shall be paid by the Company."

(b) under paragraph 20 of the ruling, the judge pointed out that "…..but it is still a court order, and has to be obeyed and enforced, unless and until, it is lawfully set aside…..Be it as it were, the Court order still stands as such"

(c) under paragraph 21, the judge stated that "in that regard, I find that unless and until the same is heard and set aside, it remains enforceable."

11. The Respondent submitted that, the question as to whether the Bill of costs and its validity have been raised addressed and confirmed by the Ruling dated 1st February 2017 and therefore, there are no reasons why the Applicants raise the same issues. Reference was made to the case of; *E.T. vs Attorney General & Another (2012) eKLR,* where it was held that:

> "the courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the Plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction.

12. That further in the case of; *Omondi vs National Bank of Kenya Limited and Others (2001) EA 177*, it was held that; " parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' and the case of; *Njangu vs Wambugu & Another Nairobi HCCC No. 2340 of 1991 (Unreported)* held 'if parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata……"

13. The Respondent submitted that doctrine of res judicata is important in adjudication of cases and serves two important purposes; (i) it prevents multiplicity of suits which would ordinarily clog the courts, and heave unnecessary costs on the parties to litigate and defend two suits which ought to have been determined in a single suit; and (ii) it ensures litigation comes to an end;

14. Further reference was made to the provisions of; Section 7 of the Civil Procedure Act Cap 21 which provides that;-

> "No court shall try any suit or issue in 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."

15. That the case of; *Henderson vs Henderson (1843) 67 ER 313* was summarized, res judicata as follows;-

> "…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 the 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 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."

16. That the test in determining whether a matter is res judicata was similarly summarized in the case of; *Bernard Mugo Ndegwa vs James Nderitu Githae & 2 Others (2010) eKLR,* as follows that: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; (v) finality of the previous decision.

17. The Respondent thus argued that, apart from the suit having identical issues as settled upon in the ruling dated 1st February 2017, having the same parties, same claim and jurisdiction, there is finality in the ruing dated 1st February 2017 on the validity of the bill of costs.

18. The Respondents further submitted that the decision of the taxing master in assessing and taxing the Bill of costs should not be set aside as the Applicants have not given any convincing grounds for doing so. The Respondents relied on the case of; *Donholm Rahisi Stores vs East African Portland Cement Ltd (2005) eKLR*, the Court held that;-

> "the taxation of costs, whether they be between party and party or between advocates and client, is a special jurisdiction reserved for the taxing officer by the Advocates Remuneration order…the present application seeks an order that would have the effect of interfering with the special jurisdiction of the taxing officer, a jurisdiction that the court cannot take upon itself. The taxing officer does nothing beyond taxation of the bill of costs…"

19. Further in the case of; Nyangito & Co. Advocates vs Doinyo Lessos Creameries Ltd (2014) EKLR, the principles under which the Court can interfere with Taxing officers decision as follows:-

a. that the Court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based

on an error of principle or the fee awarded was manifested excessive as to justify an inference that it was based on an error of principle;

b. it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration Order itself. Some of the relevant factors to be taken into account include the nature and importance of the cause or matter, the amount or value of the subject matter involved; the interests of the parties; the general conduct of the proceedings and any direction by the trial judge;

c. if the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the judge is satisfied that the error cannot materially have affected the assessment and the court is not entitled to upset a taxation because in its opinion, the amount was high;

d. it is within the discretion of the taxing officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary;

e. the taxing officer must set out the basic fee before venturing to consider whether to increase or reduce it;

f. the full instructions fees to defend a suit is earned the moment a defense has been filed and the subsequent progress or the matter is irrelevant to the item of fees;

g. the mere fact that the defendant does research before filing a defense and then puts a defense informed of that research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an Advantage against the adversary.

20. That the Court in the case of; _Kipkorir, Titoo & Kiara Advocates vs Deposit Protection Fund Board (2005) 1 KLR 528_, stated that:-

> "…on a reference to a judge from the taxation by the taxing officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer erred in principle in assessing the costs…..An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxation officer acted on erroneous principles."

21. Finally the Respondent submitted that, the Applicant has not complied with the Court in the ruling dated 1st February 2017 to deposit the sum of Kshs 1,568,106.00 into an interest earning account. That Section 4 (1) of the contempt of Court Act 2016, states that;

> "contempt of court includes- civil contempt which means willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given orders."

22. Further, Section 5 thereof states that; *"every superior court shall have power to punish for contempt of court on the face of the court."* and Section 27 of the same Act states that, defines a person who is in contempt as;

> "A person who- assaults, threatens, intimidates, or willfully insults a judge or judicial officer or a witness, during a sitting or attendance in court, or in going to or returning from the court, willfully and without lawful excuse disobeys an order or directions of a superior or subordinate court in the course of the hearing of a proceeding."

23. That the Black's Law Dictionary (9th Edition) defines contempt of Court as:-

> "conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment."

24. The Respondents thus submitted that the Reference filed by the Applicants should not be given audience to be heard until the Applicants purge the contempt. That the Contempt amounts total abuse of the Court process and the Applicants ought to be answerable.

25. The case of; _Teachers Service Commission vs Kenya National Union of Teachers & 2 Others (2013) eKLR_, was cited where the Court observed;-

> "38. The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. In has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the Applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law."

26. The Respondent submitted that the case of; _Premchand Raichand Ltd vs Quarry Services of East Africa Ltd (1972) EA 162_, outlined one of the principles of taxation as being; "*that a successful litigant ought to be fairly reimbursed for the cost he has had to incur."*

27. However in response the Applicant submitted that, although the notice of Preliminary objection raises 12 grounds, only grounds 1 and 2 are correctly raised. The rest of the grounds raise matters of facts which must not be raised by way of Notice of Preliminary objection. That even then the Respondents falsely state that, a Judgment was given in their favour on 14th May 2014 by Hon. Justice Ogola. That paragraph

104, of the judgment states the very opposite of that. In part it states as follows:-

> "the Petitioners have not made out a case to warrant the granting of the numerous prayers prayed in the Petition."

28. That similarly, the Respondent claim that through its Ruling delivered on 1st February, 2017, the Honourable Court disposed of prayers No. 3, 4 and 5 whilst those prayers were to await the hearing of the Reference. Moreover, under subheading 'filing out of time', the Respondent claim that the Applicants have forfeited its right to Appeal under rule 82 of the Court of Appeal Rules and they go on to discuss Court of Appeal authorities that interpret that Rule. That they appear to understand that it is the Court of Appeal and not this Court which determines whether a right of Appeal has been lost.

29. The Respondent argued that, the Honourable Court's record shows that since the Applicant applied for typed proceedings, the same have not been supplied and the submissions made under that heading are appropriate for the Court of Appeal as this Court does not have jurisdiction to entertain them. Similarly the submissions on the setting aside taxing officer's decision are submissions on the merit of the reference to be reserved until the hearing the reference.

30. That even then, the authorities cited by them show that when the reference is before the Court, the Court exercises its discretion whether to interfere with the decision of the taxing officer or not and no Preliminary objection can be taken where the Court is being asked to exercise its discretion. The case of; *Mukhisa Biscuits vs West End (1969) E.A. 696* was cited.

31. It was submitted that the Respondent's counsel is giving evidence from the bar when they allege that the Applicants have committed contempt of Court, since they have not filed any contempt of Court Application, That once that Application is filed they will respond in that, Article 50 of the Constitution guarantees everyone a right to a fair hearing.

32. The case of; *Mukhisa Biscuits vs West End (supra)* was cited again where the Court stated as follows:

> "A Preliminary Objection is in the nature of what used to be a demurrer. It is a pure point of law which is argued on the 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;
>
> *So far as I am aware, a Preliminary Objection consists of a point of law which has been pledged or which arose by clear implication out of pleadings, and which argued as a Preliminary point may dispose of the suit. Examples are an objection to jurisdiction of the Court, a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."*

33. Therefore for the Respondent to succeed, they must satisfy the requirements namely;

a. He accepts that all facts as stated by the other side are correct. In other words there is no dispute regarding facts;

b. He must take out a pure point of law; and

c. he objection must not invite the exercise of judicial discretion

34. The Respondent further submitted that as regard the ground properly cited in relation to limitation, it was submitted that the taxation reference is not time barred. That, Rule 11(2) of the Advocates (Remuneration0 Order requires a party aggrieved by the decision of the taxing officer to apply to a Judge within fourteen days from the receipt of the reasons for taxation. That Rule reads as follows:-

> The Taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds on his objection.

35. That in this case, the Applicant sought for taxation on 10th October, 2016, but only obtained a copy of the ruling on taxation on 22nd March 2017. The Applicant thereafter filed the taxation reference on 5th April 2017. The period translates to 14 days from receipt of reasons for taxation, and is within the prescribed time limit. Similarly, the argument that the taxation reference is time barred for being filed outside the time limits set out in the ruling of 1st February 2017 is bad. That the order made on that day was to facilitate the conclusion of the matter and cannot be said to be the time limit within which to file pleadings.

36. On the issue of Res judicata, the Applicant said that, Section 7 of the Civil Procedure Act describes what is considered to be res judicata and that in the ruling delivered on 1st February 2017, the Honourable Court ruled on the application dated 7th November 2016, brought under Order 23 Rule 1, 2 and 10 of the Civil Procedure Rules. The Application sought the following prayers;-

a. That this Application be certified as urgent and service thereof be dispensed with in the first instant;

b. That this Honourable Court do issued an ORDER NISI against the Judgment debtor's accounts with the Garnishee with Equity Bank (K) Ltd for the debt and the same be attached to answer to the Honourable Court's Certificate of Taxation passed against the Judgment debtor in favour of the Decree holders in Milimani Commercial Courts Nairobi on the 27th day of October 2016, in the above named suit and the costs of these proceedings by deducting the sum of Kshs. 1,568,106/- plus interest at 14% per annum until payment in full from the debt due from the Garnishee to the Judgment debtor;

c. That a Garnishee Order Absolute do issue compelling the Garnishees to pay to the Petitioners/Decree Holders the sum of Kshs. 1,568,106/- plus interest at 14% per annum until payment in full and the costs of these proceedings as certified by this Honourable Court;

d. That the costs of the Garnishee proceedings be added to the amount of the Certificate of Taxation and be retained out of the money recovered by the Decree Holders in priority to the amount of the Certificate of Taxation.

37. In its Ruling, this Honourable Court gave the following orders:-

a. That a Garnishee Order Absolute do issue compelling the Garnishees to pay to the Petitioners/Decree Holders the sum of Kshs. 1,568,106/- plus interest at 14% per annum on condition that the sum of Kshs. 1,568,106/ be released to the advocates of both parties to be deposited in an interest earning account held in a reputable bank to be agreed upon by the parties and held in joint names of the Advocates representing the parties;

b. That prayer 4, relating to the costs of this Application shall abide the outcome of the Appeal/reference;

c. That prayer 3, 4 and 5 of the Notice of Motion dated 21st November 2016, to await the hearing of the Reference (if any) once the Taxing officer gives the Judgment debtor reasons for the same;

d. That prayer 6 of the Notice of Motion dated 21st November 2016 is granted until the determination of the reference (if any);

e. That prayer 7 of the Notice of Motion dated 21st November 2016, to abide the outcome of the reference or Appeal;

f. That the taxing officer to give reasons requested for by the Respondent within 14 days of this order;

g. That the intended Reference be filed/served and prosecuted within one and three months respectively of this order;

h. That further mention in one month's time to confirm the grant of reasons and/or filing of the Reference;

38. Therefore from the above, it is clear that the issues in the Application dated 7th November 2016, are not directly and substantially the issues in the taxation reference application. That none of the prayers contained in the taxation reference was granted as proved by orders given on 1st February 2017. The case of; *Nancy Mwangi t/a Worthlin Marketers vs Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 Others (2014) eKLR*, was cited where it was held that;-

> "Is this case res judicata? Unless it is abundantly clear, when res judicata is raised, a Court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain; i) what issues were really determined in the previous case; and ii) whether they are the same in the subsequent case and were covered by the decision of the earlier case. One more thing; the court should ascertain whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction. The test in determining whether a matter is res judicata was stated is summarized in the case of; Bernard Mugo Ndegwa vs James Nderitu Githae & 2 Others (2010) eKLR as follows that;- i) the matter in issue is identical in both suits; ii) the parties in the suit are the same; iii) sameness of the title/claim; iv) concurrence of jurisdiction; and v) finality of the previous decision."

39. Further, in the case of; *Lilian Njeri Muranja & John Muranja Mahinda vs Virginia Nyambura Ndiba & Kajiado County Government (2014) eKLR*, it was held that:-

> "The test to determine whether a matter is res judicata was well laid in the case of; DSV Silo vs The Owners of Sennar (1985) 2 All ER 104 and repeated in the Kenyan case of; Bernard Mugo Ndegwa vs James Nderitu Githae & 2 Others (2010) eKLR. The Applicant, alleging res judicata, must show that (a) the matter in issue is identical in both suits, (b) that the parties in the suit are substantially the same, (c) there is a concurrence of jurisdiction of the court (d) that the subject matter is the same and finally, (e) that there is a final determination as far as the previous decision is concerned."

40. Thus juxtaposing the above principles with the facts of this case, it is apparent that the antagonistic parties are not the same. That it is the Respondent who filed the previous application and included the garnishee banks and the current application is by the applicant without involving the garnishee banks. The prayers sought in the two applications are totally different

41. I have considered the Preliminary objection and the grounds raised in support thereof alongside the elaborate rival arguments thereto and the legal authorities cited. The first issue raised in opposition to the Preliminary objection thereto is that; other than two grounds in relation to Limitation period and Res judicata, all the other grounds are matters of fact that cannot be raised vide a notice of Preliminary objection.

42. In considering the same, I find that the law on what constitute a Preliminary objection is settled and the parties herein have properly articulated the same vide the legal authorities cited herein, with reference to inter alia, the landmark case of, *Mukhisa Biscuits vs West End (supra)*.Therefore based on the said legal principles, I find that, of the 12 grounds relied on in support of the Application, only grounds 1, 2 and probably 7 raise issues of law. In that regard, all arguments in relation to the other grounds will not form the subject of this ruling.

43. To revert to the approved grounds, the Applicants argues at the risk of repeating what is already stated herein that, the entire application is time barred, in that the Reference is filed outside the fourteen (14) days as stipulated under Rule 11 of the Advocates (Remuneration)

Order. That, it has been filed seven (7) months after the reasons for taxation were furnished vide the Court's Ruling on 30th September 2016 and that the Applicant has not sought for leave for extension of time. A solution that cannot be tempered or remedied or cured by Article 159(2)(d) of the Constitution's provisions that do not negate procedure neither is it a leeway or loophole to avoid the same.

44. The Respondent however maintains that, the Application is not time barred; the Application is to be filed within 14 days of receipt of reasons from the Taxing officer. That the Applicant sought for reasons for taxation on 10th October 2016 and only obtained a copy of the Ruling on 22nd March 2017. The Application was filed on 5th April 2017, which is 14 days from receipt of the reasons for taxation and which is within the prescribed time limit.

45. I have considered the rival arguments on the issue of the and find that parties concede that Rule 11(2) of the Advocates (Remuneration) Order, requires a party aggrieved by the decision of the Taxing officer to apply to the Judge within 14 days of receipt of the reasons for taxation. I note from the record herein that, the Petitioners/Respondent, filed a bill of costs on 27th April 2015, following the Court's judgment, delivered on 14th May 2014. Subsequently, the Taxing master awarded the Petitioners Kshs. 1,568,106 as costs vide a decision delivered on the 30th September 2016.

46. The Applicant avers that despite the request of the reasons for the decisions, the same was not given until the 22nd March 2017, after which the Reference was filed. I further note that, the Court, in the Ruling delivered on 1st February 2017, ordered the Taxing officer to give reasons for the Taxation forthwith, hence the reasons that were given on the 22nd March 2017. Thus the period of 14 days runs from 23rd March 2017 to 11th April 2017. The said period gives a total of fourteen (14) working days. Even then, that issue can be dealt with when the Reference is considered.

47. I shall now consider the issue of Res judicata. I have considered the arguments thereto and I find that the Chamber Summons Application dated 4th April 2017 seeks for orders:

(a) That this Honourable Court be pleased to hear the reference together with the Company's Notice of Preliminary Objection herein dated 10th July 2015;

(b) That this Honoubable Court be pleased to hold that it is fuctus officio as so far as the issue of costs is concerned;

(c) That this Honourable Court be pleased to hold that it did not award the Petitioners costs in its judgment delivered herein on 14th May 2014 and consequently there is no valid bill of costs for taxation;

(d) That this Honourable Court be pleased to strike out the bill of costs herein dated 27th April 2015;

(e) That this Honourable Court be pleased to set aside the decision of the Taxing officer contained in her typed ruling delivered on 30th September 2016;

(f) That this Honourable Court be pleased to make such other orders as it may deem fit to grant; and,

(g) That the costs of this Application/reference be provided for.

48. Of these prayers, I find that prayer 1 is spent, prayers 2, 3 relates to the issue of costs, which was a subject of a ruling delivered by the Court on 1st February 2017. In that regard, the issue of costs is Res judicata. In that regard, I order that prayers 2 and 3 of the application be struck out as being res judicata. Prayers 4, 5, 6 and 7 remain.

49. However, prayer 4 and 5 relate to the bill of costs dated 27th April 2015 and the resultant decision of the Taxing officer delivered on 30th September 2016. These issues form the subject of a "Reference" herein. In the Ruling delivered by the Court on 1st February 2017, the Court directed the Taxing officer do issue the Applicant with the reasons for the Taxation to enable them file the Reference. That has now been done and the Reference is filed. It has not been heard, therefore the issues raised therein are not res judicata.

50. Finally, the Court's attention has been drawn to the fact that the Applicants in the Chamber summons were ordered vide Ruling of 1st February 2017, to deposit a sum of Kshs 1,568,106 in an interest earning account, in the joint names of the parties' lawyers. That has not been done. In my considered opinion that is total disregard and disobedience of that Court order. The Applicants do not expect to disobey the Court orders and argue that there is no formal application citing them of Contempt then approach the same Court for orders. It is this Court that issued that order. It does not need a magnifying glass, to take note of it. In that regard, the Chamber Summons Application filed on 5th April 2017, shall not be fixed for hearing until the contempt herein is purged.

51.The costs of this Application shall be in the cause.

52. It is so ordered.

Dated, delivered and signed in an open Court in Nairobi this 5th day of October 2018

G.L. NZIOKA

JUDGE

In the presence of;

Ms. Nduta Kamau for Dr. Kuria for the Applicants

Mr. Marie for Mr. King’ara for the Respondents

Dennis...Court Assistant