



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO 14 OF 2013 (O.S)**

**LINMERX HOLDINGS LIMITED.....1<sup>ST</sup> PLAINTIFF**

**UPWARD SCALE INVESTMENT CO LTD.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MERCY NDUTA KENG'ARA T/A MWANGI KENG'ARA & CO ADV.....DEFENDANT**

**RICHHOOD LTD.....1<sup>ST</sup> INTERESTED PARTY/APPLICANT**

**GEOMAX CONSULTING ENGINEERS LTD....2<sup>ND</sup> INTERESTED PARTY/APPLICANT**

**GATH CONSULTING ENGINEERS LTD.....3<sup>RD</sup> INTERESTED PARTY/APPLICANT**

**JAMES RURIGI NJUGUNA.....4<sup>TH</sup> INTERESTED PARTY/APPLICANT**

**TRIAD ARCHITECTS.....5<sup>TH</sup> INTERESTED PARTY/APPLICANT**

**MASTERBIL INTEGRATED PROJECTS.....6<sup>TH</sup> INTERESTED PARTY/APPLICANT**

**RULING**

1. For the determination of the Court is the application dated 2<sup>nd</sup> December 2015 filed by the interested parties herein. The application was made pursuant to the provisions of Section 1A, 1B, 3A and 80 of the Civil Procedure Act, Order 45 Rule 1, and Order 51 Rule 1 of the Civil Procedure Rules and Section 45 of the Advocates Act. The applicants sought the following prayers *inter alia*;

1. *Spent*
2. ***THAT this honourable Court be pleased to enjoin the applicants to this suit;***
3. ***THAT this honourable Court be pleased to review and/or set aside its order dated 19<sup>th</sup> November 2013;***
4. ***THAT this honourable Court be pleased to stay taxation of the Advocate/Client Bill of Costs filed in Nairobi High Court Miscellaneous Application Numbers 515, 516, 517, 518, 519,520, 521, 522, 523, 524, 525, 526, 527, 528, 529 and 530 of 2013 between the parties herein pending inter-partes hearing and determination of this application;***
5. ***THAT this honourable Court be pleased to stay taxation of the Advocate/Client Bill of Costs filed in Nairobi High Court Miscellaneous Application Numbers 515, 516, 517, 518, 519,520, 521, 522, 523, 524, 525, 526, 527, 528, 529 and 530 of 2013 between the parties herein pending full hearing of the Originating Summons dated 22<sup>nd</sup> January 2013.***
6. ***THAT this Court do hold that the advocate herein is estopped by conduct, record and other common law contract of correspondence form submitting any Bill of Costs for taxation;***
7. ***THAT this honourable Court be pleased to give directions that the Originating Summons dated 22<sup>nd</sup> January 2013 be disposed of by way of viva voce evidence.***

2. The application was based on the grounds adduced therein, and primarily that the applicants had never instructed the Defendant nor its firm to represent and/or to act on their behalf, Further, it was stated that there was an agreement between the parties that negated the Bill of Costs that the Defendant now sought to file, and that in any event, the Defendant had been paid and all dues settled as per the agreement. The application was further supported by the affidavit of Dr, James RurigiNjuguna, in which it was reiterated that, in as much as the 1<sup>st</sup> and the 2<sup>nd</sup> Plaintiffs may have retained the Defendant to prepare a number of documents, they, as well as the applicants herein, had instructed the Defendant to act on their behalf. It was further deposed that the Bill of Costs as filed by the Defendant offended the ruling of Haveleock, J delivered on 19<sup>th</sup> November 2013. Other depositions averred were reiterated in the grounds in support of the application.
3. In opposing the application, the Defendant contended that the Applicants were not forthright in filing the present application; firstly, it was averred that the matter was heard and determined by Havelock, J and who delivered his ruling of the same on 19<sup>th</sup> November 2013; secondly, the applicants had filed three (3) similar applications before this Court that had been dismissed; thirdly, the Applicants had sought to reprieve at the Court of Appeal, which appeal was dismissed; fourthly, the Applicants have been actively involved in the taxation proceedings, and have not only filed submissions, but also filed an application for the Deputy Registrar to recuse herself from hearing the taxation proceedings; and fifthly, the issues presently before the Court are res judicata, and that therefore, the instant application is a gross abuse of the process of the Court and merely intended to delay and frustrate the conclusion of the taxation of the Bills of Costs filed by the Defendant. The parties advocates canvassed the application orally and reiterated the issues raised in affidavits.
4. The Court has considered the application and the disposition made by the parties and the oral arguments before the Court. In considering the dispositions and the arguments, one glaring issue was prevalent; that the Applicants had approached the Court with similar applications, before filing the instant application. In their arguments in support of the application, MsKimere for the Applicants had stated that;

***“We filed two (2) application before Ogola, J and then the Court of Appeal trying to stop the taxation. We failed.”***

5. The applications that counsel for the Applicant was referring to were the applications in Misc. Civil Application No 530 of 2013 dated 4<sup>th</sup> March 2014 and 19<sup>th</sup> August 2014 as well as Civil Appeal No 83 & 88 of 2015. In all the applications, both before this Court and the Court of Appeal, the Applicants sought similar prayers to those in the instant application i.e. for stay of taxation.
6. The Defendant had raised the issue of *res judicata*, which is provided for under Section 7 of the Civil Procedure Act. Pursuant to the said provisions, it is provided that;

**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.**

At Explanation 4 of the Section, it provides that;

**Explanation.(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.**

7. In **Arnold v National Westminster Bank (1991) 2 A.C 93** it was held;

***“Cause of action estoppel arises where the cause of action in the later 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 . . . . [The] bar is absolute in relation to all points decided unless fraud or collusion is alleged.”**

A similar determination was made in **North West Water Ltd v Binnie&Partners[1990]3 ALL E.R.547**, where Lord Drake, J held at 556;

***“Where an issue had been decided in a court of competent jurisdiction, the court would not allow that issue to be raised in a separate proceeding between the different parties arising out of identical facts and dependant on the same evidence since, not only was the party seeking to re-litigate the issue prevented from doing so, by virtue of issue estoppel but it would also be an abuse of process to all, the issue to be re-litigated.***

8. The Applicants have not objected the jurisdiction of this Court, and neither have they denied that they had filed similar applications to the present one before both this Court and the Court of Appeal. In dismissing their two applications, the Court of Appeal had held thus;

***“This contention is our respectful view is a mere apprehension without more. The apprehension is based on an assumption or fear of what is likely to happen before the taxing officer. One may wonder why the applicants cannot also assume that the bills are likely to be dismissed. Apprehension or suspicion cannot be a basis of issuance of Court orders...[The] respondent having filed her bills, the taxation thereto is governed by Advocates Remuneration Order and that the rules made there under must be followed to the letter. Should the applicants be dissatisfied with the outcome of the taxation, the rules provide the party who objects to the ruling can file a reference before the High Court. We regret much as the applicants may be apprehensive about the outcome that is a process they have to face for the determination of how much they owe the respondent for the services rendered. They may have overpaid or underpaid, that is a dispute to be determined in that Court and not in the High Court or the Court of Appeal. See a dicta by the Supreme Court in the case of Peter OduorNgoge v Hon. Francis Ole Kaparo Petition No 2 of 2012 postulates that the guiding principle is that the chain of the Courts in the constitutional set up have the professional competence, and proper safety design to resolve all matters touching on the technical complexity of the law.”***

9. In other words what the Court of Appeal was directing the Applicants to do, in light of the instant circumstances and misplaced apprehension, was for the parties to submit to the taxation proceedings, and thereafter, if either of the parties was dissatisfied with the ruling of the taxing officer, they could seek reference with this Court.
10. In the foregoing therefore, the application by the Applicants is found to be *res judicata* and thereby unmeritorious, and hereby dismissed with costs to the Defendant.

**Dated, signed and delivered in court at Nairobi this 11<sup>th</sup> day of March, 2016.**

**C. KARIUKI**

**JUDGE**