REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW

MISCELLANEOUS APPLICATION NO. 252 OF 2016

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW UNDER SECTION 8 AND 9 OF THE LAW REFORM ACT, CAP 26, SECTION 2(J) OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015 AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010 LAWS OF KENYA.

AND

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF MANDAMUS, COMPELLING THE RESPONDENTS TO SETTLE A DECREE

AND

IN THE MATTER OF SECTION 21(4) OF THE GOVERNMENT PROCEEDING ACT AND SECTION 7 AND SECTION 33 OF THE SIXTH SCHEDULE OF THE CONSTITUTION, OF KENYA 2010.

BETWEEN

BESPOKE INSURANCE BROKERS LTD.....APPLICANT

VERSUS

COUNTY SECRETARY, COUNTY GOVERNMENT OF NAIROBI.....1ST RESPONDENT

COUNTY GOVERNMENT OF NAIROBI.....2ND RESPONDENT

JUDGMENT

1. On 25th July 2016 the applicant obtained leave of this court to apply for Judicial Review orders of mandamus to compel the respondents City County of Nairobi and the County Secretary of the said County Government, to settle decretal sum due in HCC 590 of 2005. The court ordered the exparte applicant to file the substantive motion and serve within 21 days from the date of issue of leave thereof.

2. On 9th August 20116 the exparte applicant filed notice of motion dated 7thAugust 2016 seeking for an order of mandamus to issue to compel the 1st respondent, the County Secretary of Nairobi City County Government to implement the decree emanating from the judgment of the High Court dated 27th October, 2008 in Milimani HCC 590 of 2005 and without delay (sic) cause to be paid the amount of kshs 25,286,910.14 together with interest accrued from the date of filing the suit; and that costs of the application is supported by grounds on the face of the notice of motion, the statutory statement verifying affidavit together with annexed exhibits.

3. The exparte applicant's case is that it instituted proceedings vide **Nairobi HCC 590 of 2005- Bespoke Insurance Brokers Ltd vs City Council of Nairobi** with judgment being entered in favour of the applicant for shs 27,914,768.10 with costs and interest at court rates of 12% per annum from the date of filing suit.

4. Thereafter, that the applicant extracted a decree dated 21st October 2008 and issued by the court on 27th October 2008. It was alleged that since then, efforts to have the entire decretal amount settled have been futile as the 2nd respondent has been making sporadic payments here and there and failing to settle the decretal amount in its entirety.

5. That as at 6th June 2016 the outstanding amount was kshs 24,557,677.14 together with costs taxed at kshs 729,233 bringing the total to kshs 25,286,910.14. It was averred and deposed by the exparte applicant's director Mr Geoffrey Wahome Muotia that the decretal sum continues to accrue interest since the date of filing of the suit and that despite numerous demands, the respondent has not issued any plausible reason for its no-compliance with the decree in that suit.

6. As a result, it was contended that the respondent continues to frustrate the applicant's efforts to have the sum settled as they continue to purposefully delay and or evade settling the interest and costs, and that the applicant continues to suffer loss and prejudice as a result of the respondent's nonpayment as they are denied an opportunity to enjoy what is rightly theirs.

7. In the verifying affidavit, a part from the grounds set out above, the applicant disclosed at paragraph 5 that although it had previously instituted **JR 295 of 2011 – Bespoke Insurance Brokers Ltd Vs Phillip Kisia, The Town Clerk of the City Council of Nairobi and City Council of Nairobi,** in pursuit of the decretal amount herein, which matter was dismissed as shown by annexed copy of the judgment, but that the doctrine of Resjudicata does not apply to judicial Review proceedings.

8. Further, that the cause of action continues to accrue as the decretal sum has never been fully settled; and that the applicant has no other remedy of seeking against the decretal sum other than through these Judicial Review proceedings.

9. The applicant also annexed copy of tabulation of the payments made by the respondents and the outstanding amount todate and urged the court to grant it Judicial Review orders of Mandamus.

10. As at 21st November 2016 after the applicant served the notice of motion upon the respondents who entered an appearance through the firm of Kithi & Company Advocates on 15th August 2016, the respondents had not filed any replying affidavit or grounds of opposition therefore the court ordered the matter to proceed to hearing as scheduled which order was not taken kindly by Mr Mutua of Kithi & Company Advocates, who wrote a letter to the Judge (not the court through Deputy Registrar as is usually the case) furiously protesting the hearing and reservation of the matter for a decision yet, according to Mr Mutua, they needed more time to file a response.

11. The court took the braved the accusations but noted that what Mr Mutua was doing by writing to the judge personally and not the court, was an intimidation through commands that the court had no mandate to proceed with the hearing in the absence of reply by the respondents yet the latter had a preliminary point of law to raise, to wit, resjudicata; but that which they had nonetheless refused to urge in court that morning.

12. The court vide a brief ruling addressed the issues raised d by Mr Mutua in his letter to court and directed that as Mr Mutua's conduct in this matter may not be on his client's instructions anyway, and that in order to do justice to his client, the ruling which was scheduled for that afternoon of 21st November 2016 was recalled and I directed that the Preliminary objection by Mr Mutua be raised on 23rd November 2016 and both parties advocates agreed on that directive and date.

13. This judgment therefore determines the notice of motion dated 7th August 2016 and the preliminary objection argued on 23rd November 2016 seeking to dismiss the notice of motion in limine for being resjudicata JR 696/2009 which was dismissed by R. Wendo J on 29th September 2010.

14. In her oral submissions in support of the notice of motion dated 7th August 2016, Miss Maitai counsel for the applicant submitted reiterating the grounds and statutory statement as well as the depositions in her client's director's verifying affidavit. She also relied on the exhibits annexed to the verifying affidavit which included the decree in HCC 590/2005, copy of certificate of taxation; copy of judgment in the said suit and a schedule of payments and alleged outstanding sums due and urged the court to allow the notice of motion as prayed.

15. In response the notice of motion as argued on 23rd November 206, Mr Mutua for the respondents argued that the notice of motion dated 5th August 2016 is resjudicata and an abuse of the court process. That the same matter had twice been filed in court vide JR 696/2009 over the same subject matter and between the same parties and vide a judgment delivered on 29th September 2010, Honourable Wendo J dismissed the claim for Judicial Review orders of Mandamus. That subsequently, the same matter was filed vide JR 295/2011 and Honourable Korir J dismissed it vide his judgment of 8th March 2013.

16. That this notice of motion is the same as what was previously dismissed in the two Judicial Reviews as it the same cause of action and between the same parties.

17. In addition, Mr Mutua submitted that the same matter was adjudicated upon vide Court of Appeal Civil Appeal No. 87/2010 following the decision by J Khaminwa dated 16th March 2009 in HCC 590/2005 between the same parties, with the Court of Appeal remarking at page 5 of the judgment that the amount in dispute had been settled save for interest on the principal sum.

18. Mr Mutua further submitted that the amount which is sought is different from the attached decree and that the annexed schedule of interest due is in excess of the decretal sum which was paid totaling shs 37,914,768 from a decree of shs 27,914,768 which is over and above by shs 10 million.

19. Further, that the applicant is seeking shs 67 million from a decree of shs 27 million which is clearly an abuse of the court process and an attempt to steal from public coffers. Mr Mutua urged the court to dismiss the notice of motion with costs.

20. In a rejoinder, Miss Maitai submitted that based on the case of **Mukisa Biscuits Manufacturing Company Ltd vs West End Distributors Ltd[1969] EA, t**he preliminary objection is not well founded. That a preliminary objection cannot be raised as a matter of discretion. That a preliminary objection cannot arise based on the prayers of mandamus which are discretionary.

21. Further, that in this case, interest has to be ascertained and the total amount is also disputed so the preliminary objection is not well founded.

22. Miss Maitai further submitted that the applicant has no other remedy other than Judicial Review and that therefore if this application is dismissed the applicant will be left with no remedy; yet the amount has never been paid in full. She relied on **JR 44/2012 James Alfred Kasoro vs Attorney General** where the court held that where there is no other legal remedy the court will grant mandamus.

That in this case, the respondents have no intention of settling the decree which will leave the applicant without a remedy.

23. In response, Mr Mutua submitted with regard to the preliminary objection, that a point of law stands on a certain set of facts upon which the court ascertains.

24. Further, that the court in determining the issue of resjudicata must look at the facts since points of law do not stand alone. Mr Mutua further submitted that the applicants had admitted that the decretal sum had been paid and that the Judicial Review court only enforces what is illegal and what was granted yet in this case, the applicant was bringing a decree and claiming different sums of money which are not supported by a decree.

25. Mr Mutua maintained that this matter was settled by the judgment of Korir J in JR 295/2011 where Korir J at page 4 was clear that the claim cannot be to compel payment based on no evidence of how the figures were arrived at. Mr Mutua prayed for dismissal of the applicant's application and that the preliminary obje tion be upheld.

Determination

26. I have carefully considered the applicant's application as supported by the grounds, statutory statement, verifying affidavit and exhibits. I have also considered the parties' advocates submissions on the preliminary objection argued to the effect that this notice of motion is resjudicata JR 696/2009 and JR 295/2011 and that it is therefore an abuse of court process and should be dismissed.

27. In my humble view, the issues for determination are:

1. Whether these Judicial Review proceedings are resjudicata JR 696/2009 and JR 295/2011 which are over the same subject matter and between the same parties; and or whether it is an abuse of the court process.

2. If the answer in (1) is in the negative, whether the application for mandamus is merited.

3. What orders should this court make.

4. Who should bear the costs of the proceedings.

28. On the first issue as to whether these proceedings are resjudicata JR 696/2009 and JR 295/2011 and or whether they are an abuse of court process, the applicant in its pleadings averred that although there were previous proceedings in JR 295/2011, over the same subject matter which was dismissed, but that resjudicata does not apply to Judicial Review proceedings.

29. Therefore, the first question that I must dispose of is whether resjudicata is applicable to Judicial Review matters, before going into whether resjudicata can be raised as a preliminary objection on a point of law.

30. On whether the doctrine of resjudicata is applicable in Judicial Review proceedings or matters, it is important to understand the origin of this legal principle which is embodied in Section 7 of the Civil Procedure Act.

31. The doctrine originates from the policy *"that parties to a judicial decision should not afterwards be allowed to relitigate the same question"*, as per Miller J in **Crown Estate Commissioners Vs Dorset County Council [1990]1ALL ER 19 at 23.**

32. In other words, the principle of resjudicata applies to bar subsequent proceedings when there has been adjudication by the court of competent or concurrent jurisdiction which conclusively determined the rights of the parties with regard to all or any matters in controversy as was held in **Mandaria V**

Ratten Singh [1965] EA 118.

33. For one to succeed in the plea of resjudicata, he 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) That there is concurrent 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.

34. Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya provides that:

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

35. It has been argued that Judicial Review proceedings do not fall under the Civil Procedure Act as they are not suits as defined in Section 2 of the Act and that pursuant to Section 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya, the High Court is expressly barred from exercising civil or criminal jurisdiction in determining Judicial Review matters which, therefore, are not suits.

36. Further argument is that the long title to the Civil Procedure Act is clear that it is " *An Act of Parliament to make provisions for procedure in civil court's* and that since Judicial Review applications are neither civil nor criminal, in nature, therefore, the doctrine of resjudicata does not apply.

37. In **Commissioner of Lands Vs Kunste Hotel Ltd [1995]-1998]1 EA 1** the Court of Appeal held that Judicial Review jurisdiction is a special jurisdiction which is neither civil or criminal and the Civil Procedure Act does not apply since it is governed by Section 8 and 9 of the Law Reform Act being the substantive law and Order 53 of the Civil Procedure Rules being the procedural law.

38. Therefore, strictly speaking, Section 7 of the Civil Procedure Act does not apply to Judicial Review proceedings.

39. The same position was upheld by the same Court of Appeal in **Republic Vs Judicial Service Commission exparte Pareno[2004] 1KLR 203-209; Sanghani Investments Ltd vs Officer in Charge Nairobi Remand and Allocation Prison[2007] 1 EA** and **Re National Hospital Insurance Fund Act and Central Organization of Trade Unions (K) Nairobi HCMA 1747 of 2004[2006] I EA 47.**

40. The above position notwithstanding, courts have in the recent past held that it does not mean that the courts are powerless where it is clear that by bringing proceedings, a party is clearly abusing the court process.

41. Thus the courts have held that whereas rejudicata may not be invoked in Judicial Review

proceedings, the court retains the inherent jurisdiction to terminate proceedings where the proceeding amounts to an abuse of its process. That is what the court in **Republic Vs City Council of Nairobi & 2 Others [2014] e KLR** held per Odunga J, inter alias that:

> " ***One of the cardinal principles of law is that litigation must come to an end and where a court of competent jurisdiction has pronounced a final decision on a matter, to bring fresh proceedings whether as Judicial Review proceedings or otherwise would amount to an abuse of the process of the court and would therefore not be entertained. The court in terminating the same would be invoking its inherent jurisdiction which is not jurisdiction conferred by Section 3A of the Civil Procedure Act as such but merely reserved there under."***

41. In **Kenya Bus Services Ltd & Others Vs Attorney General &Others[2005]1EA 111** the Court of Appeal stated, concerning the inherent powers of the court, inter alia:

> ***" …….whereas ordinary jurisdiction stems from the Act of Parliament or statutes, the inherent powers stem from the character or the nature of the court itself……It is regarded as sufficiently empowered to do justice in all situations. The jurisdiction to exercise these powers was derived, not from statute or rule of law, but from the very nature of the court as supervision court of law, and for this reason such jurisdiction has been called "inherent". For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent the process being obstructed and abused. Such a power is intrinsic in a superior court, its very life blood , its very essence, its immanent attribute without such a power, the court would have form but would lack substance. The jurisdiction, which is inherent in a superior court of law, is that which enables it to fulfill itself as a court of law. The judicial basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner. The need to administer justice in accordance with the constitution occupies an even higher level due to the supremacy of the Constitution and the need to prevent the abuse of the constitutional provisions and procedure does occupy the apex of the judicial hierarchy of values. Therefore, the court does have inherent powers to prevent abuse of its process in declaring, securing and enforcing constitutional rights and freedoms……."***

43. In **Karuri & Others Vs Dawa Pharmaceuticals Company Ltd & Others[2007] 2 EA 235** the court emphasized that nothing can take away the court's inherent power to prevent the abuse of its process by striking out pleadings or striking out a frivolous and vexatious application and that baptizing – such matters constitutional cannot make them so if they are in fact plainly an abuse of the court process.

44. However, a three judge bench sitting in **Silas Make Otuke Vs Attorney General & 3 Others[2014]eKLR** a Constitutional Petition observed, inter alia, that:

> ***" Although the constitutional principles of fair hearing under Article 50(1), access to justice under Article 48, promotion and protection of the Bill of Rights under Articles 22, and enforcement of the Constitution under 258 would generally call for full inquiry into disputes that may be resolved by operation of law, consistency with the rule of law, the principle of resjudicata as a cardinal principle for the finality of litigation and for the prevention of abuse of the court process must be inbuilt in any constitutional litigation that may be preferred for that purpose. We agree with the privy council decision in Thomas vs the Attorney General of Trinidad and Tobago [1991] LRC (Const) 1001, cited in E.T. Vs Attorney General & Another [2012] e KLR, where the Board was satisfied that the existence of the constitutional remedy as that upon which the appellant relies does not affect the application for the***

principle of resjudicata, and referred to a decision of the Supreme Court of <u>India Daryao and Others V The State of UP and Others [1961] 1scr 574,582-2</u> where Gajendragkar J held that the principle of resjudicata was applicable in cases under Article 32 of the Constitution of India:-

" But us the rule of resjudicata merely a technical rule or it is based on high public policy" if the rule of resjudicata itself embodies a principle of public policy which in turn is an essential part of the rule of law then the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity. Now the rule of resjudicata as indicated in S.11 of the code of Civil Procedure has no doubt some technical aspects, for instance the rule of constructive resjudicata may be said to be technical, but the basis on which the said rule rests is founded on consideration of public policy. It is in the interest of the public at large that a finality should attach to be binding decisions pronounced by the courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same principles form the foundation of the general rule of resjudicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in Petitions filed under Article 32" See also Charo Kazungu Matsere & 273 Others v Kencent Holdings Ltd & another Mombasa HC (CP) 136/2011; [2012]e KLR and Booth Irrigation v Mombasa Water Products Ltd (Booth Irrigation No.1)Nairobi HC Miscellaneous Application No. 1952 of 2004.

Accordingly, we unhesitatingly find that the principles of resjudicata is applicable to constitutional litigation and its relevance is not affected by the substantial justice principle of Article 159 of the Constitution which overrides technicalities of procedure "

45. From the above decision, I have no doubt in my mind that the principle of resjudicata being a public policy principle, it applies to judicial review proceedings as it bars re-litigation over the same issue and over the same subject matter and even if the doctrine of resjudicata would strictly not be applied as such in Judicial Review or constitutional matters, the court may in proper cases invoke its inherent jurisdiction to dismiss proceedings which are instituted by way of Judicial Review and which would otherwise be an abuse of the court process in similar circumstances as where the doctrine of resjudicata would be applicable.

46. It therefore follows that abuse of court process in Judicial Review proceedings takes the place of resjudicata.

47. On whether Resjudicata can be taken as a preliminary point of law, a preliminary objection on a point of law as correctly submitted by Miss Maitai, cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

48. That is the principle enunciated in the **Mukisa Biscuits Manufacturing Ltd Vs West End Distributors Ltd.** **<u>Civil Appeal No. 9 of 1969 [1969] EA 696.</u>**

49. In **Arnold Vs West Minister Bark [1991]AC 93 HC** the House of Lords held that cause of action estoppel ***" is an absolute bar in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment."***

50. In Mulla Code of Civil Procedure, 18th Edition 2012 page 293, it is observed that the principle of resjudicata as a judicial device for finality of court decisions is subject to the special circumstances of fraud, mistake or lack of jurisdiction. The authors state:

" ***The principle of finality or resjudicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a judgment becomes***

conclusive the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is routed to the rationale that issues decided may not be reopened and has little to do with the merit of the decision."

51. From the above decisions in their spirit and tenor, it is clear that resjudicata is a pure point of law and when taken as preliminary point of law so as to avoid abuse of the process of court would determine proceedings in limine.

52. It should be noted that in the Mukisa Biscuits case (supra) the court was dealing with the issue of dismissal of a suit for want of prosecution. In that case, the defendant, instead of applying for dismissal of the suit for want of prosecution, by way of a motion, it raised a preliminary objection and that is when the court made it clear that a preliminary objection consists of a point of 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.

53. The same Mukisa Biscuits case gave examples of what would constitute a preliminary objection at page 700 paragraph D of the judgment as *" an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the suit to arbitration*.

54. In this case, the applicant by its own pleadings admits that there was previously JR 696/2009 but that resjudicata does not lie in Judicial Review proceedings/matters since the principal sum claimed with costs and interest have never been settled by the respondent and that if these proceedings are dismissed, then the applicant will not be left with any remedy.

55. Further, that Judicial Review is a discretionary remedy hence resjudicata would not apply where facts have to be ascertained or if what is sought is the exercise of judicial discretion.

56. In my humble view, the applicant in this case is admitting that this matter is resjudicata JR 696/2009 but that resjudicata does not apply to Judicial Review matters hence it is safe with these proceedings. I disagree.

57. I further disagree that in the circumstances of this case, the respondent is seeking judicial discretion of the court. The applicant is seeking to have the matter herein determined in limine since it is the same proceedings were adjudicated upon and determined finally by way of a judgment.

58. In my humble view, the applicant has misapprehended the remedy of judicial review being a discretionary one, and a preliminary objection seeking judicial discretion of the court like in the Mukisa Biscuits case where the appellant defendant had sought the judicial discretion of the court to dismiss the suit for want of prosecution, by way of a preliminary objection to the suit as opposed to filing a motion to dismiss the suit for want of prosecution.

59. That being the case, I find that the preliminary objection was well taken, that a matter amounts to an abuse of court process if it has been adjudicated upon and determined fully by a court of competent jurisdiction if the issues and subject matter are the same as those determined in a previous proceeding.

60. This then leads me to answer the overall question of whether this judicial Review Application is resjudicata JR 696/2009 and JR 295/2011 or whether it is an abuse of the court process.

61. In paragraph 5 and 7 of the exparte applicant's verifying affidavit it was deposed that:

5. That the applicant had previously instituted JR No. 295 of 2011 Bespoke Insurance Brokers Vs Phillis Kisia, The Town Clerk of the City Council of Nairobi and City Council of Nairobi, in pursuit of the decretal amount herein but the same was dismissed (annexed

herein marked as "GW3" is a copy of the judgment.

7. That I am informed by my advocates on record, Messrs Maina & Maina Advocates and which information I verily believe to be true that: i. The principle of resjudicata does not apply to Judicial Review matters: ii. The cause of action continues to accrue as the decretal amount has never been fully settled. Iii. That the applicant herein is barred from instituting execution proceedings against the 1st and 2nd respondents and therefore has no other way of compelling the respondents to settle the decretal sum."

62. However, annexture "GMW3" is not the judgment in JR 295/2011 but is the judgment by J. Khaminwa J (as she then was) dated 28th October, 2008 wherein she entered judgment for the plaintiff/applicant herein against the defendant/respondents herein for a sum of kshs 27,914,768.10 plus interest at court rates from date of filing suit until payment in full, and costs of the suit.

63. However, the respondents filed before this court judgments in JR 295/2011 and JR 696/2009 between the same parties. In JR 696/2009, the applicant herein sought the following orders:-

"That the court do issue Judicial Review by way of an order of mandamus compelling the Town Clerk, City Council of Nairobi, to pay the decretal sum outstanding at kshs 36,276,431/30 as at the date of filing thereof together with interest therein till payment in full pursuant to the decree issued in Milimani HCC No. 590/2005 on 27th October 2008."

64. The applicant in the JR 295/2011 between the same parties hereto sought for the following orders:

" ***1. Judicial Review by way of an order for mandamus compelling the Town Clerk , City Council of Nairobi, to pay the decretal sum outstanding at kshs 20,872,392.12 as at the date of filing thereof together with interest thereon till payment in full pursuant to the decree issued in Milimani High Court Civil Case No. 590 of 2008 on 27th day of October, 2008"***

65. And in this application the following orders are sought:

"That an order of mandamus do issue to compel the 1st respondent to implement the decree emanating from the judgment of the High Court dated 27th October, 2008 in Milimani HCC No. 590 of 2005 and without delay cause to be paid the amount of kshs 25,286,910.12 together with interest accrued from the date of filing the suit."

66. I have perused **Republic Vs P. Wendo J in JR 696/2009**, wherein the learned judge stated as follows at page 4 of 8 of her judgment dated 29th September 2010:

" ***I do note that whereas in the statement there was no prayer for interest on the sum claimed, in the notice of motion, there is a prayer for the substantive sums and for interest thereon from the date of filing. The decree issued on 27th October 2008 was for kshs 27,914,768/10 plus interest at court rates. So by the applicant seeking interest on kshs 36,287,431/30 from the date of filing, was claiming a different sum of money all together. This is because kshs 36,276,432/- sought in the statement must be inclusive of interests. I do agree that the prayers set out in the statement and notice of motion are at variance and the notice of motion therefore offends order 53 Rule 4(1) of Civil Procedure Rule."***

67. The learned judge went further to state a follows:

"Utmost good faith is required of an applicant who approached the court for Judicial Review orders and failure to disclose material facts to his case would disentitle one to the discretionary orders of Judicial Review. Michael Fardham in his Book Judicial Review Handbook 5th Edition says as follows:

" Claimant's duty of candour" Judicial Review claimants have always been under an important duty to make full and frank disclosure to the court of material facts, and known impediments to Judicial Review. (eg alternative remedy, delay, adverse authority statutory ouster)…."

68. The court in JR 696/2009 concluded that the order of mandamus could not issue at that stage even if deserved because not all facts were disclosed to the court for consideration and to enable it arrive at a fair decision. She further found that the notice of motion was incompetent and that that was a case where the parties should have tried to pursue the appeal first before seeking an order of mandamus and she struck out the notice of motion dated 21st January 2009 with no orders as to costs.

69. No doubt, the above JR 696/2009 was struck out for being incompetent. It was not dismissed. The law is clear that where a matter is struck out for being incompetent, then that order of striking out is not conclusive of all the issues raised and therefore the aggrieved party can institute fresh proceedings.

70. Perhaps, it is for that reason that the exparte applicant herein instituted JR 295/2011 seeking the same prayers as those contained in JR 696/2009.

71. However, in JR 295/2011,Honourable Korir J had this to say in conclusion:

" ***The respondents have disputed the sum of kshs 20,872,392 claimed by the applicant. I have gone through the papers filed by the applicant and it is clear that the applicant was awarded kshs 27,914,768.10 on 21st October 2007 in High Court civil case No. 590 of 2005. A decree for this amount was later issued. It is also clear from the ruling delivered by the Court of Appeal on 21st October 2011 in Civil Application No. Nairobi 87 of 2010 (unreported 63/2010) that the principal amount was paid in full and what remains is the interest. The applicant did not place any documents before the court to explain how the interest was arrived at. This court can only compel the respondents to perform that which is legal.***

The court cannot compel the respondents to pay money without any documentation to support such payment. It is not to say that the applicant's claim is illegal. What the court requires is evidence as to how the figure was arrived at. For the reason alone, the applicant's application fails and the same is dismissed with costs to the respondent's."

72. The above judgment was rendered on 8th March 2013. There is no appeal filed challenging the above Judgment of Korir J and on 8th June 2016 three and half years later, the exparte applicant was back into the same court seeking for the same orders, with an enhanced amount of ***" shs 25,286,910.14 together with interest accrued from the date of filing suit."***

73. Examining the above prayer for mandamus and the judgment in CA 63/2010 in the Court of Appeal vide **Civil Application Nairobi 87/2010[2011]eKLR** between **City Council of Nairobi and Bespoke Insurance Brokers**, wherein the Court of Appeal was dealing with an application for stay of execution pending hearing and determination of the appeal from the ruling of Khaminwa J dated 16th March 2009, the Court of Appeal as at 21st October 2011 stated:

" ***…we are of the new that this application was brought without merit as the amount in dispute had been settled save interest on the principal sum and also more so for the fact that there is nothing to stay as s a result of the learned judge's order of 6th March 2009. That being our view of the matter, we order that this application be and is hereby dismissed with costs."***

74. The decree in HCC 590/2005 as per the judgment delivered on 21st October 2008 was kshs

27,914,768.10. According to the ruling by the Court of Appeal on 21st October 2011, the principal sum had been settled save for interest on the principal.

75. Annexture GWM4 is a schedule of interest allegedly due as prepared by the exparte applicant and not by the court. That schedule is not part of the decree of the court which still reads shs 27,914,768.10 together with interest at court rates from the date of filing suit until payment in full, and there is no indication that the costs as taxed on 30th March 2016 and a certificate of taxed costs issued by the taxing officer on 3rd June 2016 were ever included in the claimed sums of money.

76. In my humble view, GWM4 which is a schedule of interest due is not a court document. Interest due can only be calculated by the court and not by a party on its own accord since the interest awarded on the principal sum does not form a separate or independent cause of action as it is part of a decree.

77. From GWM4, the applicant is no doubt establishing a separate and independent cause of action against the respondent, which claim would be legally untenable.

78. In addition, the said schedule does not even mention the principal sum as awarded by the Honourable Khaminwa J.

79. Further, whereas the schedule claims that the total outstanding amount as ***at 6th June 2016 is kshs 24,557,677,14, the amount claimed*** in the application for leave and in the substantive notice of motion is shs ***25,286,910.14 together with interest accrued from the date of filing of the suit."***

80. The judgment by Honourable Wendo J in JR 696/2009 and Honourable Korir J in JR 295/2011 battled with the issue of the applicant herein claiming for the sums ***together with interest accrued from the date of filing the suit."***

81. An order of mandamus is issued to compel a public body or authority or an administrator to do that which the law requires it to do. For such an order to issue, the applicant must state with certainty and specifity that which the public authority or body or administrator is required to perform and which it has failed to perform.

82. The amount sought by the applicant to be paid by the respondents can only be as per the decree of the court or certificate of order against the government pursuant to Section 21 of the Government Proceedings Act.

83. In this case, the decree reads a different sum from that which is sought in the notice of motion. What the applicant has done, after Honourable Korir dismissed its application in JR 295/2011 on the ground that the court cannot compel the respondent's to pay money without any documentation to support such payment, was to prepare a schedule, instead of reverting back to the court to calculate interest if any, since the principal sum had already been settled as per the ruling of the Court of Appeal in CA 63/2010.

84. In my humble view, the conduct of the exparte applicant in seeking for mandamus orders against a public authority is unacceptable. That conduct of litigating over the same subject matter by installments and only changing the figures is a sign of dishonesty on the part of the applicant.

85. That dishonesty is further reflected in the fact that despite the principal judgment sum having been settled many years ago, as per the ruling of the Court of Appeal in CA 63/2010, the exparte applicant's **" schedule of interest"** which I have dismissed does not even reflect when that principal sum was paid and how much interest had been earned on it from date of filing suit.

86. Further, the sum of money disclosed in that ***" schedule of interest"*** is not the same sum of money claimed in the prayer for mandamus.

87. In addition, the sum of money sought to be compelled to be paid as per the prayer for mandamus is not disclosed to be interest on the principal sum but ***decretal sum in HCC 590/2005, together with interest accrued from the date of filing the suit.***

88. With utmost respect to the exparte applicant, it cannot claim interest on 25,286,910.14 from the date of filing the suit since shs 25,286,910.14 is not the sum which was claimed as the principal sum in HCC 590/2005 and neither was it the sum that Honourable Khaminwa J awarded on 27th October 2008.

89. Although paragraph 4 of the grounds in support of the notice of motion and paragraph C of the statutory statement dated 7th June 2016 claims that the debt now stands at shs 24,557, 677.14 together with costs of shs 729,233, the question, how is this fresh debt being incurred if the principal sum was settled and even if it was interest, then the notice of motion is claiming for decretal sum and not just interest. Further, it is not clear how that interest was arrived at in the absence of a uniform interest rate and or calculations by the court on the settled principal sum.

90. Furthermore, although the schedule of interest uses the ***interest rate of 12%*** in compounding the sums due, paragraph C(ii) in the statutory statement on the facts relied upon claims that:

> ***" The said judgment required the respondent to pay a sum of shs 27,914,768 together with costs and interest at 14% from dated of filing the suit until full payment."***

1. One wonders what the court rate of interest was at the time of judgment in HCC 590 of 2005 and when that interest rate started fluctuating.

2. There is so much conflicting information supplied by the exparte applicant to this court that no court of law can grant the orders being sought which orders are discretionary.

3. For example, ground 1 on the face of the notice of motion provides another rate of interest at 12% from the date of filing suit. Ground 5 thereof claims that the decretal sum continues to accrue interest since the date of filing of the suit.

4. Surely, the decretal sum having been settled, it cannot under any circumstances be found to be in existence to be accruing any interest at whatever rate. What would be owing if any is the balnce of interest due on the principal sum since there is no order in the judgment of Hom Khaminwa J that interest would also earn interest as if it was the principal sum.

5. The exparte applicant is not being candid with the court and as such, I cannot help but agree with the respondent's counsel's submissions that the applicant's application after application is intended to steal from the public coffers since for this court to compel the payment of the conflicting sums of money, which all come nearly 67 million from a judgment sum of shs 27 million, it must be shown, clearly, how that sum of money was arrived at.

6. Further, the applicant cannot bring into this court a decree and claim different sums which are not supported by a decree. I find that the interest which is being claimed is at large as it is not supported by a decree or certificate of order against a County Government as stipulated by Section 21(1)-(5) of the Government Proceedings Act, which echoes the repealed Section 263 A(1) of the Local Government Act Cap 265 Laws of Kenya on satisfaction of orders against the Government. It therefore follows that in this case, whether or not these Judicial Review proceedings are resjudicata JR 295/2011, the applicant has miserably failed to satisfy the court that it is entitled to Judicial Review orders of Mandamus to compel the respondents to settle any decretal sums as the sums allegedly due are not ascertainable from the conflicting material claims and documents placed before this court.

7. What this court has been treated to from the commencement of the hearing of this matter is

nothing but conflicting issues of fact and although this court was unfairly accused by Mr Mutua of bias for ordering the matter to proceed, this court, not being a mechanical court that acts robotically has managed to sift through the available evidence on record, even without the plea of resjudicata and found that the notice of motion filed by the applicant and which is dated 5th August is a grave abuse of the process of this court.

8. Furthermore, Honourable Korir J having dealt with the same issues that I have been confronted with, it is expected that if the exparte applicant was dissatisfied with that judgment of Honourable Korir J, it should have lodged an appeal challenging that decision since the judgment dismissed the notice of motion by the applicant, based on the merits of the matter and not on the point of incompetence as was the case in JR 696/2009.

9. is not an appellate court that would consider the judgment of a court of concurrent jurisdiction and which court determined the same issues as the ones before me and between the same parties on merits.

10. Accordingly, I find that not only is the notice of motion dated 5th August 2016 an abuse of the court process but that it is devoid of any merit and is vexatious and the order that commends itself in those circumstances is to dismiss the exparte applicant's notice of motion dated 5th August 2016.

11. Each party shall bear their own costs of the Judicial Review proceedings.

Dated, signed and delivered at Nairobi this 7th day of December 2016.

R.E. ABURILI

JUDGE

In the presence of:

Miss MAITAI for the exparte applicant

N/A for Respondent (pupil Miss Lynn Ngira attending court)

CA: Lorna