



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 40 OF 2015**

**MACHAKOS COUNTY GOVERNMENT.....PLAINTIFF/APPLICANT**

**VERSUS**

**KAPITI PLAINS ESTATE LTD.....DEFENDANT/1<sup>ST</sup> RESPONDENT**

**AND**

**BONIFACE MUTINDA KABAKA *t/a***

**KABAKA & ASSOCIATES ADVOCATES.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. On 24<sup>th</sup> October, 2017, the 2<sup>nd</sup> Respondent/Advocate drew an Advocate-Client Bill of Costs. In the said Bill of Costs, the 2<sup>nd</sup> Respondent/Advocate is claiming for his costs amounting to Kshs. 366,670,971.70.

2. Before the Advocate-Client Bill of Costs could be taxed by the Taxing Master, the Plaintiff/Applicant filed a Notice of Motion dated 17<sup>th</sup> April, 2018. In the said Notice of Motion, the Plaintiff/Applicant is seeking for the following orders:

***a. That an order do issue for the Directorate of Criminal Investigation to investigate and file a report in court as to the person who signed the following documents in Machakos High Court of Kenya Civil Suit No. 40 of 2015.***

***i. Complaint dated 18<sup>th</sup> August, 2015***

***ii. Verifying Affidavit sworn on 18<sup>th</sup> August, 2015***

***iii. Amended Complaint***

***iv. List of Authorities dated 2<sup>nd</sup> October, 2015***

***v. Certificate of Urgency dated 18<sup>th</sup> August, 2015***

***vi. Chamber Summons, the Supporting Affidavit thereof and Notice of Motion all dated 18<sup>th</sup> August, 2015***

***vii. Plaintiff's Reply to Defence dated 2<sup>nd</sup> October, 2015***

***viii. Grounds of Opposition dated 2<sup>nd</sup> October, 2015***

***ix. Plaintiff's submissions dated 6<sup>th</sup> November, 2015***

***x. Notice of Motion dated 2<sup>nd</sup> October, 2015***

***xi. Supplementary Affidavit purportedly signed by Jacinta Masila on the 14<sup>th</sup> September, 2015***

***xii. Supporting Affidavit purportedly signed by Jacinta Masila on the 1<sup>st</sup> October, 2015***

*xiii. Supporting Affidavit purportedly signed by Jacinta Masila on the 18<sup>th</sup> August, 2015*

*xiv. Plaintiff's list of Witness dated 18<sup>th</sup> August, 2015*

*xv. Plaintiff's Witness Statement dated 18<sup>th</sup> August, 2015 purportedly by Jacinta Masila.*

***b. That a declaratory order do issue that Philip Nzyuko did not sign both the Complaint and the Amended Complaint and all the other documents referred in paragraph 1 above purportedly signed by him and the signatures thereof are forgeries.***

***c. That a declaratory order do issue that Jacinta Masila did not sign Verifying Affidavit attached to the Complaint, the Supplementary Affidavit sworn on 14<sup>th</sup> September, 2015, Supporting Affidavit sworn on the 1<sup>st</sup> October, 2015, Supporting Affidavit sworn on the 18<sup>th</sup> August, 2015 and Witness Statement dated 18<sup>th</sup> August, 2015 and the signatures thereof are forgeries.***

***d. That an order do issue declaring that the Applicant/Respondent did not have instructions and/or retainer to file any suit on behalf of the Respondent/Applicant.***

***e. That an order do issue declaring that the Applicant/Respondent committed an offence under Public Procurement and Asset Disposal Act.***

***f. That an order do issue declaring that the Applicant/Respondent acted in express conflict of interest for filing the suit through his law firm while he was the Legal and Strategy Adviser and the County Attorney in charge of the County Law Office of the Respondent/Applicant.***

***g. That the Advocate-Client Bill of Costs herein dated 24<sup>th</sup> October, 2017 be struck out with costs.***

3. The Application is supported by the Affidavits of Philip Nzyuko Musya, an Advocate working in the Plaintiff's/Applicant's Advocate's law firm and the Plaintiff's Chief Officer, Lands and Urban Development.

4. In his Affidavit, the Plaintiff's Advocate deponed that he undertook pupillage in the firm of Kabaka & Associates Advocates (*the Advocate/2<sup>nd</sup> Respondent*) in the year 2011; that he was admitted as an advocate on 4<sup>th</sup> December, 2014 and that after admission, he joined the firm of B. M. Mung'ata & Co. Advocates on 12<sup>th</sup> January, 2015 where he is an associate to date.

5. It was the deposition of the Advocate that after joining the law firm of B. M. Mung'ata in January, 2015, he could not have drawn pleadings and executed them on behalf of the law firm of Kabaka & Associates; that it has come to his attention that the firm of Kabaka & Associates filed and executed pleadings in Machakos HCCC No. 40 of 2015 using his name and forged signature and that the signature appearing on that Complaint dated 18<sup>th</sup> August, 2015 is not his.

6. The Advocate also denied having signed the Plaintiff's List of Witnesses and Witness Statement dated 18<sup>th</sup> August, 2015; the Plaintiff's List of Documents dated 17<sup>th</sup> September, 2015, the Amended Complaint dated 28<sup>th</sup> October, 2015; the Notice of Motion dated 2<sup>nd</sup> October, 2015; the Grounds of Opposition dated 2<sup>nd</sup> October, 2015 and the submissions dated 6<sup>th</sup> November, 2015.

7. The Plaintiff's Advocate finally deponed that he has never appeared before the alleged Commission of Oaths called Daniel Ogola; that the court should order for an investigation into the matter and that the Plaintiff's Application dated 24<sup>th</sup> October, 2017 should be allowed.

8. In his Replying Affidavit, Boniface Mutinda Kabaka deponed that he is an Advocate of the High Court practicing in the name and style of Kabaka & Associates Advocates; that the Plaintiff instructed his law firm to file a Complaint in ELC. No. 40 of 2015 to collect the outstanding land rates, which he did and that the said instructions were given before the Public Procurement and Assets Disposal Act came into operation.

9. It is the deposition of the Advocate that the Plaintiff, through Ms. Mwikali Muthoka gave his firm instructions to file the suit; that he was appointed by the Plaintiff (*the County Government of Machakos*) as a Legal and Strategy Adviser as a Consultant and not as an employee and that the said appointment was made long after his law firm had been instructed in the matter.

10. The Advocate finally deponed that Philip Nzyuko Musya assisted in the drafting of pleadings in ELC. No. 40 of 2015 and that he signed the impugned pleadings; that the signature of the said Mr. Musya is not a forgery and that the said signature is the same as that appearing on his Petition to the Chief Justice to be admitted as an Advocate of the High Court.

11. The deponent of the Affidavit in support of the Application, Mr. Phillip Nzyuko Musya (PW1) was cross-examined on his Affidavit. PW1 informed the court that he signed the Petition which he used to petition the Chief Justice to admit him to the Bar on 4<sup>th</sup> December, 2014; that he stopped working in the firm of Kabaka & Associates Advocates the following week and that he was employed by the firm of B. M. Mung'ata on 15<sup>th</sup> January, 2015. According to PW1, he could not have signed the impugned pleadings in Machakos ELC No. 40/2015 eight (8) months after leaving the firm of Kabaka & Associates Advocates.

12. It was the evidence of PW1 that the signature on the Petition he used to petition the Chief Justice to admit him to the Bar is different from the signature that is on the impugned pleadings; and that the signature on his identity card is different from the way he signs pleadings.

13. PW1 informed the court that after discovering that his signature was forged in the year 2015, he changed his signature and that he discovered that his signature had been forged in ELC No. 40 of 2015 when he held brief for Mr. Kabaka in that matter. According to PW1, he was already in the firm of B. M. Mung'ata advocate, who are now acting for the Plaintiff, when the issue of him having signed pleadings in ELC No. 40 of 2015 arose and that it was Mr. Nthiwa, an advocate in the firm of B. M. Mung'ata, who asked him about the signature appearing in the pleadings.

14. PW1 stated that he did not have a letter of employment from the firm of B. M. Mung'ata & Co. Advocates and that he could not vouch if Jacinta signed the Verifying Affidavit. PW1 informed the court that he raised the issue of the forged signature with Mr. Kabaka for the first time in the year 2017.

15. The Plaintiff's former County Executive in charge of Lands, PW2, stated that as at July, 2014, Mr. Boniface Kabaka was the County Attorney; that he was instructed to collect rates from the large land owners in Machakos County and that the Defendant in ELC No. 40 of 2015 (*Kapiti Plains Estate Limited*) was one of the large land owners in the county from whom rates were due and owing.

16. It was the evidence of PW 2 that they gave to Mr. Kabaka instructions to collect the rates on behalf of the Client on 25th July, 2014; that the scope of the instructions was not known to him and that the issue of collecting rates included filing of a suit.

17. PW 2 informed the court that he is the one who gave to the firm of Kabaka & Associate Advocates instructions to collect rates on behalf of the County Government; that by that time Mr. Kabaka was a County Attorney and that Mr. Kabaka was allowed to continue to undertake his legal practice.

18. PW 2 stated that a Deed of Settlement between the Defendant in ELC No. 40 of 2015 and the County Government was entered into and that it is Mr. Kabaka's law firm that filed the said suit to recover the rates.

19. The Plaintiff's Chief Officer, County Treasury, PW 3, informed the court that Mr. Kabaka was instructed to collect outstanding rates from defaulters who owned land in the county; that she is the one who signed the Verifying Affidavit in support of the Plaintiff in ELC No. 40 of 2015; that she knew that the firm of Kabaka & Associates Advocates is the one that was filing the suit and that she is the one who gave the said firm instructions to file the suit.

20. The Chief Officer in charge of Lands at the County Government, PW4, informed the court that Mr. Kabaka was employed as the County Attorney; that one of his responsibilities was to follow up the debt owed by Kapiti Plains Estate Limited being the outstanding land rates and that he was paid as an Attorney of the County.

21. In cross-examination, PW4 stated that the instructions to the firm of Kabaka & Associates Advocates were done by the County Executive in charge of lands (PW2); that he interacted with the said firm and that she informed the said law firm that the Plaintiff was negotiating with the Defendant the matter that was in court.

22. It was the evidence of PW4 that the firm of Kabaka & Associates Advocates must have been paid for some legal fees in respect to the suit that they filed and that there was a client-advocate relationship between the said law firm and the County Government of Machakos. According to PW4, Mr. Kabaka's firm filed the suit after Mr. Kabaka's employment and that the instructions to the said law firm were confined to collecting rates and not filing of suits.

23. PW4 stated that the Chief Officer, Legal Services, was Mr. Kithile and not Mr. Kabaka; that Mr. Kabaka, as a County Attorney, was not under Mr. Kithile and that the suit was filed after Mr. Kabaka had been employed by the County Government of Machakos as a County Attorney.

24. The Advocate, Mr. Boniface Mutinda Kabaka, DW 1, stated that in the year 2014, he was practicing in the name and style of Kabaka & Associates Advocates; that the County Government gave his law firm instructions to collect rates vide a letter dated 25<sup>th</sup> July, 2014 and that the firm later on filed a suit to recover rates from Kapiti Limited.

25. It was the evidence of DW 1 that later on, he discovered that the County Government had entered into negotiations with Kapiti Plains Estate Limited to settle ELC No. 40 of 2015 and that he is entitled to his fees. According to DW 1, the filing fees for all the pleadings in ELC No. 40 of 2015 was made by his law firm and not the Plaintiff; that he never instructed himself and that he is entitled to legal fees.

26. DW 1 stated that Mr. Philip Musya advocate signed pleadings in his law firm upon his admission to the Bar and that his role as a legal adviser on all matters pertaining to legal issues in the county did not preclude his law firm from acting for the County Government.

#### **Submissions:**

27. In his submissions, the Plaintiff's/Applicant's advocate submitted that as at January, 2015, Mr. Philip Musya Nzyuko had already joined the firm of B. M. Mung'ata & Co. Advocates; that Mr. Musya did not sign the Plaintiff in ELC No. 40 of 2015 and that the pleadings purportedly signed by him in that suit are forgeries.

28. Counsel submitted that Mr. Kabaka was appointed by the County Government as the Head of County Law Office, County Attorney; that he was drawing a salary as an employee of the County and that he cannot purport to tax the County separately when he was paid for services rendered.

29. According to the Plaintiff's advocate, the Public Procurement and Assets Disposal Act, 2015 prohibits trading between state agencies and state officers and that the purported instructions by the County Government to the 2<sup>nd</sup> Respondent's law firm was null and void.

30. The Plaintiff's/Applicant's advocate finally submitted that the Advocate/2<sup>nd</sup> Respondent could not take an independent brief purporting to act for the county when he was the County Attorney; that he filed a suit without instructions and that the Leadership and Integrity Act prohibits any state officer from acting in any matter where conflict of interest would arise. It was submitted that having demonstrated that the contract and the engagement of the Advocate was illegal, null and void, the issue of the Advocate taxing his Bill of Costs does not arise.

31. The Advocate's/2<sup>nd</sup> Respondent's Advocate submitted that PW 1 and the Plaintiff failed to discharge their burden of proving the allegation that the signature on the specified pleadings filed by the 2<sup>nd</sup> Respondent's law firm were forgeries.

32. Counsel submitted that PW 2 confirmed in his evidence that he is the one who instructed the 2<sup>nd</sup> Respondent vide his letter dated 25<sup>th</sup> July, 2014 to recover outstanding land rates from several entities including the Defendant; that it was upon the said law firm to determine how to proceed in the recovery of the outstanding land rates and that the said firm filed a suit in that respect.

33. It was the 2<sup>nd</sup> Respondent's advocate's submissions that Mr. Kabaka was neither an employee nor the County Attorney of the County Government; that the letter of instructions by the Plaintiff was addressed to the law firm and not to Mr. Kabaka and that it is the law firm that rendered services.

34. Counsel finally submitted that Mr. Kabaka did not give his law firm instructions to act for the County Government of Machakos; that in any event, the Public Procurement and Assets Disposal Act, 2015 was not operational when the 2<sup>nd</sup> Respondent's law firm was given instructions and that there was no evidence of conflict of interest in respect of the 2<sup>nd</sup> Respondent.

#### **Analysis and findings:**

35. The genesis of the current Application was the filing of the Client- Advocate Bill of Costs in respect of the suit that was filed by the law firm of Kabaka & Associates Advocates for and on behalf of the County Government of Machakos (*Plaintiff/Applicant*).

36. In the suit that was filed by the firm of Kabaka & Associates Advocates (*the law firm*), the Plaintiff sought from the Defendant (*Kapiti Plains Estate Limited*) rates arrears up to 31<sup>st</sup> March, 2014 in respect of its three properties known as L.R. No. 7374, L. R. No. 8332 and L.R. No. 173/1. The total sum claimed by the Plaintiff from the Defendant as rates arrears was Kshs. 4,818,988,535. That suit is still pending.

37. The Plaintiff, through the firm of B. M. Mung'ata & Co. Advocates, wants the 2<sup>nd</sup> Respondent's Advocate-Client Bill of Costs dated 24<sup>th</sup> October, 2017 struck out on the ground that: Philip Nzyuko advocate did not sign both the Plaintiff and the Amended Plaintiff and all the other subsequent pleadings; that Jacinta Masila did not sign the Verifying Affidavit attached on the Plaintiff; that the 2<sup>nd</sup> Respondent did not have instructions to file the suit; that the 2<sup>nd</sup> Respondent was conflicted in filing the suit and that the 2<sup>nd</sup> Respondent breached the provisions of the Public Procurement and Asset Disposal Act.

38. The issues for determination in this Application are therefore as follows:

**a) Did Philip Nzyuko Musya advocate sign the Plaintiff on behalf of the law firm of Kabaka & Associates Advocates, and if not, what is the effect thereof?**

**b) Did the Plaintiff instruct the firm of Kabaka & Associates Advocates (the 2<sup>nd</sup> Respondent) to file the suit?**

**c) Was there a conflict of interest with the 2<sup>nd</sup> Respondent filing the suit on behalf of the Plaintiff?**

**d) Were the provisions of the Public Procurement and Asset Disposal Act, 2015 infringed?**

**e) Is the 2<sup>nd</sup> Respondent entitled to his fees?**

39. Mr. Philip Musya Advocate, the deponent of the Affidavit in support of the Plaintiff's Application was cross-examined on the deposition of his Affidavit. According to Mr. Musya, he did his pupillage in the firm of the 2<sup>nd</sup> Respondent and upon admission as an Advocate of the High Court on 4<sup>th</sup> December, 2014, moved to the firm of B. M. Mung'ata & Co. Advocates – the current advocates for the Plaintiff.

40. According to Mr. Musya, he did not and could not have signed the Plaintiff, the Plaintiff's List of Witnesses and the Plaintiff's List of Documents on 18<sup>th</sup> August, 2015 because he was not in the employment of the firm of Kabaka & Associates Advocates. It was his evidence that the signatures on the named pleadings are forgeries.

41. To show that indeed Mr. Philip Musya signed the impugned pleadings, the 2<sup>nd</sup> Respondent produced in evidence the "Notice of Petition" to the Chief Justice dated 30<sup>th</sup> September, 2014 that was signed by the said Advocate. According to Mr. Musya, the signature in his Petition to the Chief Justice and the signature in the impugned pleadings is not the same.

42. Mr. Musya admitted during cross-examination that the signature in his national identity is not similar to the signature appearing on the Petition that he made to the Chief Justice. According to Mr. Musya, after discovering in the year 2015 that his signature had been forged, he changed his signature to a different one. Indeed, the signature on his Supporting Affidavit is completely different from his two other signatures, that is, the signature on his national identity card and the Petition to the Chief Justice.

43. Although the court is not an expert in comparing signatures and making conclusive remarks on the same, Section 76(1) of the Evidence Act allows the court to compare the disputed signature with the one that is not disputed in order to ascertain whether the signature was made by whom it purports to have been written or made. It is for that reason that the 2<sup>nd</sup> Respondent herein went out of his way to obtain the undisputed known signature of Mr. Musya Advocate, which the court has compared with the disputed signature on the Plaintiff. Having compared the known signature of PW1 and the disputed signature, I find the same to be similar in most if not all respects.

44. In any event, if indeed the signature on impugned pleadings was not made by Mr. Musya, then the burden of proving that fact was on him. Section 107 of the Evidence Act provides that

***“107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”***

45. In the case of *Concepta Nyaboke vs. Peter Muasya Wangaika & Others, Machakos ELC. Case No. 32 of 2017*, this court held as follows:

***“Although the 1<sup>st</sup> Defendant denied having signed the Sale Agreement of 23<sup>rd</sup> February, 2010, she did not tender any evidence from a document examiner to show that the signature on the Agreement of 23<sup>rd</sup> February, 2010 was not his. I say so because it is only the 1<sup>st</sup> Defendant who knows how he signs documents. Indeed, it is only the 1<sup>st</sup> Defendant who can provide to the document examiner with samples of his known signature or specimen signature to enable him (the document examiner) compare it with the questioned signature, and not the Plaintiff.***

***Indeed, Section 122 of the Evidence Act provides that when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. Being the only person who is knowledgeable of his signature, the burden of proving that the signature on the Sale Agreement of 23<sup>rd</sup> February, 2010 was not his was on the 1<sup>st</sup> Defendant and not the Plaintiff. Having not done so, I find that the 1<sup>st</sup> Defendant signed the Agreement of 23<sup>rd</sup> February, 2010.”***

46. The burden of proving that the signature on the Plaintiff dated 18<sup>th</sup> August, 2015 was not his lay on PW1 who alleged that he never signed the document, which he failed to do. He could only have done that by either calling a handwriting expert which he did not do. In any event, this court had an opportunity to compare the signature on the Plaintiff and the signature that was made by Mr. Musya previously, and found the same to be similar in most respects.

47. Indeed, the fact that Mr. Musya admitted that he now has three signatures, which is not strange, shows how it is easy for someone to change the way he signs documents as and when he wants. That is the reason why the evidence of a handwriting expert is crucial when it comes to matters of signature. It is only a handwriting expert who is able to ascertain certain unique characteristics of an individual's signature notwithstanding the different signatures that the person might have. Obviously, the court does not have such expertise, especially in a situation where a person changes his signature depending with the circumstances of the occasion.

48. Having failed to call a handwriting expert, and the court having compared the known signature of Mr. Musya, which is similar in most respects, with the signature on the Plaintiff dated 18<sup>th</sup> August, 2015, I find that it is the said Mr. Musya who signed the Plaintiff in this matter.

49. Furthermore, the Plaintiff/Applicant did not produce any documentary evidence to show that Mr. Musya was indeed employed by the firm of B. M. Mung'ata & Co. Advocates in January, 2015. Indeed, Mr. Musya admitted that he does not have a letter of employment from the said firm.

50. In the absence of a letter of employment binding Mr. Musya to work exclusively for the firm of B. M. Mung'ata & Co. Advocates, the said advocate can sign documents and pleadings not only on his own behalf but also on behalf of other firms. Indeed, Mr. Musya admitted that he used to hold briefs for the firm of Kabaka & Associates Advocates while working at the firm of B. M. Mung'ata. If that is so, and in the absence of a formal letter of employment, it will not be strange or unlawful for the said advocate to sign pleadings for and on behalf of the firm of Kabaka & Associates Advocates.

51. If indeed he did so, and that is what he did, then it is his conscience that will guide him in ascertaining whether he did the right thing or not. However, this court's decision cannot be based on the consciousness of an individual or on the morality of his actions but only the law and the facts. In this case, the law allowed Mr. Musya advocate to sign the Plaintiff dated 18<sup>th</sup> August, 2015, which he did

52. Indeed, Mr. Musya did not raise any objection to the said pleadings even after noticing his signature on the Plaintiff in the year 2015. It was only when the matter came up for the taxation of the 2<sup>nd</sup> Respondent's Bill of Costs, and after Mr. Nthiwa, an advocate in the law firm of B. M. Mung'ata & Co. Advocates asked him if he signed the impugned Plaintiff. That is when he raised the issue of his signature having been forged. That, in my view, is an action of an Advocate who was trying to run away from an action that he had undertaken, and was only trying to keep his job at the firm of B. M. Mung'ata & Co. Advocates

53. The next issue that I will deal with is whether the firm of Kabaka & Associates Advocates (*the 2<sup>nd</sup> Respondent*) was instructed to institute this suit.

54. The Plaintiff's County Executive in charge of Lands, PW2, informed the court that he instructed the 2<sup>nd</sup> Respondent (*the Law firm*) to recover outstanding rates from several entities, including the Defendant. It was his evidence that he gave those instructions vide a letter dated

25<sup>th</sup> July, 2014. The letter dated 25<sup>th</sup> July, 2014 was addressed to the firm of Kabaka & Associates Advocates and was attentioned to a Mr. Paul N. Musyimi.

55. The 2<sup>nd</sup> Respondent proceeded to file the suit herein to recover the rate arrears from the Defendant. Indeed, PW2 informed the court the he was aware that the said suit had been filed. The Plaintiff dated 18<sup>th</sup> August, 2015 was filed by the 2<sup>nd</sup> Respondent's firm after the Verifying Affidavit was sworn by PW3 who was the Plaintiff's Chief Finance and Revenue Officer. In the said Verifying Affidavit, the said officer, PW3, stated on oath as follows:

***“a. That I am employed by the Machakos County Government, the Plaintiff herein as the County of Machakos Chief Finance and Revenue Collector.***

***b. That I am acquainted with the claim therefore competent and duly authorized to swear this Affidavit on behalf of the Plaintiff herein.***

***c. That I have read and understood the contents of the Plaintiff filed by Kabaka & Associates Advocates and state that the contents therein are correct.”***

56. Both PW2 and PW3, who are senior employees of the Plaintiff, were aware of the filing of the suit. Indeed, PW3 swore an Affidavit allowing the firm of Kabaka & Associates Advocates to file the suit on behalf of the Plaintiff.

57. Order 4 Rule 1(2) of the Civil Procedure Rules provides that a Plaintiff must be accompanied by an Affidavit sworn by the Plaintiff to verify the correctness of the averments contained therein. This Rule was introduced to avoid a situation similar to the one that the Plaintiff is now raising. Indeed, once the Plaintiff or its officers swear such an Affidavit, they cannot claim that the suit was filed without their instructions.

58. PW3 having sworn the Verifying Affidavit, and PW2 having given to the 2<sup>nd</sup> Respondent instructions to recover rates from the Defendant, the Plaintiff is estopped from denying that the 2<sup>nd</sup> Respondent did not have instructions to file the suit on its behalf.

59. Indeed, after the suit was filed, the Chief Officer of the Plaintiff in charge of Lands (PW4) continued to communicate with the 2<sup>nd</sup> Respondent on the status of the suit. In her letter dated 19<sup>th</sup> April, 2016, PW4 informed the 2<sup>nd</sup> Respondent that the Plaintiff was negotiating to settle the matter out of court with the Defendant. PW4 further informed the court that the Plaintiff would wish *“to maintain the decorum of Client and Advocate relationship in future.”* Indeed, none of the letters that the Plaintiff's officers wrote during the pendency of the suit suggested that the 2<sup>nd</sup> Respondent filed the suit without the Plaintiff's instructions. Estoppel, which is a legal doctrine that bars or prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true, is applicable in this case.

60. Consequently, and on the basis of the evidence before me, I find that the Plaintiff instructed the firm of Kabaka & Associates Advocates to file this suit. The Plaintiff is estopped from running away from that position.

61. The final issue to determine is whether the filing of this suit by the 2<sup>nd</sup> Respondent was contrary to the provisions of the Public Procurement and Assets Disposal Act, 2015 and the Leadership and Integrity Act, and whether the filing of the suit by the 2<sup>nd</sup> Respondent gave rise to a conflict of interest. The evidence before this court shows that Mr. Boniface Kabaka was appointed by the Plaintiff as the Legal and Strategy Adviser. According to the Appointment Letter dated 1<sup>st</sup> August, 2014, the position allowed him to *“advise the Governor and the County Executive Committee on all legal matters.”* He was the *“Head of the County Law Office as County Attorney.”*

62. The penultimate paragraph of the letter of Appointment dated 1<sup>st</sup> August 2014 provided as follows:

***“Please note that your appointment is not and may not be deemed as a contract of employment for purposes of the Employment Act and does not therefore preclude yourself and your law firm from undertaking your normal legal practice.”***

63. The letter of appointment therefore provides that Mr. Kabaka was not an employee of the Plaintiff, meaning that he was retained as a Consultant or a Legal and Strategy Adviser of the Governor and the County Executive Committee for a period of three (3) years which was renewable.

64. Even if the said Mr. Kabaka was an employee of the Plaintiff, the letter instructing his firm to recover the rates was vide a letter dated 25<sup>th</sup> July, 2014, a few days before the Letter of Appointment. The Letter of Appointment further allowed him to continue with his legal practice, over and above the services he was rendering the Plaintiff as a Legal and Strategic Adviser. There was therefore nothing illegal with the 2<sup>nd</sup> Respondent filing the Plaintiff dated 18<sup>th</sup> August, 2015 while working for the Plaintiff as a Legal and Strategic Adviser.

65. In any event, the officers of the Plaintiff were aware that it is the firm of Kabaka & Associates Advocates that was filing the suit on behalf of the Plaintiff. The same officers were aware that one of the partners in the said firm had been retained as the Legal Adviser of the Plaintiff. Why did they instruct the said firm to file the suit if at all they believed that their actions were unlawful? The said senior officials of the Plaintiff cannot breathe hot and cold at the same time.

66. Considering that the 2<sup>nd</sup> Respondent was instructed to recover rates on behalf of the Plaintiff before he was appointed as a Legal Adviser of the Plaintiff, and in view of the fact that there is no evidence to show that he is the one who instructed or participated in the instruction of

his firm to file the Complaint, the issue of conflict of interest pursuant to the provisions of the Leadership and Integrity Act does not arise.

67. The Procurement and Assets Disposal Act, 2015 came into force on 7<sup>th</sup> December, 2016. By that time, the 2<sup>nd</sup> Respondent's firm had already been appointed to recover rates on behalf of the Plaintiff and had filed the current suit. The provisions of the said Act are therefore not applicable in this matter.

68. In any event, considering that Mr. Kabaka did not give himself or his law firm instructions to institute this suit, the people who should be held liable, if at all there was a breach in procuring the 2<sup>nd</sup> Respondent's legal services, are the ones who should be held liable. The 2<sup>nd</sup> Respondent cannot be denied his legal fees just because the Plaintiff's employees did not comply with the provisions of the Public Procurement and Assets Disposal Act, 2015.

69. The analysis of the evidence before me leads to only one conclusion: the 2<sup>nd</sup> Respondent is entitled to his fees in respect to this suit. If the Plaintiff is of the view that the suit is marred with illegalities, then it is at liberty to withdraw the same. Either way, they must settle the 2<sup>nd</sup> Respondent's fees pursuant to the provisions of the Advocates Act and that Advocates Remuneration Order.

70. For the reasons I have given above, the Application dated 17<sup>th</sup> April, 2018 is dismissed with costs to the 2<sup>nd</sup> Respondent.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 5<sup>TH</sup> DAY OF APRIL, 2019.**

**O.A. ANGOTE**

**JUDGE**