



**REPUBLIC OF KENYA**

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

**ELC CASE NO 574 OF 2015**

**JOYCE NZISA.....1 ST PLAINTIFF**

**MONICA NDUNGE MWONGELA.....2 ND PLAINTIFF**

**CONNIE MBITHE MUIA.....3 RD PLAINTIFF**

**MARY MUSUKI MUDACHI.....4 TH PLAINTIFF**

**JOSEPH LOMBA MWONGELA.....5 TH PLAINTIFF**

**=VERSUS=**

**AMUGA & COMPANY ADVOCATES.....DEFENDANT**

**REGISTERED TRUSTEES**

**MATHARE TRADES UNION.....INTERESTED PARTY**

**RULING**

1. On 26/6/2015, the plaintiffs, through Michael Owuor & Co Advocates, brought a plaint dated 19/6/2015 contending that the defendant had fraudulently inflated their bill of costs dated 14/1/2014 and had, through falsification, obtained a misleading certificate of costs against the estate of the late George Zakayo Mwangela. They itemized the following particulars of fraud against the defendant:

***a) Mr Amuga, in his Bill of Costs stated “the assets recovered for the Respondents (meaning Plaintiff) included;***

***(i) Land Reference Number 6845/12 – Embakasi valued at Kshs 460,000,000 which he knew or ought to have known was fictitious or non-existent false.***

***9. There was no recovery of Land Reference Number 6845/12 from the said interested party or any other person.***

***b) The advocates omitted making search***

***c) The advocates knew or ought to have known that there was no title deed in favour of the estate and that value who never bothered to verify ownership.***

***d) The advocate is relying on technicality that the Certificate of Costs of 4th August, 2014 is final because of the Advocates Remuneration Order.***

***e) The advocate seeks overrating the bills of costs by adding future certificate of costs in his Notice of Motion dated 27th May, 2015.***

***f) The advocates filed a notice of motion on 27th May 2015 to add the extraneous matters such as those of Daniel Muendo William and Geoffrey Ochieng Walala on whose behalf he now uses to execute without filing suit.***

***g) The certificate of costs dated 4th August, 2014 in Misc Application Number 12 and 2014 could not have been done by the court if true facts were not concealed.***

2. Consequently, the plaintiffs sought the following orders against the defendant in this suit:

a) Declaration that Land Reference Number 6845/12 Embakasi was not in the name of George Zakaya Mwangela since 1973 or any other time.

b) That the Certificate of costs dated 4th August, 2014 be set aside or altered. (sic)

c) That in the alternative, should the Honourable Court not be pleased to set aside the Certificates of costs dated 4th August 2015, then the defendant be allowed to attach and sell Land Reference Number 6845/12 Embakasi to recover only his legitimate decretal amount. (sic)

d) Costs

e) Such further other relief court thinks just. (sic)

3. On 19/8/2015, the defendant filed a statement of defence in which they denied the plaintiffs' claim and contended that the suit herein offended the provisions of Sections 7 and 34 of the Civil Procedure Act because it raised issues concerning taxation of costs and execution of decree arising from judgment on taxed costs which had been determined in Nairobi High Court Miscellaneous Application Number 12 of 2014. The defendant contended that besides being *res judicata*, the suit herein was a collateral attack on the certificate of taxation issued against the plaintiffs and the resultant judgment entered against them in favour of the defendant. The defendant further stated that the suit offended the mandatory requirements of Order 4 rule 1(2) of the Civil Procedure Rules because only one of the plaintiffs had sworn a verifying affidavit and the deponent of the verifying affidavit did not exhibit any authority from the other plaintiffs.

4. Subsequently, the defendant brought a notice of motion dated 24/2/2016 seeking an order striking out the suit herein on the grounds that: (i) the suit offended Section 7 of the Civil Procedure Act; (ii) the suit was a collateral attack on the certificate of taxation issued against the plaintiffs and the judgment entered against them in Nairobi High Court Misc Civil Application Number 12 of 2014; (iii) the suit offended the provisions of Order 4 rule 1 of the Civil Procedure Rules; and (iv) the suit was frivolous and vexatious. The said application is the subject of this ruling.

5. The application was supported by an affidavit sworn by Paul Amuga. The case of the defendant was that the suit herein arose from a dispute between his law firm and the plaintiffs concerning fees payable to the law firm for services rendered in Nairobi High Court Succession Cause No 162 of 1979. He deposed that the plaintiffs challenged the taxing officer's decision through a reference and the reference was dismissed after a full hearing and judgment was thereafter entered in favour of the defendant. He deposed that the plaintiffs were trying to re-open litigation over fees payable to the firm, which issue was dealt with in Nairobi High Court Miscellaneous Application Number 12 of 2014. He further deposed that this suit was defective because the verifying affidavit was sworn by one of the plaintiffs without authority from the other plaintiffs.

6. The 1st plaintiff opposed the application through her replying affidavit sworn on 2/3/2018. She deposed that Miscellaneous Application Number 12 of 2014 was full of non-disclosure and falsehoods as the 1st defendant herein included non-existent assets in his bill of costs, resulting into an exorbitant bill of costs. She added that she had preferred an appeal against the decision of the High Court in Miscellaneous Application Number 12 of 2014. She further deposed that the 4th plaintiff had deposed in her affidavit that she swore the verifying affidavit on her own behalf and on behalf of the other plaintiffs. Lastly, she challenged Mr Paul Amuga's supporting affidavit on the ground that he did not attach and written instrument authorizing him to swear the affidavit.

7. The 2nd and 3rd plaintiffs opposed the defendant's application through grounds of opposition dated 26/11/2018. Firstly, they contended that the High Court did not deal with any triable issues while handling Miscellaneous Civil Application Number 12 of 2014. Secondly, they contended that the issue as to whether or not George Zakayo Mwangela was the registered proprietor of Land Reference Number 6845/12 had never been considered or litigated upon by a court of competent jurisdiction.

8. The application was canvassed through written submissions. The applicant (defendant) submitted that the plaintiffs' cause of action was anchored on the decision of the taxing officer made on the defendant's bill of costs through which the taxing officer awarded the defendant Kshs 11,894,926. He added that all the issues raised in the plaint are issues which were fully canvassed in Miscellaneous Application Number 12 of 2014 and both the taxing officer and Lady Justice Kamau had made their determinations on them after taking everything into consideration. The applicant further submitted that it was clear from the prayers in the plaint that the plaintiffs sought an order to set aside the certificate of costs dated 4/8/2014, the same prayer which was sought in the plaintiffs' Reference in Miscellaneous Civil Application Number 12 of 2014.

9. In response, the 1st plaintiff submitted that the issue for determination in the application was whether the suit herein was *res judicata*. She outlined the verbatim provisions of Section 7 of the Civil Procedure Act and contended that the issues in this suit had not been heard and determined by a court of competent jurisdiction. She added that the issues raised in this suit required to be canvassed in a full hearing.

10. The 2nd and 3rd plaintiffs submitted that the following three issues fell for determination: (i) whether the suit herein offended Section 7 of the Civil Procedure Act; (ii) whether the suit herein offended Order 4 rule 1 of the Civil Procedure Rules; and (iii) whether the suit herein was an abuse of the court process. They argued that the main issue in this suit was whether George Zakayo Mwangela was the registered proprietor of Land Reference Number 6845/12 and no court of competent jurisdiction had directly and substantially dealt with the said issue. It was further submitted that lack of written authority under Order 4 rule 1(3) of the Civil Procedure Rules did not make the suit herein void; it made it incompetent but the incompetence was not fatal. They added that the incompetence could be regularized through the filing of compliant verifying affidavits. Reliance was placed on the decision in the case of **Hezekia Kipkorir Maritim & 10 Others v Philip Kipkoeh Tenai & 2 others (2016)eKLR**. Lastly, it was submitted that the suit herein was not an abuse of the process of the court.

11. I have considered the application together with the replying affidavits and grounds of opposition filed in response to the application. I have also considered the parties' respective submissions, the relevant legal frameworks, and the jurisprudential principles applicable to the key issues in the application. Two key issues fall for determination in the application. The first issue is whether the suit herein is *res*

*judicata*. The second issue is whether the suit herein is incurably defective for failure to comply with the requirements of Order 4 rule 1 of the Civil Procedure Rules. I will deal with the two issues sequentially in the above order.

12. The first issue is whether the suit herein is *res judicata*. The defendant contends that the issues which the plaintiffs have raised in this suit are issues which they raised in Nairobi High Court Miscellaneous Civil Application Number 12 of 2014 and which were adjudicated upon and determined by the taxing officer of the court. It is further contended by the defendant that upon determination of the issues by the taxing officer, the plaintiffs lodged a reference under Section 51(2) of the Advocates Act and the High Court similarly considered the same issues and made a determination thereon.

13. The statutory framework on the doctrine of *res judicata* is contained in Section 7 of the Civil Procedure Act which provides as follows:-

***“7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court”***

14. The Court of Appeal gave a rendition of the doctrine of *res judicata* in **John Florence Maritime Services Limited & Ano. Vs Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) e KLR** in which it cited verbatim the following paragraph in **Henderson Vs Henderson (1843) 67 ER 313**.

***“.……where a given matter becomes the subject of litigation in any 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 a matter which might have been brought forward, as part of the subject in contest, but which was not brought, 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 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……”***

15. The rationale behind the doctrine of *res judicata* was outlined in the above case as follows:-

***“the rationale behind res judicata is based on the public interest that there should be an end to litigation over the same matter. Res judicata ensures the economic use of the court’s limited resources and timely termination of cases. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law.”***

16. I have carefully gone through the plaint which constitutes the plaintiff’s statement of claim in this suit. The gist of the claim is contained in paragraphs 4, 5, 6, 7 and 8 of the plaint which contain the following verbatim averments:

***4. By a certificate of taxation dated 4th August, 2014 the Honourable D. W Nyambu, the Deputy Registrar, allowed Ksh. 11,894,926/= to the defendants Advocate for professional services rendered to the Estate of George Zakayo Mwangela being P & A No 162 of 1979 (Nairobi) in which the plaintiffs are beneficiaries.***

***5. At the time of the said certificate, all plaintiffs had no correct or sufficient information as to the registered ownership of Land Reference Number 6845/12 - Embakasi which was valued at Ksh 75,000/- in 1978 when the Interested Parties had since been registered as owners of the said property.***

***6. There was discovery by the plaintiff that the deceased George Zakayo Mwangela was never registered as the owner of the said Land Reference Number 6845/12 Embakasi, at any time as the legal or equitable owner and his ownership arose because of the omission of the defendant to make a search.***

***7. By an affidavit sworn by the first plaintiff in doubt of true position to the effect that Land Reference Number 6845/12 belonged to the Estate of George Zakayo Mwangela, deceased. Mr Amuga had a duty to make a search by himself or through his Valuer to verify by search at the Land Registry. He sent his Valuer to value Land Reference 6845/12 it at Kshs 460,000,000/= ( about half a billion) the estate was actually inflated from about 20,000,000 without seeing the Title Deed.***

***8. Mr Amuga & Co Advocates intended to fraudulently inflate the taxed Bill of Costs on the basis that the estate was valued at about half a billion Kenya shillings. Mr Amuga knew or ought to have known that the Client/Advocate Bill of Costs dated 14th January, 2014 was falsified and the consequent certificates of costs is and still remains misleading***

17. The verbatim reliefs sought by the plaintiffs in this suit are as follows:

***a) Declaration that Land Reference Number 6845/12 Embakasi was not in the name of George Zakaya Mwangela since 1973 or any other time.***

***b) That the certificate of costs dated 4th August, 2014 be set aside or altered.***

***c) That in the alternative, should the Honourable Court not be pleased to set aside the certificates of costs dated 4th August, 2015, then the defendant be allowed to attach and sell Land Reference Number 6845/12 Embakasi to recover only his legitimate***

*decretal amount.*

*d) Costs*

*e) Such further other relief court thinks just.*

18. It is apparent from the above paragraphs of the plaint and from the reliefs sought in this suit that this suit challenges the award made in favour of the defendant by the taxing officer of the High Court in Nairobi High Court Miscellaneous Civil Application Number 12 of 2012. Indeed, the 1st defendant admits in paragraph 6 of her replying affidavit that the said suit existed but contends that the defendant herein included non-existent assets in his bill of costs and the inclusion of the non-existent assets resulted in an exorbitant bill of costs. The gist of the plaintiffs' claim in this suit is that Land Reference Number 6845/12 should not have been reckoned as part of the late George Zakayo Mwangela's estate when taxing the defendant's bill of costs in Miscellaneous Civil Application Number 12 of 2014.

19. From the materials annexed to the affidavit of Paul Amuga, it is clear that Miscellaneous Application Number 12 of 2014 was considered and a judicial decision was rendered on it. The plaintiffs in this suit subsequently lodged an appeal by way of a reference dated 17/10/2014 under Section 51(2) of the Advocates Act. Justice Kamau considered the reference and rendered a ruling on 23/2/2015 in which she dismissed the plaintiffs' reference. Four months after that, the plaintiffs brought this suit seeking the above orders.

20. It is therefore clear from the evidential materials placed before this court that the dispute in the present suit is whether or not Land Reference Number 6845/12 should have been reckoned as part of the estate of the late George Zakayo Mwangela when taxing the defendant's bill of costs. That issue was canvassed before the taxing officer and similarly canvassed before Justice Kamau. The court made findings unfavourable to the plaintiffs. That being the position, it follows that the present suit is *res-judicata* and this court has no jurisdiction to entertain this suit or purport to undo what the taxing officer and the Judge of the High Court, Lady Justice Kamau, did. My finding on the first issue therefore is that the suit herein is *res-judicata*.

21. The second issue is whether the suit herein is incurably defective for failure to comply with the requirements of Order 4 rule 1 of the Civil Procedure Rules. The defendant contends that the 4th plaintiff alone swore the verifying affidavit in support of the Plaint and the verifying affidavit was not accompanied with written authority from the other plaintiffs.

22. Order 4 rule 1 (1), (2) and (3) contain the following legal framework on the mandatory documents which must accompany a plaint.

**1) (1) *The plaint shall contain the following particulars—***

***(a) the name of the court in which the suit is brought;***

***(b) the name, description and place of residence of the plaintiff, and an address for service;***

***(c) the name, description and place of residence of the defendant, so far as they can be ascertained;***

***(d) the place where the cause of action arose;***

***(e) where the plaintiff or defendant is a minor or person of unsound mind, a statement to that effect; and***

***(f) an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint.***

***(2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule1(1)(f) above.***

***(3) Where there are several plaintiffs, one of them, with written authority filed with verifying affidavit, may swear the verifying affidavit on behalf of the others.***

23. One of the considerations which informed the legislation of the above legal framework was the need to prevent abuse of the court process by litigants who file multiple suits in respect of the same cause of action. Another consideration was the need to ensure that every party who is named as a plaintiff owns the pleadings and suit initiated in their names.

24. In the present suit, the verifying affidavit was sworn by Mary Musuki Mudachi but the written authority of the other plaintiffs was not filed. No remedial measures have been taken to regularize the omission. In my view, in the absence of evidence of any prompt remedial measures taken to regularize the non-compliance, this court has no option but to uphold the defendant's objection. I would have taken a different approach to this issue had the plaintiffs demonstrated prompt measures taken to regularize the non-compliance. Up to this stage, they have not made any attempt to comply with the mandatory requirements of the law. My finding on the second issue therefore is that the suit herein is fatally defective for non-compliance with the requirements of Order 4 rule 1 of the Civil Procedure Rules.

25. Before I pronounce the disposal order, I will comment on an issue which the 1st plaintiff raised in paragraph 3 of her replying affidavit. She contended that Mr Paul Amuga did not attach to his affidavit any document to show that he was authorized to swear the supporting affidavit. It is the plaintiffs who brought this suit. They elected to sue M/s Amuga & Compnay Advocates as the defendant. They made allegations against a Mr Amuga in various paragraphs in the plaint. In paragraph 1 of the supporting affidavit, Mr Amuga

deponed that he was an advocate of this court practising as such in the firm name and style of M/s Amuga and Company Advocates, the defendant/applicant herein. He added that he had authority to swear the affidavit. In my view, of the absence of contrary evidence by the plaintiffs demonstrating that a person other than Mr Paul Amuga practised under the business name, the contention by the plaintiffs regarding Mr Amuga's capacity to swear the affidavit has no merit

26. The totality of the above findings is that the defendant's notice of motion dated 24/2/2016 has merit and the same is allowed in terms of prayer 1. Consequently, the suit herein is accordingly struck out. The plaintiffs shall bear costs of the application and the entire suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF OCTOBER 2019.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Serunjoji holding brief for the Ms Caro for the 2nd and 3rd Plaintiffs

Joyce Nzisa – 1st Plaintiff – Acting in person

Court Clerk - June Nafula