IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & MUSINGA, JJ.A)

CIVIL APPEAL NO. 100 OF 2017

BETWEEN

SALAMA BEACH HOTEL LIMITED .....1ST APPELLANT

HANS JUERGEN LANGER .....2ND APPELLANT

TOURISTIC AND TECHNOLOGY

GMBH (TOUR AND TECH GMBH) .....3RD APPELLANT

ACCREDO AG .....4TH APPELLANT

AND

CHRISTOPHER ORINA KENYARIRI T/A

KENYARIRI & ASSOCIATES ADVOCATES.....RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Malindi (Korir, J.) dated 28th September, 2017

in

H.C.C.C No. 20 of 2015.)

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JUDGMENT OF THE COURT

1. The appeal before us is a classic example of how litigants can make a mountain out of a molehill. The genesis of the dispute between the parties revolved around the determination of the legal fees due to the respondent on account of services rendered to the 1st and 2nd appellants. The rather straightforward issue was convoluted by the parties who kept on filing a plethora of applications upon applications.

2. Ultimately, on the basis of the determination of the said applications, the High Court (**Korir, J.)** was called upon, through yet another application dated 11th November, 2015, filed at the instance of the respondent, to consider the competency of the suit (H.C.C.C No. 20 of 2015) subject of this appeal. In a ruling dated 28th September, 2017 the learned Judge found that the suit was *res-judicata* and struck it out. It is that decision that has instigated the appeal before us which turns on one fundamental issue, that is, whether the suit in question was *res-judicata* and amenable to being struck out.

3. The doctrine of *res-judicata* is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and that an individual should not be harassed twice with the same account of litigation. See ***Mulla, the Code of Civil Procedure, 16th Ed. Vol. 1 pg 161*** and the Supreme Court's decision in the case of **Kenya Commercial Bank Limited vs. Muiri Coffee Estate Limited & Another [2016] eKLR**.

4. The essence of the doctrine was succinctly captured by this Court in ***John Florence Maritime Services Limited & another vs. Cabinet Secretary for Transport and Infrastructure & 3 others*** **[2015] eKLR** as follows:

"The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the

interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. 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. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably."

5. Before delving into the merits of the appeal, a synopsis of the salient facts will put the issue under consideration in perspective. As we stated in the opening paragraph of this judgment, the parties' relationship was that of advocate/client. It seems that in the year 2010 the 1st, 2nd, and 4th appellants engaged the respondents to offer legal services when need arose. Their relationship was amicable until they fell out for some reason on or about the year, 2013. It is at that point that the respondent filed a total of 11 bills of costs against the appellants seeking taxation of legal fees it deemed as due from the appellants. Apparently, the bills were taxed but the parties were not happy with the decision of the taxing officer for one reason or another, hence they filed references challenging the same at the High Court.

6. Of relevance, is Misc. Applic. No. 16 of 2013 which was consolidated with other references challenging the taxing officer's decision. It appears that Angote, J. who was seized of the said references allowed the same on 20th February, 2014 and remitted the bills back to the taxing officer for re-taxation. He directed the taxing officer to deduct any amount which the appellants proved as having been paid to the respondent from the taxed costs. The taxing officer, Honourable Gicheha, taxed the bills once again and like the first time, the parties disagreed with her decision thus filed references before the High Court.

7. In particular, one of the issues raised by the 1st and 2nd appellants (who were some of the respondents in the references) was that the taxing officer had not considered the payments made by the appellants in computing the fees due to the respondent. In the appellants' estimation, they had overpaid the respondent, a fact which the taxing officer failed to take note of. Towards that end, **Angote, J.** in a ruling dated 26th

September, 2014 observed:

"In my Ruling of 20th February, 2014, I directed the taxing officer to deduct the amount that had been paid to the Applicant as a retainer and or deposit from the taxed instruction fees.

In the same Ruling, I directed that both parties were at liberty to produce books, papers and documents, to ascertain their respective claims.

The record shows that on 18th March, 2014, the taxing officer allowed the Respondent to file documents to support the claim of having paid the Applicant his legal fees. Any payments that had been paid by the Respondents were to be deducted from the final figure of the taxed amount.

The Respondents filed an Affidavit and annexed the documents showing what had been paid to the Applicant. The Applicant filed a response and denied that he had been paid any money by the Respondents.

In her Ruling, the taxing officer considered the documents that were produced by the Respondents to support the claim that they had indeed paid the Applicant as follows;-

'The Respondent objection is that he has paid instruction fees in full. He has availed copies of receipts to support the same which after calculating came to a total of Ksh.5,784.550/-'

That is the amount that the taxing officer found that the Respondents had paid to the Applicant. The taxing officer proceeded to deduct that figure from the final taxed amount which was Ksh.6,358,309.05/-. The taxing officer found that the amount due to the Applicant was Ksh.573,759.05.

The taxing officer also considered the issue of whether the Respondents imported for the Applicant a land cruiser VX costing JPJ 2,320,000.

…

After analysing the affidavits, the taxing officer held as follows;-

'The Respondent has availed an agreement which allegedly imply that there was a transaction between him and the Respondent. Unfortunately the agreement annexed in the said affidavit does not appear to be signed though it is witnessed. However, even if it was signed the only amount I would have taxed off is JPY 1, 160,000 and this is the payment accounted for by the agreement. There is no evidence that the amount in the annexed schedule even went towards the purchase of the Applicant's vehicle.'

…

The agreement was signed on behalf of the lender in the presence of a Mr. Martin Khaemba. There is no indication that the Applicant signed the said agreement. Consequently, the taxing officer cannot be faulted for disregarding that document." *[Emphasis added]*

8. In the end, Angote, J. issued the following orders:

> ***a) The Applicant's Chamber Summons dated 14th June, 2014 is hereby allowed in respect to instruction fees payable on the Counter claim in Miscellaneous Application number 17 of 2013 only. The payable instruction fees on the counter claim is Kshs.1,226,500 which shall be increased by half less VAT. The said amount shall then be added on the already taxed bill of costs.***
>
> ***b) The other prayers in the Applicant's Chamber Summons dated 14th June, 2014 are hereby dismissed.***
>
> ***c) The Respondents' Chamber Summons dated 25th June, 2014 in respect to Miscellaneous Application number 15 of 2013 is allowed. The payable instruction fees is Kshs.79, 689 and not Kshs.330, 510. The said amount shall be increased by a half less VAT.***
>
> ***d) The other prayers in the Respondents' Chamber Summons dated 25th June, 2014 are hereby dismissed.***
>
> ***e) Each party shall bear their own costs.***

9. That was not the end of the matter since the appellants herein had filed an Originating Summons (OS) being Misc. Applic. No. 16 of 2014 on 26th June, 2014. They prayed for *inter alia*, an order directing the respondent to produce bank slips, receipts and any other documents in respect of all monies received from the appellants. The application was premised on the grounds that the taxing officer had assessed the monies paid to the respondent as Kshs.5,134,550 yet the appellants had jointly paid the respondent close to Kshs.14,000,000. Since the taxation, the appellants have been able to retrieve documents evidencing the said payments which were over and above the taxed costs. The appellants also indicated they were intending to challenge the taxation based on the documents they retrieved.

10. Opposing the application, the respondent intimated that the High Court lacked jurisdiction to entertain the same and that the orders sought could only be issued by the taxing officer during taxation. He also contended that the application was *res-judicata*.

11. It would appear that Angote, J. considered the OS and the references around the same time since he also delivered his ruling on the OS on even date as the references. He rendered himself as follows:

> ***"As I have already stated in my Ruling of even date in Malindi Miscellaneous Application Number 16 of 2013, the taxing officer allowed the Applicants herein to file documents in support of their claim that they had paid to the advocate over and above what they had agreed upon as legal fees or as taxed.***
>
> ***…***
>
> ***After analysing the documents that were provided by the clients, the taxing officer found that indeed the clients had paid to the advocate Kshs.5,784,550 which she set off against the taxed amount. However, she rejected to admit in evidence an agreement showing that the Applicants had paid for and imported for the advocate a land cruiser VX limited costing JPY 2,320,000.***
>
> ***In my Ruling of even date, I agreed with the taxing officer that she could not have relied on the said agreement because it was not signed by both parties and there was no other evidence that indeed JPY 2,320,000 had been paid by the client.***
>
> ***…***
>
> ***For the court to make an order for the delivery by the advocate of a cash account or to produce bank papers and documents, or money, the client has to show that indeed the money being claimed was actually paid to the advocate.***
>
> ***The taxing officer of this court has already determined, on the basis of the documents that were produced by the clients/Applicant's, the amount of money that was paid to the advocate. It might be true that as at the time of taxation, the Applicants/clients were not in possession of all the documents to prove their claim, but that is water under the bridge, unless an application for review is done and allowed by the taxing officer.***
>
> ***Looking at summary of payments on the letter head of the 3rd Plaintiff purportedly made by the 1st Plaintiff for the purchase of a car on behalf of the advocate, it would appear that the contentious amount of Kshs.7,874,799 was paid by the client directly to T&T Tour & Tech Company of Germany and not to the Advocates account. I do not see how relevant an order for the production of the advocate's cash account and bank will be for the court to say with certainty that the advocate received the said money.***
>
> ***Furthermore, there is no evidence that the said vehicle was ever imported and registered in the name of the Defendant/advocate after the client paid for it.***
>
> ***In the circumstances, the order being sought by the Applicants cannot be granted at this stage. The Applicants may consider pursuing their claim against the Defendant in an ordinary suit, if they so wish once they have their document together. The Application dated 25th June, 2014 is therefore dismissed with costs."***

12. Perhaps taking cue from the aforementioned holding, the appellants filed a notice of motion application on 15th December, 2014 in Misc. Applic. 16 of 2013 this time round asking for amongst other orders:

a) Stay of execution of all proceedings pending the determination of the application.

b) Review and/or setting aside of the taxing officer's decision on the amount paid by the appellants.

c) Review and setting aside of the resultant certificate of taxation issued on 12th November, 2014.

13. The application was anchored on firstly, Angote J.'s decision on the OS and secondly, that the appellants had retrieved documents which evidenced the payment of a sum of Kshs.7,874,799 to the respondent through purchase of a motor vehicle on his behalf. In response, the respondent vide a preliminary objection asserted that the application was *res-judicata* in light of Angote's ruling dated 26th September, 2014; and that the High Court had no jurisdiction to entertain the application under the ***Advocates Remuneration Order***.

14. In regard to that application, Angote, J. in a ruling dated 17th April, 2015 held:

> ***" … I held that the issue of whether the client has additional documents that were not placed before the taxing officer was 'water under the bridge'. The application for review of the decision of the taxing officer on the grounds that the clients had additional documents which they wanted the taxing officer to consider could only be entertained by the taxing officer herself and before the taxing officer delivered her ruling and certainly not by this court.***
>
> ***Having not presented all the documents before the taxing officer, even after being given an opportunity to do so, the clients cannot at this stage claim that this court should review and/or set aside the ruling of the taxing officer so as to allow them to produce the same documents in evidence.***
>
> **…**
>
> ***It therefore does not matter, as alleged by the clients/applicants, that they have now come across documents showing that indeed the advocate has been paid his legal fees in full. The provisions of Order 45 of the Civil Procedure Rules are not applicable in this case.***
>
> ***In the absence of a competent reference before this court, I find and hold that I do not have the requisite jurisdiction to entertain an application for review or setting aside the Certificate of Costs issued on 12th November, 2014 or the taxing officer's decision of 5th June, 2014.***
>
> ***For those reasons I allow the advocates notice of preliminary objection and dismiss the clients/applicants' application …with costs."***

15. Undeterred by the abovementioned rulings, the appellant filed H.C.C.C No. 20 of 2015, the subject of this appeal, on 25th May, 2015 against the respondent. Their cause of action was to the effect that during the course of the advocate/client relationship with the respondent they had paid fees to the tune of almost Kshs.14,000,000. Nonetheless, the taxing officer in Misc. Applic. No. 16 of 2013 erroneously found that the appellants had only paid Kshs.5, 134,550. Upon discounting the said amount a certificate of costs of Kshs. 2,271,387.95 was issued in favour of the respondent with respect to the bills thereunder. Cumulatively, the total amount taxed as due from the bills filed by the respondent was Kshs.5,034,095.95. The appellants felt that they had paid over and above the taxed costs and were entitled to reimbursement. It is on that basis that they sought several orders.

16. As it had become the norm, the appellants filed an application in the said suit seeking stay of execution of the taxation proceedings pending the hearing and determination of the suit. They also urged the High Court to determine all questions relating to execution, discharge or satisfaction of the costs payable to the respondent. The application was predicated on more or less similar grounds as the suit. Resisting the application, the respondent raised a preliminary objection agitating that the High Court had no jurisdiction to entertain the application and the application was *res-judicata.* In declining to allow the application Chitembwe, J. by a ruling dated 19th June, 2015 stated:

> ***"The correct procedure is for the one who is claiming the sum of Ksh.7,847,799/= to sue the defendant separately. The taxed costs were not involving the 3rd plaintiff, Touristic and Technology GMBH (Tour & Tech GMBH): This party seems to have been introduced in this suit. The issue of taxation of costs has been dealt by the taxing master as well as by Justice Fred Ochieng, Justice Mumbi as well as by Justice Angote. This court cannot stay the execution proceedings that are based on the taxed costs in those suits on the basis that some amount paid by the 3rd plaintiff had not been taken into account. The taxed costs are not against the 3rd plaintiff. This court lacks jurisdiction to entertain the application. Further, the issue of costs between the parties has already been determined by the High Court and is therefore Res Judicata. Section 7 of the Civil Procedure Act, Cap 21 applies. The inclusion of the 3rd plaintiff in this matter does not change the situation as the amount allegedly paid by the 3rd plaintiff was also considered by Justice Angote."***

17. Following that ruling, it was the respondent's turn to file an application dated 26th June, 2015 wherein he sought the appellants' suit to be struck out for not disclosing a reasonable cause of action. His position was informed by the aforementioned rulings which he perceived to have made determinations that the issues of taxed costs and the production of documents were *res-judicata*. Furthermore, the respondent was of the view that the 3rd appellant lacked the requisite standing to institute the suit since it was not a party to the advocate/client relationship which gave rise to the dispute. As would be expected the appellants opposed the application.

18. Upon applying his mind to the diverse positions taken by the parties, **Chitembwe, J**. in a ruling dated 5th October, 2015 was reluctant to strike out the suit for the following reasons:

"Prayer (a) of the plaint is seeking a declaration that the defendant is indebted to the plaintiffs. Basically this court dealt with prayers (b) and (d) in relation to the prayer for stay of execution. Prayer (c) is seeking an order of account of the monies paid by the plaintiffs to the defendant. Prayer (e) seeks payment of any excess amount plus interest by the defendant. It is clear to me that apart from the two prayers that were affected by the preliminary objection, the rest of the prayers do disclose a reasonable cause of action. It is true that the court advised the plaintiffs to pursue their claim through a separate suit. This suit sufficiently deals with that issue. The plaintiffs can as well amend the plaint and plead the specific amount that was not taken into account by the defendant.

There is no need to strike out pleadings so that a party can file another suit. This suit is properly before the court. It is a simple claim by the plaintiffs to the effect that part of the money paid to the defendant was not accounted for. The defendant's costs were taxed. Although Justice Angote mentioned in passing the issue of these payments, there is no evidence that, that issue was dealt with by the taxing master or that the costs that were taxed did include those payments.

The defendant can simply file an account and show that indeed the taxed costs took into account the alleged payments or defend the suit and indicate that no such payment was made. That is a dispute which need to be resolved by the court. It cannot be dismissed at the outset.

Similarly, the fact that the 3rd plaintiff was not a party to the previous suits cannot act as a bar to the filing of this suit. The 3rd plaintiff is aligning itself with the other three plaintiffs. Once the matter is heard, the 3rd plaintiff will be expected to establish its connection with the other plaintiffs and if it made any payment to the defendant, it will be upon that plaintiff to establish the purpose and intent of those payments."

19. The learned Judge went on to issue the following order:

"From the pleadings, it is not specifically indicated how much the plaintiffs paid the defendant. The defendant's bills of cost have been taxed. The plaintiffs know how much is due to the defendant as per the taxed bills of costs. The prayer for stay of execution is spent. With regard to the prayer for production of statement of accounts, the plaintiffs are aware of what is being claimed by the defendant and what was paid. I do find that instead of striking out the plaint, I do order that the plaintiffs do amend their plaint under Order 2 rule 15 and categorically state what the plaintiffs paid to the defendant and what has been taxed against them in form of costs. This will enable the court to know the extent of the dispute as opposed to the manner in which the plaint has been drafted. The plaintiffs to file and serve an amended plaint as directed herein above within fourteen (14) days hereof."

20. Pursuant to the above order, the appellants amended their plaint specifically averring that the taxing officer had failed to take into account Kshs. 7,874,799 which had been paid by the 3rd appellant on behalf of the 1st and 2nd appellants. As such, the orders in the amended plaint were as follows:

a) A declaration that the defendant is indebted to the plaintiffs with regard to payments already made to the defendant by the plaintiffs.

b) The honourable court be pleased to issue an order of stay of execution in Nairobi Misc. Applic. No.769 and 770 of 2013, Nairobi Misc. Applic. No. 298, 299 and 300 and Malindi Applic. No. 16 (consolidated with Misc. Applic. Nos. 13,14,15,17,41 & 42) pending the determination of the suit.

c) An order that the defendant do account for the monies received from the plaintiffs jointly.

d) The honourable court be pleased to apply any and all the monies paid to the defendant by the plaintiffs for the satisfaction of the amounts awarded in Nairobi Misc. Applic. No.769 and 770 of 2013, Nairobi Misc. Applic. No. 298, 299 and 300 and Malindi Applic. No. 16 (consolidated with Misc. Applic. Nos. 13,14,15,17,41 & 42).

e) The defendant be compelled by an order of the honourable court to pay the outstanding balance of Kshs. 2,840,703.05 to the plaintiffs together with interest thereon.

f) Interest on (e) at the rate of ten percent (10%) per month on the lump sum interest until payment in full.

g) General damages.

h) Costs of the suit plus interest thereon.

21. Yet again the respondent filed an application dated 11th November, 2015 asking the High Court to strike out the amended plaint. The reasons being that the appellants had flouted the procedural rules of amending pleadings and had not filed the same within the local limits of where the respondent carries out his business. In a ruling dated 7th April, 2016 Chitembwe, J. dismissed the application on the grounds that it raised issues of technicalities.

22. Nonetheless, the respondent filed another application dated 5th June, 2017 basically seeking striking out of the appellants' suit. He premised this application on the grounds that the appellants claim was *res-judicata* and that the 3rd appellant lacked the proper standing to file the suit since it was not a party to the taxation proceedings.

23. The application was strenuously resisted by the appellants who contended that the said application in itself was *res-judicata* by virtue of the fact that the court had pronounced itself on several occasions on the issue of whether the suit was *res-judicata*. Nevertheless, the suit could not be struck out on the basis of misjoinder of the 3rd appellant, which the appellants denied. They maintained that the 3rd appellant's presence was integral for the just determination of the issues in dispute. As for the plea of *res-judicata*, the appellants' response was that the same was not applicable. This was because, according to them, the parties in the taxation proceedings and the suit were different. The suit was distinct from the references against the decision of the taxing officer, both of which were based on different causes of action.

24. It is the foregoing application that gave rise to the impugned ruling wherein the learned Judge (Korir, J.) apart from holding that the 3rd appellant was a necessary party also found that the suit was *res-judicata*.

25. At the plenary hearing, Mr. Ndegwa appeared for the appellants while Mr. Kenyariri appeared for the respondent. Counsel relied on the written submissions filed on behalf of the parties and also made oral highlights.

26. Rising to his feet, Mr. Ndegwa, argued that Chitembwe, J. made two rival findings in the ruling dated 19th June, 2015. In one breath, he expressed that the issue of costs had been determined by the High Court and was *res-judicata*. In another, he held that any amount claimed by the appellants against the respondent could be subject of an independent litigation. Be that as it may, the said learned Judge while considering the respondent's application dated 26th June, 2015, which sought the striking out of the suit for allegedly not disclosing a reasonable cause of action, also found that the suit was competently before the court. It is on the premise of that finding that the learned Judge went on to direct the appellants to amend their plaint.

27. Consequently, and in light of the foregoing, Mr. Ndegwa was at a loss as to why the learned Judge would strike out the suit in the manner he did.

What is more, as far as counsel was concerned, the respondent had not even sought or prayed for the court to make a finding that the appellants' suit was *res-judicata.*

28. Mr. Ndegwa took issue with what he considered as failure on the learned Judge's part to appreciate that the respondent's application by itself was *res-judicata*. In his opinion, Chitembwe, J. had considered the issues raised therein namely, locus standing of the 3rd appellant and whether the suit was *res-judicata*, on more than two occasions. He went on to argue that the learned Judge's findings were tantamount to him sitting on appeal against a decision by a court of concurrent jurisdiction.

29. Supporting the learned Judge's decision, Mr. Kenyariri, learned counsel for the respondent, deposed an affidavit setting out what he deemed as the pertinent facts of this appeal. Making reference to this Court's decision in ***Independent Electoral & Boundaries Commission vs. Maina Kiai & 5 Others*** **[2017] eKLR,** Mr. Kenyariri asserted that the suit as it were was *res-judicata*. Expounding on that proposition, counsel submitted that prayers (a)(c) & (e) which sought a declaration that the respondent was indebted to the appellants; production of accounts of monies paid by the appellants to the respondent; and reimbursement of amounts paid over and above the taxed costs to the appellants respectively, had been dealt with by Angote, J. in the ruling dated 17th April, 2015. Prayers (b) & (d) which relate to stay of the taxation proceedings were disposed by Chitembwe, J. vide the ruling dated 19th June, 2015. He added that no appeal was preferred against any of those decisions. As a result, prayers (f), (g), (h) & (i) with respect to interest and costs were automatically rendered *res-judicata*. Furthermore, the parties herein are the same and have litigated over the same issues.

30. Responding to the allegation that the learned Judge granted orders which had not been sought by his clients, Mr. Kenyariri contended that the application seeking striking out of the suit clearly depicted that it was predicated on ***Section 7*** of the ***Civil Procedure Act***. He urged us to dismiss the appeal which he believed was devoid of merit.

31. We have considered the record, submissions made by counsel and the law. It is common ground that the doctrine of *res-judicata* is delineated under ***Section 7*** of the ***Civil Procedure Act***, which provides that:-

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

32. It follows therefore, in determining whether a suit or application is *res-judicata*, whichever the case may be, all the elements outlined in ***Section 7*** must be satisfied conjunctively. That is:

> ***a) The suit or issue was directly and substantially in issue in the former suit.***
>
> ***b) That former suit was between the same parties or parties under whom they or any of them claim.***
>
> ***c) Those parties were litigating under the same title.***
>
> ***d) The issue was heard and finally determined in the former suit.***
>
> ***e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."***

See ***Independent Electoral & Boundaries Commission vs. Maina Kiai & 5 Others (supra)***.

33. Applying the above principles to the matter at hand, was the respondent's application dated 5th June, 2017 *res-judicata*? The application in question was anchored on the grounds that the appellants' suit was *res-judicata* and that 3rd appellant lacked the proper standing to institute the said suit? Were these grounds subject of determination in previous applications or suits? The answer to that question lies in the pertinent applications and the determinations thereof which we have endeavoured to set out in detail in the preceeding paragraphs.

34. In our view, the prayer with respect to the 3rd appellant's standing to institute the suit was raised by the respondent in its application dated 26th June, 2015, which sought the striking out of the appellants' suit on the grounds that it did not disclose a reasonable cause of action. However, our reading of the ruling dated 5th October, 2015 reveals that Chitembwe, J. steered away from making a finding on whether the 3rd appellant had *locus standi* and simply stated that the same would be considered at the hearing of the suit.

35. On the issue of *res-judicata*, we equally find that in as much as the same was raised by the respondent in the application dated 26th June, 2015, Chitembwe, J. did not make any definitive determination on the same. Furthermore, despite the respondent opposing the appellants' OS, application for review dated 15th December, 2014, and the application for stay of execution of taxation proceedings dated 25th November, 2015 on the ground of *res-judicata*, the objection was not in respect of the suit in question but with regard to the pertaining applications.

36. Consequently, we find that the issue of whether the suit was *res-judicata* had not been conclusively determined by any previous application or proceedings. Our finding is fortified by the sentiments of this Court in ***Suleiman Said Shabhal vs. Independent Electoral & Boundaries Commission & 3 others*** **[2014] eKLR** thus,

> ***"To constitute res judicata, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy."***

37. Having expressed ourselves as herein above was the suit *res-judicata*? Our answer to that question is a resounding yes. Why do we say so? As the learned Judge appreciated and correctly so, the references, the appellants' OS and the suit in issue related to the legal fees payable to the respondent on account of services rendered to the appellants.

Concomitant to that issue was whether the amounts which had been paid by the appellants had been factored in the taxation of the bill of costs.

38. We, like the learned Judge, are convinced that those issues were determined firstly by Angote, J in the ruling dated 26th September, 2014 wherein he observed that had he had directed the taxing officer to take into account payments which the appellants had proved in assessing the fees due. In that regard, he expressed that the taxing officer gave the appellants an opportunity to avail documents to substantiate their claim. Further, the taxing officer factored in the amounts which had been established as having been paid. Angote, J. further reiterated the same position in his ruling with respect to the OS when he found that the issue of production of additional evidence to substantiate the amounts paid by the appellants had been dealt with by the taxing officer and were, as he put it, 'water under the bridge'.

39. Similarly, Chitembwe, J. in declining to stay the taxation proceedings found that the issue of taxation and costs had been conclusively determined. Accordingly, we concur with the following findings by the learned Judge:

> ***"Angote, J. had directed the respondents herein who were the clients of the Applicant to place all the necessary material before the taxing master for the same to be taken into account during taxation. Any attempts to introduce evidence of alleged payments through this suit is indeed an abuse of the court process and in breach of the res judicata principle. Litigation must come to an end and attempts to litigate the same issues through surrogates cannot be accepted by the court.***
>
> ***The introduction of the 3rd Respondent as a plaintiff in this matter does not change the design of the respondents' claim. The fact that the respondents' claim is res judicata cannot be upset by bringing on board the 3rd Respondent. Litigating a concluded matter under surrogates or uploading more parties to a claim does not change the conclusion already reached by the court in the former trial. In any case, the 3rd Respondent was a party at some point in the taxation proceedings. The 3rd Respondent is therefore not a new party as such.…***
>
> ***Applying the stated law to the facts before me, it is clear that the respondents ought to have placed before the taxing master the evidence of the alleged payment of some money to the Applicant by the 3rd Respondent so that the amount could be taken into account during the taxation. The said payment was allegedly made on behalf of the 1st, 2nd and 4th respondents who were parties to the taxation proceedings and they must have been aware of such payments. Their attempt to claim a refund of the alleged payments through these proceedings amounts to reopening a matter that was adjudicated and determined by a court of competent and concurrent jurisdiction. In fact it is an attempt to appeal against the decision of Angote, J. The taxation of the bills of costs between the Applicant and the respondents is a matter that has been settled.***
>
> ***I am therefore in agreement with the Applicant that this suit touches on issues that have been litigated before a competent court by the same parties. This suit run afoul of Section 7 of the CPA. The Applicant's prayer that this court finds that this suit is res judicata is allowed. This suit is struck out with costs to the Applicant/Defendant."***

40. Accordingly, we find that the appeal lacks merit and is hereby dismissed with costs to the respondent.

Dated and delivered at Mombasa this 14th day of March, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

…….

JUDGE OF APPEAL

D. K. MUSINGA

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR