REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 5 OF 2015

JOHN MWANGI WANDETO.....……...……..…….APPELLANT

VERSUS

JAMES N. NDERI

T/A NDERI & KIINGATI ADVOCATES.....……...RESPONDENT

(An appeal against the Judgment and Decree of the Hon. R. M. Nyakundi, R.M. delivered on 28.4.2014 in Nyeri C.M.C.C. No. 227 of 2013)

JUDGMENT

This is an appeal against the decision of the Chief Magistrate in Nyeri C.M.C.C No. **227** of 2013 in which the appellant was sued by the Respondent for recovery of **Ksh. 22,000/=** , plus interests thereon and costs of the case being professional fees for legal services.

The Respondents' claim against the appellant in the lower court is enumerated in the plaint dated 18.6.2013 in which the Respondent, an advocate of the High court of Kenya, practicing as such in the name and style of **Nderi & Kiingati** advocates averred *inter alia* that on 3rd day of May 2013, the appellant and a one **John Mwangi Kihara** approached the Respondent for provision of legal services relating to sale and purchase of a parcel of land. Pursuant thereto, the appellant instructed the Respondent to conduct due diligence and prepare the requisite contract which was executed by the parties. The Respondent averred that both parties were to jointly pay his legal fees but they failed, which prompted the Respondent to demand his fees as provided for under the provisions of section **48** of the Advocates Act[1] (hereinafter referred to as the act).

In his defence in the lower court, the appellant averred that the agreed fees was **Ksh. 4,000/=** which was to be shared between the appellant and the vendor and that the Respondent declined to accept **Ksh. 2,000/=** being the appellants share.

At the hearing, the Respondent adopted the averments in the plaint and stated upon cross-examination that the agreed fees was **Ksh. 6,000/=** which the appellant refused to pay while the appellants evidence was that the Respondent had charged **Ksh. 6,000/=** which they bargained to **Ksh. 4,000/=** out of which the appellant was to pay **Ksh. 2,000/=** which he paid but the Respondent declined to accept insisting his fees was **Ksh. 6,000/=.** The appellant stated he left the Respondents office without the sale agreement and together with the vendor they prepared their own agreement and concluded the transaction. Subsequently, the Respondent sent a demand letter demanding **Ksh. 11,000/=** from each of one them, (from the appellant and the vendor), but subsequently the Respondent sued the appellant alone for the entire sum of **Ksh. 22,000/=.**

The vendor in the transaction in question also gave evidence in support of the appellant and his account was essentially similar to the appellants, while a one **Joseph Kamonji** testified that he referred the appellant to the Respondent for legal services pertaining to preparation of a sale agreement but subsequently the appellant informed him that they could not agree on legal fees, hence they prepared their own agreement.

I find it appropriate to emphasize the need for a trial court to properly identify the issues that fall for determination and determine the issues giving proper reasons. There is always a danger of leaving the real issues in controversy unresolved if the trial court identifies the wrong issues or treats un contested issues as the issues for determination as happened and leaves clearly contested issued undetermined. The learned magistrate in the impugned judgement identified the following issues for determination, namely; *if the appellant instructed the Respondent to offer legal services*, (this was not contested), *If legal services were offered to the defendant*,(this too was uncontested), *If the defendant paid for the legal services offered*, (this was not in issue at all), *If the legal fees agreed was for Kh. 4,000/=*, *If Ksh. 4,000 is the legal fees payable under the advocates Remuneration Rules.*

Its trite law that the issues as identified in a decision shall serve as the basis for the determination of the case. Accordingly it is important for the trial court to correctly identify the issues for determination and address the issues after carefully analysing the evidence and the law and give reasons for the decision. Identifying obviously wrong issues as I will point out shortly will most likely lead to a wrong determination and leave the real issues in the dispute unresolved. In Common Law legal systems a judicial decision is given in a *judgment* which has five aspects to it:-

a. a recitation of the *facts* of the case, i.e., an account of what happened;

b. an identification of the legal *issues*—the disputed question(s) of law—which the court is being asked to resolve;

c. the *reasoning* over the appropriate resolution of the issues;

d. the *ruling* resolving the issues put before the court, and

e. the *result* or outcome of the case, i.e., which party succeeded in the action;

Thus, it is important for the trial court to correctly identify the issues for determination so as to correctly address the dispute and resolve it. I have carefully examined the issues identified by the trial court as enumerated above and with tremendous respect, those are not the proper issues that arose from the dispute before the court. For example, it was not in dispute that the appellant instructed the Respondent to prepare a sale agreement in the transaction in question. Both parties did not dispute this fact at all. Hence, this was not an issue for determination as the learned magistrate put it. Secondly, it is not disputed that legal services were offered to the appellant by the Respondent. Again, that was not an issue for determination at all. Further, the other issues identified above were not the proper issues that arose from the pleadings, the evidence and the law.

In my view, the Respondents suit seeking recovery of advocates costs raises fundamental legal issues for determination, namely, whether or not the Respondents suit in the lower court was legally and properly before the court, hence legally sustainable and whether or not the Respondent was legally entitled to the said sum. I will address this issues shortly.

As Lord Neuberger stated "Decisions without Reasons are certainly not justice: indeed they are scarcely decisions at all.[2] It is axiomatic to the giving of Reasons by any Tribunal, be it a single judge or a panel that a logical due process has to be followed by the Tribunal, culminating in the formulation of the Reasons for its decision.

Lord Justice Sedley[3] has explained in clear terms why giving reasons is the natural and essential culmination in the due process of decision making by any public body, as follows:-

i. A statutory duty imposed on a named decision maker to give Reasons is not simply a bureaucratic chore or an opportunity for lawyers to find fault.

ii. It is a fundamental aspect of good public administration, underpinned increasingly by law, because it focuses the decision? maker's mind on exactly what it is that has to be decided, within what legal framework and according to what relevant evidence and material.

iii. Experience shows that it will sometimes produce an opposite conclusion to that which was initially in the decision? maker's mind before the rigour of formulating acceptable Reasons was applied.

It is a fundamental requirement of common law that issues for determination be properly identified and reasons for judgment or ruling be given by the judicial officer. Thomas J in *Bell-Booth v. Bell-Booth* ***[4]*** put it succinctly when he rendered himself as follows:-

> *"Reasons for judgment are a fundamental attribute of the common law. The affinity of law and reason has been widely affirmed and Judge's reasoning -his or her reasons for the decision - is a demonstration of that close assimilation. Arbitrariness or the appearance of arbitrariness is refuted and genuine cause for lasting grievances is averted. Litigants are assured that their case has been understood and carefully considered. If dissatisfied with the outcome, they are able to assess the wisdom and worth of exercising their rights of appeal. At the same time public confidence in the legal system and the legitimacy and dynamic of the common law is enhanced. The legal system can be seen by (sic) working and, although possibly at times imperfectly, striving to achieve justice according to law."*

The giving of reasons is a normal incident of the judicial process.[5] We are in the "age of reasons."[6] Never before have reasons been so praised, cherished, advocated, and promoted in public discourse as well as in academic circles.[7]The purpose of judicial reasons is to set forth an explanation for a decision on questions presented before a court. These reasons may include the court's articulation of the factual and legal basis for its decision as well as its interpretive and policy analysis of the law it is applying.

The obligation to explain how, and why, a particular decision has been reached stems from the common law. In more recent times, it has been suggested in some jurisdictions that this duty has a constitutional dimension as well.[8] Plainly, there are a number of justifications for requiring the provision of reasons. In the case of an appeal, reasons enable an appellate court to be satisfied that the decision-maker took into account all matters that he or she was required to consider, and did not have regard to extraneous material. Reasons also enable an appellate court to determine whether any other form of jurisdictional error has been demonstrated.

Reasons enable litigants to see whether any appealable or reviewable error had been committed, thereby informing the decision whether to appeal, or let the matter lie. The discipline of giving reasons could make decision-makers more careful, and rational. Finally, the provision of reasons could provide guidance for future cases. It is fair to say that the merits of giving reasons have never seriously been doubted.

In my opinion, there is no better explanation for the need to render reasons in a judgement or a ruling than those given by McHugh JA (as his Honour then was) in *Soulemezis v Dudley Holdings*[9]

> *"The giving of reasons for a judicial decision serves at least three purposes. First, it enables the parties to see the extent to which their arguments have been understood and accepted as well as the basis of the judge's decision. As Lord MacMillan has pointed out, the main object of a reasoned judgment "is not only to do but to seem to do justice."* ***[10]*** *Thus the articulation of reasons provides the foundation for the acceptability of the decision by the parties and by the public. Secondly, the giving of reasons furthers judicial accountability. As Professor Shapiro has recently said (In Defence of Judicial Candor (1987) 100 Harv L Rev 731 at 737):*

"… A requirement that judges give reasons for their decisions — grounds of decision that can be debated, attacked, and defended — serves a vital function in constraining the judiciary's exercise of power."

Also, under the common law system of adjudication, courts not only resolve disputes — they formulate rules for application in future cases.[11]

Even though it may not be easy to set out what constitutes sufficient reasons, there must be some process of reasoning set out which enables the path by which the conclusion has been reached to be followed. If it is not possible to understand from the reasons given how the conclusion was reached then plainly those reasons will be inadequate. The reasons should trace the major steps in the reasoning process so that anyone reading them can understand exactly how the decision-maker reached his or her conclusion.

The learned Magistrate cited section **46** of the Advocates Act which deals with invalid agreements and section **44** which empowers the chief justice to make orders prescribing remuneration and proceeded to find in favour of the Respondent.

It is important to point out that the trial court did not consider the provisions of section **48** of the act whose provisions are key in determining whether or not the Respondents suit being an action for recovery of advocates costs was properly before the court and therefore legally sustainable. To me, that was a real issue for determination in this case. Section **48** of the act provides that:-

(1) Subject to this Act, no suit shall be brought for the recovery of any costs due to an advocate or his firm until the expiry of one month after a bill for such costs, which may be in summarized form, signed by the advocate or a partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause to be verified by affidavit filed with the plaint, for believing that the party chargeable therewith is about to quit Kenya or abscond from the local limits of the Court's jurisdiction, in which event action may be commenced before expiry of the period of one month.

Even though there is an itemized bill appearing at page **14** of the record which is dated 7th May 2013, no evidence was tendered to show when it was served upon the appellant and whether the **30 days** provided for under the above section had lapsed prior to filing the plaint in court. In my view, this is an important legal issue which goes to the legality of the Respondents' case, hence it was paramount for the court to satisfy itself that this important legal requirement had been complied with. Interestingly, there was no attempt by either of the parties to address this issue either in the lower court or in this appeal.

The Respondent pleaded in paragraph **5** of the plaint that it was agreed that the parties were to cater for the fees for the transaction. In fact, my reading of the learned Magistrates decision is that the trial magistrate was persuaded that there existed an agreement between the parties herein on the fees payable and that explains why he cited the provisions of section **46** of the act. This brings into sharp focus the provisions of section **45** of the act on Agreements with respect to remuneration which provides at the proviso for such an agreement to be binding, it must be in writing and must be signed by the client or his authorized agent. No evidence was tendered to show that such an agreement existed in writing and if it did, to satisfy the requirement that it must have been signed by the Appellant or his duly authorized agent. To me, it was improper for the magistrate to invoke the provisions of section **46** which was totally inapplicable in the present case.

It is also instructive that the learned magistrate failed to address his mind to the provisions of section **49** of the act. The said section deals with procedure where quantum of costs is challenged by defence. From the record, the appellant filed a defence challenging the costs claimed by the Respondent. Section **49** of the act provides that:-

Where, in the absence of an agreement for remuneration made by virtue of section 45, a suit has been brought by an advocate for the recovery of any costs and a defence is filed disputing the reasonableness or quantum thereof—

(a) no judgment shall be entered for the plaintiff, except by consent, until the costs have been taxed and certified by the taxing officer;

(b) unless the bill of costs on which the suit is based is fully itemised, the plaintiff shall file a fully itemized bill of the costs within fourteen days from the date of service of the defence, or such further period as may be allowed by the court, and shall serve a copy thereof on the defendant, and, if the total amount of such bill exceeds the amount sued for, the prayer of the plaintiff shall, subject to the court's pecuniary jurisdiction, be deemed to be increased accordingly and all consequential amendments to the pleadings may be made;

(c) no court or filing fee shall be payable on filing a bill of costs required by this section, but, if thereby the amount for which judgment is prayed in the plaint is deemed to be increased under paragraph (b), the plaintiff shall pay to the court such court or filing fee as may be appropriate to the increase; and

(d) at any time after the bill of costs has been filed, and before the suit has been set down for hearing, any party to the action may take out a summons for directions as to whether such bill should be taxed by the taxing officer before the suit is heard.

The above provisions require no clarification. Clearly, the above section was not complied with. The judgement was not entered by consent. To me, the judgement arrived by the trial court offend the above clear provisions, hence the same is a nullity. I find that the learned magistrate incorrectly interpreted and misapplied the law and arrived and the wrong decision. The suit in the lower court clearly offended the clear provisions of the advocates act cited above.

The upshot is that this appeal succeeds. I hereby set aside the judgment, decree and all consequential orders made in Nyeri CMCC No 227 of 2013. The Respondent shall bear the costs of this appeal and the costs in the lower court.

Orders accordingly.

Signed, Dated at **Nyeri** this **23rd** day of **November** 2016

John M. Mativo

Judge

Delivered at **Nyeri** this **23rd** day of **November** 2016

Hon. Justice Jairus Ngaah

Judge

---

[1] Cap 16, Laws of Kenya

[2] 'No Judgement, No Justice'. Speech delivered by Lord Neuberger, November 20th 2012, the BAILII annual lecture, hosted by Freshfields Bruckhaus Deringer LLP. https://www.supremecourt.uk/docs/speech ? 121120.pdf

[3] R v Solihull MBC ex parte Simpson (1993) 26 HLR 370 per Sedley J.

[4] [1998] 2 NZLR 2

[5] Public Service Board of New South Wales v Osmond (1986) 159 CLR 656 ('Osmond').

[6] See Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV.L.REV. 1, 19–20 (1959) “The virtue or demerit of a judgment turns, therefore, entirely on the reasons that support it.”

[7] Mathilde Cohen, When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach, 72 Wash. & Lee L. Rev. 483 (2015), http://scholarlycommons.law.wlu.edu/wlulr/vol72/iss2/3

[8] Wainohu v New South Wales (2011) 243 CLR 181.

[9] {1987} 10 NSWLR 247 (‘*Soulemezis*’).

[10] The Writing of Judgments (1948) 26 Can Bar Rev at 491.

[11] Taggart “Should Canadian Judges Be Legally Required to Give Reasoned Decisions In Civil Cases” (1983) 33 University of Toronto Law Journal 1 at 3-4.