



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC. APPLICATION NO. 709 OF 2006

(Being an Appeal from the ruling of the learned Deputy Registrar Hon. Asenath Ongeri (Mrs) given on 15th July, 2014)

CHARLES JOSEPHAT AKWONI.....APPLICANT

VERSUS

THE SOLICITOR GENERAL.....RESPONDENT

JUDGEMENT

1. The matter the subject of this Judgement is an appeal from the decision of the learned Deputy Registrar, **Hon. Asenath Ongeri (Mrs)**, given on 15th July, 2014 in which the learned Deputy Registrar dismissed a Notice to Show Cause taken out by the applicant herein against the Respondent.
2. In dismissing the said Notice the learned Deputy Registrar found that the applicant had executed a discharge voucher acknowledging receipt of Kshs 437,540.50 in full and final payment of all claims arising out of the two cases. In her view there was no indication that this fact was brought to the attention of the taxing officer at the time of the taxation of the costs which were assessed in the sum of Kshs 131,297.00.
3. Aggrieved by this decision, the applicant has filed an appeal therefrom setting out the following grounds in his memorandum of appeal:
 1. **That the learned Deputy Registrar grossly erred in law fact by finding the a discharge voucher signed by the appellant before the taxation of costs incurred in the judicial proceedings had the effect of depriving the appellant of costs so incurred.**
 2. **That the learned Deputy Registrar grossly erred in law and fact by holding that the appellant who was forced to institute judicial review proceedings so as to compel the Respondent to pay him the decretal amount decreed by a court of law was and is not entitled to claim costs so incurred from the Respondent.**
 3. **That the learned Deputy Registrar grossly erred in law and fact by purporting to say in effect that the order of Mandamus of this court which allowed costs and the taxation of those costs that followed were both an exercise in futility.**
 4. **That the learned Deputy Registrar finding in the entire ruling is against the law and fact.**
4. The applicant therefore prayed that this appeal be allowed by the court allowing the appellant to execute according to law taxed costs against the Respondent and that the Respondent be condemned to pay appellant costs of this appeal.
5. It was submitted by **Mr Ombete**, learned counsel for the applicant that this Court ordered the

- Respondent by way of mandamus to pay the amount found due on 28th February, 2007 and directed the Respondent to pay the costs as well. However when it came to enforcement the Solicitor General prepared a discharge voucher on 29th October, 2010 in respect of the first order of mandamus in respect of the principal sum, costs and interests excluding the costs of the judicial review application.
6. It was submitted that following the breakdown of negotiations the applicant filed a bill which was taxed in the sum of Kshs 131,297. 00. It was submitted that the decision of the learned Deputy Registrar that the decretal sum was settled and that the applicant was barred from claiming the taxed costs was erroneous as the discharge voucher could not vacate the order of mandamus and the certificate of taxation. Apart from that it was contended that the discharge voucher was in respect of the sum due minus the costs of the application for mandamus hence the learned Deputy Registrar was in error in holding that the applicant had signed a discharge voucher and was hence not entitled to the costs awarded by the Court.
 7. I have considered the foregoing. This appeal was filed pursuant to Order 49 rule 7(2) of the ***Civil Procedure Rules*** which gives the right of appeal from certain decisions of the Registrar. One of the orders from which such an appeal lies is an order made on Notice to Show Cause under Order 22 rule 18 of the said Rules. The said appeal is meant to be filed within 7 days of the decisions sought to be appealed against and the appeal lies to a Judge in Chambers.
 8. This being a first appeal the duty of this Court in such matters was set out in **Selle And Another vs. Associated Motors Boat Company Ltd. & Others Civil Appeal No. 31 of 1967 [1968] EA 123** in which it was held:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

9. What is in contention is the discharge voucher dated 29th October, 2010. In the said discharge voucher, the applicant herein accepted the receipt of Kshs 437,540.50 in full and final settlement of the claims in respect of Nairobi CMCC No. 2189 of 2000 between the applicant herein and the Attorney General and Nairobi Civil Appeal No. 182 of 2003 between the Attorney General and the Applicant.
10. In her ruling the learned Deputy Registrar appreciated that the decretal sum was settled after the applicant had filed these judicial review proceedings. Therefore at the time of the execution of the discharge voucher on 29th October, 2010 the parties must have been aware of the existence of these proceedings. The judgement in this matter was entered on 28th February, 2007 while the costs were taxed on 24th April, 2012. Yet the discharge voucher does not expressly mention this judicial review application. Whereas the voucher uses the words “claims whatsoever nature howsoever arising against the Government”, it proceeds to state that it was “in connection” with the cases specified which were indicated as the two cases. To interpret that the first part as including all claims against the Government would have the effect of barring the applicant from making any claims against the Government including future claims and that would in my view be unreasonable.
11. In my view the position which was being advanced by the respondent was that of accord and satisfaction. However, as was held in **Kimeu vs. Kasese (No. 2) [1990] KLR 35:**

“The agreement allegedly entered into between the plaintiff and the defendant gives rise to the defence of accord and satisfaction. But before such a defence can succeed, it must be shown that the agreement (accord) was valid in law. The agreement cannot be valid in the instant case unless it is supported by consideration. There was no benefit that the plaintiff

was getting by promising to forebear from making further claim. It is an essential element of a valid accord and satisfaction that the agreement, which constitutes the accord, should itself be binding in law, and such agreement cannot be so binding unless it is either made under seal or supported by consideration. Satisfaction, viz performance of an agreement of accord, does not provide retroactive validity of accord, but depends for its effect upon the validity of the accord as a binding contract at the time when it is made....Since the defendant lost nothing the agreement has no legal validity. Even if it were valid the court would hesitate to enforce it as perhaps it would be against public policy in the sense that most illiterate accident victims would be denied fair compensation by unscrupulous actions of vehicle owners or insurance companies.”

12. Based on the material before the court there is no evidence that the ingredients constituting accord and satisfaction were present.
13. In my view the omission to expressly mention this matter which was within the knowledge of the parties can only be interpreted to mean that the parties did not intend that the costs incurred in these proceedings be part of the settlement covered by the said discharge voucher. The effect of the decision of the learned Deputy Registrar was that the process of taxation of the applicant's costs was rendered futile without a reference being filed against the taxation.
14. Having considered the appeal, I am satisfied that this appeal is merited. Accordingly the decision of the learned Deputy Registrar made on 15th July, 2014 dismissing the Notice to Show Cause is set aside. Since the only ground upon which the Notice was dismissed was the existence of the discharge voucher, the order dismissing the Notice is substituted with an order allowing the same.
15. The applicant is awarded the costs of this appeal.
16. It is so ordered.

Dated at Nairobi this day 25th day of March, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Ombete for the Applicant/Appellant

Mr. Munene for Mr. Odhiambo for the Respondent

Cc Patricia