



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Application 625 of 2009

IN THE MATTER OF THE ADVOCATES ACT, CHAPTER 16

AND

IN THE MATTER OF THE ADVOCATE/CLIENT BILL OF COSTS

BETWEEN

**GICHUKI KING'ARA & COMPANY ADVOCATE.....
ADVOCATE/APPLICANT**

VERSUS

**MUGOYA CONSTRUCTION & ENGINEERING
LIMITED.....CLIENT/RESPONDENT**

For Services Rendered In Nairobi High Court Civil Case No. 671 Of 2005

**MUGOYA CONSTRUCTION & ENGINEERING
LIMITED.....PLAINTIFF**

VERSUS

**NATIONAL SOCIAL SECURITY FUND BOARD
TRUSTEES.....DEFENDANT**

RULING

1. The applicant's application dated 23rd February, 2012 seeks the following orders:

“1.

2. That this Honourable Court do set aside the orders of the Honourable Justice Njagi dated 29th April 2010 and to re-instate the Ruling of the Hon. Taxing Master Mr. L. Kandet.

3. That upon granting prayer (2) above, this Honourable Court do enter judgment against the Respondent in the sum of Kshs.15,245,850.50.

4. That pending the determination of this application this Honourable Court to stay the execution of the Decree in HCCC No. 671 of 2005, issued in favour of the Respondent herein until it furnishes security for cost previously awarded in this case and the N.S.S.F., the Judgment debtor in the said suit be restrained from releasing any funds from any of its Bank accounts in favour of Mugoya Construction & Engineering Limited in liquidation of the Decree herein and any funds released be frozen in the accounts where they are held.

5. That in the alternative to prayer 4 hereabove, this Honourable Court be pleased to order the Defendant to deposit Kshs.45,000,000/= in Court, or in an interest earning account in the joint names of both Advocates on record as security for the satisfaction of the Decree on costs that may be passed in this suit within 7 days.

6. That costs of this application be borne by the Respondent.”

2. The application is supported by an affidavit sworn by **Philip Wambugu**, an advocate practicing as an associate in the firm of **Gichuki King'ara & Company**, the applicant herein. He deposed that on or about 29th day of November 2005 the respondent instructed the applicant to institute a suit against the National Social Security Fund to recover a sum of **Kshs.663,323,620.30**.

3. Pursuant to the said instructions the applicant filed **HCCC No. 671 of 2005** and actively prosecuted the same until January 2012 when the respondent and the defendant concluded out of court negotiations and filed a consent in court on 6th February, 2012.

4. During the pendency of HCCC 671 of 2005 the applicant filed a bill of costs for services rendered to his client/respondent, **Mugoya Construction & Engineering Limited**, and the bill was taxed in the sum of **Kshs.15,245,850.50** as against the respondent.

5. Vide an application dated 23rd October, 2008 the respondent filed an application to strike out the advocate/client bill of costs on the ground that the same was taxed prematurely before the suit was finalized.

6. Vide a ruling delivered on 29th April, 2010, Njagi, J. struck out the bill of costs with costs to the respondent.

7. On 6th February, 2012 the firm of **Ochieng, Onyango, Kibet & Ohaga Advocates** filed a notice of change of advocates on behalf of the respondent and simultaneously filed a letter of consent between themselves and **Wamalwa & Company Advocates** for the defendant whereby judgment was entered by consent in the sum of **Kshs.342,000,000/=** in favour of the respondent with a caveat that the said amount be paid immediately.

8. The applicant averred that all the legal donkey work in HCCC No. 671 of 2005 was done by itself but it was maliciously sidelined when the aforesaid compromise was arrived at. On 5th March, 2012 the applicant filed another application under certificate of urgency which was brought under **Order 39 rules 1 (a) (iii), 2 and 5** of the **Civil Procedure Rules, Sections 1A, 1B and 3A** of the **Civil Procedure Act**. The applicant sought two substantive prayers as follows:

“2. That pending the hearing of the application dated 23rd February, 2012 and all other pending applications in this matter, this Honourable Court do order that all the funds deposited in the respondent's account No. 0200288009 at the Middle East Bank Limited be immediately frozen and the respondent be denied access to the same and the National Social Security Fund be restrained from releasing any further funds to the respondent herein in execution of the decree in HCCC No. 671 of 2005.

3. That in the alternative the respondent do deposit the sum of Kshs.15,245,850.50 into court and/or in a joint interest earning account in the names of the applicant's and the respondent's counsels' firm(s) as security for satisfaction of the taxed sums herein."

9. On 5th March, 2012, Mutava, J. granted interim orders in terms of prayer (2) above. When the extracted order was served upon the Middle East Bank, **Mr. Philip Bernard Ilako**, the Bank's Managing Director, filed a replying affidavit and stated that as at the date of service of the order the amount standing to the credit of the respondent was Kshs.210,000/= and the Bank has a lien over that amount in respect of legal costs. A copy of the respondent's statement of account was annexed to the affidavit.

10. The respondent filed a replying affidavit that was sworn by **James Abiam Mugoya Isabirye**, the Managing Director of the respondent. He denied the applicant's averment that he had left the jurisdiction of this court and transferred all his assets.

11. Mr. Isabirye confirmed that the respondent had instructed the applicant in HCCC No. 671 of 2005 and in several other matters but stated that sometimes in 2009 Mr. Gichuki King'ara, a senior partner in the applicant firm, informed him that the applicant was no longer interested in representing the respondent and demanded that all its legal fees be settled.

12. Shortly thereafter the applicant filed a bill of costs in respect of HCCC No. 671 of 2005 but the bill was struck out by the court as earlier stated.

13. Following the ruling by Njagi, J. the applicant sought and obtained leave to appeal and proceeded to file a notice of appeal dated 5th May, 2010. The applicant also sought typed copies of proceedings to facilitate filing of the intended appeal. As at 8th March, 2012 when Mr. Isabirye swore the replying affidavit no steps had been taken by the applicant in connection with the proposed appeal.

14. Mr. Isabirye further stated that the applicant, having lost interest in conducting the aforesaid suit, the respondent was forced to engage directly with the defendant with a view to negotiating an out of court settlement and as a result the respondent conceded a significant portion of the amount previously claimed in HCCC No. 671 of 2005.

15. Regarding the settlement sum of Kshs.342 million, Mr. Isabirye stated that the respondent has graciously allowed the defendant to settle the same in instalments.

16. On 8th March, 2012 the respondent filed a notice of preliminary objection to the applicant's application and stated that:

"The applicant, having made an election to lodge a notice of appeal against the ruling and order of Mr. Justice L. Njagi dated and delivered on 29th April, 2010 cannot now seek to set aside the same decision."

17. In response to the respondent's replying affidavit and the notice of preliminary objection, the applicant filed a further affidavit sworn by **Leonard Muraya Njenga**, an advocate practicing in the applicant firm. Mr. Njenga highlighted the legal services that had been rendered to the respondent by the applicant over the last few years.

18. In respect of the ruling of Njagi, J., Mr. Njenga stated that the court held that the applicant could only be entitled to his fees upon finalization of the suit, which is now finalized.

19. He added that the notice of appeal that had been filed by the applicant has lapsed and the applicant no longer intends to file any appeal and in any event, the intended appeal has been overtaken by events in view of the fact that HCCC No. 671 of 2005 has been compromised. Mr. Njenga further stated that the applicant has filed a notice of withdrawal of the appeal. A copy of the same was annexed to the further affidavit and it shows the date of filing as 28th March, 2012. The notice was filed in this court.

20. The applicant and the respondent filed written submissions and both **Mr. King'ara** for the applicant and **Mr. Ohaga** for the respondent highlighted the same.

21. I will start by considering the propriety of the applicant's application to set aside the orders made by Njagi, J. on 29th April, 2010 in light of the preliminary objection. In the said ruling the court held that the applicant's bill of costs had been filed prematurely since the applicant had not finalized the matter in issue. The judge stated, *inter alia*:

“Since the retainer lasts till the work is done then the respondents should patiently do the work to its completion and then tax the bill of costs. Their claim to be paid for the work done to date contradicts the principle that the retainer is one entire contract to be remunerated after completion, and amounts to seeking payment on a quantum meruit basis. To allow the taxation at this stage would result in allowing another taxation at or even before the conclusion of the business for which the respondents were retained..... For the above reasons, I find no reason advanced for the taxation to precede completion of the work assigned, and that the taxation herein was premature, and the advocate/client bill of costs dated 17th July, 2009 is hereby struck out with costs as prayed.”

22. That ruling still remains in force since it has not been overturned on appeal or reviewed. The applicant was aggrieved by the same and filed a notice of appeal but did not proceed to file the substantive appeal.

23. Shortly after the respondent filed the notice of preliminary objection the applicant filed a notice of withdrawal of the notice of appeal. Mr. Ohaga submitted that the effect of a notice of appeal is to give the Court of Appeal jurisdiction to hear and determine a matter since such notice is filed pursuant to the provisions of the Court of Appeal Rules and cannot therefore be withdrawn by filing the same in the High Court as the applicant purported to do.

24. He cited the Court of Appeal decision in **DOLPHIN PALMS LIMITED vs AL-NASIBH TRADING COMPANY LIMITED & 2 OTHERS**, Civil Application No. NAI 112 of 1999 where the court set out the manner in which a notice of appeal ought to be withdrawn.

25. In that matter it was held that the court must be moved to make the orders declaring a notice of appeal deemed to have been withdrawn. The court delivered itself thus:

“Rule 82, in pertinent part, provides that

“If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time –

a) he shall be deemed to have withdrawn his notice of appeal and shall, unless the court otherwise orders, be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.”

We concede there is no express provision requiring a party to move the court in that regard, however, a careful reading of rule 82 clearly reveals that such an application is necessary. The phrase “unless the court otherwise orders” clearly shows that a court order is necessary and such order can only be validly made by a full bench in an application brought under Rule 80 of the Court of Appeal Rules.”

26. Mr. King'ara's contention is that the filing of the notice of appeal should not be an impediment to setting aside of the ruling by Njagi, J. and reinstating the Taxing Master's ruling since the ruling has been overtaken by events. In his view, the filing of the notice of withdrawal before this court is proper in law.

27. With respect, I do not agree with that submission as it clearly contradicts the finding of the Court of Appeal in **DOLPHIN PALM'S** case cited hereinabove, although the Court of Appeal Rules under which the matter was decided have since been revoked and in their place Court of Appeal Rules, 2010 have

come into effect.

28. The purported withdrawal of the notice of appeal was not proper in law. **Rule 81 of the Court of Appeal Rules, 2010** states that:

“A party who has lodged a notice of appeal may withdraw the notice of appeal by notice in writing to all the parties who have been served. The costs of the withdrawal shall be borne by the party withdrawing the notice of appeal.”

It is clear that no notice was given to the respondent before the notice of appeal was purportedly withdrawn. Such notice was necessary since the notice of appeal had been served upon the respondent.

29. **Rule 83 of the Court of Appeal Rules, 2010** states that:

“If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.”

30. I believe the notice of withdrawal of the appeal was prompted by the filing of the preliminary objection and in my view the respondent did not follow the right procedure.

31. Between 5th May, 2010 when the notice of appeal was filed and 28th March, 2012 when the purported notice of withdrawal was filed the applicant had sufficient time to move the Court of Appeal appropriately but did not do so. The consent vide which HCCC No. 671 of 2005 was settled was entered into only recently, 6th February, 2012.

32. This court does not have jurisdiction under **Rule 83 of the Court of Appeal Rules, 2010** to declare or deem a notice of appeal as having been withdrawn. That power is exclusively exercisable by the Court of Appeal. I am satisfied that the withdrawal of the notice of appeal did not accord with the provisions of **rule 81 of the Court of Appeal Rules, 2010**.

33. That being the case, the notice of appeal still subsists until the withdrawal is properly effected and in the circumstances the application dated 23rd February, 2012 seeking to set aside the orders of Njagi, J. cannot be entertained by this court. I agree with Mr. Ohaga that the applicant must first withdraw the notice of appeal properly before he can pursue his application.

34. The decision of Njagi, J. struck out the applicant's bill of costs and since that order has not been varied and this court lacks jurisdiction to set it aside for the reasons stated hereinabove, there is no way the court can order reinstatement of the ruling of the Taxing Master.

35. This finding disposes of the entire application by the applicant.

36. While it is not in doubt that the applicant rendered services to the respondent and ought to be paid his fees accordingly, I believe the applicant ought to procedurally withdraw the notice of appeal and thereafter file a fresh bill of costs so that the Taxing Master can determine whether the applicant's fees will be based on the initial sum of Kshs.663,323,620.30 or the settlement sum of Kshs.342 Million.

37. Having come to the conclusion that the applicant's application dated 23rd February, 2012 is bad in law the orders sought in the subsequent application filed on 5th March, 2012 cannot be granted.

38. I strike out the two applications with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JUNE, 2012.

D. MUSINGA
JUDGE

In the presence of:

Muriithi – Court Clerk
Mr. King'ara for the Applicant

Mr. Muindi for Mr. Ohaga for the Respondent

Mr. Karanja for Middle East Bank Limited