Cooperate and Pension Trust Services Limited v Muthaura Mugambi Ayugi and Njonjo Advocates & 2 others (Commercial Appeal E180 of 2022) [2024] KEHC 17082 (KLR) (13 May 2024) (Judgment)

Neutral citation: [2024] KEHC 17082 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL APPEAL E180 OF 2022

DKN MAGARE, J

MAY 13, 2024

BETWEEN

COOPERATE AND PENSION TRUST SERVICES LIMITED ..... APPELLANT

AND

MUTHAURA MUGAMBI AYUGI AND NJONJO ADVOCATES .... 1ST RESPONDENT

KENYA RAILWAYS CORPORATION ..... 2ND RESPONDENT

KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME .... 3RD RESPONDENT

JUDGMENT

1. Much tears, blood and sweat has flowed in this matter in a manner of speaking. what started as a simple matter of taxation of charges for Secretarial Services offered by Muthaura Mugambi Ayugi and Njonjo advocates has morphed into a full scale war. The Appellant wished to join to the advocate client bill of costs the proposed 2nd and 3rd Respondents.

2. In a ruling given by Hon. C. Wanyama the Deputy Registrar on 16/11/202 in HCCOM Misc E165 of 2021 the Taxing Master rejected the Appellant's claim. Acres of papers have gone into the question whether the 2nd and 3rd Respondent should be made parties.

3. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

4. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

5. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the law looks in their usual gusto, held by as follows; -

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

6. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

7. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> " Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed..."

8. The trial court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document.

9. Under Section 97 (1) of the *Evidence Act*, oral evidence is excluded in construction of written evidence. The section provides as follows: -

> " 1) When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act."

10. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows: -

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction

to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

11. The 2nd and 3rd Respondents filed submission dated 28/8/2023 stating that there is no advocate client relationship with the advocates herein. They stated that they are not necessary parties. They relied on the case of Civicon Limited v Kivuwatt Limited & 2 others [2015] eKLR: -

> " O'Hare & Hill's Civil Litigation, 7th Edition (1996) at page 101 opines that one cannot be added as a plaintiff unless one gives one's consent in writing. In contrast, anyone can be joined as a defendant even against his wishes. However, no person can be a defendant unless the plaintiff claims some relief, even if only a declaration, against him. The general rule of practice is that the plaintiff is "dominus litis." This means that he is entitled to choose the defendants against whom he wishes to pursue his claim for the relief or remedy he seeks, and that he cannot be compelled to proceed against other persons whom he has no desire to sue. The doctrine of "dominus litis" does not however extend to the joinder (or impleading) of parties. This is because the court has a duty and the power to add a person who is not a party to the action as originally constituted as a defendant even against the will of the plaintiff, whether on the application of the defendant or of the non-party in order for the real matter in dispute to be determined. The non-party (or intervener) must show that he has interest in the matters in dispute to be determined in the suit."

12. This is to the effect that only a party seeking relief should join other parties. They stated that the test for determining the necessary parties was set out in Werrot & Co. Ltd & 3 Others Vs Andrew Douglas Gregory & 2 Others [1998] eKLR.

13. The 2nd and 3rd respondents stated that the issue of Principal- Agent was not established. They stated that for taxation to occur the Taxing master must satisfy himself of existence of Advocate clients relation.

14. They say that only the person who retains an advocate is liable under the *advocates act*. A client is defined in section 2 of *Advocates Act* as follows: -

> " client" includes any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ an advocate and any person who is or may be liable to pay to an advocate any costs;

Submissions

15. The Appellant submitted that there was no appeal on the Deputy Registrar's finding.

16. It was submitted that there was misapprehension of the provisions of Section 50(1) of the *Advocates Act* as the same would apply where a party charged with the bill of costs is seeking indemnity from a third party.

17. Further, they submitted that they were entitled to pursue the reference. They relied on DK Law Advocates v Zhong Gang Building Material Co. Ltd & Another (2021) eKLR as follows:

18. The Supreme Court of Uganda (Odoki, JSC) in Rukidi vs. Iguru and Another [1995-1998] 2 EA 318 however, expressed itself as hereunder:

> " Any party is free to pursue his rights irrespective of whatever intervening events have taken place since the court is entitled to pronounce on the rights of the parties."

19. It is therefore my view that the fact that the Applicant received the amount taxed does not bar him from pursuing the reference if, in his view, the amount taxed was inordinately low. Consequently, I find no merit in the preliminary objection which I hereby dismiss.

20. They submitted that the Appellant correctly invoked Order 1 Rule 10 of the Civil Procedure Rules since taxation proceedings were civil proceedings. They relied inter alia on Re Estate of Eliud Timothy Mwamunga (2020) eKLR. They urged me to allow the Appeal.

21. On the part of the 1st Respondent, they filed submissions dated 14th May 2023 submitting that there was no provision in law that allowed the Respondent to join additional Respondents. That as such the Appellant was the party chargeable with the Bill of Costs and also liable to pay the bill. They relied on Section 2 of the *Advocates Act* to define the meaning of an advocate. They urged me to dismiss the Appeal.

Analysis

22. The matter is an issue of advocate client bill of costs. In this matter, it is a personal relationship and a related on a file by file basis. The correct question is who is a client for purposes of the dispute herein for purposes of section 2 of the *Advocates Act*.

23. The Advocates knows who their instructing clients are. For example, in insurance maters, though the parties in court are individuals or other companies, the taxation is usually between the said defence advocates and various companies. It is an open secret that most defence attorney are instructed by insurance companies for road accident cases. They never go after the insured if things go south for the instructing clients.

24. When the relationship or even the insurance goes south, the advocates do not revert to the insured for fees unless fresh instructions are given. In this case, the Advocates are alleging that the Appellant is their client. This is the only relationship in dispute. Unlike liability in suits, where you can join a third party, advocate client remains that, Advocate-Client. If a client is able to show that they were not clients in a specific matter, then the taxation dies. This is usually referred as a dispute over retainer. This is not a relationship in rem. It is in personum and as such relates to very specific cases. The relationship is not transferable.

25. Surely, there must be a way in an agreement to engage advocates, the Appellants and respondents agreed on indemnity. The 1st respondent cannot enforce a contract they are not parties. In Euromec International Limited v Shandong Taikai Power Engineering Company Limited (Civil Case E527 of 2020) [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling): -

26. The Appellant appears to have entered into a bad deal with the 2nd and 3rd Respondents. The court cannot relieve them of the contract. They cannot re-write it. In Civil Appeal No. 330 of 2003, Hussamudin Gulamhussein Pothiwalla administrator, Trustee and Executor of the Estate of

Gulamhussein Ebraihim Pothiwalla -vs- Kidogo Basi Housing Cooperative Society Limited and 31 Others where it was held;

> "A court of law cannot re-write a contract between the parties. ... it is clear beyond peradventure that save for those special cases where equity may be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain."

27. The test for a client can easily be established. Who shortlisted the advocates. Who got the advocates to do the work and was given a fee note. If the Appellant has a list of empanelled advocates and the 2nd and 3rd Respondents have a distinct list, from which list could the advocates be picked from. On instruction clients are very sober and promise to pay, in writing. They swear before Amadioha the god of justice, thunder and iron that the fees will be met. Who made this promise?

28. The 2nd and 3rd could have been the beneficiaries of the contract between the Applicant and Applicant. They cannot, be liable for a contract wherein, they are not parties. The 1st Respondent has shown that they have advocates. Client relationship is not artificial. It is real and substantial. A party cannot just turn up and be held liable. The Court of Appeal had an opportunity to and deliberated on the doctrine of privity at length in Savings & Loan (K) Limited vs. Kanyenje Karangaita Gakombe & Another (2015) eKLR. The Court rendered itself as under: -

> "In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party. In DUNLOP PNEUMATIC TYRE CO LTD v SELFRIDGE & CO LTD [1915] AC 847, Lord Haldane, LC rendered the principles thus:
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> "My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it."
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> In this jurisdiction that proposition has been affirmed in a line of decisions of this Court, among them Agricultural Finance Corporation V Lendetia Ltd (Supra), Kenya National Capitalcorporation Ltd V Albert Mario Cordeiro & Another (Supra) And William Muthee Muthami V Bank of Baroda, (supra).
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> Thus in Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi [1985] eKLR, Hancox, Nyarangi JJA & Platt Ag JA, quoting with approval from Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was reiterated:
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> "As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."
>
> Over time some exceptions to the doctrine of privity of contract have been recognized and accepted. Among these exceptions is where a contract between two parties is accompanied by a collateral contract between one of them and a third party relating to the same subject matter. Thus in Shanklin Pier V Detel Products Ltd (1951) 2 KB 854, for example, the plaintiff owned a pier, which it wished to be repainted. After the defendant represented to the plaintiff that some particular paint was fit for purpose, the plaintiff directed its contract

to use that paint. The contractor purchased the paint from the defendant, which proved unfit for purpose. Upon a suit by the plaintiff against the defendant, the court found for the plaintiff notwithstanding the fact that there was no privity of contract between the plaintiff and the defendant, as far as the contract for the sale of the paint was concerned.

While the proposition that a contract cannot impose liabilities on a non-party has been widely embraced and accepted as rational and well founded, the proposition that a contract cannot confer a benefit other than to a party to it has not been readily accepted and has in fact been the subject of much criticism. In Darlington Bourough Council V Witshire Northen Ltd [1995] 1 WLR 68 Lord Steyn eloquently demonstrated the flaw in the proposition in the following terms.

"The case for recognizing a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties. Moreover, often the parties, and particularly third parties, organize their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract."

Some jurisdictions have, accordingly and in a bid to introduce reforms and ameliorate the harshness of the rule, resorted to legislative intervention. The best examples are the United Kingdom and Singapore where the Contracts (Rights of Third Parties) Act, 1999 and the Contract (Rights of Third Parties Act, 2001 have respectively been enacted.'

29. It is true that there could and must have been an arrangement between the Appellant and the 2nd and 3rd Respondents, they should deal with it inter se. The advocate does not have a remit on the same. I dismiss the reliance is on the solicitors Act of UK. We do not have a separated bar where barristers seek fees from the instructing solicitor. The appellant does not have status of a solicitor. It must arrange its affairs with its clients to avoid drugging advocates into it. I find not merit in the Appeal.

30. I accordingly dismiss the same with costs. The costs follow the event and the event is the dismissal of the Appeal. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law,

constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

31. The law allows the court to indicate costs at the time of delivery of judgment.

Determination

32. The upshot of the foregoing is that this appeal lacks merit and is consequently dismissed with costs of Kshs. 250,000/=.

33. The bill against the Appeal be placed before the Deputy Registrar for taxation. The same is fixed for directions on 29/5/2024.

34. This file is closed.

35. The 2nd and 3rd respondents were not proper parties but were served. They shall have cost of Ksh. 150,000/=.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 13TH DAY OF MAY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Kevin Ngethe for the Appellant

Mr. Nyaribo for the 1st Respondent

Mr. Ngethe Mbugua for the 2nd and 3rd Respondent.

Court Assistant- Norah