Ngotho v Odera Obar & Co Advocates (Civil Appeal 409 of 2019)
[2023] KEHC 3075 (KLR) (Civ) (14 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3075 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 409 OF 2019

AN ONGERI, J

APRIL 14, 2023

BETWEEN

BIBIANA MBATHA NGOTHO ..... APPELLANT

AND

ODERA OBAR & CO ADVOCATES ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. L. L. GICHEHA (CM) in Milimani CMCC No. 8084 of 2017 delivered on 19/6/2019)

JUDGMENT

1) The appellant entered into an advocate-client agreement in which it was agreed that the fees payable to the advocate was to be not less than 2% of the entitlement allocated to the appellant in Succession case no. 553 of 2007.

2) The respondent filed CMCCC no. 559 of 2011 which was later transferred to the Chief Magistrate's court and became CM Civil suit no. 8084 of 2017.

3) A brief summary of the case was that on 8/3/2007 the appellant had donated a power of attorney to Andrew Mbaya(DW2) who signed an agreement on her behalf on 22/2/2008 with the respondent that the appellant would pay him 2% of her entitlement from her father's estate in Succession case no. 553 of 2007.

4) After the respondent represented the appellant in the said case, the respondent by letter dated 26/8/2011 stated that the schedule of properties had been reviewed to 144,889,641.20.

5) The said figure was arrived at on 24/8/2011 when the agent valued the estate at 144,889,641.20.

6) The respondent sued the appellant for 2% of the said Ksh.144,889,641.20 which is 4,244,509.18.

7) The appellant filed a defence and counterclaim to the respondent's suit in the Trial court and sought the following prayers;

   i. A declaration that the agreement on the lawyer-client fee is invalid and unenforceable.

   ii. An order for taking of accounts for the rental income received by the respondent from LR No. 209/6809 situated on Kabarnet Road from 16/12/2009 to 31/8/2011.In the alternative to (ii) above the appellant was seeking mesne profits for the period 16/12/2009 to 31/8/2011 in respect to LR no. 209/6809 at Kabarnet Road.

   iii. An order of delivery of any title deeds, documents or any papers in the respondent's possession, custody or power belonging to the appellant.

   iv. Damages for lost business opportunity plus cost of the suit and counterclaim and interest.

8) The Trial court upon hearing both parties found that the respondent had proved that there was an agreement signed on behalf of the appellant that the fees payable was 2% of the appellant's share of her father's Estate.

9) The Trial court also found that the counterclaim was not proved on a balance of probabilities and the same was dismissed.

10) Judgment was entered in favour of the respondent in the sum of kshs.4,244,509/18 together with costs and interest from the date of filing suit.

11) The appellant has now filed this appeal on the following grounds:

   1. That having taken cognizance of the evidence presented before her, the learned magistrate misdirected herself in concluding in all circumstances of the case and on the basis of the evidence before her, that the claim by the respondent was proven on a balance of probabilities.

   2. That the learned trial magistrate arrived at a manifestly unmerited decision to the extent that the decision upholds the unjust and unsubstantiated claim of Kshs.4,244,509.18 as advocate-client fees due and payable.

   3. That the trial magistrate erred in law and in fact in returning a finding that there was a modified fee agreement whilst in fact, no such modified fee agreement existed and particularly, none existed which complied with the strict and mandatory provisions of clause 9 of the lawyer-client fee agreement.

   4. That the trial magistrate erred in law and in fact by misapprehending and/or misapplying/or disregarding the evidence before her by concluding that the appellant had failed to prove the counterclaim on a balance of probabilities.

   5. That the learned trial magistrate erred in law and fact by failing to consider the evidence on record and wholly appreciate the argument advanced by the appellant in her submissions thus occasioning a miscarriage of justice.

   6. That the learned trial magistrate in exercising her discretion, misdirected herself by giving consideration to irrelevant and extraneous matters and/or failed to consider the relevant matters in arriving at her decision.

12) The parties filed the following submission in the appeal. The appellant submitted that as per the consent signed by both parties, the appellant's entitlement was Kshs.68,950,000 and not Kshs.144,889,641 as alleged by the respondent. She added that the consent was not varied in court and it was unconscionable for the respondent to attempt to vary the amount. The trial magistrate therefore erred in her judgement as it was based on a different amount other than the one consented by the parties.

13) In support of her argument the appellant cited *Brooke Bond Liebig v Mallya* (1975) EA 266 where Mustafa Ag VP stated;

> " .....It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed."

14) The appellant further submitted that what was contained in the agreement between the parties was contingency fees which is prohibited by the *Advocates Act*. It was argued that Contingency Fees is described as any remuneration which is conditional on the success or failure of a case. Section 46 (c) of the *Advocates Act* clearly prohibits contingency fee as it states;

Nothing in this Act shall give validity to any agreement by which an advocate retained or employed to prosecute or defend any suit or other contentious proceeding stipulates for payment only in the event of success in such suit or proceeding or that the advocate shall be remunerated at different rates according to the success or failure thereof; or

15) It was the appellant's argument therefore that the lawyer-client agreement was void ab initio and could not be enforced. That further from the fee agreement it can be inferred that if the appellant had been found to not be entitled to any share in the succession cause then the respondent would not have been able to recover any legal fees which makes it prohibited by statute.

16) It was appellant's submission that since the respondent had filed this suit for the recovery of legal fees owed to him as was within his right, he should have released any title deed and documents or papers that belong to the appellant awaiting the conclusion of the suit.

17) The respondent on the other hand submitted that it is a general rule that the intention of the parties to an agreement should be ascertained from the document. It was contended that that clear intention of the respondent's entitlement was expressly stated under clause 3 of the agreement. It was clear that the market value of the property would be applicable in ascertaining the appellant's entitlements. It was actualized at the conclusion of the succession where the open value of the properties was agreed at Kshs.144,889,641.20. the respondent added that the value ascribed in the consent dated August 19, 2009 was not an open market value of the appellant's market value to the estate.

18) The respondent argued that the oral agreement of 24th August 2011 chronicled in the letter dated August 26, 2011, touching on the assessment of the appellant's entitlement and the fees payable to the respondent constitutes a modification of the Lawyers Client Agreement and is therefore inadmissible.

19) The respondent argued that pursuant to the Power of Attorney dated March 8, 2007 the appellant appointed and designated Mr. Andrew Mbaya to act as her agent with the powers to enter into binding

agreements on her behalf. The appellant in this matter never made an allegation of breach of fiduciary duty against her agent and there was no suggestion that the agent acted beyond his scope.

20) The respondents contended that from the agreement it is clear that it did not provide that the payment of the fees due to it was upon the success or otherwise of the succession cause that the respondent was to be engaged. That the contract did not reveal payment of fees at different rates according to the success or failure but revealed that the respondent was entitled to remuneration of 2% of the appellant's entitlement.

21) Finally, the respondent contended that the committee in disciplinary case no 207 of 2011 decided that the respondent is entitled to lien and that it is not open for the appellant to reopen and re-litigate the same issue. That if in any event the appellant considered herself aggrieved by the aforementioned holding, she ought to have invoked her right of appeal under section 62 of the *Advocates Act*.

22) This being the first appellate court my duty is to re-evaluate the evidence adduced before the trial court and to arrive at my own conclusion whether to support the findings of the trial court.

23) In *Selle & Another v Associated Motor Boat Co. Ltd & others* [1968] EA 123, this principle was enunciated thus:

> " ...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 retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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..."

24) The issues for determination in this appeal are as follows:

i. Whether there was a valid Advocate/Client Agreement on the legal fees payable to the respondent by the appellant.

ii. Whether the entitlement due to the appellant was properly ascertained.

iii. Whether the appellant proved her counterclaim against the respondent.

iv. Who pays the costs of this appeal?

25) On the issue as to whether there was a valid Advocate/Client agreement on the legal fees payable to the respondent by the appellant, the law provides that an advocate can enter into such a contract so long as it is in writing and signed by the client or someone acting on behalf of the client.

26) Section 45 of the *Advocates Act* provides as follows;

45. Agreements with respect to remuneration

(1) Subject to section 46 and whether or not an order is in force undersection 44, an advocate and his client may—

(a) before, after or in the course of any contentious business [Civil or Criminal Court] make an agreement fixing the amount of the advocate's remuneration in respect thereof;

(b) .....

(c) .....

and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf."

27) In the case of; *Omulele & Tollo Advocates v Mount Holdings Ltd* C.A.75 of 2015 it was held;

> " A retainer means the instruction, employment or engagement of an advocate by his client. On the other hand, a retainer agreement is merely a contract in writing prescribing the terms of engagement of an advocate by his client, including fees payable. Therefore, it is submitted while a retainer denotes a relationship between parties, the retainer agreement is merely the physical written document or manifestation of such a relationship.....As the Section [45 of *Advocates Act*] indicates, under such agreement, the parties fix or put a cap on the advocates' instruction fees....both parties are beholden to the amount so fixed. From the foregoing it should thus be clear that the presence of a retainer is what in turn gives rise to the retainer Agreement.....It follows that for the retainer agreement to be valid and binding, the same must have been put in writing and signed by client and /or his agent."

28) In the current case, it is not in dispute that the agreement displayed at page 20 – 22 of the record of appeal was signed by the appellant's agent.

29) I find that there is undisputed evidence that the appellant donated a power of attorney to her Agent Andrew Mbaya (DW 2) dated 8/3/2007 and that DW2 signed the agreement on 20/2/2008 on behalf of the appellant.

30) I find that the Trial court was right in the finding that DW 2 was the agent of the appellant.

31) The said agreement clear stated that the

> " The lawyer and the client agree that the legal fees shall be not less than and not more than 2% of the obtained entitlement due to the client."

32) On the issue as to whether the entitlement due to the appellant was properly ascertained, the appellant said the amount due to her from her father's Estate was 68,950,000 and not 144,889,641.20.

33) The respondent said it was the appellant's agent (DW 2) who subsequently had the portion allotted to the appellant valued at ksh.144,889,641.20.

34) It is true that DW 2 had power of attorney donated by the appellant. However, the value of the entitlement payable to the appellant was Ksh.68,950,000 according to the consent on page 23 to 26 of the record of appeal.

35) I find that the parties filed a consent dated 19/8/2009 in the following terms;

> " This matter be and be hereby marked as settled and the attached distribution schedule annexed hereto be marked as an order of the court."

36) The schedule annexed shows the appellants share as 68,950,000. The law provides that the value of the subject matter can only be ascertained fromthe pleadings, judgment or settlement.

37) It is now firmly established in a long line of authorities of this Court, beginning with the case of *Joreth Ltd vs. Kigano & Associates* [2002] 1 E.A. 92, that the value of the subject matter can be discerned or

determined from the pleadings, the judgment or the settlement, as the case may be. The court in that case said;

> "We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a Bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances."

38) Although case of *Joreth Ltd v Kigano & Associates* (supra) talks about the value of the subject matter for purposes of taxation, I find that the parties had agreed thatthe legal fees shall be not less than and not more than 2% of the obtained entitlement due to the client and therefore the value of the subject matter for purposes of determining the legal fees was the one in the court settlement.

39) The respondent by letter dated 26/8/2011 stated that the schedule of properties had been reviewed to 144,889,641.20.

40) I find that the value of the subject matter in respect of the appellant's entitlement was not properly ascertained.

41) The reviewed valuation was not provided for in the agreement signed by the parties.

42) I have perused Clause 9 of the Agreement which states as follows;

> "This agreement may be modified by subsequent agreement of the parties only by an instrument in writing signed by both of them."

43) I find that there is no subsequent agreement produced before the trial court modifying the initial agreement.

44) I therefore find that the entitlement due to the appellant was 68,950,000 and not 144,889,641.20.

45) Since the appellant's entitlement was Kshs.68,950,000 and not Kshs.144,889,641, the legal fees is 2% of Kshs.68,950,000 not vice versa.

46) On the issue as to whether the appellant proved her counterclaim, I find that the appellant was seeking an order for taking accounts and in the alternative mesne profits.

47) I find that the mesne profits were not specifically pleaded.

48) The appellant had an agent (DW 2) to whom she had donated the power of attorney and he was transacting on her behalf. The said agent did not say that his signature was forged.

49) The appellant did not also give an inventory of her documents which she alleged were in the possession of the respondent.

50) I find that the appellant did not prove her counterclaim to the required standard and the Trial court was right in dismissing the same.

51) I find that the appeal partially succeeds and I accordingly set aside the judgment of the Trial court since the respondent is entitled to 2% of ksh.68,950,000 which amounts to 1,379,000.

52) The respondent is therefore entitled to Kshs.1,379,000 in respect of legal fees.

53) Judgment be and is hereby accordingly entered in favour of the respondent against the appellant in the sum of kshs.1,379,000 plus costs and interest at court rates from the time of filing the original suit until payment in full.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 14TH DAY OF APRIL, 2023.

.....

A. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent