Muthoka v Ochieng, Onyango, Kibet & Ohaga Advocates (Civil Appeal 467 of 2018) [2023] KEHC 19219 (KLR) (Civ) (22 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19219 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 467 OF 2018

CW MEOLI, J

JUNE 22, 2023

BETWEEN

PETER MUTHOKA ..... APPELLANT

AND

OCHIENG, ONYANGO, KIBET & OHAGA ADVOCATES ..... RESPONDENT

(Being an appeal from the judgment of Hon. P.N Gesora, (CM) delivered on 5th September, 2018 in Nairobi Milimani CMCC No. 2847 of 2015)

JUDGMENT

1. This appeal emanates from the judgment delivered on 12.09.2018 in Nairobi CMCC No. 2847 of 2018. The suit was commenced by a plaint filed on 21.05.2015. Peter Muthoka, the plaintiff in the lower court suit (hereafter the Appellant) was seeking the recovery for the sum of Kshs. 5,078,000/- against Ochieng, Onyango, Kibet & Ohaga Advocates, the defendants in the lower court (hereafter the Respondent).

2. It was averred that at all material times, the Appellant instructed the Respondent firm to represent the Appellant in Nairobi HCCC No. 154 of 2012, Peter Muthoka v CMCC Holdings & 12 Others wherein a ruling was delivered on 24.05.2012. And being dissatisfied with the said decision, the Appellant sought to appeal before the Court of Appeal. The Appellant averred that he then instructed the firm of Kilukumi & Co. Advocates to take conduct of HCCC No. 154 of 2012 from the Respondent specifically for purposes of appealing the said decision from the High Court and the said firm of Kilukumi & Co. Advocates vide a notice of change dated 06.08.2012 accordingly prepared the motion for stay of the orders via Civil Application Number 207 of 2012 and filed the record of appeal being Civil Appeal No. 233 of 2012 before the Court of Appeal.

3. It was further averred that vide a letter dated 05.10.2012 the Respondent raised two fee notes in respect of the matter in the Court of Appeal, namely, fee note No. 12313 & 12314 for a sum of Kshs. 4,182,000/- and 1,121,000/- respectively and the Appellant instructed Standard Chartered Bank to remit the sum of Kshs. 5,078,000/- from the account of Andy Forwarders Services Ltd to the Respondent's account.

4. That the foregoing payment was mistaken, in fact, as the firm of Kilukumi & Co. Advocates were then on record and the material error surrounding the payment of legal fees to the Respondent for services not rendered was a mistake of fact, unintentional, genuine error, rather than an act of negligence but unconscious ignorance under the mistaken belief that the Respondent was on record in the intended appeal. Therefore, the Appellant was entitled to repayment of the sum of Kshs. 5,078,000/-.

5. The Respondent filed a detailed statement of defence on 22.06.2015 denying the key averments in the plaint. Generally, it can be construed from the averments by the Respondent, that the payment of the sum of Kshs. 5,078,000/- from the account of Andy Forwarders Services Limited at Standard Chartered Bank to the Respondent was made for legal services rendered to the Appellant, upon instructions to Mr. James Ochieng' Oduol.

6. That the Appellant was at all material times aware of the existing arrangement between the parties and was not mistaken in any way when he remitted the foregoing sum to the Respondent in settlement for fees, and the suit was brought in bad faith to vilify the Respondent who is entitled to legal fees for services rendered to the Appellant and Andy Forwarders Services Limited in various suits before the High Court and Court of Appeal.

7. The suit proceeded to full hearing during which evidence was adduced by both parties. In its judgment, the trial court found that the Appellant had not proved his case on a balance of probabilities and proceeded to dismiss the suit with costs to the Respondent.

8. Aggrieved with the outcome, the Appellant preferred this appeal challenging the finding of the lower court based on copious grounds in his memorandum of appeal as follows;-

> " 1. The learned magistrate erred in law and fact in failing to analyze contextualize and appreciate he evidence adduced by the Plaintiff and as such the judgment ultimately failed to address the issues raised and framed by the Appellant.
>
> 2. The learned Magistrate erred in law and in fact by not addressing itself to any of the issues and evidence raised by the Appellant in its pleadings and written submissions;
>
> 3. The learned Magistrate erred in both law and in fact in dismissing the Appellant's suit as the Respondent wholly relied on extrinsic evidence to show that they filed the appeal when the evidence presented before the Court was clear that the pleadings in Civil Application Nai. 207 of 2012 and Civil Appeal No. 233 of 2012 was filed and prepared by the firm of Kilukumi & Company Advocates on the instructions of the Appellant and not by the Respondent;
>
> 4. The learned Magistrate erred in both law and in fact in dismissing the Appellant's claim when it is trite law that documents which are unambiguous and clear as the case that was before the trial court, should be given that plain meaning which is that the firm of Kilukumi & Company Advocates filed and prepared the pleadings in Civil Application Nai. 207 of 2012 and Civil Appeal

No. 233 of 2012 on behalf of and on the instructions of the Appellant and not the Respondent;

5. The learned Magistrate erred in both law and in fact in failing to make a finding that the Notice of Change of Advocates dated 6th of August 2012 and the pleadings filed and prepared in in Civil Application Nai. 207 of 2012 and Civil Appeal No. 233 of 2012 on behalf of and on the instructions of the Appellant by the firm of Kilukumi & Company Advocates spoke for themselves that the firm on record was indeed Kilukumi and Company Advocates and not the Respondent;

6. The learned Magistrate erred in both law and in fact in failing to make a finding that where the language used in documents such as the Notice of Change of Advocates dated 6th of August 2012 and the pleadings filed in in Civil Application Nai 207 of 2012 and Civil Appeal No. 233 of 2012 on behalf of and on the instructions of the Appellant by the firm of Kilukumi & Company Advocates applied accurately to the existing facts that indeed Kilukumi & Company Advocates filed and prepared the said pleadings and not the Respondent;

7. The learned Magistrate erred in both law and in fact in failing to consider Section 100 of the *Evidence Act* in dismissing the Defendant's attempts to rely on extrinsic evidence where the evidence as presented before the Court was clear that the firm of Kilukumi & Company Advocates filed and prepared the pleadings filed in Civil Application Nai 207 of 2012 and Civil Appeal No. 233 of 2012 on behalf of and on the instructions of the Appellant and not the Respondent;

8. The learned Magistrate erred in both law and in fact in making a finding that there was no mistake of fact when the Appellant paid the Respondent under the mistaken belief of fact that the Respondents were on record for the Appellant in Civil Application Nai. 207 of 2012 and Civil Appeal No. 233 of 2012 when in fact it was the firm of Kilukumi & Company Advocates;

9. The learned Magistrate erred in both law and in fact in dismissing the Appellants's suit and making a finding in favour of the Respondent as the evidence presented before the Court clearly showed that the Respondent had unjustly enriched itself for legal services not rendered;

10. The learned Magistrate erred in both law and in fact in making a finding that the length of time it took to settle the fee notes raised by the Respondent for their alleged legal services rendered was sufficient to show that the Appellant was not mistaken and that the Appellant knew was he was paying for;

11. The learned Magistrate erred in both law and in fact in holding that the alleged length of time taken to settle the fee notes raised by the Respondents for the alleged legal services rendered gave credence to the Respondent's case that there was an agreement between the Appellant and the other members of the group that as part of their strategy the pleadings in Civil Application Nai. 207 of 2012 and Civil Appeal No. 233 of 2012 would be prepared by the Respondent in the name of Kilukumi & Company Advocates;

12. The learned Magistrate erred in both law and in fact in making reference to the strategy meeting when no evidence was produced before the Court documenting what was discussed at the said strategy meeting and as such there was no evidence produced before the Court that the parties agreed or even discussed that the pleadings in Civil Application Nai. 207 of 2012 and Civil Appeal No. 233 of 2012 would be prepared by the Respondent in the name of Kilukumi & Company Advocates;

13. The learned Magistrate erred in both law and in fact in failing to consider the evidence raised by the Appellant's witness that he was present at the meeting and it was agreed that the firm of Kilukumi & Company Advocates would prepare and file the pleadings in Civil Application Nai. 207 of 2012 and Civil Appeal No. 233 of 2012 and not the Respondent;

14. The learned Magistrate erred in both law and in fact when it sought to compare the font used in the pleadings filed in HCCC No. 154 of 2012 and those in Civil Application Nai. 207 of 2012 and Civil Appeal No. 233 of 2012 and made a finding that the pleadings in all the three cases were generated by the same machine when no pleadings in respect of HCCC No. 154 of 2012 were produced before the court to enable the court to make any such comparisons and findings;

15. The learned Magistrate erred in both law and in fact in holding that the Appellant did not demonstrate that he paid the two fee notes under a mistaken belief of fact.

16. The learned Magistrate erred in both law and in fact in dismissing the suit with costs.

17. The learned Magistrate erred in both law and in fact by not considering the evidence as presented before it;

18. The learned Magistrate erred in law and in fact in dismissing the Plaintiffs suit without giving any written reasons or any proper basis at all for the same which was not only improper but contrary to Article 47(2) of *the Constitution*." (sic)

9. The appeal was canvassed by way of written submissions. Counsel for the Appellant began by restating the pertinent events and thereafter condensed the eighteen (18) grounds of appeal into three (3) cogent issues for the court consideration.

10. Addressing the court on grounds 1, 2, 15, 16, 17 & 18 concerning the trial court's failure to meet the muster as required in law, and citing Order 22 Rule 3 & 4 of the Civil Procedure Rules and Section 35 of the *Evidence Act*, it was argued that the trial court failed to delineate issues for determination and give reason thereof whereas the judgment was described as superficial, scant, sketchy. it was further contended that the trial court failed to state the concise statement of the cases, as the issues presented before it ranged from the relationship between the parties, the meaning and purport of a retainer, termination of a retainer and legal consequences, extrinsic/parole evidence versus documentary evidence, what constitutes mistake in contract law and the shifting evidentiary burden of proof. That considering the approach to the issues and law adopted by the trial court its approach, it was inconceivable that the trial court would have reached the correct decision in law.

11. Regarding grounds 3, 4, 5, 6, 7, 12 & 14 touching on retainer, advocate-client relationship and the trial court's reliance on extrinsic evidence, counsel began by citing the definition of retainer as coined in Halsbury's Law of England. He relied on the decisions in Omulele & Tollo Advocates v Mangun Properties [2016] eKLR and Ochieng' Onyango, Kibet & Ohaga Advocates v Akiba Bank Limited [2007] eKLR to submit that there was no advocate-client relationship when the sum of Kshs. 5,078,000/- was mistakenly paid to the Respondent, because the Respondent's services in respect of HCCC No. 149 of 2012 had been terminated and the firm of Kilukumi & Co. Advocates instructed to take over the matter in the Court of Appeal alongside HCCC No. 154 of 2012; that the law firm of Kilukumi & Co. Advocates filed a Notice of Change of Advocates dated 06.08.2012 and was subsequently instructed to file an application for stay and the substantive appeal before the Court of Appeal; and that from the record the Respondent have no relation to the two (2) matter filed before the Court of Appeal for which fees was mistakenly remitted. That in respect of the two (2) matters before the Court of Appeal, the documents filed therein speak to the fact that there was no advocate-client relationship and the Respondent's failure to return monies received on the purport of fees in the two matters was tantamount to fraud.

12. Further to the foregoing, it was submitted that the reasons advanced by the court in finding that there existed an advocate-client relationship were untenable and erroneous in both fact and law. In effect, the notice of change of advocates terminated the advocate-client relationship whereas the trial court's deduction that the font used in the said notice of change was purporting that the same had been drawn by the Respondent was preposterous. Citing the decisions in Jacobs v Batavio and General Plantations Limited (1924) 1 ChD 287 at p. 295, Housing Finance Company of Kenya Limited v Palm Homes Limited & 2 Others [2002] 2 KLR and Robin v Gevon Berger Association Limited and Others (1986) The Weekly Law Reports, May 526, at 230 counsel argued that the court disregarded documentary evidence in favour of oral evidence on the issue of an advocate-client relationship and that the trial court erred in shifting the burden of proof to the Appellant, on who should have called Mr. Kilukumi Advocates as witness.

13. It was further contended that the trial court, rather than interrogate the issues of the strategic meeting by putting to task the Respondent who introduced the matter in its defence and therefore ought to have borne the burden to call the said parties who were in the strategic meeting, shifted the evidential burden of proof on the Appellant. The cases of BWK v EK & Another [2017] eKLR and George Ndiriu Kariamburi (Deceased) and Joseph Kiprono Ropkoi & Another [2004] eKLR were called to aid.

14. Further citing the English decision in Scott v Brown, Doering, McNab & Co. (3)(1982) 2 QB 724 at 728, the decisions in Kenya Pipeline Company Limited v Glencore Energy (UK) Limited [2015] eKLR and Standard Chartered Bank Kenya Ltd v Intercom Services Ltd & 4 Others [2004] eKLR, counsel asserted that "renting" of advocates names for purposes of filing pleadings is contrary to Section 35 of the *Advocates Act* and the Respondent cannot summon an illegality in aid of its defence.

15. Submitting on grounds 8, 9 & 10 it was summarily argued that based on evidence coupled with the fact that the parties had ceased to have an advocate-client relationship, the inescapable and reasonable conclusion the court must arrive at is that the payment was made by mistake. Counsel placed reliance on the decision in Standard Bank Ltd v John Henry Akello [1979] eKLR and the English decisions in Barclays Bank Ltd v W.J Simms Sons & Cooke (Southern) Ltd & Another [1979] 3 All ER 522, Aiken v Short [1843-60] All ER Rep. 425 and Kleinworth, Sons & Co. v Dunlop Rubber Co. [1907] 97 LT 263 to contend that monies paid by mistake are recoverable as of right and that failure to adopt the proposition would lead to unjust enrichment on the part of the recipient. In summation, the court was urged to allow the appeal as prayed.

16. The Respondent defended the lower court's findings meanwhile abridged the Appellant's grounds of appeal to five (5) cogent issues for the court's consideration. Addressing grounds 1, 2 & 17 it was contended that a review of the pleadings before the trial court, the judgment and final determination, it is inconceivable that the Appellant would come before this court and claim that the learned magistrate did not address any of the issues and evidence raised by the Appellant in its pleadings and written submissions.

17. Concerning grounds 3 - 7 of the memorandum of appeal, citing Section 100 of the *Evidence Act* and the decisions in Kukal Properties Development Ltd v Tafazzal H. Maloo & 3 Others [1993] eKLR, Twiga Chemicals Industries Limited v Allan Stephen Reynolds [2014] eKLR it was argued that there was no written agreement between parties hence the terms of agreement were not clear and unambiguous, necessitating the admission of extrinsic evidence to explain the circumstances surrounding the preparation, perfection and filing of the impugned motion and appeal before the Court of Appeal. That it was proper for the Respondent to table evidence and correspondence between the parties to explain the circumstance of receiving and executing the Appellant's instructions to lodge both the appeal and application no evidence tendered by the Appellant to contradict the clear, candid, coherent evidence explaining the drawing of the pleadings.

18. Submitting on grounds 8-15 counsel cited the decision in Daniel Torotich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR to argue that the Appellant is estopped from denying the strategic team of advisors in the face of clear evidence having failed to call any evidence to confirm whether the firm of Kilukumi & Co. Advocates drafted and filed the pleadings before the Court of Appeal. That from the correspondence between the parties the Respondent presented candid evidence that at the strategic meeting, it received instructions from the Appellant to draft pleadings in the name of the firm of Kilukumi & Co. Advocates and that the said evidence was not challenged, traversed, or contradicted.

19. It was further submitted that the firm of Kilukumi & Co. Advocates have never raised a fee note in respect of the pleadings filed before the Court of Appeal as such the payment received was in respect of services rendered by the Respondent. That further during the negotiations on the fee notes the Appellant failed to settle the same over a considerable duration despite being given a rebate and or opportunity to object to the fee note. Hence the Appellant cannot be heard to argue that he paid the fee note by mistake. It was submitted that the Appellant was enjoined to pay for legal services rendered and cannot purport to demand a refund when he enjoyed the full benefits of the Respondent's legal services. The court was thus urged to dismiss the appeal with costs.

20. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in Selle –Vs- Associated Motor Boat Co. [1968] EA 123 in the following terms: -

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

In particular this 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 demeanor of a witness is inconsistent with the evidence in the case generally."

21. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 – 1988] 1 KAR 278. The court has considered the record of appeal, the pleadings, and the original record of the proceedings as well as the submissions by the respective parties.

22. The salient question for determination is whether the trial court's findings on the issues presented before it were well founded. In Wareham t/a A.F. Wareham & 2 Others Kenya Post Office Savings Bank [2004] 2 KLR 91, the Court of Appeal stated in this regard that: -

> " We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail."

23. The parties' respective pleadings have been summarized earlier in this judgment. The dispute between the respective parties revolves around an advocate-client relationship and particularly whether the Appellant is entitled to a refund having allegedly mistakenly settled fees of Kshs. 5,078,000/- for work not done by the Respondent. On the other hand, the gist of the Respondent's case has been that there was an existing advocate-client relationship and that it was entitled to the sum paid out, and the same was not mistakenly settled as purported by the Appellant.

24. The trial court after restating and examining the respective parties' pleadings and evidence stated in its judgment that:-

> " .....I have carefully considered the pleadings filed herein, the evidence adduced and the submissions by parties.
>
> .....It is important to interrogate the averment that the amount was paid by mistake of fact and also whether it was by error. It is my humble view that considering the length of time it took to settle the fee notes and the communication by parties the Plaintiff was aware what he was paying for.
>
> This gives credence to the defence put up that there was an agreement between the Plaintiff herein and other members of the group that as part of their strategy the application for stay and appeal were to be prepared by DW1 herein in the name of Kilukumi & Company Advocates. There is no time that the said firm of advocates has stated that this was not the arrangement. The negotiations between parties herein led to DW1 giving a discount of 15% and this has not been denied by the Plaintiff.

> The appeal lodged did not see the light of day as parties settled the dispute out of court. It is not disputed that the content in the memorandum of appeal was substandard. DW1 gave fine details of his pleadings and even invited the court to compare the font used in drawing pleadings in HCCC 154 of 2012 and those in 207 of 2012 and 233 of 2012 and make a finding that they were generated by same machine. All these go to point that indeed it is him who drew the pleadings in all the three cases.
>
> .....I am also alive to the fact that depending on the complexity of a matter parties can enter into a contract where they agree on fees payable without relying on the remuneration order but the bottom line is that fee notes were paid after lengthy negotiation between the Plaintiff, his representative and DW1 herein.
>
> From the foregoing, I find and I hold the Plaintiff has not demonstrated that he paid the two fee notes as a result of a mistake of fact. He was all along aware of the same and the arrangements he had with the Defendant. Nothing would have been easy than call Mr. Kilukumi Advocate to shed light on the matter in support of his case. The Plaintiff himself did not appear to testify and hold that these omissions greatly enfeeble his case. I proceed to dismiss the same with costs to the Defendant." (sic).

25. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. The duty of proving the averments contained in the plaint lay squarely on the Appellant whereas those in the statements of defence lay on the Respondent. In Karugi & Another v Kabiya & 3 Others (1987) KLR 347 the Court of Appeal stated that:

> " [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...--. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added)

26. During trial Vincent K. Mwaniki testified as PW1. The gist of his evidence was that the Appellant had hired the Respondent to act on his behalf in HCCC No. 154 of 2012 and being aggrieved with the resultant decision of the High Court, the Appellant preferred an appeal. Thus, in a meeting held at the offices of Kaplan and Stratton Advocates which Mr. Kilukumi attended, the firm of Kilukumi & Co. Advocates was instructed to take over the matter on appeal. That in the said meeting there were a couple of senior advocates in attendance wherein the firm of Kilukumi was verbally instructed to take over the matter on appeal. That upon instruction, the firm of Kilukumi & Co. Advocates proceeded to lodge its requisite pleadings before the Court of Appeal. However, the Appellant received invoices from the Respondent which were mistakenly paid under the belief that the Respondent was still on record.

27. The Respondent called one witness, James Ochieng Oduol who testified as DW1. It was his evidence that in the meeting held at the offices of Kaplan and Stratton Advocates he was given formal instructions to appeal the decision of the trial court in HCCC No. 154 of 2012 and that the application for stay was to be filed in the name of Kilukumi & Co. Advocates as the Appellant preferred that the

said firm to come on record. He had no objection to the said arrangement and had proceeded to prepare and file the application for stay and record of appeal. The fee notes in respect of the foregoing were raised on 04.10.2012 and it was not until 20.10.2013 that they were paid as parties were negotiating thereon.

28. Discussing the question of mistake of fact, the Court of Appeal in Lazarus Masayi Onjallah v Kenya Commercial Bank Ltd [2004] eKLR while citing with the approval the English decisions in Kerrison v Glyn, Mills, Currie & Co [1912] LJ KB 465 and Kleinworth, Sons, and Co vs Dunlop Rubber Company 97 LT (1907-08) 263 succinctly observed that "...the law appears to be settled that money paid under a mistake of fact is repayable..." The same court in Savings And Loan Kenya Limited v Onyancha Bw'omote [2016] eKLR while addressing the same question stated as follows; -

> " In law, the party claiming the money paid by mistake assumes the burden of showing that the payment was due to a mistake of fact: and the standard of proof is on the balance of probabilities in all the circumstances of the case; that it was the mistake of fact which gave rise to the overpayment."

29. Recently the Court of Appeal in Erastus Kihara Mureithi v Co-operative Bank of Kenya Ltd [2017] eKLR rendered itself as follows concerning a mistake of fact;-

> " It cannot be doubted as a matter of law and good conscience that if a person derives a benefit or advantage as a result of a payment forced on another person by law of that which the first person ought to pay, then the person making payment should be able to recover the sum from the one on whose behalf the compelled payment was made. Now, whether one calls it recoupment, reimbursement or simply restitution, the claim does lie. It is a claim recognized at common law quite distinct from claims cognizable in contract or in tort. And there is a concurrent duty to pay on the part of the beneficiary recognized at equity as a matter of conscience and principle in that it would be unconscionable for a person to enjoy the benefit, of another's legally compelled payment on his behalf since such a benefit if retained or not reimbursed, would amount to an unjust enrichment and a duty to restitute therefore arises. Lord Wright in the English Appeal Case of Fibrosa Spolka Acklyjna Vs. Fairbain Lawson Combe Barbour Ltd [1943] AC 32 at P 61 spoke of the essence of restitution thus;
>
> > "It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generally different from remedies in contact or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution."
>
> See, Generally, H.G. Beale (Gen. Ed); Chitty On Contracts Vol. 1, General Principles, 31st Edition (2012) chapter 29.

30. What this court has been called upon to consider is whether the Appellant established on a balance of probabilities that the payment of Kshs. 5,078,000/- was made under the mistake of fact. It is undisputed that the parties herein had a long-standing advocate-client relationship leading up to the filing Nairobi COA CA No. 233 of 2012 – PExh.2 in which the firm of Kilukumi & Co. Advocates came on record. Fee Notes No. 12313 and 12314 – Pexh.4 totaling Kshs. 5,078,000/- were raised in connection with the Court of Appeal matter against the Appellant and were paid. The bone of

contention is whether the advocate-client relationship between the parties continued post the decision in HCCC No. 154 of 2012 and particularly in respect of the application for stay and the substantive appeal in CA No. 233 of 2012. The question of retainer is therefore pertinent.

31. The Appellant extensively submitted that there was no retainer agreement in respect of CA No. 233 of 2012 between the parties and to that effect relied on a notice of change and memorandum of appeal as PExh.1 & PExh.2 drawn and filed by the firm of Kilukumi & Co. Advocates. Nonetheless, there was no retainer agreement/instruction note placed before the trial court in respect of Kilukumi & Co. Advocates or the Respondent for that matter concerning the matter before the Court of Appeal.

32. This court associates itself with the decision of Njuguna J. in Omulele & Tollo Advocates v Magnum Properties Limited [2016] eKLR where the learned Judge stated: -

> " I will start by considering what a retainer is and what it entails and in so doing, I wish to borrow the words of Justice Gikonyo in the case of Njeru Nyaga & Co. Advocates Vs George Ngure Kariuki, High Court of Kenya at Nairobi (Commercial & Admiralty Division) Case No. 723 of 2012 where the learned Judge said and I quote: -
>
> > "This word retainer has attracted serious judicial toiling and rending of minds in a bid to assign it a meaning within the provisions of the *Advocates Act*, probably because of the special position the word occupies in the advocate-client relationship. Although the present case does not fall under Section 51(2) of the *Advocates Act*, the innumerable previous courts' rendition on the phraseology...where the retainer is not disputed...provide the content of the term ''retainer''. ''Retainer'' in the wider sense entails the instructions by a client or a client's authorization for a lawyer to act in a case or a fee paid to an advocate to act in a matter during a specified period or a specified matter, or a fee paid in advance for work to be performed by the lawyer in the future. See the Black's Law Dictionary, 9th Edition. The appropriate sense of the word ''retainer'' as used in the *Advocates Act* and which is relevant to this application was aptly provided by Waweru J and Ochieng J in the cases of Nbi Hc Misc App No 698 Of 2004 A.n. Ndambiri & Co Advocates V Mwea Rice Growers Multipurpose Co-op Limited, and Owino Okeyo & Co Advocates V Fuelex Kenya Limited [2005] eKLR, respectively. Let me quote what Waweru J said in the former case that;
> >
> > "My understanding of the term ''retainer'' as used in section 51(2) aforesaid [read...of the *Advocates Act*] is instructions to act in the matter in which the costs have been taxed. I do not, with respect, subscribe to the view that "retainer" means an agreement in writing as to the fees to be paid. Needless to say, where there is such agreement, taxation would hardly be necessary. In the circumstances I find that there is no dispute as to retainer."
>
> The term "retainer" was also considered in the case of Hezekia Ogao Abuya T/a Abuya & Co. Advocates Vs Kunguru Food Complex Limited Nairobi, Misc. Appl. No. 400/2001 where an advocate who had been instructed by a client in a conveyance matter had his Advocate/Client Bill of Costs taxed and a judgment under Section 51(2) entered in his

favour, in an Application by the client to set aside the said judgment inter-alia, on the ground that there was no retainer, Ringera J (as he then was) delivered himself at page 6 therefor: -

> " in this case, such a defence is predicated on the client's understanding of the word "retainer" in that regard, I note that in Black's Law Dictionary the word retainer is explained as follows: -
>
> "In the practice of law, when a client hires an attorney to represent him, the client is said to have retained the Attorney. This Act of employment is called the retainer. The retainer agreement between the client and the Attorney sets forth the nature of services to be performed, costs expense and related matters."

33. The court (Njuguna J) proceeded to observe that;-

> " An Advocate duly instructed is retained and where there is no dispute that an Advocate was duly instructed by the client in any matter, the retainer cannot be said to be in dispute.
>
> "Justice Njagi, J in the case of Nyakundi & Co. Advocates gave the definition and form of retainer from Halsbury's Law of England, 4th Edition, Re issue at paragraph 99, page 83 where it stated: -
>
> > "The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor's retainer by that client. Thus the giving of a retainer is equivalent to the making of a contract for the solicitor's employment. Njagi J pointed out that in the same work, it is further explained that a retainer need not be in writing unless, under the general law of contract, the terms of the retainer or the disability of a party, to it make writing requisite. It is then further stated, the Judge added at paragraph 103 "even if there has been no written retainer, the court may imply the existence of a retainer from the acts of the parties in the particular case."

34. Finally, the court stated that; -

> " In this case, the Respondent has called upon the court to determine whether there was a retainer between it and the firm of Omulele Tollo & Co. Advocates. I think i have done enough to show that a retainer does not have to be in writing but the same can be inferred from the conduct of the parties or the circumstances of the case." [Emphasis added]

35. It does not appear here that there was a formal retainer agreement but clearly the Respondent had previously acted for the Appellant. In addition, Order 9 Rule 5 & 6 of the Civil Procedure Rules provide for the procedure relating to a change of advocates. In the instant matter, a cursory perusal of PExh.1 reveals that there was change of representation between the Respondent firm and that of Kilukumi & Co. Advocates. The question being whether despite the procedural step having been undertaken, there subsisted an advocate-client relationship between parties leading to the Appellant's mistake of fact in respect of the fees the appellate proceedings, from which the Respondent unjustly benefited for work not done.

36. As earlier stated, the impugned ruling in HCCC No. 154 of 2012 was delivered on 24.05.2012. Reviewing DExh.1 & DExh.2 it appears the parties were planning to have their strategic meeting in respect of the matter and a tentative date was settled for 12.05.2013 which appears to support

the Respondent's assertion that there was a strategic team of senior advocates that were handling or patently advising the Respondent on matter involving CMC Motors Limited at the time.

37. Further reviewing DExh.3, as of 30.07.2021 there appears to have been a further tentative agreement post the ruling delivered on 24.05.2012 that DW1 was to proceed to file an application and appeal before the Court of Appeal. The email of 27.07.2021 by PW1 addressed to DW1 to which read that; -

> " Dear James,
>
> I trust you have been well.
>
> Further to our various telephone conversations with our chairman on the above matter where I has been agreed that both the application for injunction and the main appeal will be filed this Monday 30th July, Kindly note that the chairman will be travelling on Tuesday and it is therefore important that he signs the documents on Monday to enable us proceed with the filing and avoid any delays that can result from his absence." (sic)

38. A perusal of DExh.4 & DExh.5 shows that parties were negotiating and purposed a meeting to discuss the issue of settling the Respondent's outstanding fees; that the Respondent sent a letter dated 05.08.2012 copied to the firm of Kilikumi & Co. Advocates - PExh.3 alongside Fee Notes No. 12313 & 12314 - PExh.4 prior to filing the notice of change of advocates in HCCC No. 154 of 2012 – PExh.1 and the appeal & application in CA No. 233 of 2012 – Pexh.2. It is in these circumstances that the Appellant purports to have settled PExh.4 on 29.10.2013 - PExh.5, under mistake fact as pleaded in paragraph 14 of his plaint.

39. The Supreme Court in Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others [2014] eKLR while discerning the question of legal and evidential burden held inter alia.

> " The person who makes such allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue".

40. Considering the correspondence tendered in evidence and conduct of the parties, it appears that while for all intents and purposes the advocate on record in CA No. 233 of 2012 by dint of PExh.1 and PExh.2 was the firm of Kilukumi & Co Advocates, the circumstances leading to filing of the appeal could not be ignored and in this case, namely that there was an apparent parallel instruction to or understanding with the Respondent restricted to the preparation of the pleadings to be filed in the Court of Appeal. In my view, the material considered by the lower court was not extrinsic; there was no formal agreement between the parties.

41. In Chitty on Contracts 24th Edition Vol I page 338, the learned author states: -

> " Where the parties have embodied the terms of their contract in a written document, the general rule is that "verbal evidence is not allowed to be given ... so as to add to or subtract from, or in any manner to vary or qualify the written contract".
>
> This rule is often known as the " parol evidence" rule. Its operation is not confined to oral evidence, but extends to extrinsic matter in writing, such as drafts, preliminary agreements

and letters of negotiation. Evidence is not admissible of negotiations between the parties; nor is it permissible to adduce evidence to show that their subjective intentions were not in accord with the particular expressions used in the written instrument. "Evidence of negotiations" ... "or of the parties intentions ..... ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction."

42. Thus, the rule against parole evidence was inapplicable to the instant proceedings. From the material tendered by both the Appellant and Respondent, the retainer of DW1 in respect of the appellate proceedings can be construed from the conduct of Appellant and PW1 through the email correspondences exhibited by the Respondent. Further, to the foregoing the Appellant did not exhibit any communication and or any form of instructions in respect of the matters before the Court of Appeal to the firm of Kilukumi & Co. Advocates to the lend credence to the averments in his pleadings.

43. The Respondent amply justified the fees received in respect of the appellate proceedings. Interestingly, it sems that though minutes were recorded in respect of the purported strategic meeting prior to delivery of the impugned ruling in HCCC No. 154 of 2012, neither party deemed it fit to adduce the same into evidence to set the record straight.

44. The filing of pleadings in the appellate court in the name of Kilukumi & Co. Advocates appears to have been a gentleman's agreement that the Appellant seems intent to resile from on the technicality that the Respondent's firm is not entitled to any fees because the firm was not on record in the appellate proceedings. Mr. Kilukumi who would have put the matter to rest the matter eschewed participating in the proceedings and the purported members of the strategic team or meeting held at the offices of Kaplan and Stratton Advocates who comprise of senior advocates were also not called as witnesses in the matter.

45. Nor was evidence tendered by the Appellant that the firm of Kilukumi & Co. Advocates had made a demand for payment of fees or that fees had been settled in favour of the firm of Kilukumi & Co. Advocates regarding the appellate proceedings to lend credence to the Appellant's disavowals. As held in Savings and Loan Kenya Limited (supra) "the party claiming the money paid by mistake assumes the burden of showing that the payment was due to a mistake of fact". This court in not persuaded that the alleged mistake of fact on the part of the Appellant was proved. But rather the contrary appears to be the case. The Appellant, not the Respondent, bore the burden to prove his case and the complaint the trial court shifted the burden by making observations that certain evidence was not produced, or witness called by the Plaintiff has no justification.

46. The Appellant, by his own proven conduct instructed the Respondent to draw the pleadings in respect of the appeal in the Court of Appeal in the name of Kilukumi & Co. Advocates, for whatever advantage or purpose. Equally, he knowingly negotiated and eventually paid the Respondent's fee note regarding the services, but having seemingly developed a change of heart, decided to disown his earlier deliberate actions by latching on to a technicality. Section 35 of the *Advocates Act* cited by the Appellant cannot give succor to him; he initiated the instructions or "arrangement" resulting in the Respondent's action of filing pleadings in the Court of Appeal in the name of another advocate.

47. The facts of this case call to mind the decision of Kuloba, J (as he then was) in Gabriel Mbui v Mukindia Maranya [1993] eKLR where in his characteristic pithy style, the learned Judge stated:-

> "No one can improve his condition by his own wrong. The latin of it is Nemo ex suo delicto meliorem suam conditionem facere potest...it is an ancient dictum of our law, that a

person alleging his own infamy is not to be heard. People whose wisdom I cannot profane by making modern comparisons to them abbreviated their wisdom in the saying, Allegans suam turpitudinem non est audiendus.... By which they meant that no one shall be heard in a court of justice to allege his own turpitude as a foundation of a right or claim. No one shall be allowed to set up a claim based on his own wrongdoing. A person cannot take advantage of his own wrong and in equity, the maxim holds good that he who comes into equity must come with clean hands... Null prendra advantage de son tort demesne... meaning no man shall profit by the wrong that he does, and Nullus commodum capere potest de injuria sua propria... which means, no one can gain an advantage by his own wrong."

48. The trial court, having analyzed the evidence before it as best it could, eventually arrived at correct findings. The appeal is therefore without merit and is hereby dismissed with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 22ND DAY OF JUNE 2023.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Ms. Khadija h/b for Mr. Ahmednasir SC

For the Respondent: Mr. Okiring h/b for Mr.Ouma

C/A: Carol