James N. Nderi t/a Nderi & Kingati Advocates v Wandeto (Civil Appeal 14 of 2019) [2023] KECA 1058 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KECA 1058 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 14 OF 2019

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

SEPTEMBER 22, 2023

BETWEEN

JAMES N. NDERI T/A NDERI & KINGATI ADVOCATES .... APPELLANT

AND

JOHN MWANGI WANDETO .... RESPONDENT

(Being an appeal against the decree and judgment of the High Court at Nyeri (J.M. Mativo, J.) dated 24th November 2016 in HCCA No. 5 of 2015)

JUDGMENT

1. Our mandate on second appeal is confined to questions of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered, or looking at the entire decision, it is perverse (*Maina v Mugiria* [1983] KLR 78; *Kenya Breweries Ltd v Godfrey Odongo*, Civil Appeal No. 127 of 2007]. This Court has to accept the findings of fact of the two lower courts unless it is of the view that, on the evidence, no reasonable court could have reached the decision, which would be the same as holding that the decision was bad in law (*Martin v Glywed Distributors Ltd (t/a MBS Fastenings)* 1983 ICR 511).

2. The background of this appeal is that the appellant, James N. Nderi t/a Nderi & Kingati Advocates is an advocate. The respondent, John Mwangi Wandeto was buying Nyandarua/Kiriita Mairo Inya Block 2/Ndemi/2530 from the owner. He instructed the appellant to facilitate the transaction. The purchase price was Kshs.1,050,000. In the plaint dated June 18, 2013 filed before the Chief Magistrate's Court at Nyeri, the appellant sued the respondent seeking Kshs.22,000 being the sum due under section 48 of the *Advocates Act* (the Act), an itemised bill of costs having been served demanding the fees and there having been no payment. The respondent's defence was that the agreed fees was Kshs.4,000, to be shared equally between him and the seller. He had offered the applicant an amount of Kshs.2,000 but that the latter had declined to accept the money.

3. The trial court heard the dispute, and in a judgment delivered on 28th April 2014 found that after the appellant drafted the agreement there was disagreement regarding how much fees was to be paid. The court resorted to sections 44 and 46 of the *Advocates Act* and found that the minimum fees payable was Kshs.25,000. Now that the appellant had claimed Kshs.22,000, the court entered judgment for the sum together with costs and interest.

4. The respondent was aggrieved by the decision and appealed to the High Court at Nyeri on the following grounds:-

> " 1. That the learned magistrate erred in law and in fact by disregarding the evidence of the defence witnesses;
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> 2. That the learned magistrate erred in law and in fact by holding that the Respondent's fees ought to be calculated as per the *Advocates Remuneration Order* and not as agreed between the parties;
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> 3. That the learned magistrate erred in law and in fact by failing to hold that the respondent had undercut the fees required by the *Advocates Remuneration Order*; and
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> 4. That the learned magistrate erred in law and in fact by finding that the *Advocates Remuneration Order* allowed a minimum fees of Kshs. 25,000/= and gave Judgment for Kshs. 22,000/=."

5. The High Court (John M. Mativo, J. (as he then was)) heard the appeal. He allowed it with costs by setting aside the judgment, decree and orders by the trial court. The learned Judge in his judgment found that there was no dispute that the respondent had instructed the appellant to prepare a sale agreement between him and the vendor, and there was no dispute that the appellant had offered his legal services to the respondent. It was found that under section 45 of the *Act*, there was no binding agreement as to costs as no such written and signed agreement had been tendered in evidence; and now that the respondent had filed a defence to challenge the quantum of costs, under section 49 of the *Act* the appellant was required to have his bill of costs taxed before suing to recover costs. Because costs had not been taxed, the learned Judge found, the judgment entered by the trial court was a nullity.

6. This is the judgment that the appellant was dissatisfied with. He came to this Court on his second appeal. His grounds were as follows:-

> " 1. That the learned judge of superior court erred in wholly misapprehending the appeal and making a finding on issues not raised in the grounds of appeal.
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> 2. The learned judge of superior court erred in finding that there was no agreement for remuneration thus arriving at the wrong finding.
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> 3. The learned judge of the superior court erred in finding that the suit by the appellant was un- procedurally brought to court.
>
> 4. The learned judge of superior court in framing his own grounds of appeal and determining them."

7. Learned counsel, Mr. Kimunya appeared for the appellant and learned counsel, Mr. Wandeto appeared for the respondent. Both counsel filed written submissions, and elected to rely wholly on them.

8. The appellant's submissions were that the High Court went on a frolic of its own and determined its own issues, without considering the evidence on record. It was argued, on the basis of *Malawi Railways Ltd v Nyasulu* [1998] MWSC 3, that parties were bound by their own pleadings and the court itself was bound by the pleadings of the parties and cannot raise a different or fresh case unless the pleadings have been amended. In the decision, it was held as follows:-

> " The Court itself is as bound by the pleadings of the parties as they are themselves. It is not part of the duty of the court to enter upon an inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice "

9. On ground two, the learned counsel's submissions was that the High Court erred when it found that there was no agreement on remuneration. Counsel pointed out that the respondent did not deny that he together with the vendor instructed the appellant to draw the sale agreement, which was done; that they discussed the fees payable; and that it was only after the agreement had been executed that differences arose on the fees payable. Counsel proceeded as follows:-

> " It is illegal for the court to therefore find that there was no agreement on remuneration and to find that the appellant was not entitled to fees having undertaken the instructions of the defendant and the vendor on the drawing of the agreement. This court will note that the reason for disagreement was the amount that the plaintiff charged for the work already done and defendant and his counterpart in the agreement feeling that the plaintiff was not entitled to also be charged Interestingly, the respondent in the trial court and the appellate court did not at all deny that there was agreement between him and the vendor on one part and the appellant on the other, to prepare the sale agreement "

10. It was the further submission by learned counsel that, the fact that there was no written agreement was besides the point. This was because the respondent's evidence, and that of his witness, was that the appellant had computed fees at Kshs.6,000 which was negotiated to Kshs.4,000. He submitted that the transaction did not amount to a contentious business under section 45 of the *Act*. He went on that his claim for Kshs.22,000 was based on fees allowable given the value of the subject matter and this was the amount in the demand notice, the respondent having been served with an itemized notice which he admitted to have received.

11. Lastly, counsel submitted that the reliance by the court on section 49 of the *Act* to find that the suit was incompetent was in error. This was because the suit had been filed a month after the respondent was admittedly served with an itemized bill, and that the respondent had not raised issue with the bill or its receipt.

12. The respondent's learned counsel opposed the appeal. His submission was that the issues that the learned Judge formulated for determination clearly arose from the pleadings,and that from the pleadings there was no agreement on remuneration. Counsel agreed with the High Court that there was no basis for the claim of Kshs.22,000, the appellant having initially demanded Kshs.11,000 from him. There being no agreement, it was submitted, what was open to the appellant was to tax his bill of costs. There being no certificate of costs, it was submitted, the suit was incompetent.

13. We have considered the judgment by the High Court, the grounds of appeal and the rival submissions by the learned counsel. We wish to reiterate that parties are bound by their own pleadings, and that the court itself can only determine issues that have been raised in the pleadings and which the parties have no agreement on. In *Galaxy Paints Co. Ltd v Falcon Guards Ltd* [2000]EA 885, this Court stated as follows:-

> " It is trite law, and the provisions of O. XIV of the *Civil Procedure Rules*, are clear that the issues for determination in a suit generally flow from the pleadings, and unless pleadings are amended in accordance with the provisions of the *Civil Procedure Rules*, the trial court, by dint of the provisions of O. XX rule 4 of the aforesaid *rules*, may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination.
>
> In *Gandy v Caspair* [1956]EACA 139 it was held that unless the pleadings are amended parties must be confined to their pleadings. Otherwise, to decide against a party on matters which do not come within the issues arising from the dispute as pleaded clearly amounts to an error on the face of the record "

14. According to the learned Judge, the only issue for determination was whether or not the respondent's suit in the lower court was legally and properly before the court, hence legally sustainable, and whether or not the respondent was therefore legally entitled to the said sum. With profound respect to the learned Judge, whether or not the appellant's suit against the respondent was legally and properly before the trial court was never an issue in the pleadings, and more so in the respondent's defence. The trial court did not address this issue. It was not an issue in the grounds of appeal to the High Court. And in the High Court, parties were not asked to address the issue before a determination was made thereon. The learned Judge found that the suit was incompetent and a nullity. It is trite that to decide against a party on a matter which did not arise from the dispute as pleaded is a fundamental error. If for any reason the learned Judge considered that the suit was incompetent, he should have invited the learned counsel to address him on it before he made a decision on the same.

15. In dealing with the question of the legality of the suit, the learned Judge acknowledged that one of the issues before the trial court was whether there was agreement on the fees to be paid. According to the Judge:-

> " No evidence was tendered to show that such an agreement existed in writing and if it did, to satisfy the requirement that it must have been issued by the appellant or his duly authorized agent"

to be able to bring the matter under section 45 of the *Act*.

16. The suit was brought by the appellant against the respondent. In the respondent's defence he deponed as follows:-

> " 2. That paragraph 3 of the plaint is admitted save that the agreed legal fees was Kshs.4,000 which was to be shared between the purchaser and the buyer.
>
> 3. That paragraph 4 and 5 of the plaint are denied and that the defendant aver that the plaintiff declined to receive the defendant's fees for Kshs.2,000"

17. According to the plaint, the respondent had refused to pay the agreed fees, and that was why the appellant had resorted to the *Act*. He had, in accordance with section 48 drawn and served an itemized bill of costs which he had sent to the respondent, demanding Kshs.22,000.

18. It was therefore clear from the pleadings that the parties had agreed on fees in respect of drawing the sale agreement. The respondent said the fees was Kshs.4,000, but the appellant was silent on it. But it was clear that the agreed fees was not Kshs.22,000. He relied on the *Act* when the respondent did not pay the agreed fees.

19. It was clear from the grounds in the appeal to the High Court that the respondent was complaining that the trial court had agreed with the appellant that the fees was as per the *Advocates Remuneration Order,* and had erroneously not considered his defence on the agreed fees. The respondent, as the appellant in the High Court, was entitled to have his grievance determined, and to have a decision on what the agreed fees was. He did not receive this determination.

20. We have been forced to go to the evidence by the parties to see what the agreed fees was. The evidence by the respondent and his witness, John Mwangi Kihara (DW 1) who was the seller of the land, was that the appellant demanded Kshs.6,000 to draw the agreement. They negotiated this to Kshs.4,000. The buyer and seller were to each pay Kshs.2,000. When the appellant testified, he was cross-examined to concede that they had agreed on Kshs.6,000 which the respondent failed to pay. He denied that fees were negotiated to Ksh.4,000. If the agreed fees was Kshs.6,000, why was he demanding Kshs.22,000? Was he not bound by the agreement? Considering his conduct, and given the consistent evidence by the respondent and his witness, the probable agreed fees was Kshs.4,000. Now that there was agreed fees of Kshs.4,000, the Kshs.22,000 demanded by the appellant and which was the amount that the trial court asked the respondent to pay, was not payable.

21. In the final analysis, we allow the appeal, and set aside the judgment and decree by the High Court. In its place, there shall be a judgment for the appellant against the respondent in the sum of Kshs.4,000 together with costs and interest.

22. Costs follow the event, but, in the circumstances of this case, we order that each party pays his own costs.

DATED AND DELIVERED AT NYERI THIS 22ND DAY OF SEPTEMBER, 2023

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR