IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & KANTAI, JJ.A.)

CIVIL APPEAL NO. 37 OF 2015

BETWEEN

D.G. WACHIRA T/A D.G. WACHIRA & COMPANY ADVOCATES .....APPELLANT

AND

JAMES MUCHENE NGEI .....RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (R.E. Ougo, J.) dated 31st *October, 2014* **in Miscellaneous Civil Application no. 146 of 2013)**

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Consolidated With

CIVIL APPEAL NO. 35 OF 2015

BETWEEN

D.G. WACHIRA T/A D.G. WACHIRA & COMPANY ADVOCATES ....APPELLANT

AND

JAMES MUCHENE NGEI .....RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (R.E. Ougo, J.) dated 31st *October, 2014* **in Miscellaneous Civil Application no. 143 of 2013)**

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Consolidated with

CIVIL APPEAL NO. 36 OF 2015

BETWEEN

D.G. WACHIRA T/A D.G. WACHIRA & COMPANY ADVOCATES.....APPELLANT

AND

JAMES MUCHENE NGEI .....RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (R.E. Ougo, J.) dated 31st October, 2014 **in Miscellaneous Civil Application no. 145 of 2013)**

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Consolidated with

CIVIL APPEAL NO. 38 OF 2015

D.G. WACHIRA T/A D.G. WACHIRA & COMPANY ADVOCATES...APPELLANT

AND

JAMES MUCHENE NGEI .....RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (R.E. Ougo, J.) dated 31st *October, 2014* **in Miscellaneous Civil Application no. 172 of 2013)**

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JUDGMENT OF THE COURT

From what we can see from the records of appeal the relationship between the appellant, **D.G. Wachira trading as D.G. Wachira & Company Advocates** and the respondent, **James Muchenge Ngei**, was for a long time a cordial one. This is borne out by various documents that are in the records.

At the request of the appellant the respondent did many things on behalf of the appellant including allowing the appellant to occupy the respondent's residential house in Athi River at no fee or rent; the respondent paying school fees for the appellant's children whose names he knew and names them in various affidavits; paying house rent for the appellant and doing various other things that are relevant to the appeals and to which we shall revert.

For reasons that are not very clear from the records, that relationship later turned bitter and sour. There is on record correspondence exchanged by the parties which is not good and where very callous language is used; the kind of correspondence that should never be in a record of any court. We shall not go into any detail of that because it will not assist in any way in determining the issues in this appeal.

It is important to note here that the appellant did not file any matter on behalf of the respondent as the various matters that were filed in various courts were filed by other advocates. The appellant rendered some services for the respondent as will be seen in the course of this judgment.

When that relationship turned the way it did the appellant filed at the High Court four miscellaneous applications being Miscellaneous Cause no. 143, 144, 145, 146 and 172 all of 2013 against the respondent. This comprised four bills of costs. The bills of costs were taxed by a Deputy Registrar of the High Court as follows:

i. In Miscellaneous Civil Application No. 143 of 2013 the bill of costs was taxed at Shs.1,989,505.

ii. In Miscellaneous Civil Application No. 145 of 2013 the bill of costs at Shs.275,912

iii. In Miscellaneous Civil Application No. 146 of 2013 the bill of costs was taxed at Shs.314,460.

iv. In Miscellaneous Civil Application No. 172 of 2013 the bill of costs was taxed at Shs.1,076,843.

The respondent moved the High Court through Chamber Summons as is required by the Advocates Act and the Civil Procedure Act asking the court to set aside those costs awarded to the appellant. In a consolidated ruling delivered by Ougo, J. on 31st October, 2014 the judge faulted the Deputy Registrar for reaching the findings that the appellant was entitled to fees. The judge set aside all those certificates of taxation that had issued from the rulings of the Deputy Registrar. Those are the orders that have provoked these four appeals which were ordered to be consolidated and we heard them together with Civil Appeal No. 37 of 2015 being the lead file.

The Memoranda of Appeal drawn by W.G. Wambugu & Company Advocates for the appellant all contain similar 14 grounds of appeal. We may sum those grounds as follows. The judge is faulted for setting aside the Deputy Registrar's decisions in the said miscellaneous applications; for finding that there was an existing fee agreement between the appellant and the respondent and in taking consideration of correspondences between the appellant and the respondent, to constitute fee agreements. The judge is also faulted for failing to consider that there were 5 distinct bills of costs to be taxed. The judge is also faulted for delivering a consolidated ruling when the bills of costs were in regard to 5 different applications. It is said that the judge fell into error in finding that the trial court lacked jurisdiction to hear the applications; that the judge misapplied provisions of the Advocates Act in finding that the taxed costs were excessive in the circumstances; that the judge erred in finding that the taxing master had awarded legal fees to the appellant in excess of what was owing; that the judge should not have interfered with the discretion of the taxing master; that the judge should not have struck out the bills of costs; that the judge should have found the pre-existing agreement between the appellant and respondent was an illegal contract. In the penultimate ground it is said that the judge erred in law and fact in taking consideration of irrelevant considerations hence arriving at a wrong conclusion and that the judge misdirected herself in granting orders that were not asked for. We are therefore asked to set aside the said ruling and we issue orders reinstating the decision by the Taxing Master and find that the bills of costs were binding upon the respondent.

When the appeals came up for hearing before us on 7th October, 2019 learned counsel **Mr. Solomon Wamwayi** appeared for the appellant but there was no appearance for the respondent. We noted that the firm of **Koceyo & Company Advocates** who are on record for the respondent had been served with a hearing notice and in view of that, we allowed the appeals to proceed for hearing.

Mr. Wamwayi submitted that there was only one issue for consideration in the appeals which was whether there was an agreement between the respondent as client and the appellant as advocate. He submitted that there was no agreement between the advocate and client and supported the Deputy Registrar for so finding. According to counsel the respondent did not sign an agreement and further that under **section 37** of the **Advocates Act** costs for work done by an advocate were subject to taxation. Counsel submitted that advocates costs cannot be paid in kind and he asked us to allow the appeals.

The letters that are central to the determination of these appeals are set out in full in the ruling by the judge. We shall set out the contents of those letters here because they are central to this appeal.

On 28th September, 2004 the appellant authored the following letter to the respondent:

> **"James Muchene Ngei,**
>
> **NAIROBI.**
>
> **RE: H.C.C.C. NO. 1321 OF 2001**
>
> **1. YOURSELF VERSUS STEPHEN VILJOEN (2) IVOR MATHEE (3) BOC KENYA LIMITED**
>
> **2. H.C.C.C. 680 OF 2002**
>
> **YOURSELF VERSUS (1) JOSEPH GILBERT KIBE (2) BOC KENYA LTD**
>
> **We refer to our discussion in connection with above matters.**
>
> **We are of the opinion at this stage our contribution in both matters should be confined to a defined role namely:-**
>
> **a. To peruse all the pleadings filed by the Plaintiff and Defendants as well as all documents to be relied upon during the trial.**
>
> **b. To point out weaknesses in the Plaintiff's case vis-à-vis Defendants' defence.**
>
> **c. To research into the law applicable in all the points raised by Defendants' pleadings and prepare possible authorities to be relied upon by the Defendant during the trial.**
>
> **d. To prepare any court documents that need to be filed and discuss the same with your advocates on record.**
>
> **Since you have advocates on record, it is premature at this stage to discuss the issue of court appearances. The issue will be discussed and agreed upon at the relevant time as it is a matter your advocates on record will have to consent to.**
>
> **Taking into consideration the fact that you already have advocates on record to whom you have no doubt paid a deposit, and weighing it against the fact that your matters are extremely involving particularly H.C.C.C. 1321 of 2001, our fees shall be Kshs.150,000/= for H.CC.C. 1321 of 2001 and Kshs.65,000/= for H.C.C.C. 680 of 2002. If this is agreeable to you, kindly let us know.**
>
> **Yours faithfully,**
>
> **(Signed)**
>
> **D.G. WACHIRA & CO. ADVOCATES."**

On 16th of January, 2006 the appellant authored again to the respondent the following letter:

> **"James Muchene Ngei**
>
> **P.O. Box 53425**
>
> **Nairobi.**
>
> **Dear Sir,**

RE: (1) PAYMENT TO NSSF IN RESPECT OF OFFICE PREMISES AT VIEWPARK TOWERS

(2) OFFICE PARTITION PAYMENT

We refer to our discussion in respect of above matter and confirm the following:-

1. We have requested you to make payment of Kshs.144,800.00 to be paid to the Landlord NSSF through it's agent Landmark Realtors Limited. We acknowledge receipt of cheque No. 000047 dated 13*th January 2006 drawn in favour of NSSF for Kshs.62,400.00 being part payment of the said sum of Kshs.144,800.00.*

2. We have requested you to make payment for the partitioning of the office space estimated at Kshs.120,000.00.

3. In appreciation, we shall not charge any further fees in all your matters save for disbursement. The said Court matters are:-

4.

a. HCCC NO. 1321 OF 2001

YOURSELF VERSUS STEPHEN VILJOEN AND 2 OTHERS

b. HCCC NO. 680 OF 2002

YOURSELF VERSUS JOSEPH GILBERT KIBE & ANOTHER

c. HCCC NO. 72 OF 2004

YOURSELF VERSUS ATTORNEY GENERAL & OTHERS

d. HIGH COURT MISC CRIMINAL APPLICATION NO. 277 OF 2004 YOURSELF VERSUS THE ATTORNEY GENERAL

e. CHIEF MAGISTRATES CRIMINAL CASE NO. 2172 OF 2005 REPUBLIC VERSUS JOHN MUNGAI KARIUKI & OTHERS

f. HIGH COURT MISC CIVIL APPLICATION NO. 1642 OF 2005

IN THE MATTER OF AN APPLICATION BY JOHN MUNGAI KARIUKI FOR AN ORDER OF PROHIBITION.

It will be upon your discretion whether to make additional payment as fees in future in respect of all the said matters. We are also appreciate (sic) the great trust your (sic) have bestowed upon us in allowing us to handle the said matters on your behalf.

Yours faithfully

(Signed)

D.G. WACHIRA & CO. ADVOCATES"

There is correspondence in the records to show that the respondent paid rent on behalf of the appellant for the appellant's law chambers on the 6th floor of Viewpark Towers in Nairobi and the appellant also paid for partitioning of those chambers amongst other payments made on behalf of the appellant by the respondent. There is also correspondence and documents evidence that other payments were made to or on behalf of the appellant by the respondent even after the 2 letters we have set out above.

In a detailed analysis of the matter before her and after considering some case law the judge recognized the principles of law applicable in the matter. She found that a judge should not interfere with the assessment of what a Taxing Master considers to be a reasonable fee because it is accepted that questions which are solely of quantum of costs are matters which the Taxing Master is particualrly fitted to deal with and the judge should not alter such a fee on the basis that in his opinion he should have allowed a higher or lower amount. A judge will interfere in exceptional cases where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the Taxing Master exercised or applied a wrong principle. The judge also identified that even if it is shown that the taxing officer erred in principle the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties. The judge looked at the two letters we have reproduced in this judgment and applying **section 45** of the **Advocates Act** she held that for an agreement to meet the requirements of **section 45** of the said Act it ought to be an agreement reduced into writing and has to be signed by the client or agent. She held in her own words of the said letters:

"I am unable to agree with the finding of the said officer that in the circumstances, having nullified the agreement, the advocate should be allowed to proceed and tax his advocate-client bill of costs. The court in such situations is required by law

not to uphold such action based on an illegal agreement. It is apparent that the advocate cannot seek to steal a match on the client and secure a benefit by invoking the illegality of the retainer agreement. As a court of law and equity I cannot allow the advocate to turn around the contract, cannot allow the advocate to get out of a contract he willingly and consciously entered into with the client even though he knew or ought to have known that the same was contrary to the provisions of the Advocates Act…."

The judge reached the finding that when an advocate enters into an agreement with his client regarding his retainer and the payable fees for such retainer, he cannot turn around and disown the agreement on the grounds that the legal fees agreed were illegal since the same was less than the scale provided under the Advocates Remuneration Order.

Section 44 of the **Advocates Act** on remuneration of advocates provides for the Chief Justice to make orders prescribing remuneration of advocates. Under **section 46** of the said **Act** an advocate and his client may before, after or in the course of any contentious business make an agreement fixing the amount of the advocate remuneration in respect thereof; and before, after or in the course of any contentious business in a civil matter, make an agreement fixing the amount of the advocate's instruction fee in respect thereof or his fees for appearing in court or both. Such agreement shall be valid and binding on the parties provided that it is in writing and signed by the client or his agent duly authorized on his behalf. Under **section 45(6):**

"Subject to this section, the costs of an advocate in any case where an agreement has been made by virtue of this section shall not be subject to taxation nor to section 48."

Section 46 relates to invalid agreements and the rest of the provisions provide for other matters in advocate/client relationships.

In the rulings delivered by the Deputy Registrar it was found that the appellant had not filed any suit on behalf of the respondent; that the appellant did not formally come on record for the respondent in any of the matters but that the appellant appeared in court on various occasions holding brief for advocates then on record for the respondent. The Deputy Registrar found that the appellant was only entitled to costs within the specific briefs that he held.

In the letter dated 28th September, 2004 the appellant clearly stated that his role involved perusal of pleadings filed on behalf of both parties in suits in various courts to point out weakenesses in each case, to research into the law applicable and to prepare any court documents that were necessary in various suits. He stated that his fee was to be Shs.150,000 in one suit being H.C.C.C. 1321 of 2001 and Shs.65,000 in H.C.C.C. No. 680 of 2002.

In the letter that followed on 16th January, 2006 the appellant set out all the matters that he was dealing with on behalf of the respondent and recognized that he had requested the respondent to make payments to the appellant's landlord (National Social Security Fund) for offices occupied by the appellant at View Park Towers. The appellant acknowledged receipt of a cheque of Shs.62,400 and he acknowledged requesting the respondent to make payment of a sum of Shs.120,000 for partitioning of his offices at the said View Park Towers. He stated that it was to be at the respondent's discretion to make any additional payment and the appellant appreciated the great trust the respondent had bestowed upon him in allowing him to act for the respondent in the said matters.

As we have seen the Advocates Act permits advocates to make agreement with their clients on payment of fees. There is a requirement that such an agreement be in writing and be signed by the client or an agent of the client. Under Section 45(6) of the said Act where an agreement has been made between the advocate and the client it will not be subject to taxation. The appellant wrote letters to the respondent clearly stating what his fees were in various matters he was advising the respondent which were in various courts where other advocates were on record for the respondent. The letters were written in September, 2004 and January 2006. The Advocates Remuneration Order that was then applicable provided in **rule 3**:

"No advocate may agree or accept his remuneration at less than provided by this Order except where the remuneration assessed under this Order would exceed the sum of Shs.10,000; and in such event the agreed fee shall not be less than Sh.10,000."

Although that rule has since been repealed it was applicable and in force when the appellant wrote the said letters stating that his fees would be Ksh.150,000 and Ksh.65,000. In **Njogu & Co. Advocates v National Bank of Kenya Limited [2016] eKLR** the advocate (appellant) entered into an agreement with the respondent (client) which obviously amounted to undercutting against the provisions of the said Act. The Advocate filed a bill of costs but the same was thrown out, an Order that was upheld by the High Court. It was held by this Court in a judgment delivered on 25th November, 2016:

"In our view an advocate who willingly and knowingly enters into an agreement in regard to the payment of his fees that is contrary to the Advocates Remuneration Order, cannot maintain proceedings whose purport is to avoid the illegal agreement by everting to the Court to tax his advocate/client bill of costs in accordance with the Advocates Remuneration Order. We concur with the learned judge that the appellant having made his bed must lie on it. That is to say that, notwithstanding the illegality of the contract, this court cannot come to the appellant's aid as the appellant is estopped by his conduct from seeking the court's intervention. We find no merit in this appeal as the appellant's bill of costs was properly struck out ….."

Considering the circumstances of the whole matter that was before the Deputy Registrar and the relationship between the advocates (appellant) and the client (respondent) the learned judge in the appeal before us did not agree with the Deputy Registrar who had disregarded the said letters. The judge found that the said letters did not amount to an agreement as they were not signed by the respondent as is required. The judge however disagreed with the Deputy Registrar who had allowed the appellant to tax advocate/client bills of costs.

As we have seen the judge found that the appellant as an advocate could not be allowed to steal a match on the client. We fully agree with the findings of the judge. It is the appellant who sought to provide services to the respondent and he was being paid in various ways as per his request. Had the appellant maintained a proper distance in the relationship of advocate and client the facts of the case would have been different. The appellant as advocate having allowed the relationship of advocate and client to be muddled in a way where the professional approach required was thrown off the window; the appellant as advocate having authored letters in his own hand where he stated that he was not going to charge other fees the judge was right in the conclusons that she reached.

We have considered the whole matter and can find no merit in the consolidated appeals. The same are dismissed with costs to the respondent.

Dated and Delivered at Nairobi this 7th Day of February, 2020.

W. KARANJA

……..……..

JUDGE OF APPEAL

M.K. KOOME

…….……

JUDGE OF APPEAL

S. ole KANTAI

…….

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR