IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, JJ.A)

CIVIL APPEAL NO. 36 OF 2017

BETWEEN

NATIONAL BANK OF KENYA LIMITED.....APPELLANT

AND

OTIENO, RAGOT & COMPANY ADVOCATES.....RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Kisumu

***(E. Maina, J.)** dated 16th February, 2017*

in

HC Miscellaneous Civil Application No. 18 of 2016)

****

JUDGMENT OF ASIKE-MAKHANDIA, JA

Retainer agreements on fees between advocates and their clients are a common phenomenon but as the old adage goes, agreements are made to be broken as one party may fail to deliver on its end of the bargain leading to a fall out that may entail legal proceedings. It is no brainer then that when the appellant herein failed to honour its promise and pay the required fees to the respondent for work done and services rendered, the respondent took legal action and filed Advocate/client bill of costs for taxation. On 28th June, 2016, the Deputy Registrar /taxing officer by a ruling delivered on 28th June, 2016 taxed the bill at Kshs. 3,279,534/83 and certificate of costs was subsequently issued.

The respondent thereafter filed a notice of motion application dated 1st July, 2016 seeking judgment on the taxed costs together with interest. Before the hearing of the application however, the appellant filed a chamber summons application, which was in fact a reference, in the High Court seeking a stay of execution of the taxed costs and also to set aside the taxing officer's ruling on taxation and for the matter to be referred back to the taxing officer for taxation afresh. The alternative prayer was for the bill of costs be taxed in accordance with the retainer agreement between the parties. The respondent's application was disposed of by consent of counsel, in that, judgment was entered in terms of the certificate of costs and a stay of execution granted pending the hearing of the appellant's application. At the hearing of the appellant's application, **Mr. Ojuro,** learned counsel for the appellant submitted that there was a retainer agreement between the parties and that the respondent should not therefore have filed advocate/client bill of costs. Alternatively he argued that having done so, the same ought to have been taxed as per the retainer agreement. In addition, he submitted that the High Court was the right forum in which to raise the issue of retainer agreement.

In opposing the reference, **Mr. Otieno**, learned counsel for the respondent submitted that the reference was an appeal from the decision of the taxing officer who cannot be faulted for failing to rely on the retainer agreement which was not placed before her. The appellant had the option of filing the alleged retainer agreement pursuant to paragraph 13A of the Advocates Remuneration order but opted not to do so despite asking for time to avail the same in court. It was further submitted that the approach adopted by the appellant, had the effect of converting the Judge into a taxing officer, which was wrong.

The learned Judge, according to counsel in the ruling warned herself of the circumstances under which she could interfere with the discretionary decision of the taxing officer and concluded that she could only do so if there was error of principle. She quoted the case of **D. Njogu & Company Advocates v National Bank of Kenya Limited, [2016] eKLR** for the proposition that the respondent ought to have relied on the retainer agreement and not try to avoid it by filing a bill of taxation. She however, noted that the appellant had consented to the taxing of the bill of costs before the taxing officer and agreed on all the items in the bill save for items 1 and 2 being the instruction and

getting up fees respectively. The Judge further found that the appellant consented to the judgment being entered on the basis of the certificate of costs. On the basis of the foregoing, the Judge held that having knowingly and willingly consented to the entry of judgment in terms of the certificate of costs, the appellant waived its right to rely on the retainer agreement. On that basis the appellant's application and or reference was dismissed with no order as to costs.

Aggrieved by the ruling, the appellant lodged the present appeal seeking to set aside the decision of the High Court, costs and for a declaration that the retainer agreement was binding on the parties. In support thereof 5 grounds of appeal were raised to wit, that the learned Judge erred in law in failing to order enforcement of the retainer agreement after finding that the same was binding on the parties; in finding that the retainer agreement could not be enforced after taxation of costs; in failing to be bound by the decision in **D. Njogu & Company Advocates v National Bank of Kenya Limited,** (Supra); and in failing to appreciate the provisions of the Advocates Act, Advocates Remuneration Order.

At the plenary hearing of the appeal **Mr. Ojuro,** learned counsel appeared for the appellant while **Mr. Otieno,** learned counsel appeared for the respondent. Counsel relied on their written submissions which they chose not to highlight.

The appellant faulted the learned Judge for failing to find that the amount payable to the respondent was as per the retainer agreement even after taxation of the bill of costs. That the retainer agreement was a live issue which could be raised at any time even after judgment. Counsel argued that the circumstances of this case were similar to those obtaining in the case of **D. Njogu & Company Advocates** (Supra). He further submitted that the learned Judge erred in finding that the retainer agreement was binding but she could not enforce it. He contended that the issue of retainer agreement could only be enforced at the point of payment of taxed costs. That the consent entered into between the parties to tax the bill of costs did not in any way therefore waive the right of the appellant to enforce the retainer agreement and there was no law that bars a party from enforcing the same after judgment.

The respondent on its part pointed out that, in a dispute over fees enforcement is through the invocation of Section 51 of the Advocates Act after a certificate of costs has been issued. That a reference from the decision of a taxing officer is an appeal to a single judge of the High Court as was in held in **Kipkorir Titoo & Kiara Advocates v Deposit Protection Fund Board (2005) eKLR.** That just like any other appeal, any document in support of or in opposition to the bill of costs not produced before the taxing officer could not be legally produced before the judge hearing the reference without leave to adduce additional evidence. The taxing officer could not therefore be faulted for not acting on the retainer agreement that was not placed before her. That the retainer agreement was inadmissible and the learned Judge correctly found it to be inapplicable in the circumstances of this case as the appellant freely participated in the taxation proceedings without alluding to the retainer agreement. Counsel submitted further that the appellant requested the taxing officer to tax the bill using the 1997 remuneration order and not the retainer agreement and cannot therefore change the position during the hearing of the appeal. He quoted the case of **Wanga & Company Advocates v Pan Africa Insurance Co., CA No. 78 of 2009** where the court stated that allowing a party to introduce new evidence at the appellate level is not only prejudicial to the opposing party but is also against public policy.

Relying on Section 45(6) of the Advocates Act, counsel submitted that where there is a valid agreement, costs will not be taxed and that in the instant appeal a demand letter was written demanding payment of legal fees within one (1) month failure to which legal proceedings would be commenced to recover the same. The appellant opted not to respond and raised the issue of the retainer agreement. Counsel agreed with High Court's finding that the consents were not entered into in any manner that was against the law. For the appellant to enforce the retainer agreement, it should have taken up the issue before taxation of the bill. Therefore the appellant was estopped from raising the issue of the retainer agreement. That the matter was concluded the moment the consent judgment was entered and had the reference been allowed, it would have amounted to allowing an appeal from a consent order which would be contrary to Section 67(2) of the Civil Procedure Act.

The respondent further argued that the case of **D. Njogu & Company** case (Supra) was inapplicable to the circumstances of this case since in that case when the matter was being heard a preliminary objection was raised that parties had a retainer agreement on fees and therefore the advocate could not file advocate/client bill of costs. That was not the case here. He agreed with the learned Judge's finding that the appellant not only took part in the taxation, conceded most of the items in the bill and proffered a view as to what was due and payable under the two items it chose to contest. As if that was not enough, the appellant even consented to the entry of final judgment in favour of the respondent for the amount it sought to contest thereafter.

This is a second appeal and therefore this Court confines itself to matters 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. (See: **Stanley N. Muriithi & Another versus Bernard Munene Ithiga (2016) eKLR**).

Having carefully considered the record of appeal, submissions by counsel and the law, the issues for determination are whether this Court should interfere with the discretion of the High Court not to enforce the retainer agreement, whether the High Court was bound by the decision in the **Njogu case** and the fate of the consent judgment entered.

I note that the taxing officer was exercising her discretion when taxing the bill. The High Court found no reason to interfere with that discretion. The parameters on interference of the discretion of the trial court or even 1st appellate case are well defined. If the discretion was exercised judiciously, this Court cannot interfere simply on the ground that if it were sitting as the court of first instance, it might have given different weight to that given by that court to the various factors in the case. For avoidance of doubt, I revert to the case **Mbogo & Another v Shah (1968) EA 93** for the formal caveat that:

> ***"A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercise his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."***

Madan, JA (as he then was) rephrased the position in **United India Insurance Co. Ltd & 2 Others v East African Underwriters (Kenya) Ltd (1985) eKLR** as follows:

"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong".

A retainer agreement is anchored in Section 45 of the Advocates Act which provides *inter alia*:

"45. Agreements with respect to remuneration

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

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

(b)before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate's instruction fee in respect thereof or his fees for appearing in court or both;

(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."

It is common ground that the parties herein had a valid retainer agreement. The question then is whether the said agreement was enforceable. As with any other agreement, the onus of proving the existence of the retainer agreement lies with the party that wishes to enforce it as is indeed is the case of contract and the evidence in support thereof. *(*See **Kenya National Capital Corporation Limited v Albert Mario Cordeiro & Another (2014) eKLR** and Section 107 of the Evidence Act). The proviso to Section 45(5) allows an advocate who is a party to a retainer agreement and who has acted diligently for the client to sue and recover the whole retainer fee should his client default in payment thereof. In fact, as long as the advocate has been diligent, his entitlement to the fixed sum is so outright that he need not tax his costs nor give statutory notice to the client prior to his pursuit of the said fees.

In the instant case, the respondent was entitled to the fixed sum in the retainer agreement and needed not notify the appellant. However, the respondent chose to demand for his fees to which the appellant did not respond. The respondent then filed his bill of costs. What is interesting is that when the respondent filed the bill, he drew it to scale notwithstanding the retainer agreement. When the bill came for taxation for the first time, the appellant's counsel sought leave, which was granted, to consult his client and take further instructions. Upon consulting the appellant, counsel conceded to all the items in the bill of costs as filed save for instructions and getting up fees which he contended needed to be pegged on the 1997 Advocates Remuneration Order. At no time did the appellant refer to or allude to the existence of a retainer agreement. To the taxing officer, all she had to do was tax the bill of costs as presented. There was no objection at all raised in accordance with Section 45(6) of the Advocates Act or as was the case in **D. Njogu & Company Advocates** (Supra). Further, the appellant consented to the certificate of costs arising therefrom being adopted as the judgment of the court. Therefore, having not brought up the existence of a retainer agreement to the attention of the taxing officer, the taxing officer could not have relied on the same. Introducing the agreement through the reference before the Judge without leave was also contrary to the law hence the learned Judge's conclusion that the appellant's counsel having knowingly and willingly consented to entry of judgment in terms of the certificate of costs, waived its right to rely on the retainer agreement. I also reiterate what was stated in the case of **Wanga & company Advocates** case (supra), that allowing a party to introduce new evidence at the appellate stage of the dispute is not only prejudicial to the other side but is also against public policy. The upshot is that the appellant waived and or was estopped from raising the retainer agreement as a defence to the respondent's claim. Nor can the claim by the appellant that the retainer agreement could be raised at any stage of the proceedings hold. In the premises the two courts below exercised their discretion properly by not reverting to the retainer agreement.

On whether the court was bound by the decision in **D. Njogu & Company Advocates v National Bank of Kenya Limited** (supra), I find that though the facts were more or less similar and that under normal circumstances the learned Judge should have been bound by the said decision, the appellant failed to raise the issue of the retainer agreement as a preliminary issue to the bill of costs and willingly let the taxing officer tax the bill of costs. Secondly, the appellant consented to the certificate of cost being adopted as a judgment of the court and a decree was issued thereafter. The appellant only referred to the retainer agreement in the reference before the High Court which was tantamount to introducing fresh evidence at the appellate stage. The learned Judge dealt with the issue in detail and arrived at the inevitable conclusion that what distinguished the present case from the Njogu case was that the appellant's counsel consented to the taxation and made no mention of that agreement to the taxing officer. That even with the knowledge of the champertous retainer agreement, the appellant's counsel again consented to the entry of judgment in terms of the resultant certificate of costs and also conceded to the appellant's application being heard long after judgment was entered. By this reasoning, the learned Judge found the case of **D. Njogu & Company (supra)** inapplicable in the circumstances of the case before her and could not therefore be bound by it. I have no grounds to impugn that reasoning.

As regards whether this Court can set aside a consent judgment, the Advocates Act provides the procedure for the recovery of advocate's costs after taxation of bill of costs and a certificate of taxation issued. All that a party is required to do is to seek entry of judgment based on the certificate of costs after which a decree is issued for execution. Section 51(2) of the Advocates Act provides that:

"The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs."

Consent judgment has a contractual effect and can only be set aside on such grounds as would obtain in a contract. By lodging this appeal, the appellant is basically asking this court to set aside orders which it consented to and were adopted as orders of the court and a decree issued. The predecessor of this Court in **Hirani v Kassam (1952) 19 EACA 131, at 134**, stated as follows:

> ***"The mode of paying the debt, then, is part of the consent judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. No such ground is alleged here. The position is clearly set out in* Setton on Judgments and Orders *(7th Edn), Vol 1, p 124, as follows: "Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court ...; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement."***

The principles that appertain to the setting aside of consent orders are well known having been set out in a line of cases including **Brooke Bond Liebig v Mallya (1975) EA 266** where Mustafa Ag. VP stated thus:

> ***"The compromise agreement was made an order of the court and was thus a consent judgment. 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."***

Similarly, in the case of **Flora N. Wasike v Destimo Wamboko (1988) eKLR** Hancox JA cited with approval **Setton on Judgments and orders (7th edition) vol 1 page 124** and reiterated that:

> ***"Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and those claiming under them… and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court…; or if the consent was given without sufficient material facts, or in general for a reason which would enable a court set aside an agreement."***

In the instant appeal, the reference appealed against was based substantially on the consent order adopted by the taxing officer. Allowing this appeal will in no doubt amount to setting aside a consent judgment. As I have noted elsewhere in this judgment, the circumstances upon which such a judgment can be set aside do not obtain in the present appeal. There was no proof of fraud, collusion or misapprehension of facts that could lead to impugning the learned Judge's finding that the consent was freely entered into by the parties and therefore the court had no justification to go against it.

For the foregoing reasons it follows that this appeal is bereft of merit and I order that it be and is hereby dismissed with costs to the respondent.

This Judgment is delivered pursuant to rule 32(3) of the Court of Appeal Rules since Odek, JA passed on before the delivery of the judgment.

As Kiage, JA concurs orders accordingly.

Dated and delivered at Nairobi this 3rd day of April, 2020.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original

Signed

DEPUTY REGISTRAR

JUDGMENT OF KIAGE, JA

I concur with the Judgment of my learned brother Makhandia JA, which I considered in draft, and have nothing useful to add.

Dated and delivered at Nairobi this 3rd day of April, 2020.

P.O. KIAGE

.....

JUDGE OF APPEAL