



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: KARANJA, SICHALE & J. MOHAMMED, JJ.A]

CIVIL APPEAL NO. 122 OF 2018

BETWEEN

HARIT SHETH ADVOCATES.....APPELLANT

AND

NZIOKA & CO. ADVOCATES.....RESPONDENT

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

at Nairobi (Sergon, J) dated 22nd September, 2017

IN

HCCC No. 187 of 2015 (O.S))

JUDGMENT OF THE COURT

This is an appeal against the ruling of **Sergon, J** dated 22nd September, 2017, allowing the Plaintiff's (**Nzioka & Co. Advocates**) (the respondent herein) application dated 10th November, 2016.

In the said Notice of Motion dated 10th November, 2016, the respondent sought orders that:

“(i) (spent)

(ii) The firm of Harit Sheth Advocates do hereby honor their terms and conditions of their professional undertaking made on the 29th March, 2013 and 5th April, 2013, by making payment of the sum of Kshs 25,000,000.00 to the applicant (Nzioka & Co. Advocates)

(iii) The firm of Harit Sheth & Co. Advocates bear the costs of this application”.

A brief background to this appeal is that the respondent was retained by Afrison Export Limited and Huelands Limited to prosecute Milimani HCCC No. 617 of 2012 against the Hon. Attorney General and other defendants. On 12th February, 2015, judgment was entered for Kshs 4,086,683,330.00 in favour of the respondent's clients against the then defendants. On 8th April, 2013, this judgment was reduced by consent of parties to Kshs 2,400,000,000.00. On 29th March, 2013, legal fees of Kshs 200,000,000.00 was secured by professional undertaking between the respondent and the appellant herein (**Harit Sheth Advocates**) who took over the conduct of the matter from the respondent.

According to the respondent, on 5th April, 2013, a further professional undertaking of Kshs 100,000,000.00 was signed by the appellant and the respondent making the total amount secured by professional undertaking to be Kshs 300,000,000.00. The fees was to be paid on a pro-rata basis depending on the sums paid by the then defendants. A dispute arose over the outstanding fees and the respondent

filed an originating summons to enforce the appellant's professional undertaking. In a judgment delivered on **3rd November, 2015** by **Mboghli, J**, the appellant was ordered to pay to the respondent Kshs 50,000,000.00 (being part of the fees found to be due then). The respondent further contended that on **26th April, 2016**, the appellant received further payment of Kshs 600,000,000.00 from the then defendants but despite demand and calls to pay the respondent, the appellant refused to pay to the respondent the outstanding balance of the agreed legal fees of Kshs 25,000,000.00 being the amount due and payable to it as per the terms of the professional undertaking; that the appellant has so far received a total of Kshs 2,400,000,000.00 from the then defendant and has paid to the respondent only Kshs 150,000,000.00 instead of Kshs 200,000,000.00 leaving a balance of Kshs 25,000,000.00 due and owing to the respondent as per the consent dated **27th April, 2016**. The respondent contended that the appellant was in breach of the professional undertaking and urged the court to compel the appellant to honour the terms of the professional undertaking.

In response to the applicant's Notice of Motion dated **10th November, 2016**, **Richard Kariuki**, an advocate practicing as a partner in the appellant's firm deposed in an affidavit sworn on **7th February, 2017** that the respondent was seeking to re-litigate a matter which had already been determined by **Mboghli, J**. who in a judgment dated **3rd November, 2015** had found that the total amount payable to the respondent under the undertaking was Kshs 200,000,000.00 and not Kshs 3,000,000.00; that later, the judgment was varied by way of consent dated **27th April, 2016** wherein one **Bryan Yongo Otumba (Yongo)** was enjoined to the suit as an Interested Party and the appellant was required to pay Kshs 25,000,000.00 each to the respondent and to **Yongo** and that the sum of Kshs 25,000,000.00 was duly paid by RTGS payments of Kshs 22,500,000.00 and 2,500,000.00 to the respondent; that the only amount remaining payable to the respondent is Kshs 25,000,000.00 which is to be paid upon receipt of the sum of Kshs 600,000,000.00 from the defendant being the final installment of the decretal dues in HCCC No. 617 of 2012; that the sum of Kshs 600,000,000.00 received by the appellant from the defendant and upon which the respondent was demanding payment of Kshs 25,000,000.00 was not the final sums of Kshs 600,000,000.00 to be paid in HCCC No. 617 of 2012 as this was interest; that the respondent was duly notified of this position through his advocates **M/s S.O. Owino & Co. Advocates** through a letter dated **8th July 2016**.

The respondent's motion was determined in a ruling dated **22nd September, 2017** wherein, **Sergon, J** held that:

“The question this court must determine is whether the defendant is in default of his professional undertaking. There is no dispute that the total decretal sum from (sic) primary suit is Kshs 2,400,000,000.00. It is also not in dispute that the professional undertaking given by the respondent stated that the legal fees due to the plaintiff would be paid on a pro rata basis from the instalments remitted from the decretal amount. A quick mathematical calculation of the decretal amount remitted to the defendant now stands at Kshs 2,400,000,000. It is therefore not true that the respondent has not received the decretal sum in full. The professional undertaking by the respondent was in clear and unambiguous terms that the legal fees will be paid to the applicant and the interested party on a pro rata basis.

In the end, I find the plaintiff/applicant has satisfactorily established his claim. Consequently the motion dated 10th November, 2016 is allowed in terms of prayer 2 and 3”.

The appellant was aggrieved with the findings of the learned judge and in a Memorandum of Appeal filed on **18th April, 2018** listed eight (8) grounds of appeal faulting the learned judge for finding that the appellant had received the full decretal sum in High Court Civil Suit No. 617 of 2012; for issuing orders directing the appellant to honour its professional undertakings which undertakings had already been overtaken and subsumed within the judgment of **Mboghli, J** dated **3rd November, 2015** as well as the terms of the consent letter dated **27th April, 2016** which was adopted by the court on **2nd June, 2016**; that the respondent's application of **10th November, 2016** was an attempt by the respondent to reopen and re-litigate matters already decided by **Mboghli, J**; for failing to consider the appellant's evidence that the first installment of 25,000,000.00 paid to the respondent under the terms of the consent letter dated **27th April, 2016** was out of the first installment of Kshs 600,000,000.00 received by the appellant and that there is an outstanding balance of Kshs 600,000,000.00 in respect of the decretal dues; that the sum of Kshs 600,000,000.00 received by the appellant in **April, 2015** was on account of agreed interest on the decretal amount in HCCC No. 617 of 2012 and was not part payment of the said decretal amount and finally, for failing to consider that the appellant's liability under its professional undertaking contained in its letters dated **29th March, 2013** and **5th April, 2013** had been modified by the terms of the consent letter dated **27th April, 2016** and consequently, the final installment of Kshs 25,000,000.00 payable to the respondent was to be paid out of the final installment of the decretal amount in HCCC No. 617 of 2012, which sum was yet to be received by the appellant.

The appeal came up before us for plenary hearing on **4th December, 2019**. **Mr. Sarvia**, learned counsel for the appellant in urging the appeal relied on the appellant's written submissions filed on **15th January, 2019** and a list of authorities filed on **6th May, 2019**. He condensed the grounds of appeal into 4 thematic areas.

Firstly, he contended that the learned judge erred in his decision in failing to find that the undertakings had been overtaken and subsumed within the judgment of **Mboghli, J** and the consent letter of **27th April, 2016** and that the balance of Kshs 25,000,000.00 was to be paid from the final installment of the decretal dues.

Secondly, it was contended that the learned judge erred in finding that the appellant had received the full decretal amount as the sum of Kshs 600,000,000.00 received in **April, 2015** was interest and not part of the decretal amount of Kshs 2,400,000,000.00 and finally, that the application was an attempt to re-litigate, hence it was *res judicata*.

Mr. Arika, learned counsel for the respondent in opposing the appeal relied on the respondent's submissions and a list of authorities both filed on **18th February, 2019**. Counsel contended that the appellant gave undertakings in the letters of **29th March, 2013** and **5th April, 2013** for payment of Kshs 200,000,000.00 and a further sum of Kshs 100,000,000.00; that the two letters of consent dated **29th March, 2013** and **5th April, 2013** did not supersede or subsume the professional undertakings given by the appellant.

We have considered the record, the rival oral and written submissions, the authorities cited and the law.

This being a first appeal our mandate is as set out in *Selle vs. Associated Motor Boat Co. of Kenya & others [1968] EA 123* wherein it was stated:

"I) 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 demeanor 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 a re-trial 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 the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif -vs- Ali Mohamed Sholan (1955)22 EACA 270".

In the appellant's written submissions, the grounds of appeal were clustered into 3 main thematic areas. Firstly, it was contended that the undertaking of **29th March, 2013** and **5th March, 2013** had been superseded and subsumed within the judgment of **Mboghli, J** of **3rd November, 2015** and the subsequent consent of **27th April, 2016** varying the judgment. Secondly, **Sergon, J** was faulted in finding that the appellant had received the full decretal sum as the sum of Kshs 600,000,000.00 received from the defendant in **April, 2015** was interest on the decretal sum. Thirdly, that the motion was an attempt by the respondent to re-open and re-litigate issues that had been determined by **Mboghli, J** and the subsequent consent of **27th April, 2016**.

In the respondent's written submissions filed on **18th February, 2019**, it was contended that the consent letter of **27th April, 2016** did not indicate that it was modifying or subsuming the professional undertakings; that the application of Kshs 600,000,000.00 as interest was mischievous on the part of the appellant as it was part of the decretal sum.

The undisputed facts of this appeal is that the respondent on behalf of its client, Afrison Export Limited and Huelands Limited obtained judgment in the sum of Kshs 4,086,683,330.00 in Milimani HCCC No. 617 of 2012. On **8th April, 2013**, this judgment by consent of the parties therein reduced the sum awarded of Kshs 4,086,683,330.00 to Kshs 2,400,000,000.00. Later, the appellant took over the conduct of the suit and undertook in the letters of **29th March, 2013** and **5th April, 2013** to pay the respondent's legal fees. In the letter of **29th March, 2013**, the appellant undertook:

"With respect to the claim against the occupation by the government of the suit property, a settlement has been reached out of court. Our clients have agreed to sell part of the property to the Government for Kshs 2,400,000,000/= (Kenya Shillings Two Billion Four Million (sic)). Now, in consideration of your having ceded the conduct of the matter to us:

(i) We shall remit to you the sum of Kshs 100,000,000/= (Kshs One Hundred Million) within ten days of receipt by ourselves of cleared funds from the Government and upon being authorized to release the said funds to our clients in full and final settlement of your fees in respect of the claim against the occupation of the suit property by the Government.

(ii) In the event that payment is made to us by installments, we undertake to remit the said funds to you pro-rata in proportion of the payment received by us.

The above payment is in full and final settlement of all fees due to you to date in respect of all matters handled by you for Afrison Export Import Limited and Huelands Limited".

Whilst in the undertaking of **5th April, 2013**, the appellant undertook:

“We hereby undertake to remit to you a further sum of Kshs 100,000,000/= (Kenya Shillings One hundred million) in addition to our undertaking of 29th March, 2013.

(i) We shall remit to you the sum of Kshs 100,000,000/= (Kenya Shillings One hundred Million) within ten days of receipt by ourselves of cleared funds from the Government and upon being authorized to release the said funds to our clients in full and final settlement of your fees in respect of the claim against the occupation of the suit property by the Government.

(ii) In the event that payment is made to us by installments, we undertake to remit the said funds to you pro-rata in proportion to the payment received by us.”

On 25th August, 2014, the appellant received Kshs 1,200,000,000.00 and paid out Kshs 100,000,000.00 being 50% of the fees. On 25th March, 2015, parties in HCCC No. 617 of 2012 entered into another consent to make payment of Kshs 600,000,000.00 by way of interest. In April, 2015, the defendant paid a sum of Kshs 600,000,000.00 to the appellants. The respondent demanded Kshs 50,000,000.00 as its pro-rated fees in respect of this payment of Kshs 600,000,000.00 but in its letter of 28th April, 2015, the appellant maintained that this was interest and not part of the decretal dues of Kshs 2,400,000,000.00. It is this dispute that led to the respondent filing an amended originating summons dated 23rd June, 2015 which was determined by **Mboghli, J** as follows:

“However, the fact that the plaintiff did not raise any query when it received Kshs 100,000,000.00 out of Kshs 1,200,000,000.00 recovered by the defendant puts to question its assertion that the undertaking was for a total of Kshs 300,000,000.00 and not Kshs 200,000,000.00.

In the letter dated 8th April, 2015, the plaintiff claims Kshs 50,000,000.00 instead of Kshs 125,000,000.00 demanded in this suit. The inescapable conclusion is that, at this stage the plaintiff’s claim is limited to Kshs 50,000,000.00.

This matter would not have reached the court had parties herein engaged with a view to settling the same.

Be that as it may, with the material before me, I am persuaded that the plaintiff is entitled to Kshs 50 Million on pro rata basis following the payment of Kshs 600 Million to the defendant.

Nowhere in the undertakings and correspondence between the parties was the issue of interest on the sum due was discussed. I am unable to award the same.

The defendant shall pay the plaintiff the sum of Kshs 50 Million within 30 days of today and in default enforcement shall follow.

The plaintiff shall have costs of these proceedings”.

In the determination by **Mboghli, J**, two critical issues were addressed.

Firstly, that the total sums to be paid to the respondent on a pro-rata basis is Kshs 200,000,000.00 and not Kshs 300,000,000.00. Secondly, that the sum of Kshs 600,000,000.00 received by the appellant in **April, 2015** was part of the decretal dues and not interest.

The appellant was dissatisfied with the said outcome and duly filed a Notice of Appeal on **16th November, 2015** and on **10th March, 2016** obtained orders of stay at the High Court. Following this turn of events, the parties entered into a consent dated **27th April, 2016** and which was adopted as an order of the court on **2nd June, 2016**. It was agreed:

“By consent the Judgment delivered by this Honourable Court on 3rd November, 2015 be and is hereby amended in the following terms.

1. Samuel Bryan Yongo Otumba be and is hereby joined to this suit as an Interested Party.

2. The defendant shall pay the sum of Kshs 100,000,000/= as follows:

(a) The Judgment sum of Kshs 50,000,000/= shall be paid as follows:

(i) The sum of Kshs 25,000,000/= shall be paid by the Defendant to the Plaintiff within 7 days of filing of this consent in court.

(ii) The sum of Kshs 25,000,000/= shall be paid by the Defendant to the Interested Party within 7 days of filing of this consent in court.

(b) The balance amounting to the sum of Kshs 50,000,000/= shall be paid from the final installment of the decretal sum in HCCC No. 617 of 2012 to be received by the Defendant from (sic) the Government as follows:-

(i) The sum of Kshs 25,000,000/= shall be paid by the Defendant to the Plaintiff after receipt by the Defendant from the Government of Kenya as the final installment of the decretal sum in HCC 617 of 2012 and within 14 days of the defendant being authorized by the Government to release the sums to their client and

(ii) The sum of Kshs 25,000,000/= shall be paid by the Defendant to the Interested Party after receipt by the Defendant from the Government of Kenya of the final installment of the decretal sum in HCCC No. 617 of 2012 and within 14 days of the Defendant being authorized by the government to release the same to their client.

3. The Defendants Notice of appeal dated 13th November, 2015 filed herein on 16th November, 2015 be and is hereby withdrawn with all parties bearing their own costs.

4. All parties to bear their own costs of this suit and all applications herein”.

The appellant received a further payment of Kshs 600,000,000.00 and it paid Kshs 25,000,000.00 each to the respondent and to **Bryan Yongo Otumba** as per the consent of **27th April, 2016**. The appellant also received another payment of Kshs 600,000,000.00 (in **April, 2015**) but it maintained that this was interest and not part of the decretal dues. Unconvinced, the appellant filed the motion dated **10th November, 2016** seeking orders as follows:

“The question this court must determine is whether the defendant/respondent is in default of his professional undertaking. There is no dispute that the total decretal sum from the primary suit is Kshs 2,400,000,000/=. It is also not in dispute that the professional undertaking given by the respondent stated that the legal fees due to the plaintiff/applicant would be paid on a pro rata basis from the installments remitted from the decretal amount. A quick mathematical calculation of the decretal amount remitted to the defendant/respondent now stands at Kshs 2,400,000,000/=. It is therefore not true that the respondent has not received the decretal sum in full. The professional undertaking by the respondent was in clear and unambiguous terms that the legal fees will be paid to the applicant and the interested party on a pro rata basis.

In the end, I find the plaintiff /applicant has satisfactorily established his claim. Consequently, the motion dated 10th November, 2016 is allowed in terms of prayers 2 and 3”.

In our view, although the appellant did give a professional undertaking as per its letters of **29th March, 2013** and **5th March, 2013** for payment of Kshs 200,000,000.00 and **“a further payment of Kshs 100,000,000.00”** as fees, the issue was subsequently determined by **Mboghli, J**, that the total fees owed to the respondents is Kshs 200,000,000.00. The appellant paid the installment of Kshs 100,000,000.00 on **25th August, 2014**. It subsequently paid a further sum of Kshs 50,000,000.00 to the respondent and **Mr. Nyongo** Kshs 25,000,000.00. The appellant does not deny that there is an outstanding balance of Kshs 25,000,000.00 owed to the respondent (and presumably another sum of Kshs 25,000,000.00 owed to **Mr. Nyongo**). Its view however, is that it is yet to be paid by the defendant a sum of Kshs 600,000,000.00 and it insists that the sum of Kshs 600,000,000.00 paid on **26th April, 2016** was interest and not part of the decretal sum of Kshs 2,400,000,000.00.

In our view, this insistence on the part of the appellant is tantamount to splitting hairs for the sake of it. The 600,000,000.00 allegedly paid as interest did not have a different colour-coding of money so as to qualify as interest per se. In any event, in the natural course of transactions, interest is paid at the tail end and not in the middle of debt payment. It is in view of this that we find that the payment of Kshs 25,000,000.00 to the respondent had crystalized.

We find no merit in this appeal. It is hereby dismissed with costs to the respondent.

Dated and Delivered at Nairobi this 22nd Day of May, 20.

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR