



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPEAL NO. 34 OF 2017

BETWEEN

CENTRE FOR PEACE AND DEMOCRACYAPPELLANT

AND

NON GOVERNMENTAL ORGANIZATIONS (NGOS) CO-ORDINATION

BOARDRESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Kisumu (**Majanja, J**), dated 20th February, 2017 in **Miscellaneous No. 7 of 2011**)

JUDGMENT OF THE COURT

The appellant was aggrieved by the ruling of the High Court (Majanja, J) which found the Notice of Motion application for review dated 24th November, 2016, as incompetent and dismissed the same. The said application was provoked by an order made by the Deputy Registrar on 22nd November, 2011, which authorized the attachment of one-third of the appellant's salary on Judgment debtor to settle the Kshs. 209,527/= being costs against it.

The said application sought two orders, namely; for a stay of execution of the order issued by the court dated 22nd November, 2016, and for the court to review and or vary/set aside orders issued on the 22nd November, 2016. The application was predicated on five grounds, outlined on the face of the application. In the supporting affidavit deposed to by **Michael Juma Otieno**, it was sworn that the respondent's advocates **Otieno, Yogo, Ojuro and Company Advocates** were not properly on record since they came on record for the respondent over a year before the conclusion of the tendering process which placed them on the respondent's panel of lawyers.

Further, the appellant believed that the said information would have assisted the court make an informed decision while it delivered the ruling on the legality of the said representation. Essentially, the deponent contended that the firm of Otieno, Yogo, Ojuro and Company Advocates did not have legal instructions to represent the respondent hence the costs awarded were illegal and not payable. As we have stated the learned Judge dismissed the application.

In its memorandum of appeal the appellant is aggrieved that the learned Judge erred in law and fact on six grounds which can be summarized thus;

- **Failing to outline and elucidate on the issues for determination from the pleadings of the parties contrary to the Civil Procedure Rules Order 21.**
- **Failing to make a determination on the legality of representation of the Respondents by the firm of Otieno, Yogo, Ojuro and Company Advocates in Miscellaneous Civil Application No. 7 of 2011 and the consequence thereof.**
- **Failing to make a finding on the consequences of the execution of illegal/unlawful costs in relation to the provisions of Articles 10, 20, 21, 22, 23, 40 and 227 of the Constitution.**

At the hearing of the appeal, **Mr. Muturi Mwangi**, the appellant's learned counsel, submitted that the learned Judge erred in addressing himself to issues that were neither in the appellant's application nor in the response thereto. To Counsel, the main issues for determination boiled down to; whether the firm of Otieno, Yogo, Ojuro and Company Advocates should have represented the Respondent in the main suit filed on 21st January, 2011, and in the subsequent application dated 24th November, 2014, without proper instructions; and whether the

respondent being a public/state body is liable to receive compensation from the appellant as costs for services rendered by the law firm.

Counsel contended that the firm was pre-qualified on 17th October, 2012, yet they were on record for the respondent prior to that date; hence the firm lacked the legal basis to act for the respondent. Similarly, the respondent lacks a basis for making any claims against the appellant for services that had been rendered to it illegally.

Opposing the appeal, **Ms. Namusubo** holding brief for **Mr. Ojuro** submitted that the appellant had failed to show that instructions were not given to the law firm in the face of the affidavit deposition by the Respondent's legal officer that they were issued verbally. Since the two were in a contractual relationship, the respondent is entitled to the awarded costs. She urged us to dismiss the appeal.

We have carefully considered the record of appeal, the submissions made by counsel and the relevant law. The single and supple issue before us is whether, the learned Judge erred in dismissing the appellant's application.

In his said ruling the learned Judge reasoned as follows:

“Without going into the merits or findings on the respective arguments, it is my view that this application must fail. The order sought to be reviewed is the one attaching one-third of the judgment debtor's salary and not the order imposing costs on the applicant. By making an order as to the mode of execution, the Deputy Registrar was merely enforcing an order of costs already issued by the Court. The order for costs will remain untouched even if I am persuaded that the applicant is right hence this application will not serve any purpose. The issue before the Deputy Registrar was the result judgment debtor being called upon to show cost (sic) why execution should not issue. The jurisdiction of the Deputy Registrar at that stage is limited to determining whether the judgment debt has been settled rather than (sic) attacking the order of costs”

The learned Judge was essentially stating that the application was misconceived and could not serve its intended purpose. That the appellant came before the court to appeal an order made by the Deputy Registrar attaching his salary, yet his arguments were based on the fact that the law firm was not lawfully on record for the respondent. We find that the said argument was misplaced as the same ought to have been directed at an appeal or review of the ruling of Nambuye, J (as she was then) which awarded the costs against the appellant.

We think that the Counsel for the appellant misapplied himself in expecting the Deputy Registrar not to effect orders stemming from a ruling given by a judge she serves under. This argument is wanting since it is fairly obvious that a Deputy Registrar serves at the direction of the court she serves under and therefore bound by its decisions. We find that the Deputy Registrar did not err in issuing the notice to show cause and the resulting order. She was merely performing her duties, therefore regardless of whether or not the law firm was properly on record, her hands were tied by the ruling delivered by Nambuye, J. **Order 49, rule 5** of the **Civil Procedure Rules** gives the Deputy Registrar that said mandate in straight forward terms;

“Execution may be ordered by Registrar

Formal orders for attachment and sale of property and for the issue of notices to show cause on applications for arrest and imprisonment in execution of a decree of the High Court may be made by the registrar or, in a subordinate court, by an executive officer generally or specially thereunto empowered by the Chief Justice by writing under his hand, but in the event of any objection being taken to the proceedings thereunder, all further proceedings shall be before a judge.”

The case of ***FRANCIS MURIUKI MURAGURI T/A LUSOI STORES & 2 OTHERS -V- MILLING CORPORATION OF KENYA (2009) LIMITED [2018] eKLR***, well elucidated the importance of the role played by the Deputy Registrar in the judicial process;

“The powers of a Deputy Registrar are stated under Order 49 of Civil Procedure Rules.

The Deputy Registrar is the taxing master of the High Court. Under this order, no leave is necessary, save for orders under Order 22 rule 28 and 75.

Rule 7 states the applications that the Deputy Registrar may hear. Among them is execution proceedings under Order 22 – that deals with modes of execution.

15. Taxation of Bills of costs is part of execution proceedings without which a decree for execution may not be drawn.”

Moreover, the matter herein concerns party and party costs, therefore it does not matter how the other the law firm came on record for the respondent, which is not complaining. The costs were awarded to the respondent and therefore the same cannot be denied to them because of an irregularity, if any, in the appointment of its counsel. In any case, the issue of instructions, it was established that indeed there was a relationship between the respondent and the firm which was clarified by the respondent's legal officer who deposed an affidavit affirming that indeed instructions were issued. This was uncontroverted.

The upshot is that this appeal is devoid of merit. It is accordingly dismissed with costs to the respondent.

DATED and delivered at Kisumu this 21st day of May, 2019

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.