



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: (WAKI, SICHALE & KANTAL, J.J.A.)

CIVIL APPEAL NO. 221 OF 2017

BETWEEN

PRIME COMMUNICATIONS LIMITED.....APPELLANT

AND

ODHIAMBO ORONGA & COMPANY ADVOCATES.....RESPONDENT

(An Appeal against the whole Ruling and Order of the High Court of Kenya at Nairobi (Onguto, J.) dated 26th April 2017

in

Misc. Cause No. 44 of 2014)

JUDGMENT OF THE COURT

The dispute leading to this appeal revolved around an Advocate/Client Bill of Costs. The respondent, Odhiambo Oronga & Company Advocates, filed an Advocate/Client Bill of Costs against the appellant, Prime Communications Limited in Nairobi H.C. Misc. Appl. No. 44 of 2014. The bill was taxed by D. W. Nyambu, Deputy Registrar, in a ruling delivered on 28th July, 2014 in the total sum of Ksh. 457,782/-. Various applications by both parties followed challenging that taxation. We need not go into all those applications for purposes of this appeal as they are not necessary for consideration of the appeal before us. What is relevant is a Chamber Summons filed by the appellant on 21st March, 2017 where various orders were sought including an order that the ruling of the Deputy Registrar be vacated; that it be declared that the respondent had not been instructed by the appellant to act for it; that it be declared that there was no retainer between the respondent as advocate and the appellant as client; that it be declared that the respondent was not entitled to costs; that the bill of costs that had been taxed be struck out; and that the respondent be directed to refund to the appellant a deposit of Ksh.228,500/= paid as part payment of costs for taxation which we have referred to.

Various grounds were set out in support of the Chamber Summons including that the appellant had not been notified of the taxation date; that the taxation proceeded exparte; that the appellant had not been accorded the right to be heard contrary to the rules of natural justice; that the respondent did not have instructions to act for the appellant; that the order for costs to be paid was made when the respondent had no instructions to act for the appellant; that there was dispute as to retainer between the appellant and the respondent which had not been resolved; that the Deputy Registrar's ruling was made without considering the merits of the case; and that the proceedings were procedurally defective for reasons stated.

There was an affidavit in support of the summons by Hasmita Patel, a director of the appellant where the same issues were deponed to.

The summons ended up before Onguto, J. The learned Judge heard submissions from counsel for both parties and on 8th March, 2017 he recognized that the appellant should have been given an opportunity to be heard but that it had been confirmed that the respondent had rendered some services to the appellant. In his own words:

“In so much as I would want to exercise my discretion and let the client have a say on the Bill of Costs through a reference it would also be appropriate of the advocate (sic) earn some fees off the taxed amount. I consequently grant leave and permission to the Applicant/Client to file and serve a Reference within the next 14 days on condition that prior to such filing and service the Client/Applicant will pay a sum of Kshs. 228,500/=. The reference one (sic) filed is to be listed for hearing in the court registry”.

What follows in the record are proceedings that took place before the said Judge on 26th April, 2017 when counsel appearing for the appellant informed the learned Judge that an application had been filed on 21st March, 2017 and apparently there was another application filed in the Court of Appeal and the appellant was waiting for a determination of the application in this Court for proceedings in the High Court to continue. It was confirmed by counsel for the appellant that the condition given on 8th March, 2017 for payment of money from the appellant to the respondent had not been met by the appellant.

Learned counsel asked the learned Judge to await the determination of an application pending in this Court before those proceedings in the High Court could be determined. That prayer was opposed by counsel appearing for the respondent who complained and stated that there was no explanation for non-compliance with the orders that the learned Judge had issued. This is what the learned Judge thought of the matter.

“COURT:

I see no reason why I should hold on to and adjourn an application which was filed without meeting a specific condition prior to its filing and even post its filing. I consequently deem the application to be an abuse of the process and hereby strike it out, given that there was no stay of the orders of 8 - 3 - 2017. The chamber summons dated 20 – 3 - 2017 is hereby struck out with costs to the advocate/respondent”.

There are 12 grounds of appeal taken by the appellant in the Memorandum of Appeal drawn by its Advocates M/s Zed Achoki & Company Advocates. The appellant complains that the learned Judge erred in directing the appellant to pay half the amount awarded by the Taxing Master before hearing the matter on the merits. According to the appellant, such an order should have awaited hearing of the Reference. The appellant also takes issue with the learned Judge for making the same order prior to determination of the dispute as related to the retainer. The other complaint relates to lack of service of the Bill of Costs on the appellant by the respondent and the learned Judge is also faulted for what the appellant says allowed the respondent to retain a benefit which the respondent was not entitled to.

The other grounds in the memorandum of appeal are related to what we have summarized above as the complaints raised by the appellant. In addition, at ground 10 where it is said that the learned Judge erred in law by dismissing the Reference before resolving the dispute as to retainer which matter had never been heard substantively.

When the appeal came up for hearing before us on 7th December, 2012, Miss Lusigi learned counsel appeared for the appellant while Mr. Ouma appeared for the respondent. Both parties had filed written submissions and the respondent had filed a list of authorities with an appropriate Digest as required by the Practice Directions of this Court.

Learned counsel for the appellant submitted that there were substantive issues that have never been heard or determined on the merits and, according to counsel, it is against the law for the learned Judge to have made an order for payment of money when such a dispute existed. According to learned counsel, the appellant was entitled to await the outcome of the application filed in this Court before complying with orders made by the High Court.

In relying on written submissions and list of authorities filed, learned counsel, Mr. Ouma for the respondent submitted that it was wrong for the appellant not to comply with the order made by the learned Judge to pay a sum of money as Reference was awaited. According to learned counsel, the appeal related to the orders made on 26th April, 2017 as there was no appeal against the orders made on 8th March, 2017. Learned counsel concluded his submissions by submitting that the respondent had rendered professional legal services to which it was entitled to payment and thus asked us to dismiss the appeal.

In a brief reply, Miss Lusigi for the appellant submitted that the respondent had offered services to the appellant for a short time and was only entitled to partial fees.

We have considered the record, the submissions filed as highlighted by the learned counsel and the law.

When the parties appeared before the learned Judge on 8th March, 2017, the learned Judge considered the material before him and found that the appellant was entitled to be heard on a complaint whether a retainer had been agreed or paid and also on when the respondent came on record to appear for the appellant. The learned Judge considered the whole issue and found that there was an undisputed sum of Kshs.228,500/= which the learned Judge ordered the appellant to pay to the respondent as a condition for leave to file a Reference against the findings of the Taxing Master who had taxed the Bill of Costs.

As correctly submitted by Mr. Ouma, learned counsel for the respondent, there was no appeal to the orders made on 8th March, 2017. When the parties appeared again before the learned Judge on 26th April, 2017 where the appellant was asking the learned Judge to exercise a discretion in its favour, the learned Judge found that it was wrong for the appellant to choose to ignore orders made by that court and still seek exercise of discretion by the same court. The learned Judge found the application before him to be an abuse of the process and he struck it out.

As we have stated, there was no appeal to the orders made on 8th March, 2017 where the learned Judge made an order allowing a Reference from the findings of the Taxing Master outside the time allowed for filing such a Reference but the learned Judge made a condition for allowing such Reference out of time. The learned Judge was entitled to make the order on conditional reference. He exercised his discretion in doing so and we do not detect any abuse of discretion in the way the learned Judge dealt with the matter.

But that should not disturb us here as we have stated that there was no appeal to those orders.

The Notice of Appeal which appears at page 131 of the Record of Appeal states that the appellant is dissatisfied with the decision of the High Court given on 26th April, 2017 and intends to appeal to this court against the whole decision. The decision of 26th April, 2017 is fully set out in this judgment. The learned Judge merely stated that he saw no reason to adjourn an application which had been filed without meeting a specific condition which had been made by the court. The learned Judge found the application to be an abuse of the process and struck it out.

Looking at the Memorandum of Appeal, there is no attack on the learned Judge on the findings made on 26th April, 2017. The complaints relate to orders made on the 8th March, 2017 where there was no appeal taken by the appellant.

We have considered the whole record and all the material before us and we can see no merit in this appeal which we now proceed to dismiss with costs to the respondent.

Dated and delivered at Nairobi this 23rd day of February, 2018.

P. N. WAKI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR