



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MUSINGA & SICHALE, J.J.A.)

CIVIL APPEAL NO. 220 OF 2012

BETWEEN

UNATRAC INTERNATIONAL.....1ST APPELLANT

MANTRAC KENYA LIMITED.....2ND APPELLANT

VERSUS

NYACHOTI & COMPANY ADVOCATES.....RESPONDENT

(An appeal from the Order and Decree of the High Court at Nairobi (Apondi, J.) dated 17th February 2011 and 3rd August 2011, respectively)

in

Miscellaneous Civil Suit No. 1068 of 2009

JUDGMENT OF THE COURT

1. This is an appeal against the Order and Decree of **Apondi, J.** dated 17th February 2011 and 3rd August 2011 respectively, dismissing the appellants' application dated 8th September 2010 brought under **Order 50 rule 1** of the **Civil Procedure Rules, rule 3** of the **High Court (Practice & Procedure) Rules, Section 1A** of the **Civil Procedure Act** and **Rule 11 (2)** of the **Advocates (Remuneration) Order**.

2. By that application the appellants sought orders expressed as follows, *inter alia*;

“(3) That there be a stay of any proceedings for the recovery of costs assessed herein pending the hearing and determination of the application.

(4) That there be a stay of any proceedings for the recovery of costs assessed herein pending the hearing and determination of the intended reference by Mantrac Kenya Limited challenging the assessment of the said costs.

(5) The time for requesting for reasons of the decision of the taxing officer, Hon. Okato, Deputy Registrar of 21st January 2010 be extended to 6th September, 2010.

(6) The time for filing a reference to the decision of the taxing officer, Hon. Okato, Deputy Registrar of 21st January, 2010 be extended to fourteen (14) days from the date of the order to be made herein.

(7).....”

3. The application was supported by an affidavit sworn by **Hatem Farouk**, the Managing Director of Mantrac Kenya Limited, the 2nd appellant, a subsidiary of the 1st appellant. Mr. Farouk stated that the 2nd appellant had placed a tender in response to an invitation for tenders by The Kenya Electricity Generating Company Limited in 2009 for construction of the Kipevu III Thermal power project; the 2nd appellant's tender was not successful and it did not appeal.

On 2nd September, 2010 the 1st appellant received a letter dated 20th August, 2010 from the respondent enclosing a certificate of costs dated 1st September, 2010 in the sum of Kshs.11,759,455.11 allegedly for work done by the respondent on behalf of the appellants. The letter had been marked 2 for the attention of Noah Zonband, who is not an employee of any of the appellants.

5, Mr. Farouk stated that there had never been any advocate/client relationship between the appellants and the respondent; that the 2nd respondent had not been served with any bill of costs; that their advocates had informed them that a perusal of the relevant court files revealed that the bill of costs and notice of taxation had been served upon a secretary known as “**Anne**” at Jasmine Centre, Block C3 along Pio Gama Pinto Road, Nairobi, allegedly on behalf of the 2nd appellant.

6. The registered offices of the 2nd appellant are located at Mansour Complex, Witu Road, Nairobi and the company does not have an employee by the name Anne, Mr. Farouk added. It was for these reasons the appellants were desirous of filing a reference to challenge the taxation and the validity of the certificate of costs. However, the reference could not be filed unless the appellants were granted the orders sought in their application. On 6th September, 2010 the appellants’ advocates had written to the Deputy Registrar/taxing officer requesting for reasons for the decision but as at the date of filing the application the reasons had not been supplied.

7. In his replying affidavit, Mr. Philip Nyachoti, an advocate in the respondent firm, stated that on 23rd October 2009 his firm was instructed by one Noah Zonband (“**Noah**”), a director of Green Jewel Panama Ltd, to file on behalf of the 1st appellant an application for review of the decision of the Tender Committee of The Kenya Electricity Generating Company to award the tender for construction of the Kipevu III Thermal Power Project to another company. Mr. Nyachoti had been informed by Noah that there was a contract between the 1st appellant and Green Jewel Panama Ltd, the 1st appellant being represented by the 2nd appellant and Noah, under which Green Jewel Panama Ltd was to act on behalf of the 1st appellant in procuring the said tender.

8. The advocate further stated that he prepared the application for review but the appellants decided not to pursue the appeal and also declined to pay his fees. As a result, counsel filed a bill of costs on 14th December, 2009. The bill of costs and the notice of taxation were served at the offices of Green Jewel Panama Ltd where Noah has an office, that is, Jasmine Centre, Block C3, Pio Gama Pinto Road, Nairobi; and Noah confirmed that he forwarded to the appellants the aforesaid documents. Subsequently the bill of costs was taxed in the absence of the appellants.

9. In his ruling, the learned judge held that Noah acted on behalf of the appellants and had authority to instruct the respondent; and that the appellants were properly served with the bill of costs and notice of taxation.

Consequently, he dismissed the appellant’s application. Being aggrieved by the said ruling, the appellants preferred an appeal to this Court. In their memorandum of appeal dated 6th September 2012, the appellants through their advocates **Hamilton, Harrison and Mathews**, raised thirty(30) grounds of appeal which in essence basically revolve around the following main issues;

a. Whether there existed an advocate/client relationship between the appellants and the respondent,

b. Whether Noah was authorized to act and/or give instructions to the respondent on behalf of the appellants,

c. Whether service of the bill of costs and notice of taxation was effected upon the appellants to enable them enter appearance at the taxation hearing.

11. At the hearing of the appeal, **Mr. Wilson Mwihuri**, learned counsel for the appellants, sought leave under **rule 104** of this **Court’s Rules** to argue on a ground that had not been specified in the grounds of appeal on the basis that the ground was overlooked during the drafting of the memorandum of appeal; that the learned judge erred in law in considering issues he ought not to have considered in the exercise of his discretion. The Court granted him leave as sought.

12. Counsel framed five issues for this Court’s determination. The first issue was whether there existed an advocate/client relationship between the parties. In this regard it was the appellants’ position that there was no such relationship between the appellants and the respondent. The appellants denied instructing the respondent either directly or through Noah to file an application to review the decision of the Tender Committee in the tender of the Kipevu III Project.

13. Counsel further submitted that the learned judge had stated at the commencement of his ruling that that particular issue was not for determination but later on held that the respondent had been instructed to act on behalf of the appellants. The appellants contended that the respondent did not produce any documents to prove that there was a retainer agreement between the appellants and the respondent, and further that neither of the appellants had been served with the bill of costs and notice of taxation; and that it was incumbent on the respondent to avail proof that indeed there was an advocate/client relationship between the firm and the appellants.

14. Counsel faulted the learned judge for finding that the bill of costs had been properly served upon the appellants. He submitted that service was effected to an address that was not the appellants’ registered office. Further, service was effected upon an unknown person who was not an employee of the appellants’ company.

15. It is the appellants’ assertion that the contract between the 1st appellant (**Unatrac**) and **Green Jewell Panama Investments Inc.** was with regard to consultancy services for a power generation capacity tender in Kenya by the name Kipevu III. The title of the agreement was clear that it was for provision of consultancy services and advice only.

16. Counsel argued that the consultancy agreement was not signed by Noah or Green Jewel Panama Investment Inc. instructing the respondent on behalf of the appellants. **Walid Hassan**, the Managing Director of Unatrac, had sworn an affidavit denying that he had

executed the alleged consultancy agreement, which the learned judge failed to consider.

17. On the second issue of whether Noah acted on/or had authority to act on behalf of the appellants, it was argued that the learned judge erred by holding that Noah was an agent of the appellants on the basis of the alleged consultancy agreement and email correspondence, when in fact a critical analysis of the documents adduced revealed that no agency relationship was created either by virtue of the terms of the contract or by implication.

18. In this regard, the appellants stated that any communication from KENGEN went directly to Mantrac on behalf of Unatrac and the responses similarly were made from Mantrac to KENGEN on behalf of Unatrac, with no copy was sent to Noah. In support of this, they relied on **Kinluck Holdings Ltd v Mint Holdings Ltd and Macharia Njeru, Advocate, Civil Application 264/97**, to demonstrate that Noah was not required, either contractually by implication, to operate as their agent. In that case cited above, the court stated that **“a law agent is bound to obey the instructions given to him by his employer, and if he exceeds or falls short of these instructions, he may be justly made liable for the damage which results from disregard of them.”**

19. The third issue was whether the appellant was served with the notice of taxation and the bill of costs. Counsel submitted that the appellants were neither served with the bill of costs dated 11th December 2009 nor the notice of taxation date 14th December 2009; and that the 2nd appellant only came to know of the taxation and the ruling when it received the letter dated 20th August 2010 from the respondent. The appellants contended that the affidavit sworn by **Hatem Farouk** averred that they did not have a secretary known as **Anne** as alleged by the respondent and the respondent failed to demonstrate to the court that the alleged Anne was the proper person to receive the bill of costs and the notice of taxation, hence the service was irregular and in total disregard to the provisions of **Order 5 rule 3(a)** of the **Civil Procedure Rules**.

20. Lastly, the appellants addressed the issue of whether the learned judge erred in holding that the court had no jurisdiction to grant a stay of execution of taxed costs. The appellants submitted that although some authorities hold that the Civil Procedure Rules do not apply to matters of taxation, **Article 159** of the **Constitution** and some case law reveal that the court has inherent powers and jurisdiction to order stay in any suit, including taxation of costs for sufficient reason.

21. The appellants concluded by urging the Court to allow the appeal and grant the prayers sought in the memorandum of appeal dated 6th September 2012, being:

(a) The order of 17th September 2011 and the decree of 3rd August 2011 be set aside.

(b) The appellants' application dated 8th September 2010 be allowed in terms of prayers 4 to 7.

(c) The costs of the appeal and in the High Court be awarded to the appellants.

22. In opposing the appeal, **Mr. Phillip Nyachoti**, learned counsel for the respondent, maintained that the issues before the High Court was twofold; whether the respondent was instructed by the appellants; and whether there was proper service of the bill of costs.

23. In his view, the appellants' entire application before the learned judge was fatally and incurably defective and could not therefore have seen the light of day even if the arguments by the appellants on instruction of the respondent firm and service of the bill of costs and notice of taxation were upheld by the judge. Counsel contended that the appellants moved the court under **rule 11** of the **Advocates Remuneration Order, 2009** but failed to apply for appropriate orders.

24. Mr. Nyachoti submitted that Noah was a known agent of the appellants and service was done as per the law of agency whose scope of authority could only be an issue between Noah and the appellants. He affirmed that Noah had sworn an affidavit stating that he instructed the respondent on behalf of the appellants. He further stated that all communication between him and the appellants was through one **Islam**, an alter ego for both companies.

25. Counsel argued that if a party was aggrieved by the taxing master's decision, the only issue that ought to be contested under **rule 11** is on quantum, yet there was no application to set aside the decision of the taxing master.

26. Further, counsel stated that the issue of whether or not the appellants instructed the respondent as well as the issue of service of the bill of costs upon the appellants were not raised before the taxing officer when the bill was taxed. Consequently, it could not have served any purpose for the taxing officer to give any such reasons for the taxation to the appellants so as to enable them file a reference to the High Court objecting to the taxation so as to justify the application for extension of time. The only avenue that was available to the appellants was to file an application to set aside the certificate of taxation and the entire taxation exercise for want of instructions and/or retainer but not to seek for reasons and extension of time to file a reference out of time, counsel opined.

27. Mr. Nyachoti further submitted that a reference under **rule 11** of the **Advocates Remuneration Order** is an appeal of the taxing master's decision on quantum and hence the reason for a party objecting to the taxing master's decision to give notice to the officer on the items of the taxation which are objected to, to enable that party file a reference or an appeal to the High Court.

28. He further contended that there is no legal basis upon which the learned judge could have exercised his discretion in favour of the appellants to extend time for the filing of the intended reference by the appellants and the giving of reason for the taxation.

29. Mr. Nyachoti further submitted that the issues as framed by the appellants cannot be determined conclusively by this Court at this stage as it will be premature to do so, in view of the orders sought by the appellants in the High Court, since the intended reference was yet to be filed and reasons for the taxation supplied, in the event this appeal is allowed.

30. Mr. Nyachoti submitted that an order for stay of taxed costs was not naturally available to the appellants as they did not seek any orders to set aside the certificate of costs and the entire taxation process. He urged us to dismiss the appeal with costs.

31. We have considered the appeal and the rival submissions. The decision appealed from was made in exercise of the discretionary power of the court. As this Court stated in **MBOGO AND ANOTHER v SHAH [1968] E.A. 93** it is well settled:

“...that this Court will not interfere with the exercise of...discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

32. The substantive issue for our determination therefore is whether the impugned decision is clearly wrong by virtue of: misdirection by the learned judge; taking into account irrelevant factors; or failing to consider matters which he ought to have taken into consideration.

33. Having carefully perused the impugned ruling and submissions by counsel, it is evident that the learned judge dealt with the matter as though it was a reference that was before him; which, in our view, was a fundamental misdirection. A reference could not have been filed unless there was extension of time. The learned judge therefore needed to consider whether the appellants had made out a case for extension of time, in the circumstance of the case.

34. Among the issues that could only be dealt with in a reference are, first, whether there existed advocate/client relationship between the appellants and the respondent; and secondly, whether the appellants had been served with the bill of costs and the notice of taxation.

35. The bill of costs was taxed ex parte and the sum that was allowed is substantial. The issue of service of the bill of costs and the notice of taxation was hotly contested. That issue is closely tied to the question whether Noah and his company were agents of the appellants. In the circumstances, it would have been in the interest of justice to have a reference filed and argued so that all the lingering issues could be determined authoritatively.

36. For the reasons aforesaid, we are satisfied that the learned judge did not exercise his discretion judiciously. We shall however restrain ourselves from making any substantive determination on the issues that are intended to be argued in the reference. We allow this appeal and set aside the ruling by the trial judge in its entirety. Each party shall bear its own costs of this appeal.

Dated and delivered at Nairobi this 9th Day of November, 2018.

W. OUKO, (P)

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR