IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & SICHALE, JJ.A)

CIVIL APPEAL NO. 88 OF 2015

BETWEEN

UPWARD SCALE INVESTMENTS CO. LTD.....1ST APPELLANT

LINMERX HOLDINGS LIMITED.....2ND APPELLANT

RICHOOD LMITED.....3RD APPELLANT

GEOMAX CONSULTING ENGINEERS.....4TH APPELLANT

GATH CONSULTING ENGINEERS LTD.....5TH APPELLANT

JAMES BURIGI NJUGUNA.....6TH APPELLANT

TRIAD ARCHITECTS.....7TH APPELLANT

MASTERBILL INTEGRATED PROJECTS.....8TH APPELLANT

AND

MWANGI KENG'ARA & CO. ADVOCATES.....RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Nairobi (Ogola, J.)

dated 20th March, 2015

in

H.C Misc. Civil Applic. No. 530 of 2013)

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JUDGMENT OF THE COURT

1. This appeal stems from an advocate/client relationship which turned sour when parties were unable to agree on legal fees. The appellants formed a consortium of consultants with the main objective of carrying out a joint 1 development venture, that is, the construction of an office block on LR No. 209/309/1. In furtherance of their objective, the appellants retained M/s Mercy Nduta Mwangi trading as

Mwangi Keng'ara & Co. Advocates, the respondent herein, as their advocate. The respondent was tasked to act for the appellants in the purchase of the suit property, draw up an agreement regulating the appellants' relationship and perform any other legal task which cropped up in relation to the joint venture.

2. A dispute arose when the respondent sent the appellants fee notes which they disputed. At one point the respondent claimed a total of Kshs. 14,503,435 as legal fees and even applied the sum of Kshs. 10,240,040/= which had been entrusted to her by the appellant for stamp duty in offsetting the said fees. Having had enough, the appellants changed advocates. As expected the new advocates requested the respondent to release the title document for the suit property as well as all other documents pertaining to the appellants. The respondent refused to do so maintaining that she had a lien over the title document until the appellants paid the balance of the legal fees which then stood at Kshs. 4,503,435/=. The appellants eventually gave in and paid the amount claimed.

3. However, the respondent still declined to release the title on the grounds that the appellants still owed outstanding legal fees of Kshs, 516, 000/ = and interest on the legal fees due to late payment being Kshs. 1,969,603.90 cumulatively totaling to Kshs. 2,045,603.90. This provoked the appellants to file suit being H.C.C.C No. 14 of 2013 seeking *inter alia*, a declaration that there was an agreement on legal fees between the appellants and the respondent. The agreement stipulated that the respondent's fees would be capped at Kshs. 12,000,000. An order directing the respondent to reimburse what had been paid over and above the agreed fees and release of the title document was also sought. On her part, the respondent denied the existence of any agreement on fees and argued she had the right to hold onto the title until her fees were fully paid.

4. The learned Judge (Havelock, J. as he then was) agreed with the respondent. In a ruling dated 19th November, 2013 the learned Judge directed the appellants to deposit in court the disputed amount totaling to Kshs. 2,045,603.90 and a release of the title document. He also directed the respondent to file bill of costs for taxation. It appears that the respondent filed a total of 17 bills of costs for taxation. This caused the appellants to file an application dated 4th March, 2014 in one of the bills being Misc. Application No. 530 of 2013, praying for the consolidation of all the bills. By a ruling dated 27th July, 2014 the learned Judge (Ogola, J.) acceded to the application and directed for all the bills to be taxed before the same taxing master.

5. Nevertheless, that was not the end of it. The appellants filed another application dated 19th August, 2014, this time seeking an order to strike out the bills of costs on the ground that they did not comply with the directions given by Havelock J. In response, the respondent filed a preliminary objection urging that the said application was not only bad in law but also an abuse of the court process. The application raised issues which were *res judicata* and *sub judice*. Vide a ruling dated 18th November, 2014 the learned Judge (Ogola, J.) proceeded to determine the preliminary objection. He observed that the issues which were raised in the application had been dealt with or should have been raised in the previous applications. The court could not limit the respondent on the number of bills of costs she could file. Nothing turned on the fact that the respondent had filed 17 bills of costs because they still had to be taxed. Furthermore, any issues pertaining to the said bills could be properly raised before the taxing master. The learned Judge proceeded to uphold the preliminary objection and dismissed the application.

6. The appellant's were aggrieved with that decision and filed a Notice of Appeal against the same albeit three days out of time. Consequently, the appellants filed an application dated 2nd February, 2015 asking for leave to file the Notice of Appeal out of time and stay of taxation of the bills of costs pending the determination of the intended appeal. The application was premised on the grounds that the appellants' advocate had inadvertently failed to appear before court when the ruling was delivered and only learnt of the same when time had lapsed; the intended appeal was arguable and would be rendered nugatory if the orders sought were not granted. To them, the outcome of the intended appeal had a direct effect on whether or not taxation of the bills filed should proceed. The respondent would not suffer any prejudice in light of the amount that had already been deposited in court.

7. In opposing the application, the respondent filed a replying affidavit and a preliminary objection. The

respondent deposed that the appellants had not given a reasonable explanation for the delay in filing the Notice of Appeal. The security which had been deposited in court was not sufficient to secure the amount claimed in the bill of costs totaling to Kshs. 134,041, 994.80. She also deposed that in the event stay was granted it ought to be on condition that the appellants provide security for the amount sought in the bills of taxation.

8. Upon considering the application the learned Judge in a ruling dated 20th March, 2015 held that the appellants had tendered a reasonable explanation for the delay. Notwithstanding the fact that the appellants had failed to annex a draft memorandum of appeal, the nature of the matter coupled with the substantial amounts concerned dictated that the appellants being given an opportunity to prosecute their appeal. Noting that the taxation of the bills in question was underway the learned Judge chose not to interfere with the same. Nonetheless, he granted leave to file the notice of appeal in the following terms:-

> ***a. Time is hereby enlarged for the giving of Notice to Appeal, and the client, applicant is hereby given leave to file an appeal out of time against the decision of this court vide its ruling delivered and dated 18th November, 2014. This order is conditional on the client/applicant performing in the alternative either order (b) or (c) below.***
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> ***b. The taxed fees found due by the taxing master pursuant to a ruling to be delivered by the taxing master on 26th March, 2015 or on any subsequent date arising from advocate/client bill of costs shall be deposited in an interest earning account opened in the joint names of the parties advocates, and shall be the security for the advocate/respondent.***
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> ***c. In the alternative to order (b) above, the parties shall agree on any other available security or mode of security which may be appropriate under the circumstances provided that if the parties are unable to agree on such security within 7 days of the delivery of the taxing master's ruling order (b) will automatically apply.***

9. It is that decision that has provoked the appeal before us. The appellants challenge the decision to the extent of the conditions given by the learned Judge. In their view the learned Judge erred in fact and law by-

- ***Granting the order for security for costs yet there was no application made for the same and bills of costs in question had not been taxed.***
- ***Exhibiting bias against the appellants.***
- ***Failing to award costs to the appellants.***

10. At the hearing of this appeal, Mr. P. King'ara appeared for the appellants while Ms. M. Mwangi appeared for the respondent. The appeal was disposed of by way of written submissions and oral highlights by counsel. We cannot help but note that the appellants' written submissions were in respect of the High Court's decision dated 18th November, 2014 wherein their application to strike out the bills of costs was dismissed. Clearly, from the Notice of Appeal on record the appeal herein relates to the High Court's decision dated 20th March, 2015, the highlights of which we have set out herein above. Without delving into the details of the said submissions, it is trite that a Notice of Appeal is what gives this court jurisdiction in any appeal. As such, we cannot entertain any arguments in respect of a decision which is not before us. Equally, it is settled that pleadings are not only binding on the court but on the parties as well. In ***Galaxy Paints Company Ltd vs. Falcon Guards Ltd. [1999] eKLR*** this Court held that:-

> ***"The issues for determination in a suit generally flowed from the pleadings and the trial court could only pronounce judgment on the issues arising from such issues as the parties framed for the court's determination."***

This applies not only to pleadings and proceedings before the trial court, but to appeals as well. See ***Coastal Bottlers Limited vs George Karanja [2015] eKLR.***

11. Mr. King'ara submitted that the respondent had not made a formal application for security for costs. He faulted the learned Judge for granting the orders on the basis of the respondent's replying affidavit. He argued that the learned Judge in directing the appellants to deposit security disregarded the fact that the appellants were entitled to file a reference in the event that they were dissatisfied with the taxing master's decision. According to him, the conduct of the learned Judge portrayed that he was extremely biased as against the appellants. He urged us to allow the appeal.

12. On her part, Ms. Mwangi contended that what the learned Judge directed the appellants to deposit was not security for costs but the taxed fees arising from the various taxation causes. In her opinion, the learned Judge exercised his discretion properly by granting the orders. This is because the venture was temporary in nature and once all the office blocks were sold, the respondent would not be in a position to recover the taxed costs. She urged us to dismiss the appeal.

13. This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of ***Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2EA 212*** wherein the Court of Appeal held inter alia that:- "***On a first appeal from the High Court, the Court of***

> ***Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"***

14. The nature of security for costs is to ensure firstly, that a party is not left without recompense for costs that might be awarded to him in the event that the unsuccessful party is unable to pay the same due to poverty; secondly, it ensures that a litigant who by reason of his financial ability is unable to pay costs of the litigation if he loses, is disabled from carrying on litigation indefinitely except on conditions that offer protection to the other party. See ***Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others [2014] eKLR***.

15. In our view, no matter how the respondent tries to put it, it is clear as evidenced in her affidavit, that the respondent was apprehensive that once the office block was complete and sold, the joint venture would cease to exist. Consequently, she would not be able to recover the costs which were to be taxed. The orders issued were in response to the respondent's apprehension. At the end of the day, we are convinced that the orders granted were security for costs for the amounts that were to be taxed.

16. Did the learned Judge err in granting the orders for security for costs? We believe he did. We say so because, by the very nature of an order for security for costs, it is not directed towards enforcing payment of the costs as such. It is designed to ensure that a litigant, who by reason of near insolvency is unable to pay the costs of the litigation should he lose, is disabled from carrying on the litigation indefinitely except upon terms and conditions which afford some measure of protection to the other parties. The onus is on the applicant to prove such inability or lack of good faith on the part of the respondent that would make an order for security for costs reasonable. This much was restated in ***Noormohamed Abdulla -vs- Ranchhodbhal J. Patel & Another [1962] E.A. 448*** thus,

> ***"In an application for security for costs, the applicant ought to establish that the respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. <u>It is not enough to allege that a respondent will</u> <u>be unable to pay costs in the event that he is unsuccessful. The same must be proven."</u> Emphasis added.***

The respondent ought to have made a formal application for security for costs to the court. This would have enabled the court to hear arguments from the parties on the issue, weigh competing rights and make an informed decision. Furthermore, the learned Judge having declined to issue the stay of taxation had no basis for granting the security for costs. In doing so, we believe he curtailed the appellants' right to

appeal.

17. With regard to bias of the learned Judge, we find that there is no evidence supporting the same hence that ground fails. Last but not least, the learned Judge in the impugned ruling directed each party to bear its own costs. Under ***Section 27 (1)*** of the ***Civil Procedure Act***, the costs of and incidental to all suits are in the discretion of the court or judge. The proviso to the section stipulates:-

> ***"Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."***

18. In this case, the learned Judge erred in not giving reasons for directing parties to bear their own costs. On our part, taking into consideration the nature of the application we find that costs of the application ought to abide the outcome of the intended appeal.

19. The upshot of the foregoing is that the appeal has merit and is hereby allowed with costs to the appellant. We set aside the decision dated 20th March, 2015 to the extent of the conditions attached to the leave granted to the appellants to file the Notice of Appeal against the decision dated 18th November, 2014 out of time.

Dated and delivered at Nairobi this 31st day of March, 2017.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O KIAGE

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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