



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ, A)

CIVIL APPEAL NO. 41 OF 2015

BETWEEN

JOSEPH KITHINJI GITONGA.....1ST APPELLANT

NANCY KARUTA GITONGA.....2ND APPELLANT

AND

KIOGORA MUTAI & COMPANY ADVOCATESRESPONDENT

as consolidated with

CIVIL APPEAL NO. 56 OF 2015

KIOGORA MUTAI & COMPANY ADVOCATESAPPELLANT

AND

JOSEPH KITHINJI GITONGA.....1ST RESPONDENT

NANCY KARUTA GITONGA.....2ND RESPONDENT

(Being an appeal from the Ruling and Decree of the High Court at Milimani Law Courts of J.M. Mutungi, J, dated 27th November 2014

in

HC ELC No. 554 of 2014)

JUDGMENT OF THE COURT

This appeal is a consolidation of *Civil Appeal Numbers 41 and 56 of 2015*, both arising out a decision of J.M. Mutungi, J, of 27th November 2014. By Originating Summons dated 29th April 2009 the **appellants**, **Joseph Kithinji Gitonga** and **Nancy Karuta Gitonga**, sought orders for the delivery to them by the respondent of all the documents relating to the property situated on LR No. 2/167 (*the property*); the leases and documents in respect of apartment numbers A2, A5, B3, and B5 on the property; and all

documents in respect of La Casa Gardens Limited, the management company for the property.

The Originating Summons was supported by the affidavit of the 1st appellant sworn on 6th May 2014, where it was deponed that the appellants are the registered proprietors of the property upon which they constructed 20 residential apartments. The appellants further deponed that they enlisted the services of the respondent law firm to undertake the conveyance of 20 apartments, to sell 7 of those apartments, and to incorporate a management company; that they paid various sums towards valuation fees, registration charges for the leases, together with an item referred to as “facilitation fees” which they later came to learn were unlawful and illegal payments; that further, owing to fraud perpetuated by the respondent’s employee in respect of stamp duty on apartment no. A3, their funds were misappropriated.

The appellants averred that their dissatisfaction with the respondent’s services led them to instruct their current advocates, Kaplan & Stratton, to retrieve the lease documents from the respondent, and to embark on completing the registration process, and re-transfer of three apartments that were unnecessarily registered in their daughter’s name due to wrong advise from the respondent; that the respondent had refused to release the lease documents to them, forcing them to seek legal recourse in court.

Subsequently, the appellants filed a Notice of Motion dated 22nd May 2014, seeking orders to stay all taxation proceedings filed by the respondent in Misc. Civil Application Nos. 115, 116, 117, 118, 119, 126, 128, 129, 130, 131, 132, 151, 152, 153, 154, 155, 156, 157, and 159 of 2014 pending the hearing and determination of the suit.

In an affidavit sworn in support of the motion by the 1st appellant, on 23rd May 2014, it was averred that based on the advocate/client relationship concerning the property transactions, and following requests for “facilitation fees” in their fee notes, the respondent had engaged in irregular and illegal dealings with government departments and offices, which the appellants aver were illegal and criminal, and contrary to the provisions of the Anti-Corruption and Economic Crimes Act, and the Penal Code; that the respondent’s fee notes, and the subsequent Bills of Costs were tainted with illegality, thereby rendering them invalid.

In its replying affidavit sworn on 28th May 2011 by Kiogora Mutai Advocate, it was averred that the respondent was retained by the appellants to undertake a conveyance in respect of 20 apartments, and to register a management company; that the appellants failed to settle their outstanding fee notes, causing them to resort to retaining the lease documents in respect of four of the apartments. The respondent further averred that the delay in affixing stamp duty to the leases, resulted from the criminal activities of other third parties where the appellants’ stamp duty payments were irregularly affixed to land transactions that did not belong to them, and that when they requested the appellants to pay their legal fees, which amounts they undertook to offset against the misdirected stamp duty, the appellants had refused, leaving them with no option but to retain the lease documents.

The respondent further averred that they filed their Bills of Costs for taxation upon realising that the appellants were reluctant to settle their fees, and that the Bills of Costs did not include an item referred to a ‘facilitation fees’; that the items included in the Bills were legitimate and bona fide disbursements raised in accordance with the Advocates Remuneration Order and with the appellants’ consent; that the Bills of Costs should proceed to taxation which was the appropriate forum for the appellants to raise their objections to any contentious items; that they had suffered severe prejudice on account of being denied their legal fees since 2006; and that there was nothing in the application to warrant a grant of a stay of the taxation proceedings.

Upon hearing and considering the pleadings and the submissions of counsel, the learned judge concluded that allegation that the respondent was engaged in illegal activities in paying facilitation fees was unfounded; that the respondent had earned their fees, and were therefore entitled to hold the lease documents as a lien for the outstanding fees; that the respondent’s Bills should proceed to taxation, where, any challenges to items in the Bills could be dealt with during taxation as the appropriate forum. And with that, the court dismissed both applications.

The court below also ordered each party to bear its own costs.

The appellants were aggrieved by this decision and have appealed to this Court on grounds that; the learned judge failed to find that facilitation payments are illegal, and that there is no provision for such payments under the Advocates Remuneration Order; in finding that there was no evidence of the facilitation payment having been made yet the law makes it an offence to attempt to bribe; in failing to find that the respondent's conduct and demand for facilitation payment tainted the advocate-client contract with illegality and estopped the respondent from seeking to recover legal fees or enforce the contract.

Both the appellants and the respondent filed written submissions upon which they relied, together with oral highlighting of their submissions before us.

Submitting on behalf of the appellants, learned counsel, **Mr. Gachuhi**, stated that the appellants and the respondent had an Advocate/Client relationship for the preparation and transfer of leases on the property, and that the process of registration involved the Lands Office in Nairobi. In the course of the transaction the respondent raised deposit request notes, where an item referred to as 'facilitation fees' was included, which the appellants understood to mean a normal disbursement under the Advocates Remuneration Order and that no explanation was proffered on the purpose of these payments. Counsel further contended that the subsequently filed Bills of Costs did not refer to the term facilitation fees, and instead included an item reference to 'ancillary registration charges'. Counsel submitted that the legality of the fee demanded was a matter for the determination of the High Court, as the taxing master had no jurisdiction to determine an issue of this nature.

Counsel's complaint was that the High Court failed to determine the legality of the payment, given that the definition of facilitation fees was an illegal payment to a government official and a criminal offence under the Anti-Corruption and Economic Crimes Act; that the standard was not whether the crime was committed, but whether there was an intention to commit a crime. Counsel argued that it is upto the courts to uphold public policy in not condoning crime. Counsel cited ***D. Njogu & Co. Advocates vs National Bank of Kenya [2009] eKLR*** for the proposition that an advocate cannot profit from his own mistakes. Counsel concluded that, since the process was tainted with illegality the taxations should be quashed, and the lease documents returned to the appellants.

Learned counsel for the respondent, **Mr. Kimathi**, appearing with Mr. Charles Onyango, opposed the appeal, and submitted that once the leases were registered, the respondent requested for their legal fees; that the appellants' current advocates queried the fee notes, leading the respondent to file its Bills of Costs. Counsel argued that the High Court rightly dismissed the application as it lacked jurisdiction; that the issue concerned the taxation of Bills of Costs which was a matter for the taxing master. Counsel further argued that facilitation payments were allowed under the Advocates Remuneration Order, as a cost that is reasonably and properly incurred. Counsel also argued that if the facilitation fee was to be paid to a government official, then the appellants as the paymaster were equally culpable; that the issue of public policy cannot be raised to deprive the respondent of its legal fees for services rendered.

We have considered the pleadings and submissions of the parties. The decisions are interlocutory in nature, and therefore require us to determine whether the learned judge properly exercised his discretion in declining to grant the stay of execution of the taxation of the Bills of Costs sought, and the release of the retained leases.

In ***Mbogo & another v Shah (1968) EA 93*** at page 95, Sir Charles Newbold P. stated;

"... a Court of Appeal should not interfere with the exercise of the discretion of a single judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice ..."

At the core of the Originating Summons and the Notice of Motion upon which this appeal is grounded is the question whether the inclusion of an item referred to as “facilitation fees” in the respondent’s fee note demands, which the appellants contend are illegal and unlawful, rendered the respondent’s Bills of Costs illegal, and incapable of being taxed.

A review of the various fee note demands from the respondent, show that there was indeed a separate item referred to as “facilitation fee” or “facilitation fees for stamp duty exemption” that was included.

In defining “facilitation” the appellants sought to rely on the definition in *Black’s Law Dictionary 8th Edition* as “...*The act or an instance of aiding or helping... in criminal law, the act of making it easier for another person to commit a crime.*”

A further definition was provided by the on-line dictionary,

Investopedia that defined “facilitating fee” as “...*a payment made to a public or government official that acts as incentive for the official to complete some action or process expeditiously to the benefit of the party making the payment.*”

On the other hand, the respondent adopted the definition of “*facilitate*” as given by the Oxford Advanced Learner’s Dictionary as being “...*to make an action or a process possible or easier*”.

As the basis for contending that the facilitation payment were illegal, the appellants relied on *sections 38 and 39* of the Anti- Corruption and Economic Crimes Act which provide that payments to government officials is an offence, though there was no reference or provision addressing “facilitation payments,” under the Act.

The above definitions notwithstanding, like the learned judge, we are unable to discern, from the impugned fee notes, the purport of the item called facilitation fees. It was not apparent from the available material whether they were payments to public or government officials to expedite the registration of the leases, or whether they appertained to expenses reasonably and properly incurred under *rule 19* of the *Advocates Remuneration Order* such as “... *stamps, Auctioneers fees, or valuation charges, agent fees, travelling expenses, fees paid on searches in public offices or on registration, cost of photocopies and other disbursements reasonably and properly incurred*”,

The Bills of Costs on the other hand, did not include any item referred to as facilitation fees, but instead included an item referred to as ‘*ancillary registration charges*’, which the respondent contended were normal disbursements permitted under *rule 19* of the *Advocates Remuneration Order*.

Having said that, there is no question that what was before the learned judge was one application to stay the taxation of the Bills of Costs already filed before the taxing master, and another for the release of the lease documents retained by the respondent.

Under *Schedule VI* of the *Advocates Remuneration Order*, Bills of Costs are taxable by a taxing master, whose duty it is to assess the costs in such Bills. Under *Paragraph 13 A* of the *Advocates (Remuneration) Order* the taxing master is empowered to assess costs and may summon and examine witnesses, direct the production of documents and to “...*adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him...*” (or her).

The procedure for objecting to a decision of the taxing master is provided by way of a reference to a judge in the High Court by the filing of a chamber summons under *Paragraph 11*.

In the matter of Winding up of Leisure Lodges Limited, Winding Up Cause No. 28 of 1996, Ringera, J (as he then was) observed that a party aggrieved by a decision of a taxing master “*whether it be on a quantum awarded on the bill as a whole or any item thereof or on the validity of the bill as a whole or any items thereof.* (emphasis ours)” has recourse to the High Court by way of reference under *Paragraph 11* of the *Advocates (Remuneration) Order*.

In our view therefore, unless divested of jurisdiction, the taxing master has an obligation under the Advocates Remuneration Order to tax the Bills of Costs, and the requisite authority to interrogate the purpose of any of the items included in the Bill including those referred to as *facilitation fees* or *ancillary registration charges*, to determine whether or not they fell within the ambits of the Advocates Remuneration Order, or were illegal payments, that were capable of rendering the Bills of Costs invalid. Indeed, such matters are better left to a taxing master for determination, and, in the event the appellants are dissatisfied with the taxing master's decision, they would be entitled to seek further recourse in the High Court under **Paragraph 11**.

As a consequence, we are satisfied that in declining to grant the orders of stay of the impending taxations, the learned judge did not improperly exercise his jurisdiction, and we see no reason to interfere with that decision.

With regard to the orders sought for the release of the lease documents held by the respondent, we agree with the learned judge that the respondent is entitled to such lien on account of **Order 52 rule 4 (3)** of the **Civil Procedure Rules** which provides that where there is a claim for costs, the court can, amongst other orders, secure the payment, and the protection of the advocate's lien. The court below having ascertained that legal fees had been incurred, and having rightly, in our view, made such order of protection of the respondent's lien, we also find no reason to interfere with that decision.

We turn now, to the only issue arising in Civil Appeal Number 56 of 2015, namely; whether the learned judge properly exercised his discretion in making orders on costs.

Kiogora Mutai & Company Advocates, now the appellant in this appeal, was aggrieved by the decision of the lower court which ordered each party to pay to bear their own costs. Having been the successful party in the applications before the lower court, the appellant's complaint was that the court failed to award it with costs, and also failed to provide a justification for declining to do so.

Mr. Kimani argued that the award of costs is discretionary, but where costs are declined, a reason or reasons should be ascribed in such situations such as this where the appellant was the successful party. In this case, the court below did not award costs to the appellant, and no reasons were provided. Counsel urged that, in the event that they were to succeed in this appeal, that costs be awarded to them in the High Court and in this Court.

Mr. Gachuhi argued in response that had it not been for the appellant's conduct, the respondents would not have had to seek the court's intervention in the manner that it did. On this account, the appellant was not entitled to an award of costs. Counsel urged us to exercise our discretion to dismiss the appeal with costs to the appellant.

Having considered the submissions of parties on the issue of costs, the issues for our determination are whether the learned judge exercised his discretion judiciously in ordering each party to pay its own costs, and further, in declining to order costs in favour of the appellant, whether the learned judge provided any reasons.

Under **section 27 (1)** of the **Civil Procedure Act**, costs follow the event, but this notwithstanding, costs are a matter of discretion of the court, and ordinarily an appellate court will not interfere with an order as to costs, unless in exercising his discretion, the learned judge misdirected himself and arrived at the wrong decision or was clearly wrong in the exercise of his discretion. See ***Mbogo & another v Shah (1968) EA 93***.

As stated in the case of ***Devram Dattan vs Dawda [1949] EACA 35***;

"It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried the case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts...If however, there be in fact, some ground to support the exercise by the trial Judge of the discretion he purports to exercise,

the question of the sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance.”

Whilst in *James Koskei Chirchir vs Chairman Board of Governors Eldoret Polytechnic, Civil Appeal No. 211 of 2005* it was held thus;

“Notwithstanding the provisions of section 27, above costs are generally a matter within the discretion of the court. The court did not, however explain why it denied the appellant his costs before the trial court. In the absence of any explanation in that regard we think that the learned judge of the superior court erred in denying the appellant the costs of the suit before the trial court.”

In the appeal before us, despite the appellant being the successful party, the learned judge merely ordered each party to bear its own costs. No reason was set out for this. We would therefore set aside the order on costs, and in their place order that the appellant shall have costs in the High Court and in this Court.

It is so ordered.

Dated and delivered at Nairobi this 23rd day of June, 2017.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR