IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPEAL NO. 260 OF 2012

BETWEEN

OUMA NJOGA & COMPANY ADVOCATES..APPELLANT

VERSUS

KISUMU TEACHERS CO-OPERATIVE SAVINGS & CREDIT SOCIETY LTD....RESPONDENT

(An Appeal from a Ruling and Order of the High Court of Kenya

at Kisumu (Nambuye, J.) dated 3rd February, 2012

in

H.C. MISC. CIVIL APPLICATION NO. 150 OF 2008)

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JUDGMENT OF THE COURT

1. The appellant, a firm of advocates, has appealed against a ruling of the High Court (R. N. Nambuye, J. (as she then was)) delivered on 3rd February 2011 by which the court allowed the respondent to offset an amount of Kshs.642, 564.00 in certified taxed costs against the respondent's claim for an amount of Kshs. 3,611,928.00 it had paid to the appellant, and which the appellant had allegedly not accounted for. The court further ordered the appellant to pay the difference of Kshs. 2,969,364.00 to the respondent.

Background

2. The parties to this appeal had a client/advocate relationship for some time between the years 2001 and 2008. Over that period, the respondent engaged the appellant to represent it in various matters. One such matter was High Court Civil Case No. 24 of 2005 where the appellant was instructed to defend the respondent. According to the appellant, the respondent failed to pay the legal fees to which the appellant was entitled for services rendered in that suit. The appellant was therefore constrained to tax its costs for the services it had rendered to the respondent in that suit.

3. On 14th August 2008, the appellant filed an application in the High Court in Miscellaneous Cause No. 150 of 2008 under rule 13 of the Advocates (Remuneration) Order made under section 48 of the

Advocates Act. It presented an advocate/client bill of costs in that cause in connection with the services the appellant had rendered to the respondent in defending it in High Court Civil Case No. 24 of 2005. On 29th June 2010, the Deputy Registrar of the court taxed, allowed and certified costs of Kshs. 382,311.22 payable by the respondent to the appellant.

4. On 3rd March 2011, the appellant presented a motion in the same cause seeking judgment against the respondent for "*the taxed costs of Kshs. 382,311.22*". Before that application could be heard, the respondent filed a motion in the same cause dated 2nd May 2011 seeking consolidation of High Court Miscellaneous Cause No. 150 of 2008 with Misc. Cause Numbers 171 of 2008; Misc. Cause Numbers 40 of 2009; Misc. Cause Numbers 251 of 2009; and Misc. Cause Numbers 274 of 2009 in which the appellant had had its costs taxed and certified. The total amount of costs certified as payable by the respondent to the appellant in those matters was Kshs. 642,564.12.

5. In addition to seeking a consolidation of those matters, the respondent in its application dated 2nd May 2011 also sought an order that:

> "4… [The] *court be pleased to grant the Respondent/Applicant's applications to convert certificate of taxation to judgment as prayed in HC MIS. APPL. NO.s 171 of 2008, 40 of 2009, 251 of 2009, 274 of 2009 150 of 2008 and 279 of 2009 amounting to Kshs.642, 564/= thereafter grant a set-off to the Applicant/Respondent herein from Kshs.3,611,928/= and the balance of Kshs.2,969,364/= be paid to the Applicant/Respondent herein."*

6. In his affidavit in support of that application, the respondent's General Manager deposed that the appellant represented the respondent in various matters between 2000 and 2007; that during that period, the respondent paid all fee notes generated by the appellant; that between 2001 and 2004, the respondent issued cheques to the appellant for a total of Kshs. 3,611,928.00 which the appellant had not accounted for despite demand by the respondent; that "all the bills taxed by the advocate relates to work done by the Advocate when all the said cheques were drawn in the Advocate's favour; that in the circumstances the respondent was entitled to set off the amount claimed by the appellant against the amount of Kshs. 3,611,928.00 which was not accounted for by the appellant; and that the appellant should be ordered to refund the balance of Kshs. 2,969,364.00.

7. In opposition to the application, the appellant filed grounds of opposition contending that the application was misconceived; that the orders sought were not capable of being granted in the manner sought by the respondent; that the respondent had not invoked the jurisdiction of the court properly; that the respondent's application was effectively in the nature of an application for accounts; and that the respondent's application was an abuse of the process of the court in that it was seeking judgment without trial.

8. On 18th May 2011, the parties recorded a consent order by which they agreed to the consolidation of High Court Miscellaneous Cause No. 150 of 2008 with Misc. Cause Numbers 171 of 2008; Misc. Cause Numbers 40 of 2009; Misc. Cause Numbers 251 of 2009; and Misc. Cause Numbers 274 of 2009. By the same consent order, the parties agreed that judgment be entered for the appellant for the total certified costs in those miscellaneous causes amounting to Kshs. 642,564.12. The parties further agreed, by the same consent, that the appellant should stay execution of the decree resulting from that judgment pending the determination of the question whether the respondent was entitled to set off the said amount Kshs. 642,564.12 against the amount of Kshs. 3,611,928.00 it was claimed was not accounted for by the appellant, and whether the appellant should be ordered to refund the balance of Kshs. 2,969,364.00.

9. The learned Judge heard arguments by the parties and delivered the impugned ruling on 3rd February 2011, holding that the respondent is entitled to set off the certified costs of Kshs. 642,564.12 payable to the appellant against the respondent's claim for Kshs. 3,611,928.00 and ordered the appellant to refund Kshs. 2,969,364.00 to the respondent. In reaching that conclusion, the Judge had this to say:

> *"… the court finds that the overriding objective in section 1B CPA enjoins the courts to espouse*

the spirit of speedy disposal of maters before them. Herein the court is being asked not to speedily dispose off the mater by way of setoff on points of technicality simply that alleged proper procedure has not been invoked, and yet the party putting up the argument has not indicated what prejudice he stands to suffer if set off is done in the manner sought. Neither has he provided the nature of the material which he intends to rely on to oppose the set off if proceedings are initiated in the matter suggested by him. Acceeding to such a demand would unnecessarily prolong the litigation and take on precious judicial time for nothing. There is no argument that counsel is only entitled to rightful fees and anything over and above that has to be accounted for and given a credit for. The client herein has rightly demanded a set off."

10. Against that decision, the appellant has appealed to this Court.

The appeal and submissions by counsel

11. Referring to grounds of appeal set out in the memorandum of appeal, learned counsel for the appellant, Mr. S. A. K'Opot, submitted that: the Judge erred in ordering the set off and refund before accounts as between client and advocate were taken; that the appellant was, in effect, condemned unheard; that the court did not have jurisdiction to make those orders; that in light of the express provisions of law in the Advocates Act and the Advocates (Remuneration) Order governing advocate and client relationship in general and taxation of costs in particular, the Judge should not have based her decision on section 3A of the Civil Procedure Act; the Judge failed to heed the provisions of Order 20 rules(1)(2) and Order 52 rule 4 of the Civil Procedure Rules; that the Judge's finding was premised on a mistake of fact by the Judge that the respondent had overpaid the appellant when in fact there was no evidence to support that finding; that in light of directions given by the court when hearing the appellant's application dated 14th August 2008 and in light of paragraph 13A of the Advocates (Remuneration) Order, the respondent had the opportunity during the taxation of the appellant's bills of costs to demonstrate the alleged overpayments but failed to do so; that the Judge in effect usurped the powers of the Registrar of the court who is the taxing officer; and that the Judge upheld expediency at the expense of justice to the parties.

12. Opposing the appeal, learned counsel for the respondent, Mr. T. M. Getange, in his brief arguments submitted that having regard to the consent orders recorded by the parties on 18th May 2011, it was within the mandate of the court to grant the orders that it did in that the process was adopted by consent and section 3A of the Civil Procedure Act was properly applied; that there was no replying affidavit to the respondent's motion dated 2nd May 2011; that the appellant was under a duty to give an account and demonstrate how the funds paid to it by the respondent were utilized; and that this Court should therefore uphold the decision by the High Court.

Determination

13. The only question we have to determine is whether the Judge erred in allowing that part of the respondent's application dated 2nd May 2011 seeking an order for the set off of the amount of the appellant's certified costs of Kshs. 642,564.12 against the respondent's claim for Kshs. 3,611,928.00 and for the refund of Kshs. 2,969,364.00 to the respondent.

14. When the appellant presented its application to the court dated 11th August 2008 under rule 13 of the Advocates (Remuneration) Order seeking leave to file an advocate/client bill of costs in connection with services rendered in High Court Civil Case No. 24 of 2005, the respondent filed an affidavit in opposition to that application. Its General Manager swore that affidavit on 27th November 2008 in which he deposed that the appellant had "*refused to account for money he received as the proceeds of the case and the various payments he received from the society*." The court (J. R. Karanja, J) that heard that application was not satisfied that there was any basis for refusing to grant the application as the matters that the respondent was raising in opposition "*would be made clear and settled on the presentation of the material bill of costs for taxation before the Deputy Registrar*."

15. When the appellant's bill of costs later came up for taxation before the Deputy Registrar, the respondent did not, on that occasion pursue the complaints of payments made to the appellant that were unaccounted for. In light of paragraph 13A of the Advocates (Remuneration) Order, we accept that the Deputy Registrar had the power to deal with such a complaint. Paragraph 13A provides:

> *"13A. For the purpose of any proceeding before him, the taxing officer shall have power and authority to summon and examine witnesses, to administer oaths, to direct the production of books, papers and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him."*

16. That was an opportunity the respondent failed to seize. The result is that under section 51 of the Advocates Act, the certificate of costs issued by the Deputy Registrar finally certified the amount of costs payable by the respondent to the appellant.

17. Rule 4 of Order 52 of the Civil Procedure Rules empowers the court, where the relationship of advocate and client exists or has existed, to make an order for delivery by the advocate of their cash account and for the payment or delivery up by the advocate of money. An application under that provision is by Originating Summons supported by affidavit. No doubt the client and the advocate would have an opportunity to be heard before orders of the court are issued under those provisions.

18. There is material on record that was before the Judge that shows that the appellant disputed the respondent's claim on the basis of which the respondent sought set off and refund. In a replying affidavit sworn on 3rd October 2009, Robert Ouma Njoga an advocate in the appellant firm, deposed that the appellant had not received any fees for services rendered in connection with High Court Civil Case No. 24 of 2005; that over the years the appellant handled several matters on behalf of the respondent for which the appellant was owed huge fees; that his firm routinely raised fee notes and set out the payments by the respondent made against those fee notes; that the respondent would therefore easily be able to reconcile its payments; that some payments made by the respondent related to stamp duty.

19. Given that material, the following statement made by the learned Judge in the impugned ruling is clearly not supportable. The Judge said:

> "*It appears the current applicant original respondent does not dispute that there is an amount of Kshs. 3,611,928 due and payable to the original/applicant the current respondent to this application against which the plea in the second limb was that the amount allowed in favour of the respondent herein of Kshs. 624,564/= be offset against the said amount of Kshs. 3,611,928/= leaving a balance of Kshs. 2,969,364/= to be paid to the original applicant current respondent*."

20. The Judge misapprehended the appellant's complaint to be one involving the procedure invoked when in fact, in addition to the procedure, the appellant was also asserting that the amount the respondent was claiming was not due. A set off is a debtor's right to reduce the amount of debt by any sum the creditor owes the debtor. [See Black's Law Dictionary.] And to the extent that the respondent was asserting a larger claim against the appellant and seeking a refund, it was for all purposes a counterclaim.

21. We are therefore satisfied that the Judge fell into error in allowing the respondent's claim against the appellant when the same was not proved. We accordingly allow the appeal, set aside the ruling of the court delivered on 3rd February 2011and substitute therewith an order dismissing the 2nd limb of the respondents prayer 4 of the notice of motion dated 2nd May 2011.

22. The appellant shall have the costs of the proceedings in the High Court and the costs of the appeal. Orders accordingly.

Dated and delivered at Kisumu this 27th day of May, 2016.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

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DEPUTY REGISTRAR