



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A)

CIVIL APPEAL NO. 177 OF 2014

BETWEEN

CANNON ASSURANCE LIMITEDAPPELLANT

AND

ANTHONY THUO KANAI.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Majanja, J.) dated 10th March, 2014

in

Const. Pet. No. 433 of 2013.)

JUDGMENT OF THE COURT

This is an appeal lodged by the appellant following the determination of its petition, dated 29th August, 2013 in which it had sought a plethora of orders as follows:-

“1. That pending the hearing and determination of this petition conservatory orders do issue staying:-

a)Taxation by any court or any judicial officer of all such bills of costs filed by the 1st respondent against the petitioner arising out of the 1st respondent’s employment as in-house counsel by the petitioner and scheduled to come up for taxation from 30th August, 2013

b) The filing in court of any Bills of Costs by the 1st respondent against the petitioner arising out of or connected in any way whatsoever with the 1st respondent’s employment as in-house counsel by the petitioner.

2. That conservatory orders in terms of prayer 1 above be issued pending the *inter partes* hearing and determination of the Notice of Motion filed herewith.

3. That a declaration be issued to the effect that the 1st respondent as an in-house counsel previously engaged as such by the petitioner is not entitled to claim any legal costs against the petitioner under Section 32A and/or 32B of the Advocates Act for any period prior to 12th July, 2012 when the said sections of the Act came into effect.

4. That a declaration be issued to the effect that any Bills of Costs raised by the 1st respondent against the petitioner under the said Sections 32A and 32B of the Advocates Act in respect to services rendered to the petitioner by the 1st Respondent as in-house counsel prior to the commencement date of 12th July, 2012 are null and void in law to the extent that the same purport to apply the provisions of the said sections retrospectively.

5. That a declaration be issued to the effect that until such time as the Honourable Chief Justice prescribes as required under Section 32B of the Advocates Act pursuant to recommendations received from the Council of the Law Society as required under Section 32B of the Advocates Act:

a) There would be no proper lawful basis upon which any in-house counsel could raise any Bill of Costs against his/her employee.

b) Any Bill of Costs filed prior to prescription by the Honourable Chief Justice of the standards of work that may be performed by a person employed as In-house counsel and the criteria for determining the remuneration payable to the in house counsel would be premature and being devoid of any legal basis would be null and void ab initio, misconceived, incompetent and bad in law.

6. That a declaration be issued to the effect that as the Honourable Chief Justice has not prescribed the standards of work that may be performed by a person employed as in-house counsel and the criteria for determining the remuneration payable to the in-house counsel as required under Sections 32B of the Advocates Act:

a) There is no proper lawful basis upon which the 1st respondent as in-house counsel previously employed by the petitioner has raised various Bills of Costs against the petitioner.

b) Consequently each and every Bill of Costs filed by the 1st respondent against the petitioner in respect of any legal services rendered to the petitioner by the 1st respondent as in-house counsel for the period prior to 12th July, 2012 being the commencement date of the said Act is premature and being devoid of any legal basis is null and void ab initio, misconceived, incompetent and bad in law.

7. That a declaration that the 1st respondents conducting matters that were assigned to him as an employee of the petitioner through his law firm A Thuo Kanai Advocates, so as to entitle him fees under Section 44 of the Advocates Act while at the same time earning a reasonable salary from the petitioner amounts to unfair labour practice and is therefore illegal and unconstitutional.

8. That an order do issue striking out all the High Court Miscellaneous causes filed by the 1st respondent for assessment of fees (the 40 miscellaneous applications listed)

9. That an order of prohibition do issue prohibiting and/or restraining the 1st respondent from raising invoices and/or filing bills of costs for legal services rendered to the petitioner in the course of his employment

10. That costs of and incidental to this petition be awarded to the petitioner against the respondents.

11. That this Honourable Court be pleased to grant such further order or orders as may be just and appropriate.”

A brief background to the appeal will suffice. The 1st respondent was an erstwhile legal affairs manager with the appellant. While engaged as such, he operated a law firm on the side in the name and style of **Messrs A. Thuo Kanai Advocates**, also known as **A. Thuo Kanai & Company Advocates**, through which he would occasionally act for the appellant by issuing demand notices, conduct litigation and conveyances. According to the appellant, the matters conducted by the law firm were allocated to the respondent as in-house lawyer but the respondent does not agree with that proposition.

Following an amendment to the Advocates' Act, which saw the insertion of **Sections 32A** and **32B**, that paved way for the remuneration of an in-house lawyer as an independent professional legal advisor to an employer, the relationship fell through. Accordingly, the respondent filed in excess of 40 miscellaneous applications before the High Court, seeking to have his fees assessed as an independent contractor on the work he had undertaken on behalf of the appellant.

Aggrieved by this, the appellant lodged a petition in the High Court as aforesaid, seeking the prayers already set out at the commencement of this judgment. Contemporaneously with this petition, the appellant filed an application dated 29th August 2013, in which it sought conservatory orders, staying the hearing of the miscellaneous applications so far filed as well as stay of any further filing of similar applications by the respondent pending the hearing and determination of the petition.

The appellant's case as presented in the High Court was that in filing the bills of costs aforesaid, the respondent had infringed on its right to fair labour practices which were protected by **Article 41** of the Constitution as in so doing, the respondent was acting in a dual capacity as an employee and as its advocate. It asserted that the respondent could not be permitted to recover fees as an independent contractor for matters he handled while he was receiving a salary as this would amount to an unfair labour practice contrary to **Article 41** of the Constitution. Citing the case of **Elizabeth Washeke & 62 Others v. Airtel Networks (K) Ltd & Another; [2013] eKLR**, the appellant urged the court to recognize that fairness must involve weighing up the respective interests of the employer *vis-a-vis* the employee as well as the interests of the public; and that it would be in the public interest to delineate the entitlement of in-house lawyer as companies and other organizations would suffer from unjustified fee claims from their employees. The appellant added that while the contract of employment was being negotiated, the respondent had advised that it would be lawful for him to represent it through his law firm and be compensated over and above his monthly salary by payment of 25% of the party and party costs on all successful claims in which he represented it, which advice turned out to be illegal. He added that the nature of the parties' relationship was governed by an employment contract which excluded the possibility of the respondent being an independent contractor to the appellant. The appellant relied on the decisions in **Nationwide Mutual Insurance Co. v Darden** 503 US 218, 112 S. Ct and **McKee v Reid's Heritage Homes Ltd [2009] ONCA 916 (CanLII)** in support of this proposition.

Further, the appellant contended that the respondent's bills of costs were invalid, as they were premised on **Sections 32A** and **32B** of the Advocates Act which had not come into force at the time the bills of costs accrued. According to the appellant, the respondent was at all material times in-house lawyer and in the absence of any prescription of the remuneration of the in-house lawyer by the Chief Justice as envisioned by **Section 32B** of the Advocates Act, the bills of costs filed and invoices raised lacked legal backing and prayed for the petition to be allowed.

The petition was opposed by the respondent, vide a replying and a further affidavit sworn on 3rd September 2013 and 17th October, 2013. Alongside his replying affidavit, the respondent also filed a notice of preliminary objection in which he stated that the petition was bad in law, as it did not raise any constitutional issues. Instead, that the issues raised pertained to a private contract between parties, and any dispute arising therefrom should be agitated before the taxing master of the High Court. In addition,

that fundamental rights and freedoms cannot be enforced against a private individual as the petitioner had attempted to do. Rather, that enforcement of rights by way of constitutional petitions can only be against the state or state organs and not against private individuals. Citing the case of **United**

States International University v The Attorney General and Others; [2012] eKLR, the respondent asserted that only the Industrial Court had exclusive jurisdiction under **Article 162(2)** of the Constitution to hear and determine such claims, since the matter arose from an employer/employee relationship. Further, that following the case of **Kagenyi v Musiramo & Another [1968] EA 43**, the dispute could not even be transferred to the Industrial Court in the event the court found that it is an employer/employee dispute and it must be struck out instead.

The respondent contended further that his bills were not brought under **Sections 32A** and **32B** of the Advocates Act as asserted by the appellant but under **Section 44** of the Act. In addition, that the work in respect of which the bills related was not covered by the employer- employee relationship, and the appellant ought not be allowed to renege on effecting payment therefor.

For purposes of this appeal, nothing much turns on the 2nd respondent as his participation in the petition was peripheral before the trial court and even before this Court.

Upon evaluation of the evidence and the issues raised, judgment was delivered on 10th March, 2014 in favour of the respondent in effect dismissing the petition with costs. According to **Majanja, J.**, this was a matter that could perfectly have been agitated under the Advocates' Act as opposed to a constitutional platform. He held that the respondent was entitled to recover his dues for any services he may have rendered as an advocate to the appellant, who was free to raise any objections it may have had thereto before the taxing master in accordance with the Advocate's Act and the **Advocates' Remuneration Order**. The learned Judge further held that where a procedure for redress is succinctly provided for under statute, that procedure should be strictly followed.

Dissatisfied with the findings, the appellant lodged the instant appeal, advancing several grounds upon which it felt the Judge erred, but which can be summarized as follows, that the learned Judge: failed to appreciate that the dispute went beyond determination of taxation of costs between an advocate and his client but also entailed a determination of whether the appellant's constitutional rights had been infringed; failed to appreciate that there existed multiple forums where the issues in the petition could be ventilated and determined among which was the High Court; failed in not advancing the overriding objective of the court and instead leaving the fate of the bills of cost to be dealt with on a case by case basis, which would lead to wastage of time and resources; failed to determine if on a progressive application of the law, the respondent could be allowed to claim compensation in a dual capacity and employ a retrospective application of **Sections 32A** and **32B** of the Advocates Act; erred in dismissing the public interest aspect of the dispute; failed to make a determination as to whether the respondent was an employee or an independent contractor; and lastly, that he failed to make a determination on whether a contract of service could subsist at the same time and between the same parties as a contract of services.

With the leave of the court, the parties filed written submissions, with brief oral highlights by learned counsel at the hearing.

Reiterating the appellant's submissions in the trial court, **Mr. Ngonde**, learned counsel for the appellant, added that the High Court had the jurisdiction to hear the petition and grant the orders sought. In that regard, the Judge erred in declining to grant the orders sought and instead referred the dispute to the taxing master under the **Advocates' Remuneration Order**. Calling in aid the decision in **Ole Nganai v. Arap Bor [1983] KLR 233**, counsel further submitted that the Judge always has a duty to make a determination on every claim made before him, which he failed to do in this case. In addition, it was submitted that the respondent was not entitled to payment as his relationship with the appellant was that of an employer-employee and not that of an independent contractor. The appellant submitted at length on the difference between an employee and an independent contractor, advancing the argument that a contract of service cannot subsist at the same time as a contract of services with respect to the same parties. Learned counsel cited a plethora of authorities in this regard. It was also urged that the duty of the

taxing master is purely the taxation of costs, and that any dispute regarding the retainer had to be referred to the court which to counsel meant the High Court. In support of this proposition, reliance was placed on the decision by **Waweru J.**, in **Mugambi & Co. Advocates v. John Okal Ogwayo & Another; [2013] eKLR**. Also faulted was the Judge's failure to address the petition on merit, particularly on the nature of the parties' engagement, his failure to find that the respondent was an employee and not an independent contractor as well as his failure to interrogate the purported retrospective application of **Sections 32A and 32B** of the Advocates Act by the respondent. Lastly, counsel contended that the Judge had failed to address his mind to the public nature and interest of the litigation before him and turned a blind eye to the wider interest of the greater public and the overriding objective of the court.

On his part, **Mr. Macharia**, learned counsel for the respondent, also reiterated his submissions before the trial court, urging that the Judge's decision was beyond reproach as indeed an alternative avenue existed for addressing the appellant's grievance. Further, that it is not unconstitutional for a party to seek settlement of dues validly accrued and owing. Counsel added that the Advocates Act and the Advocates' Remuneration Order are a code unto themselves, providing an exhaustive system within which all these issues could be addressed and it was pursuant thereto that he had filed the bills of costs.

As a first appellate court, this Court has the primary role of re-evaluating, reassessing and re-analyzing the evidence that were placed before the learned trial Judge and determining whether the conclusions reached by the learned trial Judge can stand. (See **Sumaria and Another vs Allied Industries Limited [2007] KLR** and also **Daniel N. Mugendi v Kenyatta University & 3 Others, [2013] eKLR**).

That said, and as aptly framed by the appellant, issues for determination in this appeal can be lumped into three:

- a) whether the trial Judge limited himself to taxation of the advocate-client bills of costs whilst ignoring other pertinent issues placed before him;
- b) whether the learned Judge failed to determine the petition on merit and whether this offends the overriding duty of the court; and,
- c) whether the Judge erroneously dismissed the public interest nature of the litigation before him.

Dealing with the first and second issues conjunctively, it has been contended by the appellant that the Judge neglected to address the appellant's constitutional right to fair labour practices as per **Article 41**, constitutional right to property as per **Article 40**, the appellant's entitlement to protection against retrospective application of statutes and the operationalization of statutes upon satisfaction of specific requirements imposed by the law.

Looking at the judgment, the following excerpt particularly stands out in this regard;

"35.I am aware that the petition before the Court is one for the vindication of fundamental rights and freedoms brought under Article 22 but I have found that in substance it raises grounds that are appropriately dealt with by the taxing officer dealing with each bill. This is not to say that the Court is turning a blind eye to the alleged violations, it is only grounded on the fact that fundamental rights and freedoms are realized and implemented through other laws and procedures and not necessarily through a direct application of the Constitution. Article 21 of the Constitution imposes on the State and every State organ to, "observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the bill of rights." Thus, rights of due process, fair labour practices and the right to the protection of property are all given effect through the application of the ordinary laws and it is not necessary, in these circumstances, to have recourse to the Constitution to resolve the dispute between the parties."

Given the foregoing, it cannot be said that the Judge did not appreciate that a claim for violation of fundamental rights had been pleaded. He only noted that whereas that claim had been placed before him,

its resolution could be done through the taxing master and not the constitutional court. In short, that since the matter could be ventilated through another avenue, the parties ought to have pursued that other process instead. As a result, the learned Judge cannot be accused of having failed to address issues laid before him. Further, the **Ole Nganai case** (*supra*) is clearly distinguishable because unlike the present case, the Judge in that suit failed to determine the issues laid before him, addressed extraneous issues instead and went on to grant a remedy not sought by the parties. In the present case, the question of the proper fora was a live issue in the course of proceedings. The same had been raised by the respondent in his preliminary objection as well as his submissions. This in turn informed the question of whether this was purely a matter of taxation of costs and whether constitutional issues emerged that would warrant the adjudication of the trial court. As demonstrated above, the learned Judge addressed himself on these key issues and found that no constitutional issues emerged that would invoke the court's jurisdiction.

Was the learned Judge wrong in that approach? As earlier stated, the constitutional rights alleged to have been violated were the right to fair labour practices as per **Article 41** and the right to property as per **Article 40**. On the other hand, it is not in doubt that the cause of action was precipitated by the filing of the bills of costs by the respondent wherein he sought remuneration for services he alleged to have rendered to the appellant as an Advocate. **Section 44** of the Advocates' Act, gives the Chief Justice powers to make orders prescribing remuneration for Advocates. It provides that the Chief Justice shall make orders regulating the remuneration of Advocates on professional business, whether contentious or non-contentious. Pursuant to the said section, the **Advocates Remuneration Order** was promulgated, setting out the remuneration schedules for both contentious and non-contentious matters involving Advocates and how to approach the taxing master and what to do in the event of a disaffection with the decision of the taxing master. The long and short of it is that an exhaustive system of resolution of disputed Advocates' costs and bill of costs abides under the

Advocates' Act and the attendant Advocates' Remuneration Orders. Indeed, **Section 49** sets out the mechanism thus:-

“49. Procedure in action where quantum of costs is challenged by defence

Where, in the absence of an agreement for remuneration made by virtue of section 45, a suit has been brought by an advocate for the recovery of any costs and a defence is filed disputing the reasonableness or quantum thereof-

(a) no judgment shall be entered for the plaintiff, except by consent, until the costs have been taxed and certified by the taxing officer.”

Further, **Order 10** of the Advocates' Remuneration order defines a taxing officer as the Registrar or the Deputy Registrar of the High Court or in their absence, any such officer as may be appointed by the Chief Justice. A party dissatisfied with the decision of the taxing master may thereafter lodge a reference in the High Court. It is thus without doubt that in so far as disputes relating to Advocates costs are concerned, the same must commence with the matter being placed before the taxing master who determines and certifies the same. Only then can subsequent litigation thereto be entertained.

It is a well-trodden path that where the law establishes a particular framework for dealing with a particular grievance, that framework should be invoked above all else (see. **Speaker of the National Assembly v Karume [2008] 1 KLR 425, Deynes Muriithi & 4 others v Law Society of Kenya & Another [2016] eKLR** and **Mutanga Tea and Coffee Company Limited v Shikara Limited & Another [2015] eKLR**). As a result, and in view of the exhaustive dispute resolution mechanism regarding contested Advocates' Bill of Costs set out in the Advocates' Act and the Advocates' Remuneration mechanism, the Judge cannot be faulted for referring the parties to that forum.

The appellant has cited the **Mugambi case** (*supra*), to advance its contention that the taxing officer lacks the jurisdiction to entertain disputes as to the retainer, and that his jurisdiction is purely limited to taxation of costs and that such objections can only be addressed by the High Court. Of note is that the High Court is replete with various jurisdictions as bestowed upon it by law. One such jurisdiction is the inherent

jurisdiction, which is what was invoked via a miscellaneous application in the **Mugambi case**. This is distinguishable from the present case, in which the appellant had moved the court under its constitutional jurisdiction, alleging violations of human rights. In the same spirit, whether the respondent could be allowed to invoke a retrospective application of **Sections 32A and 32B** of the Advocates Act or not was also a substantive issue to be dealt with once the matter was placed before the right forum.

On the last issue, the bone of contention is whether the respondent could charge advocate/client fees on account of his position not only as an employee but also as an advocate providing legal services to the appellant through his firm, A. Thuo Kanai Advocates and/or A. Thuo Kanai and Company Advocates, and whether such action constitutes a violation of the appellant's fundamental rights and freedoms under the Constitution and which the Judge should have addressed on account of public interest.

At no point in the pleadings was the public interest element of the litigation raised. It is trite law that pleadings, particularly in an adversarial system such as ours, are binding not only on the parties but on the court as well (see **Malawi Railways Ltd-vs- Nyasulu [1998] MWSC 3** as cited with approval by this Court in **Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR**). Pleadings are the compass or navigation aid that assists the court in determining the real issues in contestation between the parties. As such, without the benefit of having an issue pleaded before him, a Judge cannot be faulted for not voicing his views and determination thereon.

For the aforesaid reasons, we are satisfied that the appeal should fail with costs. It is so ordered.

Dated and delivered at Nairobi this 25th day of November, 2016.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR