



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, VISRAM & KARANJA, J.J.A)

CIVIL APPEAL NO. 70 OF 2014

BETWEEN

DEWDROP ENTERPRISES LIMITED APPELLANT

AND

WAMBUGU WAMBUI ANGELINE T/A

A.W. KINUTHIA & CO. ADVOCATES RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Milimani, Nairobi (C. K. Kimondo, J.)
dated 12th March, 2013*

in

H. C. C. No. 595 of 2009 (OS)

JUDGMENT OF THE COURT

1. As we can discern from the record, there existed an advocate/client relationship between the respondent and the appellant. Pursuant to the said relationship, the respondent represented the appellant in the following matters:-

(a) Arbitration proceedings between the appellant and Harre Construction Ltd.

(b) CMCC No. 10203 of 2003

(c) CMCC No. 512 of 2008

(d) Misc Appl. No. 424 of 2008

(e) Misc Appl. No. 684 of 2008

(f) SRMCC No. 13180 of 2006

(g) Misc. Appl. No. 992 of 2008

(h) H. C. C. C. No. 158 of 2007

(i) SRMCC No. 12742 of 2006

(j) Civil Appeal No. 276 of 2008

The reason for setting out the above matters shall become clear later in this judgment.

2. During the course of the relationship, the appellant entrusted the respondent with a sum of Kshs. 361,504/=. The appellant claimed that the amount was for purposes of meeting any lawfully incurred legal fees in respect of the above mentioned matters. In 2009 the appellant company learnt that the respondent never held a valid practicing certificate during the pendency of their relationship. Consequently, the appellant demanded for the refund of the money deposited with the respondent. The respondent declined to do so and the appellant filed an Originating Summons seeking *inter alia* refund of the said sum. The appellant alleged that during the pendency of the relationship, the respondent was an unqualified person within the meaning of **section 9** of the **Advocates Act** and was not entitled to the legal fees paid to her; that she received the legal fees under the pretence that she was qualified to act as an advocate contrary to **section 31** of the Advocates Act. As such, the appellant was entitled to refund of the same. In response, the respondent denied the appellant's allegations and maintained that the amount in question was utilized for the payment of filing fees in the above mentioned matters.

3. The trial Judge, in a judgment dated 12th March, 2013 dismissed the Originating Summons with no orders as to costs. In doing so, he found that the appellant had not only failed to prove that the respondent did not have a practicing certificate during the relevant period, but also that she had utilized the funds in her custody for a purpose other than paying the filing fees. It is that decision that has provoked the appeal herein which is predicated on the grounds that the learned Judge erred in law and fact by-

(a) Finding that the sum of Kshs.361,504/= was deposited with the respondent on account of filing fees.

(b) Failing to find that the respondent did not hold a practicing certificate from 2002 to 2009.

(c) Failing to find that the respondent contravened Sections 9, 31, 33 and 34 of the Advocates Act.

(d) Failing to find that the respondent had attempted to swindle the appellant Kshs.59,000/=.

(e) Finding that the appellant was not entitled to a refund of Kshs.361,504/=.

4. At the hearing of the appeal, Mr. Edward Wachira, a director of the appellant, appeared on behalf of the appellant, while Mr. J. Kamande appeared for the respondent. They both relied on the written submission filed on behalf of the respective parties.

5. On the appellant's part, it was submitted that Edward Wachira, a director of the company, paid Kshs.361,504/= to the respondent on account of legal fees; that the respondent was not entitled to claim any fees given that she did not have a valid practicing certificate, and did legal work unlawfully in contravention of the Advocates Act. The appellant argued that it was entitled to a full refund.

6. On the other hand, the respondent reiterated that the entire amount in dispute was utilized in paying court filing fees. According to the respondent, the appellant's suit was baseless and lacked merit. It was argued that the onus of proving that the respondent did not hold a practicing certificate lay with the appellant. The respondent contended that the letter from the Law Society of Kenya was clear that she had not taken out a practicing certificate for the year 2009 but that letter made no reference to the preceding years. It was also submitted that the appellant had failed to prove that the respondent had attempted to swindle the appellant of Kshs.59,000/=.

7. We have considered the record, submissions, authorities supplied by the counsel as well as the law. Being a first appeal we are cognizant of our primary role to reassess and re-evaluate the evidence tendered before the trial court and reach our own conclusions bearing in mind we neither saw nor heard the witnesses. This much was re-stated by this Court in ***Musera vs. Mwechelesi & Another (2007) KLR 159***;

“We must at this stage remind ourselves that though this is a first appeal to us and while we are perfectly entitled to make our own findings on the evidence, the trial Judge has in fact made clear and unequivocal findings and as an appellate court we must indeed be very slow to interfere with the trial Judge’s findings unless we are satisfied that either there was absolutely no evidence to support the findings or that the trial Judge must have misunderstood the weight and bearing of the evidence before him and thus arrived at an unsupportable conclusion.”

8. The appellant’s claim was based on **section 34** of the **Advocates Act** which prohibits an unqualified person from acting as an advocate by taking instructions or drafting pleadings and receiving fees or reward for the same. Of relevance is **section 34 (2)** which entitles a person to recover any money paid to such an unqualified person. The subsection provides that,

“Any money received by an unqualified person in contravention of this section may be recovered by the person by whom the same was paid as a civil debt recoverable summarily.”

Section 9 of the **Advocates Act** describes an unqualified person as—

“Subject to this Act, no person shall be qualified to act as an advocate unless—

(a) he has been admitted as an advocate; and

(b) his name is for the time being on the Roll; and

(c) he has in force a practicing certificate;...”

9. It is not in dispute that the respondent received Kshs.361,504/= from the appellant to meet legal fees which arose in connection with the above mentioned matters. The bone of contention was whether the respondent received the said amount as an unqualified person. The appellant claimed that the respondent did not have a valid practicing certificate, hence she was unqualified to act in the above matters and receive the amount in question. We, like the trial court, find that the burden lay with the appellant to prove his claim, particularly that the respondent did not have a practicing certificate during the pendency of their relationship. **Section 107 (1)** of the **Evidence Act** stipulates that,

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

10. In determining whether the appellant did discharge its burden of proof we pay regard to the wise words of Denning J. in ***Miller vs. Minister of Pensions [1947] 2 All ER 372***,

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: „we think it more probable than not?, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un) convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

11. Taking into account the evidence on record, we concur with the trial court that the appellant did not discharge the burden of proof. From the matters listed herein above, it is clear they were filed between

2003 and 2008. The appellant did not tender any evidence to the effect that the matters in question had been struck out on account of being drawn and filed by unqualified person. Further, the letter from the Law Society of Kenya clearly indicated that the respondent had not taken out a practicing certificate for the year 2009. The fact that the respondent did not expressly deny that she did not have a practicing certificate during 2003 to 2008 did not any way exempt the appellant from discharging its burden of proof. This Court in ***Douglas Odhiambo Apel & Emmanuel Omolo Khasin vs. Telkom Kenya Limited - Civil Appeal No. 115 of 2006*** observed thus:

“A plaintiff is under a duty to present evidence to prove his claim. Such proof cannot be supplied by the pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court.”

Having found that the appellant had failed to prove that the respondent was unqualified when she acted for it and received Kshs.361,504/= it follows that there was no basis for the trial court to order the refund sought by the appellant.

12. The upshot of the foregoing is that we find no reason to interfere with the trial court’s decision. Accordingly, the appeal herein lacks merit and is dismissed with costs.

Dated and delivered at Nairobi this 9th day of December, 2016.

E. M. GITHINJI

.....

JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR