



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPEAL NO. 34 OF 2012

OTIENO RAGOT & COMPANY ADVOCATES.....APPELLANT

AND

KENYA AIRPORTS AUTHORITY.....RESPONDENT

(Being a first appeal from the ruling and order of the High Court of

Kenya at Kisumu (**Aroni, J.**) dated 30th June, 2011

in

H.C.C. NO. 779 OF 2009)

JUDGMENT OF THE COURT

1. This is an appeal from an interlocutory decision given on 30th June 2011 by the High Court at Kisumu (Ali-Aroni J) allowing the respondent's motion to stay the taxation of the appellant's advocate/client Bill of Costs that was then pending before the Deputy Registrar of the court. The order of stay was to last until the hearing and determination of the respondent's suits in High Court Civil Suit No. 68 of 2011 and Civil Suit No. 69 of 2011.

2. Aggrieved, the appellant lodged the present appeal complaining that the impugned decision is clearly wrong because the High Court did not have jurisdiction to stay the taxation; that in exercising its discretion to grant the orders of stay, the High Court took into account irrelevant factors; that the learned Judge erred in concluding that the respondent's suits in High Court Civil Suit No. 68 and Civil Suit No. 69 of 2011 would be rendered nugatory and the respondent would be prejudiced unless the order of stay was granted; and that the learned Judge should have dismissed the respondent's motion as an abuse of the process of the court.

Background

3. The appellant is a firm of advocates. The respondent is a statutory corporation. In October 2009, the respondent instructed the appellant to defend it in two civil suits, namely High Court Civil Suit Numbers 155 of 2009 and 156 of 2009. In those suits, a total of 111 claimants sued the respondent seeking compensation from the respondent for alleged illegal compulsory acquisition of parcels of land for

purposes of expansion of Kisumu International Airport. There were 54 claimants in HCCC 156 of 2009 who claimed “*an average of Kshs. 258 million for loss of land, development, inconveniences, current and future loss of profits to be earned from their respect (sic) parcels of land which aggregates Kshs. 13,932,000.00*” amongst other reliefs sought. In HCCC 155 of 2009, 57 claimants claimed “*an average of Kshs. 258 million for loss of land, development, inconvenience, current and future loss of profits to be earned from their respective parcels of land which aggregates Kshs. 14,706,000.00...represent[ing] loss for their children, personal representative etc*”

4. In its defences to those suits filed through the appellant, the respondent expressly denied those allegations and put the claimants to strict proof.

5. The appellant, on behalf of the respondent, successfully moved the court and had both suits struck out. The order to strike out HCCC 155 of 2009 was given on 29th October 2010. Each party was ordered to bear its own costs for that suit. HCCC 156 of 2009 was struck out by an order given on 24th June 2010. Costs of that suit were awarded to the respondent. The appellant, on behalf of the respondent, presented a party and party bills of costs with respect to HCCC 156 of 2009, which was taxed and allowed in favour of the respondent in the sum of Kshs. 130,730,230.00.

6. By fee notes dated 19th July 2010 and 2nd November 2010 the appellant sought payments from the respondent of Kshs. 227,472,160.20 and Kshs 240,104,382.20 respectively for services rendered in connection with the two suits. The respondent took the view that the fees claimed by the appellant were excessive. It requested the appellant to revise the same. The parties exchanged correspondence over the matter. Ultimately the parties did not reach any agreement on the fees payable by the respondent to the appellant.

7. The appellant then initiated taxation proceedings against the respondent in Misc. Civil Application Numbers 95 of 2011 and 101 of 2011 in accordance with the Advocates (Remuneration) Order. The appellant presented itemized advocate/client bills of costs for purposes of taxation by the Deputy Registrar of the court as the taxing officer. With respect to services rendered in connection with HCCC 156 of 2009, the appellant sought costs of Kshs. 227,476,921.38. In connection with HCCC 155 of 2009 the appellant claimed advocate/client costs in the amount of Kshs.240, 105,795.64.

8. On 13th May 2011, while those bills of costs were pending taxation before the Deputy Registrar the respondent commenced Civil Suit Numbers 68 of 2011 and 69 of 2011. In those suits, the respondent sought declarations from the High Court that the appellant’s claims for remuneration as set out in the advocate/client bills of costs based on the values indicated by the 111 claimants in their pleadings is invalid and unenforceable. The respondent contended that the appellant’s entitlement to remuneration should be based on actual work done.

9. Those suits were accompanied by the respondent’s applications by notice of motion dated 12th May 2011 seeking orders that pending their determination, the hearing of Misc. Civil Application Numbers 95 of 2011 and 101 of 2011 be stayed.

10. The respondent’s justification for seeking interim orders to stay taxation of the appellant’s bills of costs was that the respondent’s suits would be rendered nugatory if the taxation proceeded; that the appellant’s bills of costs were based on erroneous and superficial value of the subject matter and in complete disregard of the fair value of the subject matter in Kisumu HCCC No. 155 of 2009 and HCCC NO. 156 of 2009; that if the taxation proceeded on that basis, the only recourse available to the respondent would be to object to the taxation as provided under Paragraph 11 of the Advocates (Remuneration) Order; that such course would not be satisfactory as the respondent’s objection would be limited to specific items of taxation only.

11. Those are the motions that came up before Ali-Aroni J who in separate rulings dated and delivered on 30th June 2011 allowed them. The result was that the appellant’s proceedings for the taxation of its advocate/client bills of costs were stayed pending the hearing and determination of HCCC NO. 68 of

2011 and HCCC NO 69 of 2011. It is against that background that the appellant has challenged the decisions by the learned Judge in this two consolidated appeals on the grounds already mentioned.

Submissions by counsel

12. At the hearing of the appeal before us learned counsel Mr. David Otieno for the appellant submitted that the learned Judge of the High Court did not have jurisdiction to entertain the applications and indeed the entire suits in HCCC NO. 68 of 2011 and HCCC NO 69 of 2011; that the Deputy Registrar who is the taxing officer was seized of the matters; that a judge of the High Court should only intervene in taxation proceedings in the event of a reference under Rule 11 of the Advocates (Remuneration) Order or by consent under Rule 12 thereof or if a suit was instituted for recovery of costs under Section 48 of Advocates Act; and that the learned Judge erred in usurping the powers of the taxing officer.

13. In support, counsel referred us to the cases of **Peter O. Ngoge t/a O. P. Ngoge & Associates vs. Joseph Kariuki HCCC Misc. Application No. 1001 of 2006; Daly & Figgis Advocates vs. Kanturi Networks Limited and Anor HCCC Misc. Application No. 278 of 2008; In the matter of winding up of Leisure Lodges Limited Winding Up Cause No. 28 of 1996 and Sharma vs. Uhuru Highway Development Limited [2001] 2 EA 530.** Based on those decisions, counsel submitted that all matters arising from the taxation including the question of the value of the subject matter was a matter for the Deputy Registrar as the taxing officer to address; that under Rule 13A of Advocates (Remuneration) Order, the Deputy Registrar has powers, in the conduct of taxation, analogous to the powers of a court conducting a hearing; and that as the suits with respect to which the appellant rendered services to the respondent were for specific amounts of money the question of the court determining the value of subject matter did not in any case arise.

14. According to Mr. Otieno, the learned Judge misdirected herself when she stated that she needed to strike a balance between the competing interests of the parties instead of directing the respondent to canvass its grievances before the taxing officer. Counsel went on to say that the learned Judge should have declined to grant the orders of stay because any party aggrieved by the decision of the Registrar could appeal to the High Court under Paragraph 11 of Advocates (Remuneration) Order or with the consent of the other party refer the matter to a judge under Paragraph 12 thereof as indicated. In his view, the question of prejudice considered by the learned Judge was an irrelevant consideration, and if it was a relevant consideration, the Judge ought to have considered that the appellant would suffer the greatest prejudice by being kept out of earned fees.

15. Counsel urged that the learned Judge should have held that the respondent was guilty of abuse of the process of the court because the respondent secured adjournment of the taxation proceedings before the Registrar on the basis of a representation to the appellant that it was considering settlement of its fees; that instead of settling, the respondent instituted parallel proceedings before the High Court; that the respondent thereby occasioned unnecessary escalation of costs in addition to preventing the appellant from taxing its advocate/client bill of costs.

16. Opposing the appeal, Mr. Martin Munyu learned counsel for the respondent submitted that the respondent's intent when commencing proceedings before the High Court in HCCC Nos. 68 and 69 of 2011 was to obtain declarations by the court that the appellant is not entitled to fees grounded on baseless values that were pleaded by the 111 claimants; and that the respondent was not thereby interfering with the taxation.

17. According to Mr. Munyu the Deputy Registrar as the taxing officer can only determine quantum of costs and his decision is final; that there is no material in the bills of costs themselves for determining the value of the subject matter; that there is no foundation for the amount claimed except for the reference to the amount of Kshs. 13,932,000,000.00 in the plaint which has no basis in a valuation or otherwise; that the bill of costs should be based on actual work done as opposed to looking at the pleadings for value of the subject matter; and that it was therefore necessary for the High Court to set the parameters for the taxing officer and that the orders sought in Civil Suit No's 68 of 2011 and 69 of 2011 could only be given by the High Court, and not by the Registrar.

18. In support of his submission counsel referred us to the decision of this Court in case of **Moronge & Company Advocates vs. Kenya Airports Authority Civil Appeal No. 262 of 2012** and the High Court decision in the case of **The Board of Trustees National Hospital Insurance Fund vs. Kipkorir, Titoo & Kiara Advocates HCCC No. 154 of 2004**. Citing **Mbogo and Another vs. Shah [1968] E A 93** Mr. Munyu submitted that the appellant has not made out a case for this Court to interfere with the exercise of discretion by the High Court.

19. Counsel concluded by saying that we should not interfere with the decision of the High Court and instead we should let the suits in HCCC 68 of 2011 and HCCC 69 of 2011 proceed in order for the parameters for the taxation of the appellant's client/advocate bills of costs to be set.

20. In his reply Mr. Otieno submitted that it is not necessary for the High Court to set parameters as it is incumbent upon the Deputy Registrar of the Court as the taxing master to assess the costs and that a separate suit was not necessary as the challenge could have been made before the Registrar. Mr. Otieno maintained that the Advocates (Remuneration) Order is a complete code and separate suits before the High Court are absolutely unnecessary. In that regard counsel referred us to **Noor Khan vs. Ramji Kanji & Company and Others [1966] E A 506**; **S. M. Bashir vs. United Africa Co (Kenya) Limited and others [1959] E A 864**; **Coast Brick & Tile Works Limited and others vs. Premchand Raichand Limited and Others [1964] E A 187**. With that counsel urged us to allow the appeal so that the taxation before the Deputy Registrar of the High Court may proceed.

Determination

21. We have considered the appeal and the rival submissions. The decisions appealed from are interlocutory and were made in exercise of the discretion power of the court. As this Court stated in **Mbogo and Another vs. Shah** (supra) it is well settled:

“...that this Court will not interfere with the exercise of...discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

22. The question for our determination therefore is whether the impugned decisions are clearly wrong on account of: misdirection by the learned Judge that she had jurisdiction to grant the orders staying taxation proceedings; taking into account irrelevant factors; failing to consider that prejudice would be occasioned to the appellant; and failing to appreciate that the proceedings before were an abuse of the process of the court.

23. It is not in dispute that the respondent instructed the appellant's firm of advocates to represent it in the two suits referred to, and that the appellant did in fact represent it in the defence of those suits. As stated, 54 plaintiffs in Kisumu HCCC No. 156 of 2009 and 57 plaintiffs in Kisumu HCCC No. 155 of 2009 sought reliefs from the High Court against the respondent for alleged loss of parcels of land; for non-compensation of land acquired compulsorily; and for inadequate compensation for land allegedly illegally acquired. Those suits were summarily terminated following applications made by the appellant on behalf of the respondent. It is common ground therefore that an advocate/client relationship existed between the parties.

24. As already noted the problem between the parties arose when the respondent declined to settle the appellant's fee notes on the basis that they were excessive and that they were based on erroneous value of the subject matter pleaded in Kisumu HCCC Nos. 155 and 156 of 2009. That precipitated the commencement of Misc. Civil Cause No. 95 and 101 of 2001 by the appellant seeking to have its advocate-client bills of costs of Kshs. 227,476,921.38 and Kshs. 240,105,795.64 respectively taxed by the Registrar which taxation was then stayed by the learned Judge by the orders appealed from.

25. The Advocates (Remuneration) Order is subsidiary legislation made under the Advocates Act Chapter

16 of the Laws of Kenya that makes provision for the remuneration of an advocate by his client. Under Paragraph 13 of that order, the Registrar of the court who is the taxing officer is empowered to tax or assess costs as between advocate and client at the request of either party.

26. In proceedings in the High Court, a bill of costs is taxable under Schedule VI, which provides the basis for the taxing officer to assess costs. To enable the taxing officer carry out the assessment or taxation of costs, he is empowered under Paragraph 13A to 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.*” Those are powers that the taxing officer can call to his aid where for instance there is a dispute, as is the case here, regarding “*the value of the subject matter*”

27. Under paragraph 11 of The Advocates (Remuneration) Order, the procedure for objecting to a decision of the taxing officer is provided for by recourse to the High Court by way of a reference to a judge by chamber summons. The decision of the judge on such objection is appealable, with the leave of the judge to the Court of Appeal. Under Paragraph 12 of the Order, the parties to the taxation may by consent refer any matter in dispute arising out of the taxation of a bill of costs for the opinion of the High Court. Therefore in addition to providing the taxing master with the parameters and tools for carrying out taxation of costs, the Advocates (Remuneration) Order contains an comprehensive process for any party aggrieved by a decision of the taxing officer to object to it before a judge and, as we have seen, further recourse to the Court of Appeal with the leave of the judge.

28. Ringera, J (as he then was) in **the Matter of Winding Up of Leisure Lodges Limited, Winding Up Cause No. 28 of 1996** expressed the opinion, correctly in our view, that a party aggrieved by a decision of a taxing officer “*whether it be on the quantum awarded on the bill as a whole or any items thereof or on the validity of the bill as a whole or any items thereof*” has recourse to the High Court by way of reference under Paragraph 11 of the Advocates (Remuneration) Order and that that Order is a complete code.

29. In the case of **Sharma vs. Uhuru Highway Development Ltd [2001] 2 EA 531** whose facts bears striking similarity with this matter, an advocate after rendering services to his client forwarded a fee note to his client. It was not paid. The advocate commenced a miscellaneous civil suit in the High Court submitting his itemized advocate/client bill of costs for taxation. The taxation was then scheduled before the taxing officer. Before the taxation was done, the client applied to the High Court for stay of the taxation and for the striking out of the Miscellaneous Cause. When the matter reached this Court, it was held that the proceedings before the High Court were a nullity as the matter had already been fixed for taxation before the Deputy Registrar and there were no grounds conferring jurisdiction on the judge to hear the matter and no steps had been taken to divest the Deputy Registrar of his jurisdiction. This Court was clear that in those circumstance the High Court did not have jurisdiction to entertain the application for stay.

30. Counsel for the respondent placed reliance on the case of **Moronge & Company Advocates vs. Kenya Airports** (supra) where this Court confirmed that the High Court has jurisdiction to ignore a bill in a contested taxation. What is however clear from that decision is that the Court was dealing with the question of jurisdiction of the High Court to tax in the context of a reference from the decision of taxing officer. That much appears from the judgment where the Court stated:

“ In our view, the issue of the jurisdiction of the High Court Judge to tax a contested taxation on a reference is settled. Indeed all the authorities cited to us by counsel for the appellant are unanimous that a judge of the High Court has jurisdiction to tax a bill himself.” [our emphasis]

31. It was on that basis that this Court in Moronge Company Advocate went ahead to pronounce that in the circumstances of that case it was not possible to determine the value of the subject matter as the figure that was pleaded was “*plucked from the air...and had absolutely no basis.*” That case stands for the proposition that a judge of the High Court may on a reference from a decision of the taxing officer itself

undertake the taxation. It does not support the argument which we understood counsel for the respondent to be making that where a bill of costs is pending taxation before a taxing officer, the High Court may in effect usurp the function of the taxing officer in the first instance, to itself tax the bill or determine the value of the subject matter in the name of setting parameters for the taxing officer.

32. The High Court decision in the case of **The Board of Trustees National Hospital Insurance Fund vs. Kipkorir, Titoo & Kiara Advocates HCCC No. 154 of 2004** was premised on the view taken by the learned judge in that case that the allegations made there went beyond the scope of the mandate of the Deputy Registrar on a taxation. To the extent that it might be interpreted to support the view that the High Court may usurp the taxing function confronted a taxing officer in the first instance that decision is in our view not a correct representation of the legal position.

33. How then did the learned Judge apply himself to the present matter? When allowing the respondent's applications for stay in the present case, the learned Judge had this to say:

“ whether or not to grant stay is discretionary; whether or not the court can grant the declarations sought on the face of a pending taxation is for the trial court to determine.

This suit is not about taxation of the pending bill and I am convinced that if the taxation proceeds this suit will be rendered useless and the applicant may be prejudiced; however should the suit fail the taxation even if stayed will be taxed accordingly at some stage I am also of the view that other than a delay of the taxation no prejudice is likely to be suffered by the respondent. I am therefore inclined to grant prayer 3 of the application. Costs of the motion be in the suit.”

34. We consider that the learned Judge misdirected herself by holding that the suits before her were “*not about taxation of the pending bill(s)*”. Those suits are undoubtedly premised on the complaint by the respondent that the appellant's claim for fees is based on “*total disregard of the instructions carried out and the value of the work done*”; and that the appellant is “*estopped from claiming any fees based on the monetary sum pleaded in the original suit*”. In those suits, the respondent also complained that the appellant had gone ahead to file taxation proceedings based on with invalid and unenforceable subject value when the appellant is only entitled to remuneration based on actual work done. In our view, those were matters for determination by taxing officer in the first instance before any party aggrieved by the determination of the taxing officer, can escalate them to the High Court.

Consequently, we are persuaded that the decision of the High Court to stop the taxation in the circumstance of this case was clearly wrong so as to invite our intervention. We allow the appeals and set aside the rulings and orders of the High Court given on 30th June 2011 allowing the respondent's applications dated 12th May 2011. We substitute therewith orders dismissing the applications with costs to the appellant. The appellant will also have the costs of these appeals.

Dated at Kisumu this 19th day of June, 2015.

D.K. MARAGA

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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