IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, J. MOHAMMED & ODEK, JJ.A)

CIVIL APPEAL (APPLICATION) NO. 83 OF 2015

CONSOLIDATED WITH

CIVIL APPLICATION NO 88 OF 2015

BETWEEN

UPWARD SCAKE INVESTMENTS CO. LTD ……..…..…. 1ST APPELLANT/APPLICANT

LINMERX HOLDINGS LIMITED ……..…….…… 2ND APPELLANT/APPLICANT

RICHHOOD LIMITED ……..…….... 3RD APPELLANT/APPLICANT

GEOMAX CONSULTING ENGINEERS ……....…… 4TH APPELLANT/APPLICANT

GATH CONSULTING ENGINEERS LTD ……..…....…. 5TH APPELLANT/APPLICANT

JAMES BURIGI NJUGUNA ……..…. 6TH APPELLANT/APPLICANT

TRIAD ARCHITECTS ……..… 7TH APPELLANT/APPLICANT

MASTERBILL INTEGRATED PROJECTS……....…..... 8TH APPELLANT/APPLICANT

AND

MWANGI KANG'ARA ADVOCATE …….....……. RESPONDENT

(Application for stay pending hearing and determination of an appeal against the entire ruling of the High Court of Kenya (Ogola, J.) dated 14th November 2013

in

H.C.M.A NO. 530 OF 2013)

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RULING OF THE COURT

[1] For reasons perhaps only known to the applicants in these matters, they filed two similar applications over same subject matter under **Rule 5 (2) (b)** of the Court of Appeal Rules. The eight (8) applicants seek in both applications that an order of stay of taxation and/or any further proceedings in Nairobi High Court Misc. Application No. 516, 522, 523, 524, 525, 526, 527, 528 and 529 of 2013 and Nairobi High Court Misc. Application No. 26 of 2014 which are pending taxation between the eight applicants and Mwangi Keng'ara Advocate on the other hand. The respondent also filed an application seeking to strike the applicants' application dated 4th May 2015, on the grounds that no leave to appeal was obtained prior to filing the appeal and secondly the due process of taxation as stipulated in the Advocates Act, had not taken place to give rise to an appeal.

[2] The applicants too not relenting in their bid to ensure the respondent would have no chance in presenting the aforesaid motion, filed a notice of preliminary objection which we must state on the outset is an alien procedure unknown in the Court of Appeal as it is not provided under the Appellate Jurisdiction Act or the Court of Appeal Rules. This preliminary objection was on the grounds that the respondent who practices under the name and style of **Mwangi Keng'ara & Company Advocates** does not hold a practicing certificate for the year 2015. The applicants therefore applied to have the Notice of Motion dated 2nd February 2015, and the supporting affidavits sworn on 9th and 18th February struck out.

[3] All the applications were before us for hearing; bearing in mind the overriding objective in the administration of justice as spelt out under **Section 3A** of the Appellate Jurisdiction Act, and in order to save on judicial time, all the three applications and the so called objection were argued together for determination in this ruling. We do not wish to take a lot of time on the issue of whether **Mercy Nduta Mwangi** is competent to file pleadings in this matter on behalf of the respondent, so we might as well begin with it. The issue was; Ms. Mwangi did not hold a practicing certificate for the year 2015 and therefore she is not competent to file valid pleadings.

[4] It is common ground that the respondent is a firm name or a business name for **Mercy Nduta Mwangi**. Ms. Mwangi therefore referred us to **Rule 22 (1)** of the Court of Appeal Rules which provide that any party to any proceeding in court may appear in person or by advocate. She submitted that she was appearing in person as the proprietor of the law firm that did not have legal status. She also made reference to this Court's decision differently constituted in the case of;

Kenya Power & Lighting Co. Ltd v Mahinda T/A Nyeri Trade Centre (2005) 1 KLR 773 where it was held:

> **"Where a party is not appearing in person, he can only act, in relation to an appeal through an advocate unless the party is a corporation which has complied with Rule 22 (2) of the Court of Appeal Rules or is a person under disability where Rule 22(3) has been complied with."**

The fact that Ms. Mwangi practices under the firm name of the respondent was not controverted by the applicants and since she is acting to defend herself as the proprietor of the firm name which is not a corporation, we would wish to leave this issue at that and decline to strike out the pleadings as urged by counsel for the applicants.

[5] This now takes us to the Notice of Motion dated 4th May 2015, by the respondent seeking to strike out Civil Appeal No. 83 of 2015. This is for reasons that the applicant did not seek leave to file the appeal; the Advocates Act does not give an automatic right of Appeal; the record of appeal was not certified and that the applicants included extraneous records which have nothing to do with this appeal. We also do not wish to take long on this issue as we wish to make a determination upon the evaluation of the entire material that was placed before us. We will therefore proceed with the substantive applications which are supported by the grounds stated therein and the supporting affidavits sworn by Joseph Gitau Mburu a joint director of the applicant companies.

[6] Briefly summarized, the applicants retained the service of **Mwangi Keng'ara & Co. Advocates** in regard to sale, purchase and transfer of parcel of land known as **LR No. 209/309/1** (IR NO. 92457)

situated along 4th Ngong Avenue Nairobi. The said firm was supposed to carry out the following tasks within the same transaction:

a) Prepare an agreement to subscribe shares in the 2nd applicant by M/S Richhood Limited.

b) Prepare a shareholders' agreement for M/S Richhood Limited.

c) Prepare an unconditional agreement for acquisition of shares in the 2nd applicant for purposes of joint venture for purchase of land between the 1st and 2nd applicants M/s Richhood Limited and M/S First Western Consortium Limited.

d) Prepare a shareholders' agreement for the 2nd applicant.

e) Provide Secretarial Services to the promotes of 2nd applicant.

f) Prepare deed of assignment of the Civil and Structural Engineering fees.

g) Prepare memorandum of agreements for appointment of the Civil Structural Engineer.

h) Prepare memorandum of agreement for the appointment of the Mechanical and Electrical Consulting Engineers.

i) Prepare memorandum of agreement for the appointment of Architect (TRIAD Architects).

j) Prepare a deed of assignment of the Architect (TRIAD Architect) professional fees.

k) Prepare the memorandum of appointment of the quantity Surveyor (Masterbill Integrated Project).

l) Prepare the deed of assignment of the quantity surveyors (Masterbill) professional fees.

m) To act in the sale, purchase and transfer of L.R. No. 209/309/1 from the 1st to 2nd applicant as joint counsel for the applicants.

[7] It would appear there was a disagreement between the clients/applicants and the respondent as their advocates on fees payable for services rendered thus the 1st and 2nd applicant applied before the High Court in HCCC No. 14 of 2013 (OS) for an order that the advocate be allowed to present their bill of costs for determination by court and to release the title documents for the aforementioned property. The court allowed the application by the applicants and ordered the advocate to present 16 bills for taxation by court in view of the fact that the advocate had raised fee notes in respect of the work done in separate fee notes. According to the applicants, the items sought to be taxed in all the bills fall under one transaction, relate to the same subject matter and the instructions fees which fell for determination in all the bills are identical.

[8] The respondent lodged the bills for taxation and we were informed that they have been allocated different dates for hearing before the taxing master. The applicants are apprehensive that if the bills do proceed for taxation, the sum claimed by the respondent is exorbitant; the respondent is seeking a whooping over Ksh 150 million. Counsel for the applicant submitted that the taxing master may just allow the bills as drawn by the respondent, which order will cripple the applicants and their companies which were mere investment vehicles. The applicants contended that the multiplicity of bills of costs filed by the respondent amount to unjust enrichment and if allowed to proceed for hearing and determination before the taxing master, the applicants will be prejudiced.

[9] These applications were opposed by the respondent through the replying affidavits sworn by Mercy Nduta Mwangi, an advocate in the respondent's firm. It is stated in the affidavit that the applicants have

filed a duplication of motions in Civil Appeal No. 83 and 68 of 2015 which is an abuse of the court process. Also the same issues were subject of litigation in High Court Civil Suit No. 14 of 2013 (Originating Summons) and they were determined by Havelock, J. in a ruling delivered on 19th November 2013 but no appeal was filed against the said ruling. These same issues have been in introduced in the present motion, thus revisiting the same issues in an interlocutory application and bandwagoning the issues that were determined in the Ruling of November 2013, where no appeal was filed, which is tantamount to lodging an appeal through the back door which is an abuse of the Court process.

[10] In the said ruling, it was held that the advocates had a lien over the title documents and the court went further to secure the said lien by ordering that the title documents be released to the applicants only upon deposit of the respondent's fees in court. That is when the 16 bills of cost were filed pursuant to that ruling by Havelock J.; an additional Misc. Application No. 26 of 2014 was filed in relation to the preparation of an agreement for appointment of marketing agent which according to the respondent was in regard to subsequent services. As regards the 17th bill of cost, the respondent was of the view that if the applicants wish to raise any objection regarding the same, they have a chance to do so before the taxing officer. The respondent contended that the bills were filed according to the Advocates Remuneration Order; the respondent as the advocate for the applicant in the various transactions was entitled to security for costs pending the appeal considering the temporary nature of the joint venture for which they rendered services to the applicants.

[11] According to the respondent, there was a specific clause for winding up all the projects and payment of unutilized sums to settle the companies liabilities and they were viewing this protracted litigation as the applicants' concerted effort to defeat the respondent's claim. Further, the respondents contended that no order of consolidation of the 16 bills was made by the High Court or the taxing officer, although there was an order that the bills be placed before the same taxing officer, therefore it is premature for the applicant to preempt the matter in the Court of Appeal and interfere with due process.

[12] In their address to us during the hearing of these motions, both counsel stuck to their respective positions. Mr. King'ara, learned counsel for the applicant emphasized that the respondent was paid a sum of Kshs. 24 million being her professional fees although there was an agreement that her fees was 12 million as per the letter the respondent wrote to the applicants on 12th March 2012. However, the respondent raised a further fee note of 4 million, she later started demanding for 24 million and continued to withhold the title documents. That is when the applicants sought to compel the respondent to release the documents and the court directed her to file the bill of cost. The respondent filed several bills including for work that was not included in the ruling of Havelock, J. claiming a whooping sum of Kshs. 156 million. Mr. King'ara argued that his clients were apprehensive that if the bills of costs are taxed as drawn by the respondent, the applicants will highly be prejudiced and the intended appeal will be rendered nugatory.

[13] On the application for stay of proceedings in regard to the taxation of the advocate's bills, Ms Mwangi for the respondent submitted that the matter giving rise to the appeals were bills of costs filed under the Advocate Act which provides a complete procedure with its own rules that does not involve the application of the Civil Procedure Rules. The application before the High Court that was brought by the applicants under the Civil Procedure Rules was dismissed as it contravened the Advocate Act, hence there is no competent appeal to warrant an order of stay of proceedings. Moreover the appeal is premature as the bills have not been taxed.

[14] Appeals or references as they are referred under the Advocates Act, are regulated by paragraph 11 of the Remuneration Order, which is by way of reference to the court. The decision of the High Court in taxation matter is final. Ms. Mwangi submitted that there were no competent grounds arising from the instant applications to warrant the exercise of this court's discretion to grant an order of stay of proceedings that are before a competent court of law. Moreover, the issues that were placed before the court were determined by Havelock, J. and no appeal was filed in regard to the ruling of November 2013. The orders sought to stop the taxation of bills of cost which are filed pursuant to paragraph 69 of the Act; when there is a dispute over the Advocates fees for professional services rendered, it is only a taxing

officer who can determine the fees payable as per the Advocates Remuneration Order; the Court of Appeal cannot interfere with a lawful process of taxation.

[15] We have considered the two applications which are essentially seeking for similar orders of stay of proceedings in regard to various bills of cost filed by the respondent. The principles applicable to the determination of applications under **Rule 5 (2) (b)** of this Court are well settled as observed the in Court in **Ismael Kagunji Thande V. Housing Finance Kenya Ltd** Civil Application No. Nai 157 of 2006 (unreported):

> **"The jurisdiction of the Court under Rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed, he must not only show that his appeal or intended appeal is arguable but also that unless the Court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory. (see also Githunguri V. Jimba Credit Corporation Ltd. No. 2 *1988+ KLR 838."**

[16] As we observed in the opening paragraph of this ruling, it is not at all clear to us why the applicants filed two similar applications. It is an abuse of the court process. That aside, the applicants filed voluminous records of papers running into about 5 volumes in each application and into thousands of pages. Going through that maze of pages was an odious task but only to discover most of the papers had nothing to do with the issue at hand; that is whether the applicant's have an arguable appeal. The practice of overloading court with irrelevant paper work must be discouraged. Parties and their advocate should take time to plan their litigation in a manner that promotes the overriding objective in the administration of justice.

[17] What is before us are prayers to stop the taxation of the respondent's bill of costs. It is evident there is a dispute over the fees payable to the respondent by the applicants who had engaged the respondent to provide certain legal services. The record before us bears that; on 22nd January, 2013, the applicants filed a suit by way of an originating summons under **section 47 (1)** of the Advocates Act. That suit was heard and on 19th November 2013, Havelock, J., issued a ruling. We wish to restate a pertinent portion of what the learned Judge stated:-

> **"In all circumstances, it seems only fair to both parties that this Court do so order. As a result, this Court directs that the defendant will file 16 bills of costs herein for taxation purposes in relation to the fee notes that were raised and which were included in the annexture to the defendant's replying affidavit dated 1st February 2013 from pages 69 to 102. The attitude of the Courts in this regard can be gleaned from the case of In the Estate of Ogilvie: Ogilvie V. Massey (2) [1910] P. 243 at p. 245, where Buckley LJ found:-**
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> **'On question of quantum, the decision of the taxing master is generally speaking final. It must be a very exceptional case in which the court will even listen to an application to review his**
>
> **decision. In questions of quantum, the judge is not nearly as competent as the taxing master to say what is the proper amount to be allowed the court will not interfere unless the taxing master is shown to have gone wholly wrong. If a question of principle is involved it is different; on a mere question of quantum in the absence of particular circumstances, the decision of the taxing master is conclusive. I think that the learned judge ought not to have interfered."**

[18] Incidentally, the applicants were also seeking in that suit that the court do direct the respondent to file the bill of costs for taxation pursuant to **section 47 (1)** of the Advocates Act in view of the fact that the applicants' fees notes were exorbitant. It appears that when the respondent filed her bills of costs, the applicants filed another application on 4th March 2014 seeking the same orders as in the present applications. This later application was heard by Ogolla J., who issued the following orders on 27th June,

2014:

> **"a). The Notice of Motion dated 4th March 2013 partially succeeds to the extent that I direct that the said bills for taxation shall be presented for taxation before the same Taxing Officer at the same time.**
>
> **b) The parties herein shall fix a date for the taxation of the said bills within 14 days from the date herein.**
>
> **c) The temporary stay of proceedings herein is hereby lifted.**
>
> **d) I assess the cost of this application at 50% and grant the same to the Advocate/Respondent."**

[19] The gravamen of the matters before us is the outcome of another application that the applicant filed on 2nd February 2015 seeking similar orders. These are the orders that were made in the application which we assume is the subject matter of the motions before as the applications are titled *"an appeal against the Rulings of 18th November 2014 and a partial appeal against the ruling dated 20th March, 2015, the rulings of Ogolla, J."* These were the orders made on 20th March 2015;-

> **"a)Time is hereby enlarged for the giving of Notice of Appeal, and the client, applicant is hereby given the leave to file an appeal out of time against the decision of this court vide its Ruling delivered and dated on 18th November, 2014. This order is CONDITIONAL on the Client/Applicant performing in the alternative either order (b) or (c) below.**
>
> **b) The taxed fees found due by the Taxing Master pursuant to a Ruling to be delivered by the Taxing Master on 26th March 2015 on any subsequent date arising from advocate/client Bill of costs filed in High Court Misc. Applications Nos. 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529 and 530 of 2013 and 26 of 2014 between the parties herein shall be deposited in an interest earning account opened in the joint names of the parties advocates, and shall be the security for the advocate/respondent fees herein.**
>
> **c) In the alternative to order (b) above, the parties shall agree on any other available security or mode of security which may be appropriate under the circumstances provided that if the parties are unable to agree on such security within 7 days of the delivery of the Taxing Master's Ruling, order (b) above will automatically apply.**
>
> **d) Parties shall bear own costs of the application."**

[20] Issues were raised about the competency of the appeals because the applicant was not given leave to appeal. We are also cognizant of the provisions of the Advocates Remuneration Order especially Order 11 and 12 provide for any objection to an order of the taxing officer, the party objecting should file a reference before the High Court. There is no provision for an appeal before the Court of Appeal. However in this matter there is no taxation that has taken place as such, as it is clearly stated in the aforesaid ruling, that the applicant was granted leave to appeal although there were several rulings, some dating to November 2013. Be that as it may and bearing in mind the broad mandate given to this Court under **Article 164 (3) (a)** to hear appeals from the High Court, we are prepared to proceed to determine the motions before us on merit.

[21] This leads us to the crux of the matter whether the intended appeals are arguable and if this is answered in the affirmative, the next issue is whether the appeal(s) will be rendered nugatory unless an order of stay of proceedings is issued. The respondent was ordered by court pursuant to the provisions of **section 47 (1)** of the Advocates Act to file her bill of costs. It is necessary to state that the order directing the respondent to file the advocate's bill of costs for taxation was made on the applicants' request and prayers to court. It is most surprising that the same applicants' are turning around to seek a stay of the

same taxation that they asked for. What is more intriguing is the said bills have not even been taxed. There is no order of taxation that may be causing the applicants grievances. The applicants are merely apprehensive that if the taxation will proceed of the advocates' bills which in their opinion are grossly exaggerated, the applicants are likely to be ordered to pay a lot of money which will prejudice them as they contend the respondent was already paid for her services.

[22] This contention in our respectful view is a mere apprehension without more. The apprehension is based on an assumption or fear of what is likely to happen before the taxing officer. One may wonder why the applicants cannot also assume that the bills are likely to be dismissed. Apprehension or suspicion cannot be the basis of issuance of court orders. This Court cannot assume what a constitutionally ordained court is likely to do or not do in the discharge of the courts statutory mandate. It can only assume the court will be guided by the law, laid down procedure and established precedent as stated in the Constitution. Parties must not only have confidence but faith in the institution of the court and respect the court structure. This court or the High Court for that matter cannot tax advocates bill of costs or resolve a dispute over the fees payable for professional services rendered by an advocate to a client. As we have already stated, the applicants sought for an order that the respondent be compelled to file her bill of costs for taxation pursuant to the provisions of Section 47 of the Advocates Act and that order subsists.

[23] The respondent having filed her bills, the taxation thereto is governed by Advocates Remuneration Order and the rules made there under must be followed to the letter. Should the applicants be dissatisfied with the outcome of the taxation, the rules provide the party who objects to the ruling can file a reference before the High Court. We regret much as the applicants may be apprehensive about the outcome that is a process they have to face for the determination of how much they owe the respondent for the services rendered. They may have overpaid or underpaid, that is a dispute to be determined in that court and not in the High Court or the Court of Appeal. See A dicta by the Supreme Court in the case of **Peter Oduor Ngoge V. Hon. Francis ole Kaparo** Petition No. 2 of 2012 postulates that the guiding principle is that the chain of courts in the constitutional set up have the professional competence, and proper safety designs to resolve all matters touching on the technical complexity of the law.

[24] We think we have said enough to demonstrate that the applications before us are preemptive, they have no merit and we have no hesitation in ordering them dismissed with costs.

Dated and delivered in Nairobi this 2nd day of October 2015.

M. K. KOOME

……..

JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR.