



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: ONYANGO OTIENO, KARANJA & MARAGA, JJ.A.

CIVIL APPEAL NO. 233 OF 2010

BETWEEN

PETER ODIWUOR NGOGE T/A

O.P. NGOGE & ASSOCIATES..... APPELLANT

AND

PROF. WASHINGTON JALANGO OKUMU.....RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Nambuye, J) dated 15th February, 2008

in

H.C. MISC. C. APPL. NO. 259 OF 2007)

JUDGMENT OF THE COURT

The appellant, **PETER ODIWUOR NGOGE** is an advocate practising under the firm name of **O. P. Ngoge and Associates**. The record shows that at the material times in respect of this appeal, he was instructed by the respondent **PROFESSOR WASHINGTON JALANGO OKUMU** to render the same respondent legal services. Acting on behalf of the respondent, the appellant filed H.C.C.C. No. 649 of 2005 and High Court Miscellaneous Suit No. 1797 of 2005. The record shows that some verbal discussions were entered into in respect of the legal fees that the same instructions were to attract, but as the same verbal discussions were not reduced into written agreements, they do not meet the requirements of the provisions of the Advocates Act. It is, however, not in dispute and the respondent stated so in both of his affidavits that he gave the appellant retainership in respect of the two matters. The learned counsel then on record for the respondent also stated in his written submissions before the High Court that retainership was not disputed. The appellant later demanded what he called his scale fees in respect of each of the cases. When the respondent failed to respond positively to his demands, he lodged Advocate/Client Bill of Costs pursuant to **Rule 13** of the Advocates (Remuneration) Order in respect of each case. Those two Bills of Costs were filed as H.C. Misc. Application Numbers 259 of 2007 and Misc. Application No. 260 of 2007. The Bill of Costs in Misc. Application No. 259 of 2007 was in respect of legal services rendered in respect of H.C.C.C. No. 649 of 2005 and the Bill of Costs in Misc. App. No. 260 of 2007 was in respect of H.C. Misc. Civil Suit No. 1797 of 2005. The Bill of Costs in Misc.

259 of 2007 was taxed by consent at Kshs.1,297,939/- and that in Misc. 260 of 2007 was taxed by consent at Kshs.1,568,479/=. The appellant thereafter obtained a certificate of taxation in respect of each of the Bill of Costs, signed by the Deputy Registrar of the High Court.

Armed with the certificates, the appellant then filed in respect of each claim a Notice of Motion dated 22nd August, 2007 in the High Court pursuant to the provisions of **Section 51** of the Advocates Act, **rule 7** of the Advocates (Remuneration) Order and **Order L Rule 1** of the Civil Procedure Rules. As the two Notices of Motion are for all intents and purposes the same in content, we will reproduce only one of them and this is Notice of Motion in respect of Misc. Civil Application No. 259 of 2007. It sought orders:-

- “1. That Advocate/Client costs herein as taxed by consent on the 3rd August, 2007 and allowed as against the respondent in the sum of Kshs.1,297,939/= be made a Judgment of the Honourable Court.***
- 2. That the Honourable Court do order that the said taxed costs be paid with interest pursuant to Rule 7 of the Advocates Remuneration Order.***
- 3. That the costs of this application be awarded to the Advocate/Applicant.”***

As we have stated above, the other application in respect of Misc. Application No. 260 of 2007 was similar as the application in respect of Misc. Civil Application No. 259 of 2007 we have reproduced above except that the amount in Misc. Civil Application No. 260 of 2007 is Kshs.1,568,479/=. In respect of each application, the grounds in support were also the same and these were:-

- “1. That the said costs has already been taxed by consent and certified and that the respondent is yet to settle the same.***
- 2. That there is no dispute on retainer.***
- 3. That the respondent herein has not filed reference by way of an appeal against the said taxation or obtained stay of execution of the Taxed Amount and the certificate of costs has not been altered.”***

Those two applications, which were each supported by an affidavit sworn by *Peter O. Ngoge*, were opposed by the respondent who filed replying affidavit in respect of each application. Again as the contents of the affidavits are the same, we will refer to the affidavit filed in reference to allegations in the affidavit in support of Misc. Application No. 259 of 2007. In brief, the respondent at paragraph 3 and 4 of the replying affidavits states:-

- “3. That I initially engaged the applicant as my advocate to act for me to file an application for injunction in the civil suit HCCC 649/05 at an agreed fee of Kshs.10,000/- by which he requested a deposit of Kshs.5,000/= for opening the file and another Kshs.2,500 as court fees which sum I duly remitted together with an additional fee of Kshs.4,000/= in total amounting to Kshs.11,500/=.***
- 4. That about 6 months after I engaged the advocate, our relationship deteriorated after I failed to hear from him and he did not keep me posted of what was happening in the case.”***

Added to the above, the respondent also alleged in the other part of his Replying Affidavit that he gave the appellant more money at the appellant's request but later a misunderstanding developed between them and the respondent hired the services of another advocate. He maintained that he did not owe the appellant any money as he had paid all that was agreed between them. All this notwithstanding, that the Bill of Costs in respect of both cases were taxed by consent of both parties. We shall revert to that later in the judgment.

The two applications were placed before *Nambuye J. (as she then was)* who heard them together by way of written submissions and having perused them, delivered a lengthy joint ruling dated and delivered on 15th February, 2008 in which the learned Judge refused to grant the orders prayed for and awarded costs of both applications to the respondent. In dismissing the applications, the learned Judge stated as follows:-

“Applying the two options open to this Court in resolving the disputes herein, the court makes the following findings:-

- 1. Since the bill in Nairobi Misc. Application No. 259/2007 of Kshs.1,297,939/= relates to services rendered in the prosecution of an interlocutory application, the client feels that the extend (sic) of the retainer is questionable, the proper proceedings through which these grievances can be ventilated and defended through a civil suit. The court therefore declines to enter summary judgment for the applicant and gives direction that the Counsel do file a civil suit to recover the said costs as they need to be justified.***
- 2. Likewise in Misc. Application NO. 260, since the bill of 1,568,479.00 relates to preparation and presentation of an application for contempt which appears not to have been argued as the same is not accompanied with a ruling or orders emanating there from, justice demands that since the client disputes on the extend (sic) of the retainer it is proper that directions be given that the Counsel do file a Civil Suit to claim the fees indicated as circumstances displayed herein demand that the client be allowed to ventilate the grievances in a civil suit and that this is a proper case where the Counsel should be called upon to justify his bill.***
- 3. In making finding 1 and 2 above this Court has tapped on the authority bestowed upon it in Section 51 (2) of Cap 16 Laws of Kenya to the effect that the Court may make such order in relation thereto as it thinks fit.”***

The appellant felt aggrieved by that ruling. Vide an Ex parte Chamber Summons dated and filed on 20th February, 2008, he sought leave to be granted to him to appeal against that ruling and order. *Sitati, J.* granted him leave vide a ruling dated and delivered on 8th April, 2008, hence this appeal premised on thirteen (13) grounds contained in a Memorandum of Appeal dated 5th September, 2010. In summary, those grounds are that the learned judge erred in treating both applications as references under **Rule 11 (2)** of the Advocates (Remuneration) Order challenging the consent of the parties; that the learned Judge erred in holding that there was a dispute on the extent of the retainer whereas the respondent admitted that there was a retainer contract between the parties; that the learned Judge erred in law in failing to adopt as a judgment of the court the consent of parties which had not been altered or set aside; that the learned Judge erred in holding that the respondent was justified in questioning the commensurability of Bills taxed as compared to the services rendered whereas the respondent had not challenged the amount recorded by the Deputy Registrar in taxation; that the learned Judge failed to uniformly apply the law in that she did not give equal considerations to decided cases cited by both parties and that she erred in law in granting prayers not sought by the respondent; that the leaned judge, in ordering a suit to be filed to claim the costs, failed to appreciate that after the bill was taxed by consent of both parties, there was no longer any triable issues to go for trial in this matter.

We have, in the above summary only cited matters we found necessary for our judgment. There were many allegations in the memorandum which we did not find necessary for the purpose of this judgment as they were composed of the appellant’s opinion of the learned Judge which would not be of any help to us.

Be that as it may, *Mr. Ngoge* who conducted the appeal in person and addressed us at length on the appeal, submitted that the Bills that were before the learned Judge were agreed upon pursuant to the provisions of **Section 45** of the Advocates Act. As the agreement was never set aside or altered in any way, the court should have adopted them in the summary judgment under the provisions of **Section 51** of the Advocates Act. Instead what the learned Judge did, was in his view proceeding as if the respondent had proceeded under **rule 11** of the Advocates Remuneration Order and challenged the bills as taxed which was not the case in this matter. In his view, nothing existed in law like “*extend retainership*” and

he felt that term was of the Judge's own making as either there was retainership as there was in this case or there was none. He further submitted that it was not correct for the learned Judge to claim that there was a dispute on the extent of retainership as in law there was nothing termed extend of retainership. He urged us to allow the appeal.

The respondent's advocates, *Rombo & Company Advocates* though duly served with the hearing notice of the hearing of the appeal on 8th February, did not appear on that date and neither was the respondent present and so there was no input from the respondent on the appeal.

We have anxiously considered the appeal before us, the record of it, the submissions of *Mr. Ngoge*, the ruling of the learned Judge of the High Court and the law. The starting point is **Section 45(1)** of the Advocates Act. It states:-

“45(1) subject to Section 46 and whether or not an order is in force under Section 44, an advocate and his client may –

- a. ***Before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate's remuneration in respect thereof.***
- b. ***Before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate's instructions fee in respect thereof or his fee for appearing in court or both.***
- c. ***..... not applicable.....***

And such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorised in that behalf.”

In the matter before us, the respondent's response to the application that was before the court pursuant to **Section 51** of the Advocate's Act was, as can be deciphered from paragraphs 3 and 4 of each of his replying affidavits, that he and the appellant agreed on a fee for the services the appellant rendered to him and that as he met that fee and paid some extra amount over and above the agreed fees even before the entire work was done, the appellant was not entitled to make any further demands. As can be seen from the part of **Section 45(1)** we have reproduced hereinabove, that argument cannot stand simply because that agreement, even if it did exist, was not reduced into writing and was never duly signed by the appellant. Thus, the appellant was entitled to demand whatever he felt was his due fee for the instructions and the work done. He did so and says the respondent failed and/or refused to pay the amounts demanded in respect of each case. The appellant thereafter proceeded to file his bills and to seek taxation of the same bills. Taxation was done and the bills were each taxed by consent of both parties. In respect of Miscellaneous Application Number 259 of 2007, the bill was taxed at Kshs.1,297,939/= and in respect of Miscellaneous Application Number 260 of 2007 it was taxed at Kshs.1,568,479. Certificates of taxation in respect of each matter duly signed by the Deputy Registrar were issued as we have stated above. We note that in respect of Misc. Application Number 259 of 2007, the Bill of Costs filed by the appellant was Kshs.2,059,277.92 and in respect of Misc. Appl. No. 260 of 2007, the Bill of Costs as filed was for Kshs.2,896,254.51. We note further from the proceedings in the record that the reduction of each bill to Kshs.1,297,939 and Kshs.1,568,479 respectively was the reflection of the consent that was negotiated by both parties probably after considering the commensurability of the work done as against the original instructions. Whatever caused the reduction, the amounts that were reflected in the certificates signed by the Deputy Registrar was a reflection of taxation by consent and that is stated in each certificate. The respondent never complained against the consent figure in either certificate. He never approached court under **Rule 11** of the Advocates (Remuneration) Order and must have been contented with the issues he raised during taxation that reduced the amounts in respect of each case.

From the above, it is clear that, in our view, once the taxation had proceeded by consent of the parties and once the retainership was not in dispute, as it was not, the appellant was in law entitled to proceed to court pursuant to provisions of **Section 51** as he did. The learned Judge of the High Court nonetheless

refused to grant summary judgment to the appellant on grounds that the client felt that the “extent of retainer was questionable”. With respect, we do not appreciate that argument even if we were to assume that the word “extend” was misspelt and should have been “extent” so that the reason for denying the appellant the summary judgment was that the “extent of the retainership” was questionable. It would appear from the judgment that by saying the “extent of retainership” was questionable, the learned Judge meant that the services rendered by the appellant were not commensurate to the fee demanded. She delved into the documentations that were before her and having considered them in terms of apparent work done by the appellant, the learned Judge concluded:-

“The plaint as well as the application are not exhibited to show who drew and filed them. This being the case it means that the only services that the applicants rendered to the protesting client were the agitation of the injunction application which services were supposed to be rewarded by the amount claimed. Turning to Misc. Application No. 260/07 the respondent’s clients averments are the same. The amount totals 49,000/=. The services rendered are the same. The bill presented and alleged to have been taxed by consent came to Kshs.1,508,478 (sic) in the further affidavit vide paragraph 3 thereof there is annexure PONI. A perusal of which reveals presence of an application by way of notice of motion in Misc. Application No. 1779/2005 for committal to civil jail for contempt of court orders issued in HCCC No. 649/05. The application was drawn and filed by O.P Ngoge and Associates. The supporting affidavit is also drawn and filed by applying counsel. There are no proceedings or ruling or orders in respect of the said application. In the absence of a ruling and orders in respect thereof, it means that the bill of Kshs.1,586,478/- is related to preparation and prosecution of the said application.”

This demonstrates that the learned Judge embarked on reconsideration of the bills afresh as if the respondent had proceeded before her under **rule 11** of the Advocates (Remuneration) Order which was not the case. That, in our view, was a misdirection and that is what led her into introducing a new term to the law of taxation of Advocate/client bill called “ extent of retainer” a concept entirely new in that field. The application was before her under section 51 of the Advocates Act. That section provides as follows:-

“51(1) Every application for an order for the taxation of an advocate’s bill or for the delivery of such a bill and the delivering up of any deeds, documents and papers by an advocate shall be made in the matter of that advocate.

(2) The certificates of the taxing officer when any bill has been taxed shall, unless it is set aside or altered by the court, be final as to the amount of the costs covered thereby, and the court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”

In this matter, as we have stated above, retainer was not disputed; taxation was by consent, and a certificate of the taxing officer was issued, in respect of each case. The respondent had been before the taxing master and the record shows at pages 188-189 of the record that respondent’s advocate, one *Mr. Rombo*, appeared together with the appellant before *Muya SPDR* who was the taxing master and they signed the consent after certain items were disallowed as they strove to reach a settlement in respect of each matter. That was the day the respondent and his advocate had in court to raise the matters such as whether the appellant drafted and filed the plaint; whether he prepared all the documentations for contempt of court; whether he only dealt with important application in one matter and the complexity of the matters that he was instructed to do. If they, by mistake, failed to raise them, then they should have proceeded vide **rule 11** much as they would have found it difficult to succeed as a result of the consent that was on record. They did not do that either and we do not think it was proper for the learned Judge to go into matters that were not properly before her. Her duty in our view, was to look into whether there was a certificate of taxation and whether it was properly drawn and then look into whether retainer was not disputed. If these aspects were satisfied then the court should have acted and given summary judgment. Introducing a new concept called extent of retainer was in our view avoiding the issues that were before the learned Judge for **Section 51(2)** did not authorise the learned Judge to extend the requirements of the law.

We have perused and considered at length the several authorities in the record, submitted by both the appellant and the respondent. All of them are only of persuasive authority upon this Court. We do agree with the holding of *Nyamu J* (as he then was) in the case of **ORUKO & ASSOCIATES vs BROCCO KENYA LTD** Milimani Commercial Court case NO. 1465 of 2002, where the learned Judge stated:

“The wording of the sub-section is clear as to when judgment can be entered by the court. Judgment under this Section can only be entered where there is proof of a retainer and the retainer is not disputed.”

We have revisited the entire matter afresh, re-analysed and re-evaluated it afresh as we must do this being a first appeal - see the case of **SELLE & ANOTHER VS. ASSOCIATED MOTOR BOAT COMPANY LTD & OTHERS (1968 EA 123)**. We have also taken into consideration that the learned Judge, was according to the wording of **Section 51(2)** above, exercising her discretionary powers on the matter. Having done all that, we are certain in our minds that the learned Judge, in introducing the concept of extent of retainer, did misdirect herself on a point of law and that being the case, our intervention is warranted.

We allow this appeal, set aside the order of the learned Judge in respect of each application and in its place we order that each of the two applications namely Miscellaneous Application Nos. 259 and 260 both of 2007 be and are hereby allowed each in terms of prayers 1 and 2. Costs of each application be awarded to the appellant. Costs of this appeal shall also be paid to the appellant. Judgment accordingly.

DATED and DELIVERED at NAIROBI this 20TH day of APRIL, 2012.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

D.K. MARAGA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR