IN THE COURT OF APPEAL
AT MOMBASA
(CORAM:OMOLO, O'KUBASU & WAKI, JJ.A)
CIVIL APPEAL NO. 168 OF 2006

BETWEEN

MALINDI HOLDINGS & ESTATE AGENTS LIMITED .....APPELLANT

AND
MORRIS MWAMBUI KUPALIA .....RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Malindi (Ouko, J.) dated 16th December, 2005

in

H.C.C.S. No. 43 OF 2002)
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JUDGMENT OF THE COURT

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The respondent herein is an advocate of the High Court of Kenya practicing in Malindi ("the advocate"). The appellant company on the other hand, was his client ("the client"). In 1994, the client instructed the advocate to purchase for it some two plots of land in Malindi and deposited the necessary funds for that purpose. But the advocate did not carry out those instructions. Four years later in 1998, the advocate gave a written undertaking to the client for refund of those funds. By the year 2002, however, that undertaking had not been discharged and so, the client went before the superior court on 6th May, 2002 and took out an originating summons under Order LII rule 4 of the Civil Procedure Rules, which was subsequently amended with the court's leave, seeking the following orders:

"1. THAT the defendant do deliver up a cash account of his dealings with the plaintiff.

2. THAT a declaration be issued that the defendant is holding monies due to the plaintiff and the same be returned to the defendant.

3. THAT the defendant do deliver to the plaintiff a list of the money which he has in his possession or worked on behalf of the applicant.

4. THAT the defendant do make payment to the plaintiff of Kshs.1,5000,000/= at 20% interest per annum from February, 1994.

5. THAT the defendant do make payment to the plaintiff of Kshs.400,000/= with interest at commercial bank rates as from March, 1994."

An affidavit in support of that originating summons was sworn by a director of the client annexing a copy of the written undertaking given by the advocate and the terms thereof. There was no response or denial to the factual statements made in that affidavit. The only response that came from the advocate was a challenge on the procedure adopted by the client, the contention being that an originating summons was inappropriate and that Order LII rule 4 of the Civil Procedure Rules was improperly invoked. He sought in a notice of preliminary objection filed in October 2002 that the suit be struck out.

For some three years or so the matter was not heard in court as it was adjourned severally on representation by the parties that they were exploring a settlement. On a hearing date set with the consent of both parties however, the advocate, who was represented by another advocate, did not attend court and the matter proceeded in his absence. The superior court (Ouko J.) examined the record and considered the submissions of counsel for the client and dismissed the suit on the basis that the wrong procedure was adopted. He stated as follows:

"The current application is based on an undertaking made by the defendant to the plaintiff on 4th March, 1998. Under Order 52 rule 7 of the Civil Procedure Rules, the court can only enforce an undertaking made by an advocate to his client if such undertaking was given in a suit in the High Court by summons in chamber or in any other case, by originating summons. The undertaking in question was given four (4) years before the institution of this suit. It is interesting to note that the procedure adopted under Order 52 rule 7 is different from the usual procedure for originating summons under Order 36 of the Civil Procedure Rules. For instance under the former there is no requirement for directions which is provided for under Order 36 rule 8A. Secondly, whereas under Order 36 a suit commenced by originating summons can be converted and heard as if it was commenced by a plaint, there is no such provision in Order 52. The procedure under Order 52 is very clear and exhaustive. In conclusion, none of the prayers sought can be granted as they were based on the undertaking which, I have held did not comply with the law. In the result the applicant's amended originating summons dated 6th May, 2005 is dismissed with costs."

The client was aggrieved by that ruling and has challenged it on four grounds set out in his memorandum of appeal which all rotate around the procedure for delivery of cash accounts and enforcement of undertakings made by advocates. Learned counsel for the client, Mr. Kiarie Kariuki referred us to Order LII of the Civil Procedure Rules which makes provision for that procedure and states in rules 4 and 7 as follows:

"Rule 4. (1) Where the relationship of advocate and the client exists or has existed the court may, on the application of the client or his legal personal representative, make an order for: -

(a) The delivery by the advocate of a cash account;

(b) The payment of delivery up by the advocate of money or securities;

(c) The delivery to the applicant of a list of the money or securities which the advocate has in his possession or control on behalf of the applicant;

(d) The payment into or lodging in court of any such money or securities;

(e) The delivery up of papers and documents to which the client is entitled.

(2) Applications under this rule shall be by originating summons, supported by affidavit, and shall be served on the advocate.

(3) If the advocate alleges that he has a claim for costs, the court may make such order for the taxation and payment, or securing the payment, thereof and the protection of the advocate's lien, if any, as the court thinks fit.

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Rule (7) (1). An application for an order for the enforcement of an undertaking given by an advocate shall be made: -

(a) if the undertaking was given in a suit in the High Court, by summons in chambers in that suit; or

(b) in any other case, by originating summons in the High Court."

In both rules the procedure for invoking the court's jurisdiction is spelt out. It is clear from the ruling of

the superior court that the learned Judge was of the view that the suit related to enforcement of an undertaking and that the relevant rule of Order LII was rule 7. The Judge was right in that view. It is nevertheless contended by Mr. Kariuki that the learned Judge erred in law in holding that the rule could only be invoked if the undertaking was given in a pending suit, and that therefore the undertaking given in this case was incapable of enforcement since it was given four years before the suit was filed. That was the submission which Mr. Muranje for the advocate conceded, and we think both counsel are right.

The provisions of rule 7 do not admit of any ambiguity. If there is an existing suit between the parties and an undertaking is given by an advocate during the pendency of that suit, a chamber summons may be taken out within the suit for enforcement of the undertaking. That is the plain reading of rule 7 (i) (a). If, however, the undertaking was given outside the parameters of a suit pending in the High Court, the enforcement of the undertaking shall be originated by summons. As the learned Judge correctly observed, the originating summons under Order LII is self-regulating and exhaustive. It differs from an originating summons under Order XXXVI. The procedure is summarized in rule 10 of Order LII as follows:

"Rule 10. (1) An originating summons under this Order shall be made returnable for a fixed date before a judge in chambers and, unless otherwise directed, shall be served on all parties at least seven clear days before the return date.

(2) No appearance need be entered to the summons and no affidavit in reply need be filed and all parties may be heard without an appearance."

In our view, the intendment of the rule was to secure quick resolutions to disputes between advocates and their clients without undue regard to technicalities. It is a noble procedure which has since been augmented by the enactment of sections 1A and 1B of the Civil Procedure Act and the corresponding sections 3A and 3B of the Appellate Jurisdiction Act, as well as the provisions of Article 159 (2) |(b) and (d) of the new Constitution. On that ground alone, which is conceded, this appeal ought to succeed.

Mr. Muranje, however asks us to order a retrial of the matter because the Originating summons was not based on enforcement of an undertaking but on the delivery of cash account under Order LII rule 4. It is indeed so that the rule invoked by the client was rule 4, but the substance of the application as expressly stated in the grounds on the face of it, and the affidavit in support thereof was the written undertaking given by the advocate on 4th March, 1998. That is why the learned Judge dealt with the substance of the originating summons and not the form of it as he was entitled to do. All the opportunity was given to the advocate to respond to the application and if so inclined, deny the facts stated therein. He also had the opportunity to appear in court and respond to the application but no reason is given as to why he never attended court on the hearing date agreed on by the parties. No application was made to the superior court to explain his absence in court nor was there any request made before the superior court for re-hearing of the matter. Instead the advocate appeared to have been satisfied with the ruling subsequently given in his favour, his absence in court notwithstanding. In those circumstances, we find no reason to accede to the advocate's prayer at this stage that we make an order for retrial.

The upshot is that the appeal is allowed with the result that the ruling of the superior court delivered on 16th December, 2005 dismissing the originating summons dated 6th May, 2005 is hereby set aside. We substitute therefor an order that prayers 4 and 5 of the originating summons be and are hereby granted as prayed. The appellant shall have the costs of this appeal and of the lower court. It is so ordered. Dated and delivered at Mombasa this 4th day of March, 2011.

R.S.C. OMOLO
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JUDGE OF APPEAL

E.O. O'KUBASU
.....
JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

The appeal before us is intriguing for two reasons: firstly, because the respondent concedes that the superior court erred in determining the procedural issue which is central to the case, but still asks us to dismiss the appeal; secondly the respondent concedes that there is no denial or response to the facts stated by the appellant before the superior court, but still requests for a retrial of the suit.
What are the facts and procedural issues at stake?