REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, BOSIRE & WAKI, JJ.A)

CIVIL APPEAL NO. 248 OF 2003

BETWEEN

CITY PANEL BEATERS & PAINTERS LTD............................APPELLANT

AND

LILA VADGAMA..RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya at Nairobi (Mwera, J.) dated 11th day of March, 2003

in

H.C.C.C. NO. 1073 OF 2001)
****

JUDGEMENT OF THE COURT

The record of appeal before us is an illustration of the worst case scenario in the adversarial system of litigation. What started off as a simple claim on a fee note has ballooned into a battle royale between an advocate and his client lasting ten years, and still counting. There were also side show skirmishes between the advocates on record themselves. In view of the final orders we intend to make in the matter, we shall refrain from extensive analysis of the pleadings and the numerous interlocutory applications filed along the way.

Lila Vadgama (*"Vadgama"*) was the advocate who filed suit in July, 2001 claiming legal fees in the sum of Shs.1,401,000/= on account of services rendered in drawing up three agreements. He has all along represented himself in the suit but did not show up to oppose the appeal when it was heard before us on 8th March, 2011, as he could not be traced at the physical address provided for service and was therefore served through registered post.

The client was ***M/S. City Panel Beaters & Painters Ltd***, who is the appellants before us. It appeared in the suit through Mr. Rommel Da Gama Rose, (*Da Gama Rose*) Advocate, who shot back with a lengthy *"defence, set-off and counterclaim"* extending to 15 paragraphs and 12 sub-paragraphs. The defence essentially denied that there was any advocate/client relationship or any legal services rendered as alleged. All there was, according to the appellant, was an arrangement made in 1994 based on the friendly relationship Vadgama had with the Managing Director of the appellant, one ***Gurbux Singh Sagoo***

(Kugi). Under that arrangement, and for reasons given by Vadgama, Vadgama would occupy and use the business premises of the appellant at in Industrial Area, Nairobi without payment of any consideration, and in turn he would not claim or charge any fee for any professional services he might be called upon to render on behalf of the appellant. For a period of about five years Vadgama occupied those premises and used secretarial services offered by the appellant and he never raised any claim for legal fees since no legal services were rendered during that period or at all. The appellant then claimed a sum of Shs.40,000/= per month on account of rent or *mesne profits* and for services rendered over the period of four years; Shs.15,000/= per month for a period of 41 months on account of motor vehicle repairs and maintenance; all totaling Shs.2,255,000/=. It sought to set off Vadgama's claim if found valid, and to counterclaim the balance.

Vadgama was offended by that *"defence, set-off and counterclaim"* and immediately took out a chamber summons dated 9th October, 2001 (filed on 11th October, 2001) seeking to have the entire defence, set off and counterclaim struck out save for two paragraphs admitting the descriptions of the parties. He also sought an alternative order that the counterclaim be severed from his suit and heard separately. The chamber summons was amended on 24th October, 2001 to state the grounds for seeking those orders, among them; that there was no reasonable defence or counterclaim; they were both vague, frivolous, irrelevant and offended the rules of pleadings; they were scandalous and defamatory; they imputed disciplinary offences against the advocate; they imputed criminal offences of tax avoidance; and that they were untenable for illegality.

In addition to filing affidavits in reply to that application the appellant responded on 30th October, 2001 with its own chamber summons seeking to have the plaint struck out. Eventually however, Vadgama sought to have the plaint amended and his prayers were granted and the amended plaint was filed on 8th January, 2002 thus rendering the appellant's chamber summons irrelevant. In granting leave for the amendment of the plaint, the court also gave leave for amendment of the defence, set off and counterclaim and these were filed on 16th January, 2002. In reply to the "*Amended defence, set off and counterclaim*", Vadgama additionally filed a *"counterclaim to counterclaim"*, on 23rd January, 2001. The "*counterclaim to counterclaim*" related to a letter written by Da Gama Rose to another advocate in relation to the issues in the main suit, which letter Vadgama claimed was defamatory of him and he therefore sought aggravated damages. Da Gama Rose found the pleadings on the counterclaim procedurally untenable and an abuse of court process, and on behalf of the appellant, he took out a motion on 14th February, 2002, seeking to have it struck out.

The two applications: Vadgama's chamber summons for striking out the "*defence, set off and counterclaim*", and the appellant's notice of motion to strike out the "*counterclaim to counterclaim*" were heard before Mwera J between May 2002 and February, 2003. In his ruling delivered on 11th March, 2003, the learned Judge allowed the appellant's motion and struck out the "*counterclaim to counterclaim*". He reasoned that, unlike the English rules which provided for such procedure in the **Supreme Court Practice Rules (1991) (vol. 1)** there was no similar procedure under the Civil Procedure Rules. He stated in part:

"In our Civil Procedure Rules perhaps the part that comes close enough is order 8 – DEFENCE AND COUNTERCLAIM. But it has nothing by which a plaintiff can set up a counterclaim against a counterclaim which a defendant has pleaded along with his defence in a suit. So on this ground alone, namely that the law as it is in Kenya does not allow, the plaintiff's counterclaim to counterclaim filed here on 25.1.2002 is incompetent and not tenable in law. It is disallowed on that basis."

The learned Judge ordered that each party shall bear own costs. There was no appeal by Vadgama against that determination, but the appellant has challenged the order for costs. We shall return to that complaint shortly.

The learned Judge also granted the chamber summons and struck out the offending paragraphs and subparagraphs of the "*amended defence, setoff and counterclaim*". He made findings that that piece of

pleading did not traverse the claim; that it imputed and imported criminal conduct on the part of Vadgama; and that it was contrary to the Advocates Act and Rules as it exposed Vadgama to disciplinary proceedings. In the Judge's view "the *pleading was not supposed to be what civil litigation is all about*", concluding in his own words: -

"The court was thus satisfied that the defence and counterclaim are essentially off the mark. The court therefore is minded to grant the defendant leave appropriately to amend its defence to answer the claim as laid. The counterclaim as laid, if that cross action has to remain ought to be taken up in a separate suit. Having perused the nature of the pleadings and how each party went about them, with allegations of this or that kind, separate actions for the suit and counterclaim appear a better course to determine them."

The appellant was given 14 days to amend the defence further. Instead of so proceeding, it proceeded on appeal to this Court and laid out seven grounds in the memorandum of appeal, seeking in the end orders: -

"1. That this appeal be allowed with costs.

2.That the ruling and order of the Superior Court made on 11th March, 2003 be set aside and be substituted with an order dismissing the Respondent's application dated 23rd October, 2001 with costs and allowing the Appellant's application dated 6th February, 2001 with costs."

As stated earlier, the appeal was not opposed as Vadgama did not show up despite service of hearing notice. Learned counsel appearing for the appellant, Mr. Kelvin Mogeni consolidated those grounds and argued them globally, essentially urging us to find as the superior court did, that the *"counterclaim to counterclaim"* was properly struck out but to reverse the order on costs. That is because under ***section 27 (1)*** of the Civil Procedure Act, which gives discretionary power to the court to award costs, there is a proviso thereto that costs *"shall follow the event unless the court for good reasons otherwise orders"*. In his submission, there was no reason given or recorded by the Judge for depriving the successful party of its costs of the application.

Mr. Mogeni further submitted in respect of the dismissal of the appellant's application that the decision was wrong since an application for striking out a counterclaim could not be made after a reply was already made to the counterclaim. ***Order 8 rule 11*** of the Civil Procedure Rules (as it then was), which was invoked by Vadgama in his chamber summons states, in relevant parts, as follows:

"*Where a defendant sets up a counterclaim, if the plaintiff .... contends that the claim thereby raised ought not to be disposed of by way of counterclaim, but in an independent suit, he may at any time before reply, apply to the court for an order that such counterclaim may be excluded, and the court may, on the hearing of such application, make such order as shall be just."*

Mr. Mogeni drew our attention to the lengthy *"Reply, Defence to Amended set off/counterclaim and counterclaim to counterclaim"* which were filed by Vadgama on 23rd January, 2002 and submitted that the filing overtookthe application for striking out as it joined issue with the appellant's *"Defence, set off and counterclaim"*. Finally Mr. Mogeni submitted that the issues of illegality or imputation of criminal conduct as found by the superior court, could only be determined at the full hearing of the suit and the plaintiff's claim was so intertwined with the set off and counterclaim that they could be heard and determined separately.

We have considered the appeal fully even without the benefit of the respondent's submissions and we are of the view that it is meritorious. The appellant, as correctly submitted by Mr. Mogeni, was wrongfully deprived of its costs as the successful party without any reason being assigned for such order. We also think the issues raised in the *"set off and counterclaim"* which the respondent responded to and joined issue with the appellants ought to be determined at the full hearing as the two respective claims are intertwined.

In the result we allow this appeal and grant the orders sought by the appellant with the result that the

various paragraphs and subparagraphs of the *"defence, set-off and counterclaim"* which were struck out by the superior court are hereby reinstated. The issues arising from the pleadings shall be determined by the superior court on merits upon hearing the parties. We further order that the costs of this appeal shall abide the result of the hearing before the superior court.

Orders accordingly.

Dated and delivered at Nairobi this 8th day of April, 2011.

R.S.C. OMOLO
....
JUDGE OF APPEAL

S.E.O. BOSIRE
....
JUDGE OF APPEAL

P.N. WAKI
....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR