



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: OMOLO, TUNOI & BOSIRE JJA)
CIVIL APPEAL NO. 47 OF 2005

BETWEEN

KAMAU MUHIA.....APPELLANT

AND

MWANIKI GITAU & CO. ADVOCATES.....RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Nairobi (Ojwang J.) dated the 5th day of March 2004

in

MISC. CIVIL APPLICATION NO. 718 OF 2003)

JUDGMENT OF THE COURT

This is an appeal from the decision of the superior court (Ojwang Ag. J) which was given on 5th March 2004, pursuant to an application by **Mwaniki Gitau & Co. Advocates** (*the respondent*), under Order XLVIII rule 3 of the Civil Procedure Rules, **section 3A** and **18** of the Civil Procedure Act, Cap 21 of the Laws of Kenya. The respondent in that application was **Kamau Muhia**, (*the appellant*). It is quite clear from the heading of that motion that it was not filed in an existing suit but as a miscellaneous civil application. Five substantive prayers were made to the court, as follows:

“(2) Execution be stayed pending determination of serious and crucial issues arising out of orders and execution proceedings issued by the Deputy Registrar in Miscellaneous No. 83 of 2000 at Nyeri.

(3) The execution proceedings issued in Miscellaneous Civil Application No. 83 of 2000 at Nyeri by way of notice to show cause why the applicant should not be arrested and committed to civil jail be set aside.

(4) The said Miscellaneous Application No. 83 of 2000 be transferred to High Court at Nairobi for disposal.

(5) The Certificate of Costs signed by the Deputy Registrar on 11th June 2003 awarding costs to the Respondent be annulled or cancelled, the document being null and void.

(6) The ruling made by the Deputy Registrar on 11th March 2003 following a purported taking of accounts be set aside.

(7) The order made by the Deputy Registrar on 3rd June 2001 reviewing the consent order on costs be set aside.”

The motion was supported by a 46 paragraph affidavit setting out the background to the motion, but considering the prayers in the motion we are of the view that the motion should have been brought within the suit in which decisions against which orders were sought were made. The events that followed the filing of the above motion show the dangers which may and did arise because of the court acting without the full facts necessary for a given decision. To put the matter in proper perspective it is necessary to set out the background facts as can be gleaned from the record.

The respondent was the appellant’s advocate in **Nyeri High Court Civil Case No. 267 of 1999**, in which the latter had sued Joseph Gacheru and another for the recovery of damages. The appellant paid the respondent an initial sum of either Kshs.53,000 or Kshs.55,000/= as his fees. There is a dispute on this. The appellant was successful and he was awarded Kshs.408,240/= with party and party costs of Kshs.91,712/=. The resultant decree was settled by United Insurance Company Ltd. The respondent is alleged to have retained part of that money as his fees, being Kshs.55,000/= which he had been paid initially plus what he considered due to him as advocate/client costs. That is what sparked off the dispute between the appellant and the respondent.

To resolve the dispute the respondent took out a motion under Miscellaneous Cause No. 83 of 2000 seeking an order that the taxing master approve his bill of costs. The matter was placed before W.K. Korir, a Deputy Registrar, who taxed the bill at Kshs.175,493/=. In that taxation the appellant was represented by one Wagiita, advocate, and it is alleged that the taxation was by consent. The appellant later complained that the taxation was improperly done in his absence, and because of that fact he successfully moved the court to release Wagiita from acting for him. Thereafter the appellant brought in person an application to review or set aside the taxation which application was heard by another Deputy Registrar, one C.D. Nyamweya. Mr. Nyamweya decided to review downwards the taxation to Kshs.117,531/=. Juma J. directed that accounts be taken by a Deputy Registrar to ascertain how much was payable to the appellant from the money the respondent had retained out of the sums paid over to him by United Insurance Company. The statement of account is part of the record of appeal and reads as follows:

“STATEMENT OF ACCOUNT

Amount Mwaniki Gitau & Co. Advocate was given (Applicant)	587,510
Amount handed over to Kamau Muhia (Respondent)	445,017
Balance That He Owes Kamau Muhia	142,493.00
Order given by the court	117,531.00
Balance that he owes Kamau Muhia	24,962
Deposit given by Kamau Muhia at the beginning of the case:	55,000
Total	79,962
Court fees	14,000
Interest at court rates as from 17/3/99 at 12%	45,102

Total amount due

139,064”

Those accounts were apparently settled by M.R. Gitonga, a Deputy Registrar. The aforesaid sum was the subject matter of execution proceedings. An attempt was made to draw decrees and certificate of costs on the basis of those accounts. A notice to show cause was issued and served upon the respondent. It is the one which prompted the respondent to take out the motion which gave rise to the decision appealed against. We note that after reviewing the taxation the Deputy Registrar issued a Certificate of Costs in favour of the appellant for Kshs.139,064.

The above motion was first placed before Nyamu J. (as he then was). He was told that earlier Juma, J. had countermanded the execution on the ground that there was no decree to be executed but somehow the appellant found his way around and a notice to show cause was issued the absence of decree notwithstanding. Nyamu J. issued *ex-parte* orders of stay and he gave a date for the inter partes hearing of the motion. He later certified the motion as urgent. The application was eventually heard by Ojwang Ag. J. (*as he then was*). We pause there to consider some procedural issues.

The first issue relates to the provisions under which the application was expressed to brought. Section 3A of the Civil Procedure Act, reserves the inherent power of the court to make such orders as may be necessary for the ends of justice and to prevent abuse of the process of the court. It is not a provision which ordinarily may be invoked to originate proceedings. Then there is section 18 of the same Act. It is a section, which gives the High Court jurisdiction to transfer a suit pending before it to any subordinate court competent to try or dispose of the same; or order withdrawal of a suit pending before a subordinate to itself or to another subordinate court with jurisdiction to hear and dispose of it. The section does not empower the High Court to order withdrawal of a suit pending before one of its registries to another or from one judge of the same court to another. There is however, power under O.46 of the Civil Procedure Rules for the court to give directions as to the place a matter should be heard. To do so the matter must be pending before the judge giving such directions. A judge has no power to order that a matter pending before another judge be withdrawn from that other judge and be placed before himself for hearing as happened in the matter before us.

Order 48 (now Order 49), was also invoked in the application which gave rise to the decision appealed against. It deals with special powers of the Registrars. The application was made to a judge and clearly that provision was not applicable to the matter Ojwang Ag. J. was seised of. The learned judge however proceeded with the matter oblivious of the fact that no proper order of transfer had been made of Nyeri Miscellaneous Civil Application No. 83 of 2000 from Nyeri to Nairobi, nor had any directions been given that it would be heard in Nairobi.

The foregoing notwithstanding, it is clear Ojwang Ag. J. made orders which are still in force. The orders remain in force until set aside by a court of competent jurisdiction. But what are those orders? The learned judge after going through the background facts and giving due analysis to them came to the following conclusions. First that the appellant had not established a clear basis for objecting to the consent order on taxation of costs. Second that the Deputy Registrars at Nyeri who handled the matter had failed to consider the nature of advocate-client costs and mistakenly thought that the costs were payable to the appellant instead of the advocate, the respondent herein. Thirdly, that the orders by the Deputy Registrars, in effect, awarding the appellant costs were made without jurisdiction and were therefore a nullity. Fourthly that the use of the court process by the Deputy Registrars to give advantage to the appellant not only amounted to abuse of the process of the court, but also an illegality. Lastly, that if the appellant was dissatisfied with the consent order on taxation he should have appealed against it. On the basis of the foregoing findings the learned judge made orders thus:

“(1) The execution proceedings issued in Miscellaneous Application No. 83 of 2000 at Nyeri are hereby declared null and void.

(2) The Certificate of Costs signed by the Deputy Registrar at Nyeri on 11th June 2003 awarding costs to

the Respondent is hereby declared null and void.

(3) The Ruling made by the Deputy Registrar at Nyeri on 11th March 2003, following a purported taking of accounts is set aside.

(4) The order made by the Deputy Registrar at Nyeri on 3rd June, 2001 reviewing the consent order on costs is hereby set aside.

(5) The Applicant's costs in this application shall be borne by the respondent".

The appeal before us is against those orders. The appellant in his memorandum of appeal has raised fourteen grounds but those grounds may be condensed to the following.

(1) The learned Judge had no jurisdiction to order transfer of Miscellaneous Civil Application No. 83 of 2000 from Nyeri to Nairobi.

(2) The learned judge erred in ruling on matters of procedure and ignored the substantive issues in the dispute between him and the respondent.

(3) The learned *judge* failed to appreciate that the consent order on taxation was made in his defence.

(4) The learned judge erred in failing to appreciate that the respondent had filed numerous applications before the court at Nyeri but was slow in taking hearing dates for them thereby deliberately delaying the finalization of the matter.

(5) The learned judge was on several occasions heard the application before him *ex parte* and thus condemned the appellant unheard.

(6) The respondent had frustrated him through the filing of several applications and thus rendered him impecunious.

The provisions cited by the respondent for seeking transfer of **Nyeri Miscellaneous Civil Application No. 83 of 2003** were not applicable. The power to transfer proceedings in the High Court is vested in the judge seised of a matter. The judge may on application order a matter to be heard at a given place "*for cause shown*". (see Order 46 rule 6(2) of the Civil Procedure Rules). The court may also *suo moto*, order that a matter be heard and disposed of at a particular place, but it can only do so if he has reasonable cause for doing so. In each case it is the judge seised of the matter who has jurisdiction to make such an order. In a Registry where there are more judges than one, and none of them has commenced the hearing of the matter any of those judges has jurisdiction to make such order.

In the matter before us one of the grounds of appeal as earlier on shown is that Ojwang Ag. J. lacked jurisdiction to order the transfer of Nyeri Miscellaneous Civil Application No. 83 of 2003 to Nairobi High Court Central Registry. We find no specific order in the record of appeal ordering transfer of the application, but it is clear from the record that both Nyamu J. and Ojwang Ag. J. assumed jurisdiction of the said application and proceeded as though an order had been made directing that the aforesaid application be heard by a judge in the High Court Central Registry in Nairobi. Having assumed jurisdiction no steps were taken to transfer the record of the application from Nyeri to Nairobi. Consequently Ojwang Ag. J. did not have the benefit of the notes of the various Deputy Registrars, who made the orders which the respondent was challenging in his motion filed in the High Court Central Registry, Nairobi. With tremendous respect to the learned Judge, we agree with the appellant that he had no jurisdiction to grant the orders he made, but not for the reason the appellant proffered, but for the reason that he did not have all the material necessary before him to make the orders he made. The orders which we set out earlier, must therefore, as of right, be and are hereby set aside.

We have agonized on what further orders to make in view of the appellant's notice to show cause, which the respondent wanted set aside, but which in view of the order we have made vacating all the orders Ojwang Ag. J. made is pending before the High Court at Nyeri. The appellant, we believe, might take

steps to proceed with execution proceedings which were stopped by Ojwang Ag. J.'s orders. Ordinarily we would have ordered that the respondent's application filed in the High Court Central Registry, Nairobi be transferred to Nyeri for hearing. However in view of the provisions of **sections 3A and 3B** of the Appellate Jurisdiction Act we have decided against that course of action. The two sections make provision for the overriding objective of civil litigation namely, the just determination of the proceedings in an efficient, timely and affordable manner. Sending the matter over to Nyeri will not only lengthen the process, but it will increase expense and delay the finalization of the matter. We note that the appellant was allowed to file this appeal *forma pauperis*. To minimize the delay and expense and also to shorten the process, we requested for the record of proceedings in **Nyeri High Court Miscellaneous Civil Application No. 83 of 2003**. The whole file was forwarded to us. We have gone through it carefully, this being a first appeal.

The appellant's case is that the respondent retained Kshs.209,518/= from the decretal sum in **Nyeri High Court Civil Case No.267 of 1999**, as his fees. When the accounts were taken the Deputy Registrar ruled that the taxed costs of Kshs.117,530/= would be deducted from that figure being the costs due to the respondent as Advocate- Client costs. The Deputy Registrar also discounted a sum of Kshs.19,228/= which was either interest thereon or additional costs. The balance comes to Kshs.72,729/=. In our understanding that is the amount of money Gitonga, SRM, as Deputy Registrar found was due and owing to the appellant. She also ordered that that sum would attract interest at court rates from 17th March 1999. The order was made on or about 11th March 2003.

There was confusion as to what the money was for. The Court Registry at Nyeri wondered in an internal memo how that money would be designated. On 29th October 2001 an executive assistant addressed a handwritten memo to the Deputy Registrar, among other things seeking directions on the matter. He penned thus:

"The amount claimed is not an award by the court. Please direct."

The Deputy Registrar did not address that concern. He merely directed that a warrant of arrest be issued, presumably as had been requested in the notice to show cause. It is the issuance of the warrant of arrest which prompted the respondent to file an application at the Central Registry, in Nairobi.

In the application for execution the appellant did not claim Kshs.72,729/= as we showed earlier but Kshs.130,895/= made up of sums of money which cannot be properly justified by looking at the court record. For instance the appellant included a figure of Kshs.91,987, without showing how he came to it. He has also included Kshs.22,750/= as travelling and other expenses. We could find no record to justify its inclusion, and the basis for its claim. He has included an element of interest with effect from 3rd May 2000 of Kshs.11,038/=. The court did allow interest of 12% with effect from March 1999 but not on Kshs.91,987/=. It must have been on Kshs. 72,729/= which upon computation would not have exceeded Kshs.14,000/= for two year period the appellant used in his calculation. So on the basis of the material in the record as we could discern it, the total due to the appellant as at the 1st November, 2001 when he lodged in court an application for execution was Kshs.86,729/= inclusive of interest. That in our view is the amount of money the High Court at Nyeri should have asked the respondent to release to the appellant as part of the decretal sum in **Nyeri High Court Civil Case No.267 of 1999**.

In the result we allow the appellant's appeal and set aside the orders of Ojwang Ag. J made on 5th March 2004. The appellant wants us to reinstate the order dated 27th October, 2000, but we are averse to doing so as there are several orders which were made subsequent to it which were not the subject matter of this appeal. In view of that and considering what we have stated in this judgment regarding the accounts between the respondent and the appellant, the order which commends itself to us, is to order that the respondent pay within 30 days a sum of **Kshs.86,729/=** as at the date of this appeal, plus interest thereon at court rates from then until payment in full, failing which execution to issue.

Dated at Nairobi this 13th day of May 2011.

R.S.C. OMOLO

.....
JUDGE OF APPEAL

P.K. TUNOI

.....
JUDGE OF APPEAL

S.E.O. BOSIRE

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR