



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 222 OF 2005

KENYA COMMERCIAL BANK LIMITED APPELLANT

AND

MUTURI, GAKUO & COMPANY ADVOCATES (A FIRM)..... RESPONDENT

(Appeal from a ruling and order of the High Court of Kenya

Milimani Commercial Courts (Mohammed Ibrahim, J) dated 22nd February 2005

in

H.C.C.C No. 591 of 2003)

JUDGMENT OF THE COURT

In order to understand fully this appeal before us, we feel substantial parts of the plaint and the defence need to be reproduced in this judgment.

Vide a plaint dated 22nd September 2003 and filed on the same date in the superior court, the appellant in this appeal, Kenya Commercial Bank Limited, sued the respondent, Muturi, Gakuo & Company Advocates (a firm of advocates) and pleaded, *inter alia*, as follows:

“3. In the month of March, 2000, the plaintiff retained and employed the defendant as its advocate for reward to realize certain properties charged to it and to also act for it in H.C.C.C No. 38 of 2001 that was subsequently instituted against it and another by Prodex International Limited and seven others (hereinafter referred to as “Prodex”) and the defendant agreed and undertook to so act for the plaintiff.

4. In the course of the defendant so acting, an agreement was reached fixing the amount of the defendant’s remuneration in respect thereof in the total sum of Kshs.2,000,000.00; which the plaintiff duly paid.

It was further agreed that any further fees payable to the defendant would be recovered directly from Prodex, either after judgment is entered against Prodex or a settlement with Prodex is reached.

5. In total disregard of the aforementioned agreement, the defendant on 21st August 2003 served

upon the plaintiff a Notice of Taxation to which was attached the Defendant's bill of costs dated 14th August, 2003 in HIGH COURT MISCELLANEOUS APPLICATION NO. 746 of 2003.

6.

7. The plaintiff avers that the agreement on the defendant's remuneration as more particularly pleaded in paragraph 4 hereinabove having not been set aside or varied, the same is valid and binding on the parties hereto, consequently the defendant is estopped from claiming any further fees from the plaintiff.

8. The plaintiff further avers that in view of the agreement fixing the Defendant's remuneration payable by the plaintiff in the total sum of Kshs.2,000,000.00, the defendant's claim against the plaintiff for further fees in the sum of Kshs.26,508,677.60 is in the circumstances an abuse of the due process of this Honourable Court.

9.

10.

REASONS WHEREOF the plaintiff prays for:

a) A declaration that the agreement reached fixing the amount of the defendant's remuneration payable by the plaintiff in the total sum of Kshs.2,000,000.00 and that any further fees payable to the defendant would be recovered directly from the plaintiff's debtor either upon judgment being entered against the said debtor or a settlement with the debtor being reached, is valid and binding on the parties hereto.

b) A declaration that on account of the agreement reached fixing amount of the defendant's remuneration in the total sum of Kshs.2,000,000.00 and which said sum the plaintiff duly paid, the defendant is not entitled to claim any further fees from the plaintiff for being retained to act for the plaintiff in H.C.C.C NO. 38 OF 2001.

c) Costs of this suit.

d) Such further or other relief as the Court may deem just and expedient to grant."

To the above plaint, the respondent filed a statement of defence dated 6th October 2003. It was filed on the same date 6th October 2003. It pleaded in its pertinent paragraphs as follows:

"2. The defendant admits the contents of paragraph 3 of the plaint.

3. The defendant denies the contents of paragraph 4 of the plaint in toto and puts the plaintiff to strict proof thereof.

4. The defendant avers that no agreement was reached between it and the plaintiff with regard to fees payable to it as alleged in paragraph 4 of the plaint and in particular, as envisaged and required by section 45 of the Advocates Act.

5. In answer to paragraph 5 of the plaint, the defendant states that there being no agreement duly entered into between the parties with regard to fees payable to it in respect of handling H.C.C.C No. 38 of 2001 on behalf of the plaintiff, the defendant avers that it is acting within its rights in filing HIGH COURT MISCELLANEOUS APPLICATION NO. 764 OF 2003 for determination of costs due to it by the Honourable Court.

6. In answer to paragraph 7 of the plaint, the defendant reiterates the contents of paragraph 4

and further states that the purported agreement, being unlawful, cannot and is indeed not binding and enforceable against the defendant.

7. In answer to paragraph 8 of the plaint, the defendant states that its claim for outstanding fees is not an abuse of the process of this Court.

REASONS WHEREFORE the defendant prays that the plaintiff's suit be dismissed with costs."

The appellant had, immediately after the plaint was filed but before the statement of defence was filed, proceeded to the court by way of notice of motion filed on 23rd September 2003, sought stay of the hearing of Miscellaneous Application No. 764 of 2003 which was in effect a taxation of the disputed bill of costs. That application was granted. That however is not directly relevant to the matter before us. What is relevant is that after the close of the pleadings, the respondent took out chamber summons dated 12th February 2004 but filed on 1st March 2004. That chamber summons was filed pursuant to **Order VI rule 13(1) (c) and (d)** of the Civil Procedure Rules, and **section 3A** of the Civil Procedure Act.

Vide that chamber summons, the respondent sought two orders namely that:

"(a) The plaint herein be struck out.

(b) Costs of this application be provided for."

It was based on four grounds which were:

"(a) The plaint may prejudice, embarrass or delay the fair trial of the action.

(b) The plaint is otherwise an abuse of the process of the court.

(c) The suit herein is predicated on the existence of a valid agreement between the parties as envisaged under section 45 of the Advocates Act, Chapter 16 of the Laws of Kenya.

(d) There is no valid agreement as envisaged by section 45 of the Advocates Act."

In the affidavit in support of that application, Mr. Njee Muturi, an advocate in the respondent's firm of advocates, amplified the grounds in support of the application we have reproduced herein above. At paragraph 9, 10 and 11, he refuted the validity of an agreement alleged by the appellant and upon which the appellant's suit was premised. He stated as follows concerning that alleged agreement:

"9. It is not true that any agreement with regard to fee payable to my firm for acting for the defendant was reached as contemplated under section 45 of the Advocates Act.

10. The suit herein is based on the presumption that there exists a valid agreement between the parties herein with regard to the fee payable to the defendant in respect of its acting for the plaintiff in H.C.C.C No. 38 of 2001 when no agreement at all was reached.

11. It is true that the correspondence exchanged between the parties does not reveal a valid agreement between the parties with regard to fees payable to my firm by the plaintiff in H.C.C.C No. 38 of 2001."

The appellant filed grounds of objection to that application by the respondent which sought to strike out its plaint. The five grounds of its objection were:

"1. That the defendant's application is defective and bad in law.

2. That this suit is not plain and obvious to warrant the summary procedure sought by the defendant.

3. **That the plaintiff raises serious triable issues.**
4. **That the question of existence or otherwise of a valid agreement as envisaged under section 45 of the Advocates Act is a triable issue calling for a full trial.**
5. **That the defendant's application is misconceived and lacks merit."**

In its affidavit in support of those grounds of objection, the appellant, through its Relationship Manager, Mr. John Oringo stated at paragraph 7 as follows:

"7. That the correspondence exchanged between the plaintiff and the defendant vide the defendant's letter dated 25th February 2002, 4th November 2002, and the plaintiff's letter dated 14th October 2002 set out in the supporting affidavit of Njee Muturi at page 3, 4, and 5 of annexure NM demonstrates an offer and acceptance constituting an agreement binding the parties hereto."

And at paragraph 11 of the same affidavit, the appellant stated:-

"11. That I am advised by the plaintiff's advocates on record which advise I verily believe to be true that the plaintiff's suit is not frivolous or scandalous and that the same raises triable issues as follows:

- (i) **Whether there is an agreement between the plaintiff and the defendant for payment of fees with respect to the H.C.C.C No. 38 of 2001.**
- (ii) **Whether such agreement is valid.**
- (iii) **Whether such agreement conforms with the requirements of section 45 of the Advocates Act or any other provisions of the law.**
- (iv) **Whether the defendant is entitled to any further fees on account of H.C.C.C No. 38 of 2001 and**
- (v) **Whether the declaration should be granted."**

Both affidavits had several annexures mainly letters exchanged between the parties. We have perused all of them. That application was placed before Mohamed Ibrahim J. who after hearing it struck out the plaint. In doing so, the learned Judge stated, *inter alia*, as follows:

"In conclusion, I do hereby hold that there is nothing which is there to go for trial and there are no triable issues in the suit. I further hold that there is no agreement in writing fixing the amount of the defendant's remuneration and I do hereby strike out the plaint dated 22nd September 2003 with costs to the defendant."

That is the order that prompted this appeal before us, which is premised on the following six grounds:

- 1. That the learned Judge erred in law and in fact in striking out the plaint as raising no triable issues notwithstanding the holding that extrinsic and/or oral evidence was required to prove the case.**
- 2. That the learned Judge erred in law and in fact in striking out the plaint despite the fact that this was not a clear and obvious case.**
- 3. That the learned Judge erred in fact and in law and in his assessment of the submissions and evidence before the court and the applicable law and thus arrived at an erroneous ruling.**

4. **That the learned Judge erred in law in disregarding or failing to consider the triable issue of the validity or otherwise of the agreement on costs between the parties despite acknowledging its existence.**
5. **That the learned Judge erred in law and in fact in failing to consider and take into account the appellant’s submissions at all.**
6. **That the learned Judge erred in law and in fact in predisposing his mind to a position favourable to the respondent and against the appellant and thereby arrived at the wrong decision.”**

Both counsel, Mr. Munyu, for the appellant, and Mr. Katiku, for the respondent, addressed us at length. We have anxiously considered their submissions, the record, the ruling by the learned Judge of the superior court, and the law. As a first appellate court, we are duty bound to revisit the matter afresh and come to our own independent conclusion but always bearing in mind that the superior court had also heard counsel on their submissions and giving allowance of the same – see the case of **Selle v. Associated Motor Boat Co. Ltd (1968) E.A 123**. We are also aware that the suit in the superior court has not been heard as it was struck out and with that in mind, our decision in this judgment must not in any way prejudice the fair hearing of the case should that be necessary.

The application that was before the superior court was brought under **Order VI rule 13(1) (c) and (d)** of the Civil Procedure Rules as well as under **section 3A** of the Civil Procedure Act. **Order VI rule 13(1) (c) and (d)** of the Civil Procedure Rules states as follows:

“13(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that

- (a)
- (b)
- (c) **It may prejudice, embarrass or delay the fair trial of the action; or**
- (d) **It is otherwise an abuse of the process of the court.”**

The learned Judge of the superior court in his ruling considered the correspondence between the parties and concluded that the agreement as required under **section 45** of the Advocates Act must be in writing either in one composite legal document or in a contract, but either way, it must be signed by the client or his duly authorised agent or it may be contained in correspondence or letters but the terms must be unambiguous, specific and certain. Having come to that conclusion, he made a finding that the agreement pleaded in the plaint did not meet those requirements and thus the substratum of the suit was non-existent and hence the plaint lacked triable issues and was thus for striking out.

In our view, with respect, we do not agree. In his lengthy ruling, the learned Judge posed several issues which he acknowledged could not be answered at that stage without evidence being adduced at a full hearing. He, for example, stated:

“The question now is – what final fees? Is it the final fees for all legal services rendered or is it final payment of the so-called “interim legal fees” referred to in the 2 previous letters reproduced above? In view of the contentious interpretations given by the parties and reference to conversations and oral agreements, this court is unable at this stage to make any factual finding on what is meant without further evidence from the makers of the 2 letters, namely Mr. Muturi and Mr. Jodo besides Mr. Paul Asamba who is supposed to have been in conversation with Mr. Muturi.”

That in effect, meant that there was need for full hearing to ventilate those issues to enable the court to finally decide whether indeed a contract existed between the parties as alleged in the plaint or not as

alleged in the statement of defence. In short, the learned Judge was in that statement saying that the issues went beyond the correspondence exchanged and there was need to hear the parties and their witnesses so as to reach a fair decision. Again, in the same ruling, the learned Judge stated:

“In the light of paragraph 4 of the plaint, it is my view the court could have to determine and decide whether the sum of Ksh.2,000,000/= paid was in respect of “interim legal” fees or “final legal fees” for all services rendered.”

As indicated above, this Court at this stage is unable to determine or find the true construction of and meaning in the correspondence on the basis of the opposing affidavits herein. It would require the *viva voce* testimonies of the makers of the letters and others like Mr. Asamba and a Mr. Muyoti which can be tested under scrutiny of cross-examination in a trial.”

And lastly in that aspect, the learned Judge also stated in his ruling after considering **section 46(d)** of the Advocates Act:

“Consequently, I am unable to find at this stage whether the purported agreement, if it was concluded, was in violation of section 46(d).”

In view of the above, we find it difficult to appreciate the learned Judge’s finding that as there was no agreement as required under **section 45(1)** of the Advocates Act, the suit could not stand. That decision was, in our view, one to be reached after resolving the matters raised by the learned Judge some of which are as appear above and that could only be done after hearing the suit. We do not see what would have prejudiced, embarrassed or delayed the fair trial of the suit in the plaint. Neither do we see what could amount to an abuse of the process of the court in the plaint.

Having perused the pleadings, we are of the view that the issue as to what constituted a valid agreement in this suit is a triable issue. Secondly, the issues as to whether the payment made was in respect of all the work that was done and the part that was still to be done by the respondent or whether it was in respect of the instructions covering one matter only was a triable issue. Thirdly, the issue as to whether oral communication plus correspondence amounted to a valid agreement under the Advocates Act was a triable issue. There may be many others, but only one triable issue needs to be demonstrated to enable the court to allow full hearing. All these issues were matters that, in our view, required *viva voce* evidence so as to enable the court to resolve them in full.

They were not matters that could be disposed of summarily. They were certainly not matters that could be viewed as constituting abuse of the court process or as matters that could embarrass or delay the fair trial of the suit.

We share the same sentiments with Madan, J.A (as he then was) in his judgment in the well known case of **D.T. Dobie & Company (Kenya) Ltd. vs. Muchina [1982] KLR 1** where he stated.

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.

On the other hand, if there is a point of law which merits a serious discussion, the court should be asked to proceed under Order XIV rule 2.”

Although Madan, J.A was dealing with a matter brought under **Order VI rule 13(1) (a)**, the principles enunciated in that judgment do, in our view, apply to this case.

The sum total of the above is that this appeal must succeed. The appeal is allowed. The ruling and order of the superior court striking out the plaint dated 22nd September 2003 with costs to the defendant

are set aside. We order that the suit shall proceed to full hearing. Costs of the appeal and of the application in the superior court to the appellant. Judgment accordingly.

Dated and delivered at Nairobi this 8th day of February, 2008.

E.O. O’KUBASU

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JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR