IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Omolo, Tunoi & Keiwua JJ A)

CIVIL APPEAL NO 240 OF 2001

KABUITO CONTRACTORS LIMITED ……….............................…APPELLANTS

VERSUS

DAVID MUKII MEREKA T/A MEREKA & CO ADVOCATES….RESPONDENTS

(An appeal from an order of the High Court of Kenya at Nairobi

(Khamoni J) dated 6th July, 2001 in HCCC No 1451 of 2000)

JUDGMENT

The short point which arises for our determination in this appeal is the interpretation to be given to rules 2 and 11 of order VIII of the Civil Procedure Rules. Those rules provide:

"2 A defendant in a suit may set-off, or set up by way of a counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a cross-suit, so as to enable the Court to pronounce a final judgment in the same suit, both on the original and on the crossclaim; but the Court may on the application of the plaintiff before trial, if in the opinion of the Court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to the defendant to avail himself thereof."

"11. Where a defendant sets up a counterclaim, if the plaintiff or any other person named in manner aforesaid as party to such counterclaim 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."

We have juxtaposed the two rules above because on a first reading of them, they would appear to be dealing with the same matter and the decision of Khamoni, J which is the subject of the appeal to us, appears to us to deal with the two rules as though they dealt with one and the same issue.

How did the matter arise before Khamoni, J?

By a plaint dated 2nd August, 2000, David Mukii Mereka, Trading as Mereka & Company Advocates, the respondents herein, claimed from Kabuito Contractors Ltd, the appellants herein, the sum of Kshs 12,344,230/= and that sum was alleged to be due to the respondents from the appellants on the foot of professional services rendered by the respondents to the appellants in respect of HCCC No 1323 of 1999

which the appellants had instituted against the Nairobi City Council. The respondents had partly acted for the appellants in that suit and an interim fee-note had been rendered to the appellants. The appellants refused to pay and upon that refusal, the respondents had delivered to the appellants an itemized bill of costs in the sum of Ksh 12,344,230/=. The appellants had refused and/or neglected to pay the bill. The respondents then instituted their suit in the High Court.

The appellants entered appearance in the High Court on 30th August, 2000 and on 12th September, 2000, the appellants filed their defence which also had a counterclaim. In the counterclaim, it was pleaded, first, that in

1997, the appellants had instructed the respondents to act for them in the purchase of two properties, namely LR No/20/91/12751 and LR No/20528.

The two properties were to cost Kshs 5 million and Kshs 14,247,518.50 respectively. The appellants had deposited with the respondents the two sums; the transactions failed to go through and when the appellants demanded the refund of the monies, the respondents were only able to refund them in instalments. No interest on the money was ever paid and in that counterclaim the appellants asked the High Court for an order that the respondents should pay the interest on the monies which had been refunded in instalments. A specific sum of Kshs 4,601,822.10 was claimed in the counterclaim.

Secondly, the appellants had pleaded in their counterclaim that in 1999 the appellants, through the respondents as their advocates, had instituted HCCC No 592 of 1999 against the Kenya Power & Lighting Co Ltd. In paragraph 37 of the defence and counterclaim, the appellants had pleaded that:

“On 24th March, 1999 the plaintiff [ie the respondents] negligently entered an order by consent against the interest of the defendant [appellants] herein (his client in the suit) and against the tenor of the suit by ignoring or otherwise giving due consideration to the defendant’s instructions in the matter.” and in paragraph 38 it was alleged that:

“The plaintiff acted in breach of the professional duty of case (sic) owed by an advocate to clients in his conduct which he undertook to perform.”

The particulars of negligence were then set out and the appellants then prayed for:

“Damages for breach of duty and negligence aforesaid”, against the respondents.

When served with the defence and counterclaim, the respondents on 28th September, 2000 filed a reply to the defence and a defence to the counterclaim. Simultaneously the respondents also filed what was designated “Notice of Motion” under order VIII rules 2 and 11 of the Civil Procedure Rules, section 3A of the Civil Procedure Act and section 48 of the Advocates Act and the prayers sought in the motion were:

“1. That the counterclaim filed on behalf of the defendant [appellants] pursuant to paragraphs 23 and 34 be excluded and/or struck out.

2. That the Court do give directions whether the plaintiff’s Bill of Costs may be filed and taxed.

3. That costs of this application be awarded to the plaintiff/applicant.”

The grounds upon which this application was brought were:

“(a) That the matters raised in the counterclaim arise out of other contentious and non-contentious matters related (sic) in any way to this suit which matters ought to be dealt with in an independent suit.

(b) That the alleged counterclaim cannot be conveniently disposed of in the pending suit and ought not to be allowed.

(c) That the matters raised in the counterclaim are an afterthought and an attempt to deny the plaintiff what is rightly due to him for professional services rendered."

The application was supported by an affidavit sworn by one David Mukii Mereka who is the advocate at the centre of one dispute. There was a replying affidavit sworn by one Amin Rajendra Patel on behalf of the appellants.

The application was extensively argued before Mr Justice Khamoni on 2nd July, 2001, and in a reserved but brief ruling delivered on 6th July, 2001, the learned judge stated, in pertinent parts:

"I am not sure whether I do understand prayer No 2 as I do not see how the plaintiff's Bill of Costs is yet to be filed and how it can be ordered taxed at this stage. I will therefore dismiss that prayer and I do hereby dismiss it."

There is a cross-appeal by the respondents in respect of this part of the learned judge's order, and the two complaints raised in the notice of crossappeal are:

"1. That the learned judge erred in failure (sic) to give directions on the respondent's itemized Bill of Costs as required by section 49 of the Advocates Act (cap 16) Laws of Kenya (sic).

2. That the learned judge erred in dismissing the said prayer for direction on the respondent's Bill of Costs."

The "Bill of Costs" referred to in these grounds had been annexed to the respondent's plaint when the plaint was filed. Like the learned trial judge, we do not know that the respondents were entitled to rely on the provisions of section 49 of the Advocates Act. That section only applies in the absence of an agreement between an advocate and a client with regard to the advocate's remuneration and where a defendant/client disputes in his defence, the reasonableness or quantum of the costs claimed by the advocate. In this case, it cannot be said that the appellants were merely challenging the reasonableness or quantum of the sum claimed in the plaint. While the appellants admitted in paragraph 4 of the defence that they consulted the respondents on a claim of Kshs 116,708,169.75 against the Nairobi City Council, the appellants then went on to plead as follows in the subsequent paragraphs of the defence.

"5. The defendant make (sic) it abundantly clear to the plaintiff that the plaintiff was to take no action in the matter or otherwise act on behalf of the defendant in respect thereof unless the plaintiff's professional fees were first agreed.

6. The plaintiff advised the defendant that it had a very good case with an overwhelming probability of success against NCC for the sum claimed together with interest thereon at 36% per annum and urged the defendant to permit the plaintiff to file suit on the defendant's behalf as plaintiff against NCC as defendant.

7. The plaintiff agreed to limit his professional fees payable by the defendant to Kshs 225,000/= (two hundred and twenty five thousand); a further fee was to be negotiated after the suit was set down for hearing.

8. It was an express and in the alternative an implied term of the agreement that the further fee would be for services not then rendered by the plaintiff to the defendant.

9. Acting upon the faith of agreement herein above stated the defendant, instructed the plaintiff to file suit.

10. ....

11. After the close of pleadings in the said suit the plaintiff by a fee note dated 28th October, 1999 referred to an interim fee note did request the payment of the aforesaid sum agreed for all the professional

and related services it had rendered together with a request for VAT in the sum of Ksh 33,750.00 (thirty three thousand, seven hundred and fifty) and disbursements in the sum of Kshs 72,050.00 (seventy two thousand and fifty) all making a total of sum of Shs 330,800.00 (three hundred and thirty thousand eight hundred)"

Our understanding of these averments in the defence is that the appellants were alleging an express agreement between them and the respondents.

Whether those averments are true or not is besides the point at this stage. Section 49 of the Advocates Act applies only in the absence of an agreement. Nor can we see how the averments we have reproduced herein be described as only challenging the reasonableness or quantum of the costs claimed by the respondents. They clearly amount to a total denial by the appellants that the respondents were owed any money in respect of fees and this is clearly brought out by the last averment in the appellants' defence which was that:

"Reasons wherefore the defendants prays, (sic) that the plaintiff's suit be dismissed with costs and judgment be entered for the defendant ..."

There was clearly no merit in Mr Ndungu Nganga's contention on behalf of the respondents that the appellants were merely challenging the reasonableness or quantum of the respondent's costs. The appellants were alleging an agreement between them and the respondents and that pursuant to that agreement no costs were due to the respondents. Section 49 of the

Advocates Act did not, therefore, apply and the learned trial judge was right in rejecting prayer No 2 in the respondents' notice of motion. We accordingly dismiss the cross-appeal with costs thereof to the appellants.

That now brings us to the appeal itself and as we said at the outset that involves the consideration of rules 2 and 11 of order VIII of the Civil Procedure Rules. To appreciate the meaning of the two rules, one has to read them in the context of the whole order.

Order VIII has a total of twenty rules and it is headed "Defence & Counterclaim". Rule 2, as we have seen allows a defendant to raise a setoff or a counterclaim in his defence. But under rule 2 only two parties are involved namely the plaintiff and the defendant. If a defendant sets up a set-off or counterclaim the plaintiff can apply to the Court, before the trial, for an order that the set-off or counterclaim cannot be conveniently disposed of in the same suit or that it ought not to be allowed. The time for the application to the Court is before trial. We repeat that under rule 2 only the plaintiff and the defendant are involved.

Then we move to rules 7,8, 9 and 10 of order VIII.

Those rules provide as follows:

"7. Where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff, together with any other persons, he shall add to the title of his defence a further title similar to the title in the plaint, setting forth the names of all persons who, if such counterclaim were to be enforced by cross action, would be defendants to such a crossaction, and shall deliver to the Court his defence for service on such of them as are parties to the action together with his defence for service on the plaintiff within the period within which he is required to file his defence.

8. Where any such person as is mentioned in rule 7 is not a party to the suit, he shall be summoned to appear by being served with a copy of the defence, which shall be served in accordance with the rules for regulating service of summons.

9. Any person not already a party to the suit who is served with a defence and counterclaim as aforesaid must appear thereto as if he had been served with summons to appear in the suit.

10. Any person named in a defence as a party to a counterclaim thereby made may, unless some other or further order is made by the Court, deliver a reply within fifteen days after service upon him of the counterclaim and shall serve a copy thereof on all parties to the suit.

The plain interpretation of these rules is that they clearly recognize that a defendant by his counterclaim may join to the counterclaim parties other than the plaintiff. The parties so joined, if they are not already parties to the suit with the plaintiff, must then be brought into the suit by serving them with the defence and counterclaim and allowing them time to appear and defend, if they are inclined to do so. But either the plaintiff or any of the parties so joined by the defendant in the counterclaim may be of the view that the claim raised by the counterclaim ought not to be disposed of by way of counterclaim, but in an independent suit, then in such a case, the plaintiff or any of the parties joined in the counterclaim, may apply to the Court, at any time before filing a reply to the counterclaim, for an order that such counterclaim be excluded, and the Court may, on the hearing of the application, make such order as it deems just. So that while rule 2 applies only as between a plaintiff and a defendant, rule 11 applies as between the plaintiff and/or any other party joined in a counterclaim, on the one hand, and the defendant on the other hand. Under rule 2 the application to the Court must by made by the plaintiff before trial and the grounds upon which such an application is to be made are that the counterclaim cannot be conveniently disposed of in the pending suit or that it (counterclaim) ought not to be allowed. Under that rule, that is, rule 2, the Court is entitled to refuse the defendant permission to avail himself of the counterclaim. We see no provision in rule 2 for the Court striking out the set-off or counterclaim. The Court can only refuse a defendant permission to avail himself of the set-off or the counterclaim.

But under rule 11 the plaintiff or any other person joined by a defendant in his counterclaim or both the plaintiff and such other person may apply to the Court before filing a reply to the counterclaim for an order that the counterclaim may be excluded. The ground for making the application is that the claim raised by the counterclaim ought not to be disposed of by way of a counterclaim, but in an independent suit. Upon the hearing of any such application, the Court is entitled to make any order which it deems just, unlike in rule 2 where the Court is only entitled to refuse the defendant permission to avail himself of the counterclaim.

It is clear to us from a plain reading of rules 2 and 11 of order VIII that while the two rules deal with the same subject matter, namely counterclaim, they apply to different situations. Rule 2 applies where the only parties involved are the plaintiff and the defendant and the application to the Court is to be made before the trial of the suit and the cross-suit, or setoff. Rule 11 applies where the defendant has brought in other parties in addition to the plaintiff and the application to the Court is to be made before a reply [to the counterclaim] is filed. The respondent’s advocates confused the purport of the two rules and invoked both rule 2 and rule 11.

Rule 11 had absolutely nothing to do with the matter. In his short ruling, the learned trial judge asked the question:

“Is there inconsistency in the two rules?”, but he did not then proceed to answer that question. He simply stated that:

“I will follow the period prescribed by rule 2 and say that the applicant/plaintiff has made his application

“before trial”.”

The answer to the question posed by the learned judge is that there is no inconsistency between rules 2 and 11. The two rules deal with different situations and in the matter under consideration, the respondents were wrong to bring in rule 11. Though for a wrong reason, the learned judge came to the correct conclusion that respondents’ motion was brought before trial and was valid. The learned judge granted prayer No 1 in the respondents’ application which was that:

“That the counterclaim filed on behalf of the defendant pursuant to paragraphs 23 to 44 be excluded and/or struck out.”

Under rule 2 upon which he based his decision the only order the learned judge was entitled to make was to refuse the appellants permission to avail themselves of the counterclaim.

Accordingly, while we dismiss the appellants' appeal against the order of the trial judge, we order that the judge's order be amended to state that the appellants are refused permission to avail themselves of their counterclaim. The counterclaim will obviously remain on the record but the appellants shall not be entitled to rely on it. Save as stated herein, we dismiss the appellants' appeal with three quarters of the costs thereof to the respondents.

We only need to add that we have basically dealt with the matter on first principles because none of the parties to the appeal cited to us any authorities and our own research on this aspect has only led us to the Ugandan case of *General Trading Co Ltd v I N Patel & Others T/A Nakasero Automobiles* [1958] EA 702 which dealt with provisions of the then order VIII rules 2 and 12 of the Ugandan Civil Procedure Rules which were in *pari materia* with our rules 2 and 11 of order VIII. The then Court of Appeal for Eastern African thought that there was an apparent duplication in the two rules but they declined to express any opinion in relation thereto – see page 704 letter E of the Report. We also need to mention that Mr Kilonzo for the appellants, as a last-ditch effort, contended that even if the learned judge was right in his interpretation of rules 2 and 11, on the material before him, the learned judge was not entitled to conclude that the counterclaim could not be conveniently disposed of in the suit. Our short answer to that must be that the learned judge was exercising a discretion with regard to that point and we have not been told that in coming to his conclusion, the judge breached any of the injunctions set out in the case of *Mbogo & Another vs Shah*, [1968] EA 93 concerning the exercise of a discretion by a trial judge and when an appellate court will interfere with such an exercise.

Dated and delivered at Nairobi this 11th day of July, 2003

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K.TUNOI

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JUDGE OF APPEAL

M.M.O. KEIWUA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR