IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: KWACH, SHAH & BOSIRE JJ.A)
CIVIL APPEAL NO.234 OF 2000

AGNES NZALI MUTHOKA ..... APPELLANT

AND

INSURANCE COMPANY OF EAST AFRICA LTD ..... RESPONDENT

(Being an appeal from the ruling and order of the High Court of Kenya at Nairobi (Justice S. Amin) on 6th June 2000.
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JUDGMENT OF THE COURT

Agnes Nzali Muthoka is the named appellant but in actual fact she does not personally have any specific grievance against Insurance Company of East Africa Ltd., (the respondent). If anything it is her advocate, Nelson Kaburu, who is aggrieved by the decision of the superior court given on 6th June, 2000, in its Civil Case No.122 of 2000 in which that court (Sheikh Amin, J.) made an order requiring the respondent to settle its liability to the appellant and costs due to her said advocate by two cheques, one in the name of the appellant and the other in her advocate's name to cover his fTehees . respondent's liability to the appellant arose this way. The appellant , while in the employment of DWA Sisal Limited, was injured in an industrial accident. The said company had an insurance policy with the respondent for its employees who got injured at work. The appellant's injury was reported to that company which eventually agreed to pay the respondent a total of Kshs.116,400, which was inclusive of Kshs.10,000 as costs which was payable to her aforesaid advocate. The respondent made out two separate cheques, the first one for Kshs.106,400, in the name of the appellant, and the second one for Kshs.10,000/=, in the name of her advocate. Both cheques were sent to Mr Kaburu who on receipt of the same thought that the respondent improperly drew two cheques instead of one. He returned the cheques and demanded that the respondent make out one cheque for the total amount. The respondent declined to comply. Consequently, on the advice of Mr Kaburu, the appellant instituted a suit by plaint in the Chief Magistrate's Court, at Nairobi, seeking a declaration that her advocate was "the rightful person to receive the whole payment on her behalf as her agent", and in the alternative a declaration that payment should have been made as per her instructions on the discharge voucher dated 9th September, 1999, namely that payment be made to Nelson Kaburu Advocates, account number 0102180282700 at Standard Chartered Bank, Haile Selassie Avenue, Nairobi.

The respondent filed a written statement of defence and in it averred, inter alia that there was nothing legally wrong in making payment as they did, and that their decision to pay by two cheques was proper and equitable. But upon application by the appellant the defence was struck out under Order VI rule 13 of the Civil Procedure Rules and judgment was entered as prayed in the plaint. The respondent was aggrieved and lodged an appeal to the superior court.

Before the said appeal was admitted to hearing two applications were filed. The first one was by the respondent herein seeking a stay of execution of decree pending the final determination of the said appeal. The second one was by the appellant seeking an order striking out the appeal. Both applications were listed for hearing before Shaikh Amin J. on 6th June 2000. His record of the proceedings for that day is very short. We consider it important to reproduce the same.

> "Lumumba: application 30/5/2000. Stay of execution.
>
> Mr Kaburu: I want it to be paid in one cheque - Civil Appeal 15 of 1992. Pre-Kinyanyui decision therefore no longer a valid decision to be applied.
>
> Order: The amount is to be paid forthwith - 2 cheques.
>
> Leave to appeal granted.
>
> Shaik M. Amin.
>
> Judge."

As is clearly apparent the learned Judge did not render any decision on both applications. His decision disposed of the whole appeal and is the subject matter of the present appeal.

There are eight grounds of appeal. In summary they attack the manner in which the learned Judge dealt with the two applications, and more specifically, that the learned Judge instead of dealing with the two applications proceeded to determine the appeal itself, failed to keep a proper record of proceedings and also failed to give a reasoned ruling.

This appeal arose from interlocutory proceedings. Ordinarily this court would not express any concluded view on the dispute between the parties if it forms a distinct impression, as we do here, that the decision appealed from arose from unsatisfactory proceedings and adjudication as call for a direction for the rehearing of the matter by the court below. However, the issues raised by the present appeal are clearly intertwined with the merits or otherwise of the suit both before the subordinate court where it originated and also before the first appellate court from whose decision the present appeal arises. In view of the peculiar facts and circumstances of the case, and considering the immense hardship such a direction may cause to the appellant, who as we have already stated was not and is not aggrieved by the respondent's decision to pay by two cheques, we consider it imperative to conclusively deal with the dispute pursuant to the provisions of Section 3 of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya.

The appellant had a claim against the respondent arising from injuries sustained in an industrial accident. The claim having been settled out of court a suit for its recovery was thus avoided. The respondent made payment of the total damages agreed upon between counsel on both sides. The appellant's claim was thus settled. However, when the appellant's counsel returned the two cheques the respondent made out to settle its liability to the appellant it was not because the total amount of the two cheques fell short of the settlement amount or any other reason touching on liability, but because he thought he was denied the opportunity of recovering from the appellant costs which, in his view, he is entitled to recover from the appellant as advocate client costs. But that was not a matter the appellant was personally aggrieved about as to have necessitated a suit being filed in her name. She would gain nothing more by payment being made either directly to her or through her advocate by one or two cheques. In answer to a question we put to him, her counsel, Mr Kaburu, relying on the decision of this court in the case of Kenya Bus Services Ltd v. Susan Muteti (Civil Appeal No.15 of 1992) (unreported), stated that the suit was filed merely to protect a settled principle that where a party to a dispute is represented by counsel, payment to him should be made through the said counsel. That may well be so, but in the instant case Mr Kaburu was definitely wrong and insensitive to have advised the appellant to sue when none of her legal rights had been infringed. A period in excess of twelve months has elapsed since the cheques were returned by Mr Kaburu. The appellant has been kept out of her money for all that period of time because of this case. She will get no more than the amount of money agreed upon as damages. If anything

she will eventually lose part of the benefit it would provide.

We wish to observe that an advocate's position vis-a-vis his client is fiduciary in nature. Consequently he is obliged to act in the client's best interests. Mr Kaburu did not act in the best interests of the appellant when he commenced civil proceedings against the respondent merely to compel them to make payment by a single cheque. He knew that the suit was not for the benefit of the appellant yet when he obtained her consent to sue it is doubtful whether the consent was an informed one, because if that were so it is doubtful whether the appellant would have consciously agreed to be kept out of her money merely because her counsel was desirous of enforcing some legal principle. The position is made worse by the fact that under the Advocates Remuneration Order made under the Advocates Act, Cap 16 Laws of Kenya, an advocate is not entitled to any advocate-client costs where a dispute, as here, is settled between the parties otherwise than by suit. Clearly this is a case in which Mr Kaburu took advantage of his illiterate or semi-illiterate client. That is the conclusion we came to at the hearing of this appeal and hence the order we made then that the whole of the appellant's money be deposited by the respondent in this Court in her name, so as to be under the direct control of the Court.

Likewise the respondent acted improperly by gratuitously arrogating to itself the role of protector of the appellant's rights over the money which was due to her from it as damages. The negotiations which preceded the settlement between the parties were conducted by her advocate on her behalf and we think it was improper for the respondent to doubt the honesty of her counsel in concluding that he was unlikely to pass it on to her without any proper basis for doing so. Its action, to some degree provoked this unwarranted litigation.

In view of the conclusions we have come to, what is the appropriate order to make on the appeal?. Neither side won. It is however a triumph for justice. This appeal would have been avoided had the learned Judge of the superior court conducted the proceedings before him as the law requires him to do. By trying to short-circuit the rules of procedure he ended up doing injustice to the parties. It is elementary that a Judge has to hear parties, record down as fully as possible what they submit on, crystallize the issues, answer them as fully as possible and eventually hand down a decision. These, the learned Judge of the superior court failed to do.He gravely erred. This is a matter which, ordinarily would call for a retrial. However, as we stated earlier a retrial will serve only to increase costs and delay the payment to the appellant of the money justly due to her.

In the result we come to the conclusion that had the learned Judge made a determination of the two applications which were before him, he would have come to the conclusion that the respondent's appeal was frivolous and struck it out as the respondent lacked any proper basis for refusing to make out one cheque to the appellant's advocate. Like the appellant's counsel, they thus gravely erred.

We therefore allow the appeal vary the Judge's order by directing that the money due to the appellant be deposited in court. As we believe that has already been done pursuant to the order we made earlier in the appeal, we direct that the sum of Shs.106,400/= be paid over forthwith to the appellant personally. Her counsel should pursue his costs with the respondent.

Regarding the costs of this appeal and the proceedings before the subordinate and the first appellate courts the order that

commends itself to us is that the respondent shall bear its own costs while Mr Kaburu will bear the appellant's costs.

Dated and delivered at Nairobi this 23rd day of March 2001.

R.O. KWACH

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JUDGE OF APPEAL

A.B. SHAH
.....

JUDGE OF APPEAL

S.E.O. BOSIRE
.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR