



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT BUSIA**

**CIVIL APPEAL NO. 3 OF 2019**

**CORNELIA ATIENO BWIRE.....APPELLANT**

**= VERSUS =**

**MATHEWS TONADO OKECH.....RESPONDENT**

*(An appeal from the taxation of the Chief Magistrate at Busia delivered on 30/5/2019 by Hon. W. K. Chepseba)*

**J U D G E M E N T**

1. This appeal arises from the taxation of party and party costs by Hon. Chepseba CM on 30<sup>th</sup> May 2019 in Busia CMCC No. 9 of 2019. The appellant who was the plaintiff in the Court below raised the following grounds in her memo of appeal dated 18<sup>th</sup> June 2019;

*1) The learned Chief Magistrate erred in law in failing to hold that an advocate is only entitled to costs for the work done by advocate.*

*2) The learned Chief Magistrate erred in law in failing to rule on the issue of whether Mr. Okutta, having acted for both parties was competent to appear for the Respondent and earn a fee.*

*3) The learned Chief Magistrate erred in failing to address generally the objections raised by the Appellant to the Bill of Costs as contained in her Written Submissions.*

*4) That the learned Chief Magistrate erred in failing to notice that the Change of Advocates or Appointment of Advocates was filed with an eye to the Bill of Costs as out of Court negotiations had already commenced.*

*5) That since the learned Chief Magistrate erred in principle this Honourable Court has jurisdiction to interfere with the quantum.*

2. She urged the court to find merit in her appeal and enter judgment in her favour for orders that;

*(i) Appeal be allowed and Ruling of the Honourable Chief Magistrate be set aside.*

*(ii) This Honourable Court do retax the Bill of costs.*

*(iii) Respondent do pay the costs of this Appeal*

3. The Appellant relied on the submissions as filed. The Respondent opposed the appeal by filing a document titled **“Response to Appeal by Respondent”**. He also filed a four paragraph submission. In summary, the Respondent submits that the Appeal is incurably defective as the Appeal ought to have been brought by filing a reference. On merit of the Appeal, the Respondent submitted that there was undertaking on costs given by the Appellant’s counsel which undertaking is binding on all the parties thus this appeal lacks merit. He urged the court to dismiss the appeal with costs.

4. From the record, at page 30, the Respondent’s bill of costs was taxed at Kshs.113,785. The bill drawn by the Respondent asked for Kshs.163,885. In the honourable magistrate’s ruling, he noted the objection by the Appellant that the Respondent was not entitled to instructions fees. The magistrate in answering the question stated thus, **“However looking at the record, the advocate is on record having acted for the defendant and is therefore entitled to the bill on item 1; we shall tax off Kshs.42,500 on items 3, 4 & 9 and Kshs.2,000 on item 8”**.

5. In ground 1 of the Appeal, the Appellant states that the Advocate is only entitled to costs for the work done. There is on record a notice of appointment of advocate by the Respondent dated 12<sup>th</sup> February 2019 and later a notice of change of advocate filed by Ouma-Okutta &

Associates on 8<sup>th</sup> March 2019. The filing of these two documents before the plaintiffs' suit was withdrawn on 14<sup>th</sup> March 2019 entitled the Respondent's counsel to instructions fees which could only be forfeited by consent of the parties. It is not open to the Appellant to determine whether there was any work done by counsel since party and party costs is not the same as advocate-client bill of costs.

6. The question whether Mr. Okutta advocate was a material witness so he could not represent both the Appellant and the Respondent is a question that the Appellant would have taken if the matter was to proceed on merit. The learned magistrate could not determine such a substantive question during the taxation process where a suit was withdrawn. Neither can the same issue be determined in appeal challenging the costs awarded to a Respondent. The Appellant ought to have moved the lower court vide miscellaneous application to have the issue determined before the bill is taxed. However given there was a notice of appointment filed I reiterate that costs follow the events as stated in the proviso to Section 27(1) of the Civil Procedure Act which states thus "*provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.*"

7. In ground 3, the Appellant stated that the learned Chief Magistrate failed to address generally the objections she raised. I have already paraphrased the part of the ruling of the trial magistrate where he gave reasons why the Respondent's counsel was entitled to instructions fees. Secondly, Advocates fees chargeable are guided by the Advocates Remuneration Order. The Appellant has not pleaded that the amounts taxed were in excess of the amounts provided for under the scale of the Advocates Remuneration Order. Thus the ground raised lacks merit.

8. The last issue raised is that the learned Magistrate failed to notice that the Change of Advocate was filed with an eye on the Bill of Costs as out of court negotiations had already commenced. The proceedings in the Court below does not indicate that the parties intimated to the court that they were negotiating the matter. The Appellant did not endeavour to explain to this Court how the learned Magistrate would have known that the appointment of the advocate was intended to earn fees. Further nothing stopped the appellant from including the issue of settlement of costs in their negotiations. If there is any one to bear the blame for this omission it is the Appellant.

9. In light of the analysis I have given herein above, I find no merit in this Appeal. Consequently I proceed to dismiss it with costs to the Respondent.

**Dated, signed and delivered at BUSIA this 30<sup>th</sup> day of January 2020.**

**A. OMOLLO**

**JUDGE**