



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL APPEAL NO.11 OF 2017

(FORMERLY HCCA.53/2016)

(Appeal Originating from Nyahururu CM's Court Civ.No.195 of 2015 by: Hon. A.P. Ndege – S.R.M.)

HANNAH WANJIKU MUTURI.....1ST APPELLANT

MARY WANGUI.....2ND APPELLANT

- V E R S U S -

PAMOJA WOMEN DEVELOPMENT PROGRAMME.....DEFENDANT

R U L I N G

1. By summons dated 3/2/2020, the applicant/appellants seek orders that taxation of item 1 in Bill of Costs dated 28/6/2019 at Kshs.30,000/= be set aside and same be taxed at Kshs.300,000/= and that item 2 of the same Bill taxed at Kshs.15,000/= be set aside and taxed at Kshs.150,000/= . The same is based on order 11(1) and (2)A.R.O. It is supported by the grounds on the foot of the summons namely:

I. That the appellants being aggrieved by the ruling delivered on the 21/4/2015 at Nyahururu CMCC.195 of 2015 where their statement of defence was struck out filed an appeal against the decision and the same was allowed with costs on the 29/3/2019.

II. That the ruling on the appeal was to apply to Nyahururu CMCC.No.196 of 2015, 199 of 2015, 200 of 2015, 201 of 2015, 202 of 2015, 203 of 2015, 206 of 2015, 207 of 2015, 208 of 2015, 210 of 2015, 211 of 2015, 212 of 2015, 2013 of 2015 and 214 of 2015 where the statement of defence in the suit were struck out vide the impugned ruling delivered on the 21/4/2016.

III. That the applicant filed their bill of costs dated 28/6/2019 and on the 20/1/2020 item No1 on instructions fees was assessed at Kshs.30,000/= and setting up fees at Kshs.10,000/=.

IV. That the taxing master erred in assessing instructions fees based on the provisions of schedule 6(a) instead of Schedule 6(b) of the advocates remuneration Order.

V. That the instructions fees ought to have been based on the total amount brought in the suits affected by the appeal as follows:-

Ø Nyahururu CMCC No.195 of 2015 – Kshs.98,133.00

Ø Nyahururu CMCC No.196 of 2015 – Kshs.66,048.00

Ø Nyahururu CMCC No.199 of 2015 – Kshs.150,000.00

Ø Nyahururu CMCC No.200 of 2015 – Kshs.163,955.00

Ø Nyahururu CMCC No.201 of 2015 – Kshs.179,678.00

Ø Nyahururu CMCC No.202 of 2015 – Kshs.166,833.00

Ø Nyahururu CMCC No.196 of 2015 – Kshs.153,663.00

Ø Nyahururu CMCC No.196 of 2015 – Kshs.105,625.00

Ø Nyahururu CMCC No.196 of 2015 – Kshs.135,171.00

Ø Nyahururu CMCC No.196 of 2015 – Kshs.176,551.00

Ø Nyahururu CMCC No.196 of 2015 – Kshs.133,607.00

Ø Nyahururu CMCC No.196 of 2015 – Kshs.168,681.00

Ø Nyahururu CMCC No.196 of 2015 – Kshs.153,535.00

Ø Nyahururu CMCC No.196 of 2015 – Kshs.140,628.00

Ø Nyahururu CMCC No.196 of 2015 – Kshs.72,733.00

2. The application is also supported by affidavit of Waichungo Martin sworn on 3/2/2020 which reiterate same grounds.

3. In the record I did not find the respondent's affidavit however there are submissions by the both sides.

Applicant submissions:

4. The applicant submitted that, the trial magistrate erred in finding that the applicable law was scheduled 6(a). The suits in the lower court were liquidated claims where the value of the subject matter of the suits could be ascertained from the amounts sought for in the plaints filed by the Respondent.

5. Schedule 6(a) is applicable to claims where an appeal is not provided for in the Advocates Remuneration Order.

6. In the instant case, the fees for prosecuting the appeal is provided under paragraph 1(b) (page 290) of the advocates (Remuneration) (Amendment) Order 2014 as the value of the subject matter of the 15 suits involved in the appeal was Kshs.2,065,607/=. The appeal was opposed and the instructions fees therefore ought to be a sum of Kshs.141,312.14/= as per scale. The appeal proceeded to full hearing and we submit that the sum of Kshs.300,000/= sought for was reasonable.

7. The sum of Kshs.30,000/= awarded was way below the amount provided for under paragraph 1(b) of the Advocates Remuneration Order 2014 as the least instructions fees provided for to present an appeal for a sum of 0-Kshs.500,000/= is Kshs.75,000/=.

8. The appellants in this suit were sued for a sum of Kshs.98,133/=-.

9. The getting up fees should be adjusted upwards accordingly.

Respondent submissions:

10. The respondents submitted that, the Party and Party Bill of Costs subject of the instant matter, had been filed due to the Judge R.P.V. Wendoh awarding the costs of an appeal.

11. It is noted that the Appeal arose from a decision by Hon. A.P. Ndege where the appellants were the defendants in CMCC No.185 of 2015.

12. The appeal was granted setting aside the order of Hon. A.P. Ndege.

13. That the Judgment by the Judge in respect of the costs of the appeal stated as follows:

14. Order[; *"The Respondents will bear the cost of this appeal"*

15. In page 2 of the Ruling of the Hon. A.P. Ndege (attached) dated 20/1/2020 the court found that the applicable law was scheduled 6(a), which provided that: -1 *"To present or oppose an appeal in any case not provided above, such sum as may be reasonable but not less than Kshs.25,200/=-."*

16. The main ground relied by the appellant in their application herein is that the Hon. A.P. Ndege applied schedule 6(a) and therefore erred in assessing instructions fees instead of applying schedule 6(b) of the Advocates Remuneration Order 2014.

17. It should be noted that the Respondent herein Pamoja Women Development Programme filed a plaint against the appellants at Nyahururu Lower Court seeking judgment against them jointly and severally for:-

Ø The sum of Kshs.98,133/=-

Ø Interest thereon at court rates

Ø *Costs of this suit*

Ø *Such further or other relief as this Court may deem just to grant*

18. This suit was filed as Civil Case No.195 of 2015 at Nyahururu Law Courts. The Respondent herein had also filed other suits against other different debtors in separate actions and when the suit came up for hearing before the presiding Magistrate, the court directed that CMCC No.195 of 2015 be the same Test Suit since the circumstances under which the debts arose were the same, the facts were the same and the plaintiff was the same.

19. The respondent herein on 20th January, 2016 filed Notice of Motion seeking to struck out Defence by the defendants in CMCC No.195 of 2015 which was granted on 21st April, 2016 (annexed is the Order).

20. The applicants herein who were the defendants in CMCC No.195 of 2015 appealed in HCCA No.11 of 2017 against the Judgment of Hon. A.P. Ndege.

21. The appeal was granted by Justice R.P.V. Wendoh on 29th March, 2019 setting aside the order of Hon. A.P. Ndege.

22. It was the costs against the Respondent in that one suit where the amount demanded is specifically the sum of Kshs.98,133/= that is the upshot of this Reference by the appellants.

23. The appellants in their Reference herein were demanding the sum of Kshs.300,000/= based on 15 suits instead of one suit CMCC No.195 of 2015 whose costs was awarded to the appellants in their appeal.

24. Respondent submitted that, if the taxation should be based on Schedule 6(b) instead of Schedule 6(a) of the Remuneration (Amendment) Order 2014 then the value of the subject matter of the Test Suit in the appeal should be Kshs.98,133/= and Not Kshs.2,065,607/= as alleged herein by the appellants.

25. The instructions fees taxed in item number 1 should therefore be less than Kshs.75,000/=. The getting up fees as per item 2 should be 1/3 of the Kshs.75,000/= Kshs.25,000/=.

26. The total amount taxed should not exceed Kshs.100,000/=.

27. However, it should be noted that the Bill of Costs and subsequent reference by the appellants herein is premature and should wait finalization of suit CMCC.No.195 of 2015 which was remitted back for hearing by the Appeal Judge Justice R.P.V. Wendoh on 29th March, 2019.

ISSUES ANALYSIS AND DETERMINATION

28. After perusing the record, pleadings and the submissions, I find the issues are; whether the appeal on taxation has merit? And what is the orders as to costs?

29. The appellants had filed a Party and Party Bill of Costs dated 28/6/2019 where the appellants had sought a total sum of Kshs.557,550/=. The Bill was argued through Written Submissions in a Ruling delivered on 20/1/2020 the taxing master awarded a sum of Kshs.86,600/= and a Certificate of Costs was issued to that effect.

30. The advocate then filed a Reference on 3/2/2020 seeking to set aside the decision of the Taxing Master of the Ruling delivered on the Bill of Costs on 21/1/2020 seeking the following orders:

31. That the taxation of the item 1 of the Bill of Cost dated 28/6/2019 at Kshs.30,000/= be set aside and the same be taxed at Kshs.300,000/=.

32. That the Taxation of items 2 of the Bill of Costs dated 28/6/2019 at Kshs.15,000/= be set aside the same be taxed at Kshs.150,000/=.

33. The Party and Party Bill of Costs aforesaid had been filed due to the Honourable Judge R.P.V. Wendoh awarding the costs of that appeal.

34. It is be noted that the Appeal arose from a decision by Hon. A.P. Ndege where the appellants were the defendants in CMCC No.195 of 2015.

35. The appeal was granted setting aside the order of Hon. A.P. Ndege.

36. That the Judgment by the Judge in respect of the costs of the appeal stated as follows:

37. Order; *"The Respondents will bear the cost of this appeal"*

38. In page 2 of the Ruling of the Hon. A.P. Ndege (attached) dated 20/1/2020 the court found that the applicable law was scheduled 6(a), which provided that: *"To present or oppose an appeal in any case not provided above, such sum as may be reasonable but not less than Kshs.25,200/="*.

39. The main ground relied by the appellant in their application herein is that the Hon. A.P. Ndege applied schedule 6(a) and therefore erred in assessing instructions fees instead of applying schedule 6(b) of the Advocates Remuneration Order 2014. Which states that, ".... to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgment or settlement between the parties and—That value exceeds But does not exceed;

Ø Kshs. Kshs. Kshs.

Ø 500,000 75,000

Ø 500,000 750,000 90,000

Ø 750,000 1,000,000 120,000

Ø 1,000,000 20,000,000 fees as for Kshs.1,000,000 plus an

Ø additional 2%.

Ø Over 20,000,000 Fees as for 20,000,000 plus an additional 1.5%.

40. It should be noted that the Respondent herein Pamoja Women Development Programme filed a plaint against the appellants at Nyahururu Lower Court seeking judgment against them jointly and severally for:-

a) The sum of Kshs.98,133/=

b) Interest thereon at court rates

c) Costs of this suit

d) Such further or other relief as this Honourable Court may deem just to grant

41. This suit was filed as Civil Case No.195 of 2015 at Nyahururu Law Courts. The Respondent herein had also filed other suits against other different debtors in separate actions and when the suit came up for hearing before the presiding Magistrate, the court directed that CMCC No.195 of 2015 be the Test Suit since the circumstances under which the debts arose were the same, the facts were the same and the plaintiff was the same.

42. The respondent herein on 20th January, 2016 filed Notice of Motion seeking to struck out Defence by the defendants in CMCC No.195 of 2015 which was granted on 21st April, 2016.

43. The applicants herein who were the defendants in CMCC No.195 of 2015 appealed in HCCA No.11 of 2017 against the Judgment of Hon. A.P. Ndege. The appeal was impugning the order striking out the defence thus not an appeal where the value of the subject matter could be determined from the pleadings, judgment or settlement between the parties in appeal thus the trial magistrate/taxing officer was correct on applying the provisions of Rule 6(a) of schedule 6 of ARO. The award of ksh 30,000 and getting up for trial ksh 10,000/= was in in-line with the cited provisions and reasonable in the circumstances of the case.

44. The bill was not for all the parties in the cases where the order of reinstatement of defences was to apply. It was costs for the parties in the HCA 11 of 2017. It matters not the suit no 195 of 2015 was a test suit.

45. Thus the court makes the following Orders;

(i) The appeal/application is dismissed with costs to the respondent assessed at ksh 10,000.

Dated, Signed and Delivered at NYAHURURU this 24TH day of NOVEMBER , 2020.

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CHARLES KARIUKI

JUDGE

PRESENT:

Henry Court Assistant

Waichungo for Applicant

N/A for Respondent