

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.58 OF 2013

MILLING CO-OPERATION OF KENYA(2009) LIMITED.APPELLANT/RESPONDENT

VERSES

SAMUEL MUCHAI NJUGUNA T/A WAMU STORES.....1ST RESPONDENT

RAHAB WAMBUI T/A WAMU STORES.....2ND RESPONDENT

FRANCIS MURIUKI MURAGURI T/A LUSOI STORES.....3RD RESPONDENT

RULING

1. The applicants chamber summons dated **29th October 2020** simply prays that this court does set aside the Deputy Registrar of this courts orders dated **13th October 2020** in which she gave instruction fees of Kshs. 30,000 to the applicant instead of Kshs106,340 as per the pleadings in the court record.

2. The application which is essentially a reference is supported by the affidavit of Michael Kanyi Ngure, counsel for the 3rd respondent. The same is not opposed.

3. As can be deduced from the said affidavit it is evident that the appeal herein was dismissed for want of prosecution and in particular when the applicant failed to process the same. The court granted it a chance on 28th January 2019 but it failed to meet the dateline. The application to reinstate was equally dismissed.

4. The bill of costs was taxed and the taxing master under item 1, instruction fees, awarded the applicant Kshs. 30,000 which in the opinion of the applicant was erroneous taking into consideration that the amount pleaded in the plaint was specific namely Kshs. 2,956,000. The instruction fees would have been 106,340 per the **Advocates Remuneration Order 2009**.

5. The court upon perusing the pleadings herein as well as the application and the bill of costs agrees with the applicant. The matter however was not determined in terms of the appeal being heard fully but was dismissed on a technicality.

6. In the premises one cannot argue that the applicant strictly laboured as though it was in a full trial. The courts have the discretion now of assessing the extent of the man hours and research involved in defending or prosecuting the appeal. The award must be commensurate to the work involved as much as possible. In other words, it should not burden the losing party and chase it from the sit of justice. It must also not enrich the winning party especially in a matter such as this where the suit was dismissed for want of prosecution.

7. This must have been in the minds of the legislators when they enacted **Schedule 6 (1) (b) of the Remuneration Order** which states that;

“To sue or defend in a suit in which the suit is determined in a summary manner in any manner whatsoever without going to full trial the fee shall be 75% of the fees chargeable under item 1(b).”

8. Taking the totality of the above reasoning, the instruction fees of **Kshs. 79,755** shall be an appropriate compensation to the applicant in the circumstances. The award of Kshs, 30,000 by the taxing master is hereby set aside and substituted with the above sum of Kshs, 79,755

9. The total bill is hereby taxed **Kshs. 147,352**

10. The costs of this application shall be in the cause.

Dated at Nakuru this 17th day of December 2020.

H. K. CHEMITEI

JUDGE