



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
HIGH COURT CIVIL CASE NO. 359 OF 2013

ISAAC NDUNGU KIGURU.....1ST PLAINTIFF/APPLICANT

JULIUS MUTUTA.....2ND PLAINTIFF/ APPLICANT

VERSUS

NEWTON SIELE.....1ST DEFENDANT/RESPONDENT

DORCAS TOO.....2ND DEFENDANT/RESPONDENT

MAHAT SARA.....3RD DEFENDANT/RESPONDENT

(Sued as officials of Kenya Pharmaceutical Association)

R U L I N G

1. The application dated 20th March 2015 is brought under Section 1A,1B, 3A, 63(e) of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules and Part V11 and V111 of the Advocates (Remuneration) Order. It seeks the following orders:

"1.(spent)

2. **THAT there be a stay of the intended taxation of party to party costs pending the hearing and determination of this application.**

3. **THAT the firm of Kinyanjui & Njau advocates be ordered to bear the entire party and party costs of the suit and this application as well.**

4. **THAT the applicants/ plaintiff be awarded costs of this application ."**

2. The background facts to the application is a ruling delivered on 3rd April, 2014 striking out the plaint herein with costs. The ruling was in respect of a preliminary objection raised by the Defendant based on the issue in regard to whether the plaintiff's Advocates were qualified to file suit. Subsequent to the said ruling, the Respondent's filed a party and party bill of costs which is pending taxation. The Applicants swore two affidavits in support of their application. According to the Applicants, their former advocates, that is the firm of Kinyanjui & Njau Advocates, ought to personally bear the costs in question. The Applicants have further averred they are innocent of any wrong doing as they did not know that their

former advocates were unqualified and urged the court not to visit the mistakes of the advocate on them.

3. The application is opposed to as per the replying affidavit (undated) filed on 1st July 2015. The Respondents' deponed that party and party costs are borne by the losing litigant and not their advocate regardless of the reasons for awarding costs. That if the court's intention were that the Applicants' former advocates were the one's to meet the costs, that would have been unequivocally stated in the ruling. They averred that they served the applicants with demand for costs after they discovered that the firm of **Kinyanjui & Njau Advocates** had closed shop and ceased operations as a law firm. They further deponed that they will be denied the fruits of justice and unjustly condemned to chasing ghosts.

4. The Respondents have further contended that it would be against the rules of natural justice to grant the orders sought by the applicants since the law firm of **Kinyanjui & Njau Advocates** has not been served with the application. They asserted that the onus is on the litigants to find out the registration status of the lawyers they retain since the information is publicly and easily available. That in any event, the Applicants have other avenues for redress from the unqualified advocates.

5. I have considered the application and the facts as deponed by the parties in the supporting, replying and supplementary affidavits. I have also taken into consideration the submissions of the parties.

6. The Applicants instituted this suit against the Respondents. They were represented by a firm of advocates known as Kinyanjui & Njau Advocates. The suit was dismissed following a preliminary objection that was raised by the Respondents to the effect that the advocates on record for the applicants had not taken out a practicing certificate in accordance with section 9 and 34 of the Advocates Act. The bone of contention is who should bear costs between the applicants and their advocate.

7. The question of costs is governed by Section 27 of the Civil Procedure Act which stipulates as follows:

"27. "(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid;

and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

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.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

8. Costs therefore follow the event. As stated by the Supreme court in the case of **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR:-**

"It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs."

9. Whereas in the case at hand the Applicants were ordered to bear the costs of the suit, they argue that they are innocent litigants who are victims of circumstances. However, it is noted that the firm of Kinyanjui & Njau Advocates are not a party to this application. It would offend the rules of natural justice to condemn them unheard. Faced with a similar situation in the case of **Ngomeni Swimmers Limited v Katana Chara Suleiman [2014] eKLR**, the Court of appeal stated as follows:-

" the record does not show that such Notice was given calling upon such counsel to show cause why a wasted costs order should be made against him for his misconduct. Therefore the order was made unilaterally which was wrong. Much as it was in the discretion of the court to make such order, we feel that discretion was exercised rather whimsically as the appellant's counsel was condemned unheard."

10. The Applicant is not left without any redress. The ruling dated and delivered on 3rd April, 2014 by Hon. D. A. Onyancha, J observed as follows:-

"As I also stated in the same case, where striking out leads to injury to the party whose case is struck out, the remedy to such party lay either in starting the suit afresh or in seeking leave to file the suit out of time if time barred, or in the last resort, filing a suit against the erring advocate on the basis of professional negligence or other similar remedies. In my view the question as to the competence of an advocate on record at the time for filing the suit, goes to the root of the validity and competency of the pleadings or documents drawn by him."

11. Turning to the issue of the mistakes of the Applicants' former advocates, the said advocates were appointed by the Applicants. The mistake of the Applicants' Advocates cannot be visited on the Respondents through granting the stay orders sought.

12. With the foregoing, this court finds no merits in the application and the same is hereby dismissed with costs.

Dated, signed and delivered at Nairobi this 17th day of Nov.,2016

B.THURANIRA JADEN

JUDGE