



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
HCCC NO. 847 OF 2005

GRACE WANGUI NGENYE.....PLAINTIFF

VERSUS

WILFRED KIBORO.....1ST DEFENDANT

NATION MEDIA GROUP LIMITED.....2ND DEFENDANT

AS CONSOLIDATED WITH

HCCC NO. 1008 OF 2005

GRACE WANGUI NGENYE.....PLAINTIFF

VERSUS

WILFRED KIBORO.....1ST DEFENDANT

NNATION MEDIA GROUP LIMITED.....2ND DEFENDANT

RULING

The application before this Court for determination is the chamber summons dated 5th December 2012 brought under Rule 11 (2) of the Advocates Remuneration Order 2009 seeking for the orders that :-

1. The master’s finding and decision dated 8th November 2012 awarding instruction fees in both HCCC 847 and 1008 of 2005 be set aside.
2. The Taxing master’s decision of 8th November 2012 awarding getting up fees in both HCCC 847 and 1008 of 2005 be set aside.
3. The court do set aside the taxation rulings both in 847 and 1008of 2005 dated 8th November 2012 awarding Kshs 250,000:00 as instruction fees and Kshs 83,333:30 as getting up fees for each of the above matters be and is hereby set aside.
4. The bills of costs lodged by the plaintiff in both HCCC No 847 and 1008 of 2005 be referred back to a different taxing officer for taxation.
5. In the alternative the court do make an appropriately reduced award in the place of instruction fees and getting up fees as awarded by the taxing master in his rulings of 8th November 2012 or give appropriate directions as to the taxing of the subject bills by another taxing master.

The application is premised on the grounds and the supporting affidavit of Sekou Owino deponed on 5th

December 2012. He avers that he is the legal officer of the defendant. That a joint judgment was delivered on 21st June 2010 by Rawal J. as she then was awarding the plaintiff an all-inclusive sum of Kshs. 3,500,000/= comprising Kshs. 2,000,000/= as general damages and Kshs. 1,500,000/= as aggravated damages. That the plaintiff filed two separate bills for taxation in relation to party and party costs in respect to both suits and the taxing master awarded Kshs. 250,000/= as instruction fees each and Kshs. 83,333.30/= as getting up fees for each suit totalling a figure of Kshs. 666,666.60/=. He deposes that he believes that the taxing master erred in awarding instruction fees in both cases the same having been consolidated and heard together. He further states that the taxing master made a substantial error in his calculation of instruction fees by basing his assessment on Kshs 3,500,000/= in both cases yet this was the global sum awarded for both cases. He states that the taxing master proceeded on an erroneous assumption that the Court had awarded Kshs 3,500,000/= in each case. That the scale fee for Kshs 3,500,000/= is Kshs 114,500/= and that he took in irrelevant considerations in enhancing instruction fees from Kshs 114,500/= to Kshs 250,000/= which were:-

- a. The importance of the plaintiff
- b. The threat of the defendant's publications and actions to the plaintiff's career and livelihood.

He believes that the anguish suffered by the plaintiff was adequately compensated by the award of damages and the same cannot be the basis for enhancing costs payable to the plaintiff. That both cases were on defamation, the respective defences were struck out and the suit proceeded to hearing for assessment of damage. The issue of complexity does not therefore arise. That the award of Kshs 250,000/= is excessively high and will have the effect of affecting the defendant's right to access to justice and this is so because the same figure is awarded in both suits thereby increasing the instruction fees payable to an award of Ksh 3,500,000/= to Kshs 500,000/=. That since the suit was consolidated, the plaintiff called the same witnesses and tendered the same evidence and the preparation of the evidence was more or less the same and it was therefore erroneous for the taxing master to award getting up fees in both cases.

In response the Respondent Grace Wangui Ngenye swore a Replying Affidavit on 1st February 2013 in which she stated that the court entered judgment in her favour against the defendant in the sum of Kshs 2,000,000/= in general damages and Kshs 1,500,000/= in aggravated damages, costs and interest thereon on 21st June 2010 for both suits that had been filed. Thereafter the applicants filed an application for stay of execution which they later withdrew on 28th March 2011 which gave way to the compiling and filing of the party and party bill of costs which was taxed and a ruling given on 8th November 2012. She states that the taxing master was fairly balanced in the manner he taxed all the items of the bill of cost. That the getting up fees awarded in both cases was well deserved as the suits were materially different one grounded on the print media and the other on a story in the electronic media and evidence adduced by the witnesses were different. That each suit filed differently attracted distinct instructions and getting up fees are rightly awarded by the taxing master. That each of the cases were supported by different witnesses documents/exhibits and authorities as the proceedings would bear out and the preparations must therefore have been different. That the award by the taxing master was Kshs 638,881.30 and not Kshs 666,666.60. She states that the taxing master is entitled and allowed some latitude in looking at the bill of costs during taxation and may exercise some discretion which in this case was exercised cautiously, conservatively and judiciously without prejudicing the defendant. That the consolidation was done solely for the purposes of writing, ruling and this fact is clearly stated on the face of the ruling of the Hon Lady Justice Nambuye. That each application was argued separately but the honourable judge only consolidated the files for purposes of writing the ruling. That in the circumstances the applicant is not truthful and is misleading the court in indicating that costs should only be charged on one file. Therefore in the circumstances the award of the taxing master should not be disturbed as the same is not so inordinately high as to warrant interference by this honourable court especially considering that the written submissions had sought an award of Kshs 19,000,000/= in each of the suits and that should indeed have been the basis of the instruction fees.

Parties appeared before me on 13th March 2013 and made submissions. Parties reiterated the contents of the pleadings filed. I have considered the submission and the authorities the parties have used to support

their reasons. The issues for determination before me are:-

1. Whether the decision of the taxing master to award instruction fees in both HCCC 847 and 1008 of 2005 be set aside on the grounds that the two suits had been consolidated.
2. Whether getting up fees should be set aside having been taxed twice yet there was consent by the parties to consolidate the suit.

I have read through the ruling delivered on 3rd July 2009 that struck out the defences of both suits, HCCC NO.847 of 2005 and HCCC NO. 1008 of 2005 and note that the suits were not consolidated. Subsequently at the hearing on the 9th February 2010, the suits were consolidated. From the court record the plaintiff gave evidence and called 5 witnesses who testified during the hearing. There was a joint general award of Kshs 2,000,000/= and aggravated damages of Kshs 1,500,000/=. I also note that at paragraph 3 of page 32 of the judgment delivered on 21st June 2010 by Rawal J. as she then was, she ordered that **“Costs of both the cases be paid to the plaintiff”**. In my view the plaintiff was entitled to costs of both suits but I must bear in mind that the parties recorded consent that the suits be consolidated for purposes of the hearing. In Judicial Hints on Civil Procedure 2nd Edition by Kuloba J. it was stated that **“where suits or appeals are consolidated there should be an apportionment of costs including the instruction fees. The advocates for the parties cannot expect to be paid twice over the same work because he has won three actions”**.

I hold the view that costs of consolidated suits should be apportioned when it comes to instruction fees. The taxing master awarded instruction fees on the basis of the award of Kshs 3,500,000/= on each suit which in essence amounted to Kshs 7,000,000/= and in so doing he paid the plaintiff twice the award given by the judge and in my view this would amount to unjust enrichment bearing in mind that the suits were consolidated. I therefore set aside the taxing master’s finding and decision in awarding instruction fees in both suits at Kshs 3,500,000/= on each suit and direct that the instruction fees be taxed on the award of Kshs 3,500,000/=to be apportioned to both suits as Rawal J gave costs for both suits. On getting up fees since counsel prepared for the hearing for one suit after the consolidation this item should be taxed once. I note that the taxing master went out of his way in considering extraneous matters in awarding instruction fees. What he considered were views that should have been expressed during the trial. The Advocate’s Remuneration order allows the taxing master when considering instruction fees to consider the nature or importance of the matter, the amount or value of the subject matter involved, the interest of the parties, complexity of the matter and all circumstances of the case. In this matter Rawal J gave an award of Kshs 3,500,000/= which in my view was the amount to be considered when taxing these bills of costs. The taxing master therefore misdirected himself in considering the status of the plaintiff to the extent that he did, yet the same had been extensively considered in the judgement of Rawal J.

I therefore grant prayers 2, 3 and 4 of the application dated 5th December 2012 are granted. I have given directions on how the bill of costs should be taxed. Each party to bear its own costs.

Orders accordingly.

Dated, signed and delivered this 22nd Day of May 2013.

R.E OUGO

JUDGE

In the Presence of:-

.....Plaintiff/Respondent

.....Defendants/Applicants

.....Court clerk