

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL CASE 39 OF 2010

ANDREW O. NYANGWESOAPPELLANT

VERSUS

1. ALLOYS BARASA

2. OYE ASHIOYA T/A ASHIOYA & CO. ADV.

**3. EMMANUEL OTIANGALA T/A
KURONYA AUCTIONEERSRESPONDENTS**

R U L I N G

On 29th February, 2012, the appeal that by the appellant filed was dismissed by Muchemi J. The court awarded costs of the appeal and of the suit before the lower court to the respondents. The respondents presented their bill of costs to the Deputy Registrar of this court for assessment. The bill was filed on 4th March 2012. On 5th June 2012, the respondents' counsel appeared before the Deputy Registrar and sought to be given a date for the taxation of the respondent's party to party bill of costs. The assessment was fixed for 19th June 2012. According to the respondents, they served the appellant with a notice of taxation on 11th June 2012. An affidavit of service sworn by Richard Musachi, a process server, was filed in court. The said process server swore that he had served the appellant at his offices situate at Younear Building, ground floor, along Busia – Kisumu road. The process server deponed that although the appellant accepted service, he declined to sign on the copy of the notice of taxation.

On 19th June 2012, the bill of costs of the respondents was assessed in the absence of the appellant. The court reserved its ruling for the 17th July 2012. On that day, the Deputy Registrar of the court delivered his ruling assessing the respondents' costs of the suit at kshs.51,100/=. Meanwhile, on 3rd April 2012, the appellant filed a notice of motion pursuant to the Provisions of **Order 41 Rule 4** of the **Civil Procedure Rules** seeking to have the assessment of the respondents' bill of costs stayed pending the hearing and determination of an appeal which the appellant claimed to have lodged before the Court of Appeal at Kisumu. The application was not heard by the court until on 23rd July 2012 when the appellant filed a certificate of urgency. On that day, this court certified the application urgent. It directed the appellant to serve the respondents with the application for hearing on 26th July 2012. Upon being served, the respondents filed a statement of grounds of opposition. In the said grounds of opposition, the respondents argued that the application was incompetent, frivolous and filed in abuse of the known procedure of the court. The respondents contend that the appellant could only challenge the decision of the Deputy Registrar in assessing the respondents' costs by filing a reference to this court.

On 26th July 2012, this court heard oral rival submission made by the appellant, who was acting in person and by Mr. Ipapu, the advocate of the respondents. This court has carefully considered the said submission. It has also read the pleadings filed by the parties herein in support of their respective opposing positions. The appellant acts in person. It was apparent from the manner in which the appellant filed his pleadings in this appeal, that he should have sought professional legal advice. Unfortunately, the appellant thinks that he knows the law and that the judicial officers to whom he presents his case are biased against him for one reason or the other. In the present application, the appellant deponed that one of the Deputy Registrars of this court, being a friend of one of the respondents (who happens to be an advocate of the High Court of Kenya and a practitioner in Busia town) had made decisions against

him. This court carefully perused the file and observed that the allegation made by the appellant had no foundation.

So what is the issue for determination in this application? The appeal filed by the appellant was dismissed. The appellant was aggrieved and told the court that he had filed an appeal against the said decision to the Court of Appeal sitting at Kisumu. Meanwhile, the appellant sought to stay the taxation of the respondents' bill of costs pending the hearing of the said appeal. To succeed in his application, the appellant was required to establish that he would suffer substantial loss if the said bill of costs is taxed. The appellant was also required to provide security for costs for this court to stay the said taxation.

In his oral submission, the appellant took issue with the fact that the Deputy Registrar of this Court had assessed the respondents' bill of costs in his absence. He submitted that he had not been served with the notice of taxation as claimed by the respondents. On their part, the respondents' submitted that the appellant was properly served and therefore the Deputy Registrar was within his mandate to assess the respondents' costs in the absence of the appellant. The respondents' further argued that if the appellant was aggrieved by the decision, he ought to have filed a reference to this court instead of filing an appeal to the Court of Appeal.

The appellant did not persuade this court that he would suffer substantial loss if the respondents' proceeded to assess their costs. If the appellant succeeds in his appeal before the Court of Appeal, the respondents will be compelled to refund the sum that they would have been paid by the appellant. In that regard, the appellant's application for stay of taxation fails.

As stated earlier in this ruling, the appellant would have benefited from legal advice on the procedure to follow after his appeal was dismissed. However, the appellant is within his constitutional rights to agitate his case without the benefit of such legal advice. Having considered the appellant's application, it was clear to this court that the appellant's real grievance is that the respondents' bill of costs was assessed in his absence. This court will invoke its inherent jurisdiction and set aside the ex parte assessment of the respondents' bill of costs so that the appellant will be given the opportunity to participate in the taxation. The parties to this application will be required to appear at the registry today to fix the date for the assessment of the respondents' bill of costs. There shall be no orders as to costs.

DATED AT BUSIA THIS 31ST DAY OF JULY 2012.

L. KIMARU
J U D G E