



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 914 of 1994

1. SOLOLO OUTLETS LTD

2. CYPERR PROJECTS INTERNATIONAL LTD

3. CYPERR ENTERPRISES LTD

4. S. K. JIRONGO.....PLAINTIFFS

V E R S U S

1. THE NSSF BOARD OF TRUSTEES

2. POSTBANK CREDIT LTD

3. DEPOSIT PROTECTION FUND BOARD

4. EWAN ALEXANDER DAVIDSON

5. DAVID MUTISYADEFENDANTS

R U L I N G

There has been considerable delay in the preparation and delivery of this ruling. The same was caused by an oversight and is regretted.

The 1st Defendant herein, the **NSSF BOARD OF TRUSTEES**, has applied by **chamber summons dated 21st April, 2008** seeking the following main orders:-

- “(a) ...
- (b) **That this...court be pleaded to vary and/or set aside its order of 13th February, 2008 entering judgment on costs against the 1st defendant and all consequential orders, including the certificate of costs dated 28th February, 2008, the decree issued thereof as well as the warrants of execution dated 2nd April, 2008.**
- (c) **That the issue as to whether any costs are payable to the plaintiffs arising out of the suit and/or counterclaim, and if so how much, be heard on merits.**
- (d) ...
- (e) **That the 1st defendant be granted unconditional leave to defend any claim for costs by the plaintiff arising out of HCCC NO. 914 OF 1994.**
- (f)”

The application is stated to be brought under **paragraph 11** of the **Advocates (Remuneration) Order** (the **Remuneration Order**), and also under **section 3A** of the **Civil Procedure Act, Cap 21** (the **Act**). There is a lengthy supporting affidavit annexed to the application. The Plaintiffs have opposed the application by an equally lengthy replying affidavit. There is a further affidavit filed by the 1st Defendant in response to the replying affidavit.

The parties have in their affidavits given a history of the dispute, though in certain aspects the histories given by them differ. But I have perused the court record for myself. The following is the back-ground of the present application.

The Plaintiffs filed suit against the Defendants and claimed, *inter alia*, the sum of KShs 2.5 billion. The 1st Defendant filed defence denying liability. It also counterclaimed the sum of KShs 1,970,859,953/00.

Pursuant to application by the Defendants, the court (Shah, J as he then was) in a **ruling delivered on 5th September, 1994** ordered that-

“...this suit be stayed with leave to the plaintiffs to file proper, separate suits and on terms that the plaintiffs do pay the defendants costs of this suit...”.

The 1st Defendant interpreted this order to mean that it had been awarded costs on both the Plaintiffs’ suit and on its own counterclaim, and it drew its bill of costs accordingly. When the bill came up for taxation the Plaintiffs gave their interpretation of the order of 5th September 1994 as that costs had been awarded only upon the Plaintiffs’ suit and not upon the counterclaim as well, which counterclaim, in their view, had not been disposed of.

The 1st and 4th Plaintiffs had in the meantime applied by **notice of motion dated 27th August, 2004** seeking dismissal of the 1st Defendant’s counterclaim for want of prosecution. This application was subsequently overtaken by the 1st Defendant’s action of discontinuing its counterclaim by **notice of discontinuance dated 18th December, 1997** under **Order 24, rule 1** of the Rules. The taxing

officer then, correctly, and by an order made on 10th December 2004, directed the parties to place the matter before a judge for interpretation of the order of 5th September, 1994.

The matter was placed before Ransley, J on 27th January, 2005 who ruled as follows:-

“...It would be unreasonable to keep the Defendant out of the costs awarded to it until the disposal of an application to strike out the counterclaim has been heard. What the Defendant is now entitled to are its costs for defending this suit up until the date when the suit was stayed. As costs arising from the counterclaim can be dealt with later and after the disposal of the counterclaim either in this suit or the further suit which has yet to be heard, I order the bill to proceed in accordance with my directions....”

Ransley, J therefore seemed to agree with the Plaintiffs that the order of 5th September, 1994 did not award the 1st Defendant costs on its counterclaim, which counterclaim was yet to be disposed of.

Taxation of the 1st Defendant's bill of costs subsequently proceeded upon this basis. It was taxed at KShs 1,059,145/00, and the Plaintiffs paid this sum.

On 14th February, 2008 the 1st Plaintiff applied under **Order 24, rule 3** of the Rules for judgment for costs of the 1st Defendant's counterclaim. Such judgment for costs was entered on 20th February, 2008. A certificate for costs under **paragraph 68A** of the Remuneration Order for the sum of KShs 19,735,129/50 was issued on 10th March, 2008. The Plaintiffs then moved to execute the decree for those costs against the 1st Defendant, thus provoking the present application.

The 1st Defendant's case in this application is, briefly, that no costs were awarded to the Plaintiffs upon the counterclaim and that therefore the deputy registrar erred in issuing a certificate for costs upon the counterclaim in the sum of KShs 19,735,129/50 under paragraph 68A of the Remuneration Order in favour of the Plaintiffs. It is the 1st Defendant's further case that the issue of costs upon the counterclaim was a highly contentious one and the deputy registrar should not have assessed the same *ex parte* the 1st Defendant under paragraph 68A aforesaid. In any event, maintains the 1st Defendant despite the ruling of Ransley, J of 27th January 2005, Shah, J had awarded to the 1st Defendant costs for the entire suit, including the counterclaim, and the Plaintiffs were never awarded any costs.

For the Plaintiffs it is submitted that Shah, J never awarded costs upon the counterclaim, which remained on record undisposed of after the order of 5th September, 1994. This position was reinforced by the ruling of Ransley, J of 27th January 2005. The 1st Defendant accepted this position as exemplified by the manner in which it proceeded with taxation of its bill of costs; it abandoned its claims of costs of the counterclaim. More importantly, further submitted the Plaintiffs, the 1st Defendant subsequently discontinued the counter-claim under Order 24, rule 1 of the Rules. The Plaintiffs thus properly and lawfully sought judgment for costs under Order 24, rule 3 of the Rules. Such judgment was properly entered and a certificate for costs properly issued under paragraph 68A of the Remuneration Order.

Those then are the rival positions taken by the parties to this application.

It is quite clear that the order of Shah, J delivered on 5th September 1994 stayed only the Plaintiffs' suit to enable them to file proper and separate suits against the Defendants. It did not stay the 1st Defendant's counterclaim. The costs awarded to the Defendants against the Plaintiffs were thus in respect to the Plaintiffs' suit only, not the entire suit inclusive of the counterclaim. The counterclaim was

not disposed of by the ruling of 5th September, 1994. The ruling of Ransley, J of 27th January, 2005 so interpreted the ruling of 5th September 1994, and there was no appeal against that interpretation.

The 1st Defendant accepted this position as interpreted by Ransley, J. That is why it proceeded to tax its costs as related only to the Plaintiffs' suit, and not upon its own counterclaim. The 1st Defendant subsequently discontinued the counterclaim by notice of discontinuance under Order 24, rule 1 of the Rules. Why would it have discontinued the counterclaim if it had been disposed of by the ruling of Shah, J of 5th September, 1994?

The counterclaim having been discontinued, the Plaintiffs were entitled to seek judgment for costs under Order 24, rule 3 of the Rules. That rule provides:-

“3. Upon request in writing by any defendant the registrar shall sign judgment for the costs of a suit which has been wholly discontinued, and any defendant may apply at the hearing for the costs of any part of the claim against him which has been withdrawn.”

The suit that was discontinued here was the 1st Defendant's counterclaim. The Plaintiffs were defendants in that counterclaim.

Did the deputy registrar act correctly and lawfully in issuing a certificate for costs under paragraph 68A of the Remuneration Order? That paragraph provides as follows:-

“68A. (1) Notwithstanding anything to the contrary in this Order, when the Registrar of the High Court enters final judgment under Order XLVIII, rule 2 of the Civil Procedure Rules, he may, on application in writing and without the filing or taxation of a bill of costs or of notice to any party, sign a certificate of the costs of the suit calculated in accordance with item 15 of Schedule VI.

(2) An advocate may, in any case in lieu of taxation, apply in writing for a certificate under this paragraph.

(3) If the Registrar refuses an application under this paragraph he shall on request certify his refusal in writing to the applicant and the applicant may within fourteen days of receipt of the certificate give notice of objection, whereupon paragraph 11 shall apply.”

A final judgment for costs had already been entered under Order 48, rule 2 of the Rules. That rule states:-

“2. Judgment may, on application in writing, be entered by the Registrar or, in a subordinate court, by an executive officer generally or specially thereunto empowered by the Chief Justice by writing under his hand, in the following cases:-

(a) under Order IXA;

(b) in all other cases in which the parties consent to judgment being entered in agreed terms;

(c) under Order XXIV, rule 3 (costs, where suit withdrawn or discontinued).”

Upon request by the Plaintiffs, the deputy registrar had no discretion in the matter. He had to enter judgment for costs, and he duly did so.

Under paragraph 68A of the Remuneration Order the deputy registrar had the discretion, upon application in writing and without the filing or taxation of a bill of costs or notice to any party, to sign a certificate of the costs of the counterclaim calculated in accordance with item 15 of Schedule VI of the Remuneration Order. There was such application by the Plaintiffs. So the deputy registrar acted within the law in issuing the certificate of costs.

However, given the contentious history of the issue of costs in this suit, it would have been prudent for the deputy registrar to direct that the Plaintiffs do file a bill of costs for taxation *inter partes*. Proceeding as he did under paragraph 68A of the Remuneration Order was bound to be resisted by the 1st Defendant, not least because of the sum involved in the costs. Besides, the costs as assessed in the sum of over KShs. 19 million appear to be excessive, particularly because the sum of the counterclaim may not have been a liquidated demand as such.

What is to be done now? The present application is stated to be brought under paragraph 11 of the Remuneration Order. The assessment of the Plaintiffs' costs on the counterclaim under paragraph 68A was done *ex parte* the 1st Defendant and without notice to it. As soon as the 1st Defendant learnt of the assessment (at execution) it wrote to the deputy registrar objecting to the same. It then filed the present application.

In the particular circumstances of this case, I consider that the present application is a proper challenge under paragraph 11 of the Remuneration Order to the assessment under paragraph 68A of the Plaintiffs' costs of the 1st Defendant's counterclaim. I further consider that justice will be best served in this case by making the following orders, which I hereby do:-

1. The certificate of costs dated 28th February, 2008 for KShs. 19,735,129/50 issued against the 1st Defendant in favour of the Plaintiffs is hereby set aside.
2. All the consequential proceedings upon that certificate of costs, including any and all execution proceedings are hereby set aside.
3. The Plaintiffs shall file a bill of their costs of the 1st Defendant's counterclaim, and the same shall be taxed *inter partes* in the usual way.

For the avoidance of doubt, the order of 13th February, 2008 by which judgment for costs of the counterclaim was entered for the Plaintiff shall remain undisturbed as the same was entered in accordance with the law. For the same reason the issue as to whether any costs are payable to the Plaintiff upon the 1st Defendant's counterclaim shall not be re-opened. Prayer (e) of the chamber summons dated 21st April, 2008 is refused.

Regarding costs of the application, the only just order that commends itself to me is that the parties do bear their own costs.

Those shall be the orders of the court.

DATED AT NAIROBI THIS 11TH DAY OF FEBRUARY, 2010

H. P. G. WAWERU

J U D G E

DELIVERED THIS 12TH DAY OF FEBRUARY, 2010