



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 1869 of 1998**

**ANYASI OLUSESE.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**SAMMIE MACHARIA.....2<sup>ND</sup> PLAINTIFF**

**versus**

**THE STANDARD LTD .....1<sup>ST</sup> DEFENDANT**

**DEO OMONDI.....2<sup>ND</sup> DEFENDANT**

**RULING**

An old case of 1998 and perhaps it would have been thought because of its old age, that a judgment already delivered in the case be executed without further delay and therefore when I delivered that judgment on 29<sup>th</sup> September 2008 I could not imagine parties in the case being back before me to-day in a ruling touching on execution of the judgment the dispute being strangely between the surviving Plaintiff, Anyasi Olusesse referred to as the 1<sup>st</sup> Plaintiff, and their Original Advocates, M/s C.N.Kihara & Company, over costs of the suit as between the two. If they are parties who love delay in this suit, it is proving difficult for the court to bring that delay to an end. After the judgment, two very senior and experienced Deputy Registrars of this court tried to

finalize the remaining process expeditiously but in the end they gave up and had to bring the matter back to me for the parties to talk as if they had been doing nothing before the Deputy Registrars aforesaid.

This is a suit which had two Plaintiffs and because of delay in prosecuting the suit, one of the Plaintiffs passed away after Plaintiffs had closed their part of the case but before benefiting therefrom. The Defendants remained to adduce evidence. The Deceased was by then the 2<sup>nd</sup> Plaintiff and up to that stage M/s C.N. Kihara & Co. Advocates had been Advocates for both Plaintiffs from the beginning. They were even the ones who on 4<sup>th</sup> February 2008 fixed the suit for further hearing on 9<sup>th</sup> July 2008 when the suit was brought to me for the first time for further hearing.

But by that 9<sup>th</sup> July 2008, the 1<sup>st</sup> Plaintiff Anyasi Olusese had changed advocates and was acting in person so that before me that Plaintiff acted in person until the date 29<sup>th</sup> September 2009 when I was delivering the judgment that he came with an Advocate Mr. J.B. Shilenge.

According to record in the Court Case file, from that time onwards, the Plaintiff remained represented by Advocates but those were not M/s C.N. Kihara & Company Advocates.

The said record shows that from that time onwards the Plaintiff has been acting through those other advocates like M/s C. Bakhoya & Co. and M/s Wamaasa & Co.. The last named Advocates are the ones who filed what they

described as **“PARTY & PARTY BILL OF COSTS”** dated 5<sup>th</sup> March 2009 and filed on 9<sup>th</sup> March 2009. It does not disclose provisions of the law under which it was filed and even learned Counsel, Mrs. Othieno in her effort to convince me that Rule 62 A of the Advocates (Remuneration) order was not observed, did not disclose to me provisions of the law under which that bill of costs was filed. It was filed by M/s Wamaasa & Co. Advocates from whom Mrs. Othieno and Mrs. Rashid have been coming to represent the Plaintiff.

As I have said, those were Advocates who came into this suit after M/s C.N. Kihara & Co. Advocates had been in the suit, in fact for a period of 10 years. No dispute there had been change of advocates in the suit and am not sure how many such changes. The Advocate finally on the record at the time of filing the Bill of Costs on 9<sup>th</sup> March 2009 were M/s Wamaasa & Co. Why are they saying nobody observed Rule 62 A of the Advocates (Remuneration) Order when they have failed to disclose the rule under which that Party and Party Bill of Costs was filed on 9<sup>th</sup> March 2009? That Rule states as follows:-

**“62A (1) Where there has been a change of advocates or more than one change of advocates, the advocate finally on the record shall draw a single bill for the whole of the matter in respect of which costs have been awarded.”**

Subrule (2) is merely for guidance of the Taxing Officer after the bill has been

filed. But Subrule (3) is also important to reproduce here. It is as follows:

**“(3) The bill shall be accompanied by a certificate setting out the dates during which all advocates acted, together with all agreements for remuneration made with them, all sums paid to them for costs and whether those sums were paid in full settlement.”**

In the absence of evidence to the contrary, the Party and Party Bill of Costs dated 5<sup>th</sup> March 2009 and filed on 9<sup>th</sup> March 2009 must have been filed under Rule 62A (1) aforesaid. M/s C.N. Kihara & Co. Advocates got to know about it. They filed Notice of Objection to that Bill of Costs. The objection is dated 20<sup>th</sup> April 2009.

That is what the parties were talking about on 17<sup>th</sup> July 2009 before the Senior Principal Deputy Registrar, Mrs. B.M. Ougo when they decided to have it heard on 13<sup>th</sup> August 2009. They were all present on 17<sup>th</sup> July 2009, Mrs. Rashid holding brief for Mrs. Wamaasa for the Plaintiff; Mr. Kamau standing in for Mr. C.N. Kihara for the Objector and Mrs. Nyamweya holding brief for Mrs. Ochieng for the Defendants.

On 13<sup>th</sup> August 2009, Mrs. Rashid was present again. Mrs. Ochieng came and Mr. C.N. Kihara himself was there. Apparently the 1<sup>st</sup> Plaintiff was personally also present; and on that day decisions were made and actions

taken. Was that outside Rule 62 A if the Party and Party Bill of Costs against which the Objection dated 20<sup>th</sup> April 2009 had been lodged was itself under Rule 62 A? See what happened on that 13<sup>th</sup> day of August 2009 in a cordial manner:

**“Mrs. Rashid- We have discussed and between me and Mrs. Ochieng and Mr. Kihara and we have agreed to come back on the 1<sup>st</sup> September 2009. I have instructions to file another bill. That the Plaintiff withdraws the current bill.”**

Emphasis by underlining are mine to mark the words suggesting instructions from the 1<sup>st</sup> Plaintiff to Mrs. Rashid.

Mr. Kihara added:

**“We had agreed to file a joint bill which will be taxed on the 1/9/09 and it is the only reason that we are allowing the bill to withdraw.”**

The learned Senior Principal Deputy Registrar at this stage requested the parties to step out and discuss what they wanted on the bill. The parties did so and when they returned to the Senior Principal Deputy Registrar after a few minutes they asked her to record a consent, Mr. Kihara saying: **“We have agreed.”** The following consent was then recorded:

**“By consent the Bill of Costs filed on the 9<sup>th</sup> March 2009 vide M/s Wamaasa and Company be marked as withdrawn. That the firm of M/s Wamaasa and Company and the firm of C.N. Kihara do file a joint party and party bill of costs within 7 days. Mention on the 18<sup>th</sup> August 2009 to fix a date for taxation.”**

That was a clearly worded consent the parties present fully participating in the

process which was lawful notwithstanding the fact that the Bill of Costs being withdrawn had been filed under Rule 62 A. Consents are lawful and are used many a time in Civil litigation in courts in this country.

In fact it may be asked why C.N. Kihara & Company Advocates came up with their Notice of Objection against the Bill of Costs filed by Wamaasa & Company Advocates as “the Advocate finally on the record”? C.N. Kihara Company Advocates felt Wamaasa & Company Advocates were not fully complying with Rule 62 A and therefore C.N. Kihara & Company Advocates wanted full compliance with that Rule. Hence the consent as a compromise in an effort to comply fully with Rule 62 A thereby safeguarding the interest of C.N. Kihara & Company Advocates while at the same time allowing Wamaasa & Company Advocates what is properly due to them. Why fight when what is involved can be separated in peace?

But in this matter when the parties went back for the mention of 18<sup>th</sup> August 2009, Mrs. Rashid filed the Plaintiff’s Notice of Motion dated 18<sup>th</sup> August 2009 and there was no joint Party and Party Bill of Costs, what had been drafted by M/s C.N. Kihara & Co. Advocates simply being ignored by M/s Wamaasa & Co. Advocates whose Mrs. Rashid stated as follows before the Senior Principal Deputy Registrar (SPDR) on that day:

**“We agreed last time that we file a joint bill of costs. It was an error on my part as the defendant sought to have just a bill of costs. We seek to be back on the 26/8/2009 to argue an application we have filed.”**

That is the Notice of Motion dated 18<sup>th</sup> August 2009 and Mr. Kamau who appeared for M/s C.N. Kihara & Company Advocates remarked as follows:

**“We had taken the incentive to kind drafted the joint bill of costs. Both firms had talked and the bill was sent by email. We were not aware they had issues with the consent order. I have just been served with the Notice of Motion. We need the court’s direction.”**

Mr. Ochieng said

**“We were waiting for the joint bill of costs. We are waiting for the Plaintiff to move.”**

The Senior Principal Deputy Registrar directed that the Notice of Motion dated 18<sup>th</sup> August 2009 be heard first and gave hearing date 7<sup>th</sup> September 2009. At that time, there was actually nothing else to be heard, there having been no joint Party and Party Bill of Costs filed.

But that adjournment gave Plaintiff and his former advocates M/s C.N. Kihara & Company opportunity to try and complicate the matter as the firm of M/s C.N. Kihara & Company on that same 18<sup>th</sup> August 2009 filed their Notice of Preliminary Objection and M/s Wamaasa & Company Advocates responded in a counter objection on the ground that M/s C.N. Kihara had no locus standi in the Notice of Motion dated 18<sup>th</sup> August 2009.

Those side issues took the Senior Principal Deputy Registrar’s time on 7<sup>th</sup> September 2009 as submissions were made ending up with the date for a ruling in the submissions instead of fixing a date for taxation of a joint Party and

Party Bill of Costs which had not in the circumstances, been filed.

In her ruling dated 25<sup>th</sup> September 2009, the Senior Principal Deputy Registrar held the view that since M/s C.N. Kihara & Company Advocates had worked for the Plaintiff, the Advocates must be paid for that work and that in doing so, the Plaintiffs Counsel must comply with Rule 62 A (1) and (3). She noted that what the parties sought to have in their consent was what the rule provides for because the work done by the firm of C.N. Kihara & Company Advocates must be taken into account.

The learned Senior Principal Deputy Registrar also held separately that the firm of C.N. Kihara & Company Advocates had the locus to address the court during the hearing of the Notice of Motion dated 18<sup>th</sup> August 2009. She then directed that it be heard by a judge.

After all that, the case was brought back to me and I have heard Mrs. Othieno and Mr. Kamau more or less repeating what was said before Deputy Registrars, especially the Senior Principal Deputy Registrar Mrs. Ougo concerning same issues.

If the Applicant in the Notice of Motion dated 18<sup>th</sup> August 2009 is saying that Rule 62 A does not say that a joint Bill of Costs be filed, why has he failed to file a non joint bill of costs which satisfies the interest of C.N. Kihara & Company Advocates as well as the Applicant's interests as required by that rule? Where is the Applicant's cleanliness in the matter? If someone else can

jointly make the Applicant comply, what is wrong with a consent recorded to that effect?

Per incuriam? Where is it in Order XLIV Rule 1 (1)(a) and Rule 2 of the Civil Procedure Rules? From the Applicant's own authority:

“Words and Phrases

Legally Defined”

Second Edition

John B. Saunders

**“What is meant by giving a decision per incuriam is giving a decision when a case or statute has not been brought to the attention of the court and they have given the decision in ignorance or forgetfulness of the existence of that case or that statute.”**

According to “A Concise Law Dictionary”

Fifth Edition

By

P.G. Osborn

**“Per incuriam”** means “Through want of care.” That is:

**“A decision of the court which is mistaken” or “given without the court’s attention having been drawn to the relevant authorities or statute.”**

Such a decision does not become a binding authority. It is a decision of the court.

That situation is not found in order XLIV Rule 1 (1) (a) and rule 2 aforesaid and it is therefore far fetched if not misplaced for the Applicant to

bring it in this Notice of Motion brought under provisions of the law dealing with evidence not adduced by a party before a court. Moreover, unlike in “**Per incuriam**” situation, that evidence must not have been left out

**“Through want of care”**

By relying on the ground of “**Per incuriam**” therefore, the Applicant has failed to bring the Notice of Motion dated 18<sup>th</sup> August 2009 within the ambit of Order XLIV rule 1(1)(a) and rule 2 of the Civil Procedure Rules.

Secondly, even accepting reliance upon the ground of “**per incuriam**”, what the Applicant has told the court about the alleged failure to apply or comply with Rule 62 A cannot be true. From what happened, not only was that provision of the law fully in the minds of each one of the three learned Counsels before the Senior Principal Deputy Registrar at the time of recording the consent, but was also fully in the minds of the Senior Principal Deputy Registrar who demonstrated that presence in her ruling dated 25<sup>th</sup> September 2009 – where she even directed the Applicant’s Counsel to comply with Rule 62 A (1) and (3).

Thirdly, to use Order XLIV Rule 1 (1) (a) and Rule 2 to set aside a consent order recorded in a court of law is to lead a court into using wrong provisions of the law to grant a court order not deserved thereby bringing injustice into relevant proceedings. Fraud, misrepresentation, mistake, not proved and not even alleged by the Applicant.

On the issue of the locus standi of M/s C.N. Kihara & Company Advocates in this Notice of Motion, the Senior Principal Deputy Registrar ruled that the Advocates had the locus because they are signatory to the consent order sought to be reviewed. I would add that as former advocates in the suit, they have the locus to safeguard their interest under rule 62 A of the Advocates (Remuneration) order. Infact I do not understand why that interest should be creating a problem with the Plaintiff.

I should remark that filing of applications, suits or any court process during the High Court vacation is not prohibited by law. What the law requires is that a party to be heard during that time must seek permission of the court and that is readily granted depending on circumstances of each case. It is not therefore correct to say that filing of this Notice of Motion during the High Court vacation rendered the Notice of Motion null and void.

However, from the totality of what I have already said, in light of all that was brought before me during hearing of the Notice of Motion, the 1<sup>st</sup> Plaintiff's said Notice of Motion herein dated 18<sup>th</sup> August 2009 be and is hereby dismissed with costs to M/s C.N. Kihara & Company Advocates.

This ruling means that while the consent recorded by the parties on 13<sup>th</sup> August 2009 remains in existence, there is no bill of costs yet filed in terms and compliance of that Consent Order ready for taxation to-date. However, that consent order remains the basis for further

proceedings in Party and Party Bill of Costs taxation in this suit and should be complied with.

Dated this 5<sup>th</sup> day of February 2010.

J.M. KHAMONI

JUDGE

Present:

Mrs. Rashid for Wamaasa & Company, Advocates for the 1<sup>st</sup>  
Plaintiff/Applicant

Mr. Kamau for C.N. Kihara & Company, Advocates for the Respondents  
Court Clerk: Kabiru