



**AKIBA BANK LIMITED.....APPLICANT**

**VERSUS**

**SUNDEV INVESTMENT LIMITED.....1<sup>ST</sup> RESPONDENT**

**KENGOLD AUTOMOBILES LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING ON PRELIMINARY OBJECTION**

The Applicant in this case has raised a Preliminary Objection to the 2<sup>nd</sup> Respondent's Bill of Cost dated 16<sup>th</sup> January, 2008 on five grounds cited on the face of the Preliminary Objection. These are:

1. THAT, the alleged Decree is a nullity as no Directions have been gone into pursuant to O.XXXVI, r. 8B of the Civil Procedure Rules to determine the procedure to be adapted, and as such the Decree is premature.
2. THAT, there is no provision in law that a Decree in Originating Summons is issued by Deputy Registrar.
3. THAT, there is no provision in law for a Decree to issue pursuant to an oral application on a day when the matter is scheduled for mention.
4. THAT, in originating summons, it is only a Judge of the High Court who can make an order on costs as he considers just.
5. THAT, in the foregoing, the Bill of Costs is a nullity.

The Preliminary Objection was argued for the Applicant by Miss Mungai while Mr. Mwangi opposed it on behalf of the 2<sup>nd</sup> Respondent.

The brief facts of the case is that the Applicant brought this suit by way of an originating summons filed in court on 10<sup>th</sup> March, 2005. Subsequently, the Applicant filed a Notice of discontinuance of proceedings on the 6<sup>th</sup> April, 2006. Thereafter a Deputy Registrar entered judgment for costs of the suit on 27<sup>th</sup> July, 2007 upon a written request for entry of the said Judgment. On a mention date before the court on 24<sup>th</sup> September, 2007, the Respondent applied to the Deputy Registrar for a decree to be issued pursuant to the judgment entered by the Deputy Registrar on 27<sup>th</sup> July, 2006. The learned Deputy Registrar obliged and proceeded to direct that a decree do issue in the case. It was following the order for the decree to issue that the 2<sup>nd</sup> Respondent filed its Bill of Costs on 14<sup>th</sup> May, 2008. It is this Bill of Costs, together with all orders made herein by the Deputy Registrar(s) subsequent to the withdrawal of the suit by the Applicant that are the subject matter of this Preliminary Objection.

The Applicant's position is that the issue of costs payable after the Applicant withdrew its suit could only be handled by a Judge and that the Deputy Registrar lacked jurisdiction to entertain or give any orders or directions on the issue of costs.

The 2<sup>nd</sup> Respondent on the other hand maintains that the procedure adopted in obtaining the judgment and decree was proper and that there was nothing procedurally wrong with the Bill of Costs.

Counsel for the Applicant is clearly right that order XXXVI rule 11 of the Civil Procedure Rules dictates the court with the power and jurisdiction to make orders as to costs incurred by any party in a suit brought by way of an originating Summons. The rule stipulates as follows:

***“If an originating summons be adjourned into court, the judge may, if he thinks the question to be determined is of sufficient importance, order that the costs be taxed on the scale applicable to suits. In all other cases the judge may make such orders as to the costs of the parties as he considers to be just.”*** (Emphasis mine).

I think that the provisions of this rule are abundantly clear, that in all cases brought through Originating Summons under Order XXXVI, only the judge can make orders regarding costs. The matter was filed before the High Court for hearing and determination by that court. Once the originating summons was discontinued, the rule provides that the issue of costs can only be addressed by the High Court and no other court.

Clearly, the Deputy Registrar had no jurisdiction to enter a judgment on costs, or to issue a decree or to tax the Bill of Costs filed herein. The Deputy Registrar lacked jurisdiction to act as he did rendering the said orders invalid, null and void *ab initio*. Having come to this conclusion, I do uphold the Preliminary Objection dated 26<sup>th</sup> May, 2008. I set aside the judgment on costs entered herein and the order of decree issued by the Deputy Registrar. The Bill of Costs filed by the 2<sup>nd</sup> Respondent is also struck out.

**Dated at Nairobi, this 3<sup>rd</sup> day of October, 2008.**

**LESIT, J.**

JUDGE

***Read, signed and delivered, in the presence of:***

Ms. Mungai for the Applicant

Mr. Mwangi for the 2<sup>nd</sup> Defendant/Respondent

**LESIT, J.**

JUDGE