



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 2255 of 1999**

**LAWRENCE NGINYO KARIUKI.....PLAINTIFF**

**VERSUS**

**WACHIRA WARURU & ANOTHER.....DEFENDANT**

**RULING**

This case was fixed for a hearing by consent of both parties on a priority basis, as it is an old case, which requires urgent disposal. The defendants, who were earlier represented by Mohamed Muigai & Co. Advocates, were served with a letter informing them that the Advocates would be withdrawing acting for them. The defendants therefore had about two months before the hearing date to appoint and properly instruct new advocates who would, inter alia, handle the fixed hearing.

The defendants however did not appoint new advocates until three or four days before the date for hearing - that is to say on 5.10.2007 when the hearing was coming on 8.10.2007. Even then, the new Advocates Guram & Company, were apparently not fully instructed to proceed with the hearing. As a result the new advocates had to seek adjournment on 8.10.07, and adjournment was for good reasons recorded in the application, granted.

However, the defendants were ordered to pay costs of the adjournment and Satish Gautama for the plaintiff, sought inter alia, getting-up-fees. He argued that he came to court fully prepared to proceed with this case, which he termed, a heavy libel suit. He argued that the case took him a lot of time to prepare. That if he is not compensated for preparing and getting-up, then his client will have lost in terms of costs since he will finally charge him for the same whether the plaintiff won or lost. Mr. Gautama saw no good reason for not making the defendants who benefited from the adjournment, responsible.

On the other hand Mr. Munyasi saw no reason why the plaintiff should be granted getting-up and preparation costs when he can be paid only a day's higher scale fees. He further argued that since the hearing did not take off, getting-up fees should not arise.

I have carefully considered the issue before me. The court clearly laid the fault for not proceeding with the hearing at the defendant's door-step. The case is old and the hearing date which had been taken by consent was not honoured by the defendants. The defendants in our view, were lucky to obtain the adjournment. The court did not hear the defendants arguing that they were entitled to the adjournment because they had conducted themselves properly. Indeed they were condemned in costs because they had unfairly and unreasonably caused the adjournment.

The defendants did not deny the fact that plaintiff's advocate Mr. Gautama, did not take time to prepare for the hearing which finally was thwarted by the defendants adjournment. In my considered opinion, the plaintiff's advocate has good and valid reason to seek compensation for the "wasted" period. The court calls it "wasted" because the defendants' counsel will need to prepare again for the next hearing. While I am not the taxing officer, I nevertheless think that this court has discretion and power to make reasonable compensatory orders in costs, especially where as in this case, the party aggrieved has shown that he is entitled and sought relevant orders.

My brother Ibrahim, J. being faced with a similar issue in the case of **Guardian Bank Limited & another v Paramount Bank Limited & Two others** in Nairobi Civil Case Numbers 812 and 813 of 2000, had no difficulty in exercising the courts discretion to grant getting-up fees. He was in that case surprised, as I am in this case, that the party who had enjoyed the court's favourable discretion in getting an adjournment, was opposing a properly compensatory indulgence sought by the opposite party who had suffered costs arising from the same adjournment. In my view, in appearing to be strongly opposing such compensatory order in costs, the defendants were not demonstrating good faith.

The result is that the plaintiff is entitled to getting-up costs in any event in the following terms: -

**ORDERS**

1. The defendants to pay adjournment costs, which include witness expenses and time for 8.10.2007 in any event.
2. Getting-up fees for the plaintiff's counsel for 8.10.2007 is hereby allowed and ordered.
3. The costs above to be agreed upon or to be taxed.
4. The orders above shall not stand on the way of disposal of the main suit.

DATED and Delivered at Nairobi this 12<sup>th</sup> day of November, 2007.

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**D A ONYANCHA**

**JUDGE**