



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Civil Suit 252 of 2005**

**LEAH GACHERU.....**  
**.....PLAINTIFF**

**VERSUS**

**J. M. KARANJA T/A KARANJA MBUGUA & CO.**  
**ADVOCATES.....DEFENDANT**

**RULING**

On 13<sup>th</sup> October 2005 the plaintiff herein filed an originating summons under **Order LII rules 4 and 10** of the **Civil Procedure Rules** and sought as against the defendant two specific orders which are as follows:-

*“1. The defendant do make full payment of the decretal sum awarded to the plaintiff in Nakuru HCCC No. 279 of 1999, Leah Gacheru Vs Barclays Bank of Kenya Ltd. as more particularly set out in the affidavit in support thereof.*

*2. The defendant do make remittance and give a detailed account of the monies held on behalf of the plaintiff arising from the aforesaid suit.”*

In her affidavit in support of the originating summons the plaintiff deponed that in the aforesaid suit, judgment was entered in her favour on 8<sup>th</sup> April 2005 and a sum of Kshs.2,500,000/- plus interest and costs was awarded to her. Pursuant to the said judgment the defendant in HCCC No. 279 of 1999 paid to the defendant herein on her behalf a sum of Kshs.2,762,154.50. She further stated that upto the time of filing the originating summons she had made several demands to the defendant herein to pay her money as awarded by the court but he had failed to do so.

On 29<sup>th</sup> November 2005 the court ordered the defendant to pay to the plaintiff Kshs.2,000,000/- within 15 days from the aforesaid date and deposit a sum of Kshs.500,000/- in court within the same period of time. The defendant was to be paid his costs after taxation of his bill of costs was done. On 31<sup>st</sup> January 2006 the plaintiff filed her bill of costs in respect of this matter. The defendant had not filed his bill of costs in respect of HCCC 279 of 1999 but the court had allowed the plaintiff to execute the decree that was issued pursuant to the orders made on the 29<sup>th</sup> November 2005 before the costs therein were taxed as provided by **Section 94** of the **Civil Procedure Act**.

When the plaintiff's bill of costs was listed for taxation before this court's Deputy Registrar, the defendant's advocate objected to the same arguing that no order for costs had been made by Apondi J on

the 29<sup>th</sup> November 2005. He argued that the Deputy Registrar could not therefore tax the bill and further argued that the plaintiff had to go before the judge and apply for award of costs in this matter.

Apondi J, having been transferred from this station, the advocates for the parties herein agreed to make submissions before this court regarding the issue of costs. Mr. Kahiga for the defendant submitted that in the originating summons the plaintiff did not make any prayer for costs and therefore the same were not payable unless the orders made by the court on 29<sup>th</sup> November 2005 were reviewed. On the other hand, Mr. Kagucia for the plaintiff submitted that under **Order L rule 13** of the **Civil Procedure Rules** it was not necessary to pray for costs in the originating summons. He further submitted that ordinarily, costs follow the event. He urged the court to find that the plaintiff, as the successful party, was entitled to costs as against the defendant.

**Section 27(1)** of the **Civil Procedure Act** provides as follows:-

***“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:***

***Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”***

From the above quoted provision of the law it is apparent that costs are always in the discretion of the court and unless otherwise stated such costs follow the event. In ***KARANJA V KABUGI [1981] KLR 270***, the Court of Appeal held that such discretion must be exercised judicially and on fixed principles and with due regard to the proviso to **Section 27(1)** aforesated. The court went on to state that a successful party should not be deprived of his costs unless his conduct has led to litigation which, but for his own conduct, might have been averted. I do not think that the plaintiff’s conduct herein led to the present litigation between her and the defendant. In this matter, it is not in dispute that the plaintiff was forced to file a suit against the defendant to recover a substantial amount of money which had remained with the advocate for several months from the time when it was paid to him on her behalf. It was only after the plaintiff filed the originating summons that the defendant through his advocate told the court that he was ready to pay a sum of Kshs.2,000,000/- within sixty days and the balance of the decretal sum to await taxation of his bill of costs. That is what prompted the court to make the orders it issued on 29<sup>th</sup> November 2005. To that extent, the plaintiff was successful in her matter and I see no reason why she should be denied the costs thereof. ***Afortiori***, the provisions of **Order L rule 13(1)** are clear beyond any peradventure. They are as follows:-

***“It shall not be necessary in an originating summons, motion, chamber summons or other process to ask for costs, or for general or other relief, which may be granted by the court as it thinks just.”***

In this matter, I am persuaded that the plaintiff herein is entitled to the costs and disbursements in respect of the originating summons which she brought as against the defendant. The Deputy Registrar should therefore go ahead and tax the plaintiff’s bill of costs that was filed on 31<sup>st</sup> January 2006. The defendant should also file his advocate/client bill of costs for taxation within the next thirty days from the date hereof. The defendant shall bear the plaintiff’s advocate’s costs for 21<sup>st</sup> and 29<sup>th</sup> September 2006 when this matter was mentioned and argued and for today when this ruling was delivered.

DATED, SIGNED and DELIVERED at Nakuru this 5<sup>th</sup> day of October, 2006.

**D. MUSINGA**

JUDGE

Ruling delivered in open court in the presence of Miss Nyagor for the plaintiff and Mr. Mburu for the defendant.

**D. MUSINGA**

JUDGE