



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI
CIVIL CASE NO. 4777 OF 1990

STEPHEN KIGIMA KABERA..... PLAINTIFF

VERSUS

KIGUMO MAENDELEO FARMERS.....1ST DEFENDANT

GABRIEL GAKURU MUGO..... 2ND DEFENDANT

CONSOLIDATED WITH

HIGH COURT CIVIL CASE NO. 4452 OF 1991

KIGUMO MAENDELEO FARMERS..... PLAINTIFF

VERSUS

THE STANDARD LIMITED 1ST DEFENDANT

STEPHEN KIGIMA KABERA..... 2ND DEFENDANT

RULING

The dispute herein relates to costs payable in circumstances where the parties in two related suits H.C.C.C. No.4777 of 1990 (Stephen Kigima Kabera –vs- Kigumo Maendeleo Farmers and Gabriel Gakuru Mugo) and H.C.C.C. No.4452 of 1991 (Kigumo Maendeleo Farmers –vs- The Standard Limited and Stephen Kigima Kabera) recorded a consent judgment on 26.11.02 as follows:

(a) Judgment for Stephen Kigima Kabera against Kigumo Maendeleo Farmers in the sum of Shs.162,647 inclusive of interest.

(b) Judgment for Kigumo Maendeleo Farmers against Stephen Kigima Kabera and the Standard Limited jointly and severally in the sum of Shs.78,063.25 inclusive of interest.

(c) Judgment for the Standard Limited against Kigumo Maendeleo Farmers in the sum of Kshs.44,125/= inclusive of interest

(d) The issue of lost years to be determined by the court. liability for lost years (if any) to be apportioned as under:

(i) Kigumo Maendeleo Farmers to bear 50% liability

(ii) Stephen Kigima Kabera to bear 50% liability

(e) The issue of costs to be determined by the Court.

When the matter came up for hearing on the issue of lost years, the Claimant failed to attend Court and that part of claim was therefore dismissed with costs. The parties have failed to agree on the costs payable in respect of the suits and the successful counterclaim wherein the Standard Limited was awarded Kshs.44,125.

M/S Shapley Barret & Co., Counsel for the Defendants in H.C.C.C. No.4777 of 1990 and the Plaintiffs in H.C.C.C. No.4452 of 1991 have submitted that in assessing costs herein the Court should apply the principle that costs follow the event and find that separate fees be allowed for each of the two suits and that the fee for the successful counterclaim be based on the sum awarded.

M/S Hamilton, Harrison & Mathews, Counsel for the Plaintiff in H.C.C.C.4777 of 1990 and 2nd Defendant in H.C.C.C. No. 4452 of 1991 argue on the other hand that since liability was apportioned equally each party should bear its own costs; that since the suits were consolidated only one instruction fee should be entertained and that the successful counterclaim ought not to be treated as a suit for the purposes of the taxation.

Counsel for the 2nd Defendant in H.C.C.C. 4777 of 1991 did not file any submissions, opting instead to adopt those of M/S Hamilton Harrison & Mathews.

Having considered the submissions filed herein, the relevant legal principles and the authorities submitted by Counsel I give directions as follows:

1. Each of the two suits shall attract own instruction fees under the relevant schedule.

2. The suit containing a claim for lost years be treated as the main suit

3. Applying the principles in ABDUL AZIZ SULEMAN -vs- IGEMBE FARMERS CO-OPERATIVE SOCIETY LTD & ANOR, [1966] E.A. 352 apportionment in the second suit be at a lower percentage at the discretion of the Taxing Master of the Court.

4. On the authority of MEDWAY OIL AND STORAGE CO. LTD – vs- CONTINENTAL CONTRACTORS LIMITED [1928] A.C. 88, costs in the counterclaim shall be based on actual costs necessitated or accrued solely as a result of the counterclaim and not to be based on the amount awarded since the counterclaim is not a suit commenced as stipulated in Schedule VI I (a) or (b).

I see no basis for an order that each party bears its/his own costs. If that was the intention of the parties then the same ought to have formed part of the consent recorded herein on 26th November 2002.

Accordingly parties may proceed to file their respective Bills for taxation by the Taxing Master along the above directions for him to deal with the respective quantum in accordance with the principles laid down in JAMES ARTHUR –vs- NYERI ELECTRIC UNDERTAKING [1961] E.A. 492.

Dated and Delivered at Nairobi this 21st day of January 2005

M.G. Mugo

Judge

In the presence of:

Ms Mugaa present for Hamilton Harrison & Mathews Advocates for the Plaintiff

N/A for Shapely Barret & Company Advocates for the 1st Defendant

N/A for Archer & Wilcock Advocates for the 2nd Defendant