



## **Civil Practice and Procedure**

- Under what circumstances may an advocate be ordered to pay costs personally.

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL DIVISION, MILIMANI**

**Civil Suit 391 of 2004**

**MENNO TRAVEL SERVICES LIMITED.....PLAINTIFF**

**VERSUS**

**THE CO-OPERATIVE BANK OF KENYA LIMITED.....DEFENDANT**

**RULING**

By a chamber summons dated 8th September 2004, the defendants successfully applied for the dismissal of the plaintiff's present suit on the basis that it had been filed by an unqualified person within the meaning of the Advocates Act. By a ruling delivered on 1st December 2004 the court dismissed the suit with costs to the defendant.

The defendant now by a Notice of Motion dated 7th June 2005 seeks the following orders: -

1. The decree dated 1st December 2004 and issued on 1st March 2005 be reviewed in so far as the order for payment of costs in concerned;
2. This Honourable court be pleased to order that the costs of this suit be borne by Peter Leo Onalo practicing as Onalo & Company.

Defence counsel submitted that he was seeking an order of the court that costs which by the decree passed hereof were ordered to be paid by the plaintiff, that they be paid by the plaintiff's counsel. He submitted that a certificate of costs was issued in this matter for kshs 537, 908. That at the same time costs were also awarded against the self same plaintiff in the case HCCC No 350 of 2004 for kshs 2, 013, 310/-. That the party awarded costs in HCCC No. 350 of 2004 had been unsuccessful in execution for those costs because it transpired that the plaintiff had no assets that could be attached. That in view of that inability to pay those costs the defendant had concluded that the plaintiff would not be able to settle the costs hereof. Defence counsel then stated that costs are an entitlement to a successful party in litigation. That the defendant is accordingly aggrieved by its inability to recover the costs duly awarded to it by the decree of 1st December 2004. That the defendant being so aggrieved falls within the provisions of Section 80 of the Civil Procedure Rules. Defence counsel referred to the definition of the word aggrieved in

K.J.Aiyars Judicial Dictionary, which is defined thereof as: -

***“The expression “aggrieved person” means a person who has got a legal grievance i.e. a person is wrongly deprived of anything to which he is legally entitled and not merely a person who has suffered some sort of disappointment.”***

Counsel submitted that the law does make provisions for advocates to bear costs of the suit having regard to the circumstances of the case. In that regard counsel referred to section 27 of the Civil Procedure Act, which provides wide discretion to the court in regard to the award of costs; which discretion he argued can extend to the award of costs against a party not in the suit.

Counsel argued that the power to review is wide and can even extend to review of consent orders as in the case of **KIMITA – V – WAKIBIRU [1985] KLR 317**. Part of the holding of that case is as follows: -

**“.....”any other sufficient reason”, under XLIV rule 1 (1) enabling a party to apply for review is not necessarily confined to the kind of reason stated in the two preceding heads, namely error and discovery of new evidence neither do these heads form a genus or class of things which the third general head could be analogous to.”**

Defence also relied on the case of **NJOROGE – V – MBITI [1986] KLR 519** where the court entertained a review by a person not a party to the original suit. The reason for seeking costs to be paid by an advocate is to be found in order 3 of the Civil Procedure Act, which established that advocates are agents for any party they act for in any litigation.

Defence relied on the case of **YONGE – V – TOYNBEE [1910] I KB 215** where the court held: -

**“...that a solicitor who had taken on themselves to act for the defendant in the action had thereby impliedly warranted that they had authority to do so, and therefore were liable personally to pay the plaintiff’s costs of the action.”**

Defence counsel submitted that similarly in this case the firm of Onalo & co. Advocates had impliedly warranted that they had authority to file the present suit; in response thereof the defendant filed a memorandum of appearance and a defence. Defence counsel submitted that since it turned out that the plaintiff’s counsel had no authority to file the suit the costs awarded to the defendants were equivalent to damages and accordingly he concluded the plaintiff’s counsel was liable to pay. Defence relied on Halsbury’s Law of England (3rd Edition) paragraph 106 – 107 & 270 – 271. The application was opposed. Counsel submitted that the law prohibits payment of costs in a suit brought by an unqualified persons, in this regard he referred to section 40 of the Advocates Act.

Plaintiff’s counsel further argued that costs were awarded in favour of the defendant to be paid by the plaintiff, and that, that award was in accordance with the prayer of the defendant when it sought the striking out of the suit. Counsel therefore concluded that it was now too late for the defendant to get the orders it seeks, and if indeed the defendant wanted orders against Mr. Onlao it ought to apply to join him as a party in this suit. He also argued that having obtained an order for costs to be paid by the plaintiff, the defendant was estopped from seeking a review. That in any case applications for review ought to be made within reasonable time, but the defendant in this case had waited for 5 months; and that it ought to be borne in mind that Mr. Onlao had not had time to be heard on taxation, since the costs had already been taxed.

The above summarises counsel’s argument. I am of the view that the first thing that I ought to consider is whether the defendant is entitled to seek a review. The plaintiff argued that it was too late for the defence to seek review, having waited for 5 months. I find that the period of 5 months ought to be looked at in perspective of what has occurred in this file. I note that the costs, the subject of this application were only taxed on 6th may 2005, and I find that, that was after the plaintiff’s counsel severally applied for adjournment of taxation. Considering the above I am of the view that 5 months

period does not defeat the defendant's application. I wholly accept defence argument, that the inability of the defendant to recover costs awarded to it does amount to defendant being aggrieved, and therefore brings the defendant within the provisions of section 80, Civil Procedure Act, and Order XLIV. Plaintiff's counsel obviously at the time of filing this suit knew that he was lacking in a practicing certificate, indeed his 30 years of practice, his experience as a law lecturer and as an author of legal publication ought to have made him aware the consequences of filing such a suit. Filing such a suit, in those circumstances is tantamount to counsel's dereliction of duty as an advocate of the high court of Kenya and can attract an order for the award of costs to be visited upon such an advocate. The argument by plaintiff's counsel, that Mr. Onalo ought to have had an opportunity to participate in taxation of the costs can aptly be replied to by defence counsel's submissions that; "they sacrificed their own client to their own peril." That response relates to the three occasions that the plaintiffs counsels applied for adjournment and when the matter came up on 13th April 2005, which date the plaintiff's counsel was aware of, the said counsel failed to attend taxation which then proceeded exparte, but it is important to notice, that on the date of ruling of that taxation plaintiff's counsel was represented. The plaintiff's counsel did, to that extent, participate in taxation, and one would then ask themselves the question, would the plaintiff counsel had made a more rigorous representation if he knew that the costs were awarded to him. I am satisfied that the plaintiff's counsel was given opportunity to participate in taxation and accordingly was afforded an opportunity to be heard on the issue of costs. By virtue of section 27 Civil Procedure Act, and under the High Court inherent power I find that there is sufficient discretion to order that costs be paid personally by Mr. Onlao which I hereby do.

The orders of the court are: -

**(1) That the costs taxed herein on 6th May 2005 shall be borne by MR. PETER LEO ONALO advocate practicing as Onalo & Company Advocates.**

**(2) That the costs of the Notice of Motion dated 7th June 2005 are awarded to the defendant as against MR. PETER LEO ONALO advocates.**

Dated and delivered this 22nd day of September 2005.

**MARY KASANGO**

**JUDGE**