



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI
HIGH COURT CIVIL NO.378 OF 2003**

1. JAMES WAIHENYA KAMAU

2. LYDIA MUTHONI NDERITU

**3. WESLEY KIPNG'ENO BET (Suing on their own behalf and on behalf of 504 others
as per the attached Authorities ListPLAINTIFF**

VERSUS

KENYA BREWERIES LIMITED..... DEFENDANT

RULING

By their application of the 25th June, 2004 the Applicants seek the following orders:-

(2) **THAT** there be stay of any further proceedings in this suit pending the hearing and determination of this application.

(3) **THAT** this court be pleased to review its Orders/Decree made on the 5th December 2003 and the same be set aside in so far as its relates to payments of costs.”

By way of Review under O.44 Rule (1) (1) (b) and 1(2). The grounds are that the orders were beyond the scope of the Application of the 12/11/2003 that there is no provision to make an order for costs that the person against whom the orders were made were not parties to the suit and that the proper jurisdiction of the Court was not invoked.

Mr. Ngala relied on the case Kenya Commercial Bank Ltd versus Mwanza Mbaluka & Another C.A 274 of 1997 in which the Learned Court of Appeal held citing with approval a passage from Gandy V Caspair {1956} EACA page 139 that a decision on matters which do not come within the issues on which the parties want a decision would clearly amount to an error apparent on the face of the record.

This suit was struck out because the advocate who filed the suit Mr. Rumba Kinuthia and subsequently Mr. Ngala who come on record and took over the proceedings from him did not have valid practicing certificates at the relevant time.

Mr. Ngala submitted the costs should have been assessed against the Plaintiffs who were parties to the suit. He further submitted that on Rule 61 of the Advocate's Remuneration. Order lays down a procedure for making advocates liable for costs, which was not followed.

Mr. Gachuhi who opposed the application submitted that the provisions of Rule 61 of the Advocate's Remuneration order only applied to the taxation of Bills between an Advocate and his client.

Although the provision appears to be general in nature I do not think it in anyway inhibits the court from making such order as to costs as it thinks appropriate.

He also submitted there was no error on the face of the record and that the Application was unduly delayed having been filed some six months or so after the order complained of.

Although I do think that the Application is brought late I would not dismiss it on that ground. I think the applicant is entitled to argue an error on the face of the record if it can be shown that the order for costs was wrongly made.

However the discretion to award costs is to be found in section 27(1) of the Civil Procedure Act which states 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:”

It should be borne in mind that the Plaintiffs who employed the Advocate in question did so in the belief that they were properly qualified. It would be very hard to make the Plaintiff pay for their Advocates lack of practicing certificates.

The section above gives the court a wide discretion to determine by whom such costs are to be paid. I do not think this excludes advocates if in the circumstances of the case it is just.

However sympathetic one may feel for the advocate, they are the authors of their own downfall and should not now complain.

In the circumstance I dismiss this application with costs to the Respondents.

Dated and delivered at Nairobi this 25th day of November, 2004

P.J. RANSLEY

JUDGES