



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 54 OF 2014

IN THE MATTER OF THE ADVOCATES ACT CAP 16 AND IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER

AND

IN THE MATTER OF TAXATION OF ADVOCATE/CLIENT BILL OF COSTS

BETWEEN

BEDROCK HOLDINGS LIMITEDAPPLICANTS

VERSUS

GILLYS SECURITY AND INVESTIGATION SERVICES LTD.....RESPONDENT

(Being an application against the decision of the Deputy Registrar in Kisumu HCCC Appeal No. 54 of 2014 Gillys Security And Investigation Services Ltd Versus Maseno University & 4 Others at Kisumu dated 31st July 2018)

RULING

This is a Ruling on a Reference from Taxation.

1. On 31st July 2018, the learned taxing officer dismissed the Bill of Costs which had been lodged by the Interested Party, **BEDROCK HOLDINGS LIMITED**.
2. The reason for the decision of the taxing officer was that the Judge who had determined the application which gave rise to the Bill of Costs in issue, did not make an order for the payment of costs.
3. By the reference now before me, the Interested Party submitted that the taxing officer had erred, because the learned Judge had actually awarded costs to the Interested Party.
4. It was said by the Interested Party that the order for costs was made by the Judge on 9th May 2017.
5. When answering the application the Respondent pointed out taxation of the Bill of Costs could only proceed if there had been an Order awarding costs.
6. And it was the understanding of the Respondent the only person who had the requisite jurisdiction to make an order for costs, when a suit had been discontinued, was the Registrar.
7. Therefore, the Respondent submitted that Majanja J. lacked jurisdiction to make an order, granting costs in favour of the Interested Party.
8. The Interested Party cited the decision in **K'OPOT Vs CORNEL AMOTH MISC. APPLICATION NO. 322 OF 2015**, for the proposition that an Advocate need only file his Bill of Costs.
9. Once the Bill of Costs had been filed, the Interested Party submitted, it cannot be invalid, and therefore the taxing officer should proceed to carry out the exercise of taxation.
10. On its part, the Respondent cited the decision in **CORPORATE SECURITY SERVICES LTD. Vs LINKSOFT**

COMMUNICATION SYSTEMS LTD HCCC NO. 128/2013. It was the Respondent's understanding that that authority declared that it was mandatory for an application for costs to be made, and that that requirement stemmed from **Order 25** of the **Civil Procedure Rules**.

11. **Order 25 Rule 3** provides as follows;

“Upon request in writing by any defendant the registrar shall sign judgment for the costs of a suit which has been wholly discontinued, and any defendant may apply at the hearing for the costs of any part of the claim against him which has been withdrawn.”

12. That means that when a suit had been discontinued, the defendant may apply for the costs of such suit, and that the application for costs would be determined by the registrar.

13. There is no compulsion in the provisions of **Order 25 Rule 3**.

14. The second authority cited by the Respondent was **ALICE C. KALYA & 4 OTHERS VS JOSEPH GACHAGUA & ANOTHER, CIVIL APPEAL NO. 391 OF 2015**.

15. The Respondent submitted that the Court of Appeal had, in that case, held that the High Court had no jurisdiction to award costs on a case which had been withdrawn, unless the costs were awarded by the Deputy Registrar.

16. In that case, the Plaintiffs had discontinued the case. That step was taken before the defendants had been served with Summons to Enter Appearance.

17. Nonetheless, the defendants had, out of due diligence, obtained particulars of the suit and had filed a Memorandum of Appearance and a Defence. Those steps were taken by the defendants before the suit was discontinued.

18. First, the Court of Appeal made it clear that;

“..... nothing bars a diligent defendant, desirous of the defence of his rights, from entering appearance and defending an action once he learns of its existence, even before he is served with summons to enter appearance.”

19. In the circumstances, the Court went on to say that;

“A defendant who has so entered appearance and defended is not to be placed under any disadvantage by that reason alone in the matter of costs. Thus, when the Plaintiff elects to wholly discontinue the suit or withdraw part only of his claim, the defendant is entitled as of right to request for judgment for costs under Order 25 rule 3 of the Civil Procedure Rules”

20. In this case, after the defendants had made their application pursuant to Order 25 Rule 3, the learned Judge made a ruling, dismissing the prayer for the costs of the withdrawn suit.

21. In its determination, the Court of Appeal expressed itself thus;

“As the person appointed to take action on the request for Judgment on costs is the registrar, we find a substance in the appellant's contention that the learned Judge, in taking up and dealing with the matter did so without jurisdiction.”

22. It is crystal clear that when an application is made under **Order 25 rule 3**, by a letter addressed to the registrar, the application ought to be dealt with by the registrar.

23. In the case before me, there was no application under **Order 25 rule 3**.

24. The suit was withdrawn on the strength of the Notice of Withdrawal.

25. The learned Judge adopted that Notice of Withdrawal, into an Order, pursuant to which the suit was marked as withdrawn.

26. The learned Judge further ordered that the matter was withdrawn,

“with costs to be agreed upon or taxed by the Deputy Registrar.”

27. In the event, this case is distinguishable from the one of **ALICE C. KALYA & 4 OTHERS Vs JOSEPH GACHAGUA & ANOTHER, CIVIL APPEAL NO. 291 OF 2015**.

28. But even if it were to be presumed that the Judge had no jurisdiction to give an order on costs, once the Order was made, it should be complied with unless it was reversed through either an application for Review or an Appeal.

29. The learned taxing officer erred by dismissing the Bill of Costs.

30. Nonetheless, the taxing officer who will now have the task of handling the issue of taxation, will have the discretion to determine whether or not the order in issue awarded costs to the Interested Party.

In effect, the Bill of Costs is now reinstated and it shall be placed before the learned Deputy Registrar for taxation or such other steps as are within the jurisdiction of the taxing officer.

31. The costs of the application dated 13th August 2018 are awarded to the Applicant.

DATED, SIGNED and DELIVERED at KISUMU This 7th day of March 2019

FRED A. OCHIENG

JUDGE