



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
MISCELLANEOUS APPLICATION NO. 503 OF 2013

LYDIA D. WANJIKU.....PLAINTIFF

VERSUS

JOSEPH NDIRANGU WAHERO

T/A ZEE ENTERPRISES ALSO

KNOWN AS ZEE AUTO ENTERPRISES.....1ST RESPONDENT

AL HUSNAIN MOTORS LIMITED.....2ND RESPONDENT

THE REGISTRAR OF MOTOR VEHICLES.....3RD RESPONDENT

RULING ON REFERENCE

1. The application before me was brought pursuant to Rule 11 (2) of the Advocates Remuneration Order.
2. The applicant asked the court to review the decision of the Taxing Officer. The applicant also asked that the said decision of the Taxing Officer be set aside.
3. Finally, the applicant asked this court to award her costs in accordance with the provisions of the Advocates Remuneration Order.
4. The genesis of this matter is the case of **LYDIA D. WANJIKU Vs JOSEPH NDIRANGU WAHERO T/ZEE ENTERPRISES** Also known as **ZEE Co. AUTO ENTERPRISES & 2 OTHERS CMCC No. 3238 of 2012**. That case was at the Chief Magistrate's Court, Milimani.
5. On 10th April 2013 Hon. C. Obulutsa, the learned Chief Magistrate entered judgement in favour of the applicant, Lydia D. Wanjiku.
6. Thereafter, on 22nd October 2013 the trial court issued a Decree and a Certificate of Costs.
7. It is common ground that the Certificate of Costs was for the sum of Kshs. 67,385/-.
8. Apparently, the applicant was dissatisfied with the award of that quantum of costs. She therefore decided to lodge an itemized Party & Party Bill of Costs at the Commercial Division of the High Court, in Milimani.

9. The total sum claimed in the Bill of costs was Kshs. 235,605/-. But the applicant decided that from that total sum, she would deduct the sum of Kshs. 67,385/-, which had been awarded in the Certificate of Costs. In the result, the applicant was seeking costs in the sum of Kshs. 168,220/- more than she had been awarded earlier.
10. In the face of the Bill of Costs the 1st Defendant lodged a Preliminary Objection. Essentially, the respondent deemed the Bill of Costs as an abuse of the court process, because the applicant had already been given a certificate of costs, by the trial court.
11. It was the contention of the respondent that if the applicant had been dissatisfied with the sum awarded by the Certificate of Costs, she should have filed a reference or, in the alternative, she could have lodged an appeal.
12. Having given due consideration to the Preliminary Objection, the learned taxing Officer, Ms D.W. Nyambu held that the certificate of costs which had been issued by the trial court was final, pursuant to the provisions of Section 51 (2) of the Advocates Act, unless the said certificate was either set aside or altered.
13. As the certificate had not been set aside or altered, the learned Taxing Officer declined to conduct the taxation of the Party & Party Bill of Costs which the applicant had lodged. In effect, the Taxing Officer upheld the Preliminary Objection.
14. It is that decision of the Taxing Officer which triggered the application which is now before me.
15. As far as the applicant was concerned, the Taxing Officer was wrong to have held that the applicant was not entitled to costs which were to be awarded from the subordinate court.
16. I have carefully perused the Ruling by the Taxing Officer, but I found nowhere where it was held that the applicant was disentitled to costs awarded by the subordinate court.
17. The applicant also faulted the Taxing Officer for failing to consider that the Certificate of Costs was not calculated according to Schedule IV.
18. In order to make a determination on whether or not the certificate of costs was calculated in accordance with the Schedule IV, the Taxing Officer would have had to delve into the merits of the sums claimed in the Bill of Costs.
19. As the Taxing Officer upheld the Preliminary Objection, she definitely did not venture into giving consideration to the merits of the Bill of Costs.
20. When a court upholds a Preliminary Objection, it cannot be expected to, nonetheless, determine the substantive issues, on the basis of merit.
21. In **MUKISA BISCUIT MANUFACTURING Co. LTD Vs WEST END DISTRIBUTORS LTD [1969] E.A. 696, at page 700**, Law J A recognized the attributes of a preliminary objection, as follows;
- “So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit”.***
22. In effect, when a preliminary objection is successful, it serves to dispose of either the suit or the application in respect to which it relates. Therefore, when the court upholds a preliminary objection it cannot then be expected to still give a determination of the issues raised in the case.
23. The applicant submitted that a successful party was entitled to costs on an indemnity basis. By that I understand her to be saying that the successful party is entitled to get reimbursement for the costs she

incurred in the case.

24. If that be the applicant's position, then this court says that that is not the correct legal position. The very purpose of formulating an Advocate's Remuneration Order was to have a predictable and controlled regime for legal fees. One of the things given due acknowledgement is that a party can agree with his own advocate on the fees which the advocate would be paid. A party may agree with his lawyer on the method to be used in calculating the fee payable to the lawyer.

25. That means that a party is free to pay his lawyer relatively high or relatively low fees, subject to rules governing under-cutting, and also subject to the law on champertous agreements.

26. However, just because a person chooses to hire an expensive lawyer or lawyers does not mean that if he is successful, he would pass over the legal costs to the other party. Such a successful party would only be able to get an order against the other party for such costs as are in accordance with the Remuneration Order. In other words, the successful party would not be reimbursed for all the legal costs he has incurred, if such costs exceed the quantum provided for in the Remuneration Order.

27. A party who is ordered to pay costs is thus not required to indemnify the party who was awarded costs.

28. If parties had to indemnify those who were awarded costs, regardless of the quantum, the courts would have ignored the following words of caution, which were stated by Spry V.P in **PREMCHAND RAICHAND LTD & ANOTHER Vs QUARRY SERVICES of EAST AFRICA LTD & OTEHRS [1972] E.A. 162, at page 163;**

"...The courts owe a duty to the public to see that costs are not allowed to rise to such levels as to deprive of access to the courts, to all but the wealthy?."

29. In this case, the issue which was determined by the learned Taxing Officer was clearly an issue of law. I so hold because the parties were on common ground on the question of facts. Essentially, the facts, as re-stated by the Taxing Officer, were that the appellant did apply to the trial court, for a Certificate of Costs.

30. It was the finding of the Taxing Officer that the appellant had, by applying for the Certificate of costs, exercised her right under Rule 68 A (2) of the Advocates Remuneration Order.

31. Rule 68 A is headed;

"Certificate of Costs?."

32. And Rule 68 A (2) provides as follows;

"An advocate may, in any case in lieu of taxation, apply in writing for a certificate under this paragraph?."

33. It is open to a party who has been awarded costs to elect to ask for a certificate of costs, instead of having a Party & Party Bill of Costs taxed.

34. In this case the applicant elected to ask for a Certificate of Costs.

35. The applicant was not forced to make that election.

36. In response to the applicant's request, the trial court issued a certificate of costs.

37. The certificate of costs issued by the trial court was thus lawful and regular in every sense.

38. Of course, the applicant was dissatisfied with the quantum of the costs awarded to her. However, the said dissatisfaction with the quantum could not render the process of issuing the certificate of costs, irregular.

39. Although the applicant submitted that she was deprived the right to a fair hearing, because the certificate of costs was issued before the court gave her an opportunity to be heard, I find that a request for the issuance of a certificate of costs is not a request to be heard. In effect, the applicant did not ask to be heard before the certificate of costs could be issued: She cannot therefore complain that the court had refused to give her something which she had never asked for.

40. She asked for a certificate of costs; and that is exactly what she was given.

41. If the applicant formed the considered opinion that there was an error in the certificate of costs, she ought to have moved the court to challenge the said error, with a view to having it corrected.

42. However, it was not open to the applicant to file a Bill of Costs in respect to the very same costs for which a certificate had been issued. If the Taxing Officer had accepted to tax the Bill of Costs, that would be tantamount to awarding the appellant further costs, in respect one order for costs.

43. In the result, there is no legal basis to warrant either the setting aside of the decision made on 5th June 2014, or of having the said decision reviewed.

44. The learned Taxing Officer has not been shown to have made any error, in principle, or at all, so as to clothe this court with authority to set aside her decision.

45. In the result, the application dated 19th June 2014 is dismissed. The applicant will pay the costs to the Respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 8th day of September 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Onsongo for Miss Kilonzo for the Plaintiff

No appearance for the 1st Respondent

No appearance for the 2nd Respondent

No appearance for the 3rd Respondent

Collins Odhiambo – Court clerk.