



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CORAM: LUVUGA, DEPUTY REGISTRAR (IN CHAMBERS)
CIVIL APPEAL NO. 71 OF 1996
BETWEEN**

1. JOHN KIMANI NJONGE

2. KIMANI WAWERU

3. MUIKAMBA KINYANJUI APPELLANTS

AND

BORO KINYUA

GEORGE GITHAE NDING'URI

ALLAN MUTHAMA

NDINGURI MIGWI

KARANJA NJOROGE

ABRAHAM WANGAI

WACHIRA NDINGURI RESPONDENTS

**(Appeal from the ruling of the High Court of Kenya at Nairobi
(Bosire J) dated 15th November, 1995**

in

H.C.C.C. NO. 1741 OF 1995)

RULING ON TAXATION

The respondents' bill of costs before me for taxation arises out of an appeal to the Court of Appeal against an order of the High Court dismissing an application for review of an earlier order dismissing the application for injunction.

The appeal was withdrawn with costs to the respondents by a consent letter jointly signed by the advocates for the parties.

Mr. Mwaura objected to items 4 instructions fees and 10 of the bill of costs on the ground that the amount of KShs.1,200,000/= claimed on item 4 is not justified as the appeal was an ordinary one and there was nothing difficult in it. The appeal was concerning a refusal by the High Court to grant an

injunction to the appellants. He said the appeal was not heard instead it was withdrawn by consent of both parties.

In Mr. Mwaura's view there was no preparation by the counsel for the respondents as he could have prepared if the appeal came to hearing. He referred to rule 9(2) page 48 of the rules and submitted that even if the rule is taken into account the amount claimed is not justified. He said the appeal did not involve money or even ownership other than an order for injunction. The appeal did not concern the community as the appellants are shown on record and the matter affected the seven respondents only.

On these submissions Mr. Mwaura urged me to disallow the item as a whole. He however suggested a figure of KShs.9,000/= if I am inclined to grant some money to the respondents.

As regards means to pay Mr. Mwaura submitted that it is common knowledge that the appellants are poor villagers and are not in employment, one of them being an old man of 80 years. They live on a land given to them by the Government. Mr. Gichichio counsel for the respondents in his support for the amount claimed, said it was barratrosic for the appellants to bring a matter before the Highest Court in the land if they believed it is unsubstantial matter. Before the matter came to the Court of Appeal it had come by way of an application for injunction in the High Court and the same was dismissed against the appellants. The review application they filed after was also dismissed with costs. He said the appeal before the Court therefore was against the review and it is the third time the appellants had brought the respondents to court. All along the respondents have been objecting to these matters and it goes to show the seriousness.

The appeal had been fixed for hearing on 29th April, 1997 and the consent for the withdrawal of appeal was filed on 22nd April, 1997 which was about seven days to the hearing date and before that date there was an application in court Civil Application Nai.315 of 1996 for the dismissal of the appeal filed on 9th April, 1996. The consent to withdraw the appeal was arrived at shortly before the date of hearing. From the record of appeal it could be noted that there were substantial material to be considered and it needed preparation for the hearing of the appeal. Mr. Gachichio submitted that if the injunction had been granted it could have had far reaching implications in terms of persons freedom of movement with even considerable financial loss. He further submitted that the appeal involved substantial matters and the amount claimed on items 4 is justified. The appellants managed to higher one of the leading law firms in the Republic up to the Court of Appeal. From the record the appellants own plots Nos.345, 346 and 347 in the said Escarpment Scheme and as it is common knowledge it is the prime part of our land. It cannot be said the appellants are men of straw.

He submitted that they should be made to pay the amount claimed in the bill as they brought the matter to court which they did not consider seriously.

As I have said before in past rulings in a taxation before this Court, I am required by the rules of this Court to tax costs as between party and party arising out of an appeal before this Court in accordance with rules and scales set out in third schedule to the Rules. See rule 108(1) and (2) pages 35 of the Rules.

I have read the record in this appeal and carefully considered the submissions of both counsel in this taxation and also with regard to the nature, importance and difficulty of the appeal. It is not in dispute that the appeal was not heard, it was withdrawn before it came for hearing. It is a factor to note that costs payable should not appear to be a punishment to the unsuccessful party but rather successful litigants as in this appeal ought to be fairly reimbursed for the costs they have had to incur in the appeal.

In the present appeal the appellants lost both in the High Court and in this court. As stated earlier, the appeal arose from the dismissal of an application for review in the High Court. Although the appeal was not heard nevertheless the respondents counsel must have had to prepare especially as it was about seven days remaining before the hearing though I take note he had not yet filed the list of Authorities. However the appeal was not heard and the costs should be reasonable. In my view the figure of 1,200,000/= cannot be said to be reasonable in the circumstances of this appeal. The amount is far much excessive and cannot be allowed to stand.

In my opinion and taking into account all the factors to be considered in this taxation I consider a figure of KShs.60,000/= as being reasonable instructions fee which I allow. KShs.1,140,000/= is therefore taxed off on item 4 of the bill. As regards item 10, it was held as far back as 1973 in a taxation in Civil Appeal No.66 of 1972 and also accepted in recent ruling in a taxation in Civil Appeal No. 117 of 1985 that all charges for attendances on the opposite party, correspondences, perusals and consulting Authorities are governed by rule 9(3) as they are clearly part of the instructions. It therefore follows that the items concerning perusals of documents in this appeal, attendances on the opposite party, correspondences between the parties and the Registrar, also drawing of certain letters are not allowable as separate items but as part of the instruction fees. In the circumstances therefore items 2, 3, 5, 7, 8, 9, 10, 11, 12, 13, 14, 16, 18 and 20 of the bill of costs are disallowed. The amount taxed off is more than one quarter of the profit costs claimed. I therefore disallow items 21, 22 and 24 of the bill of costs including attendances before me.

In the results the bill of costs filed by the advocates for the respondents on 17th June, 1997 is taxed at KShs.60,670/= which is to be added a sum of KShs.607/= taxing fee making in all KShs.61,277/=.

Dated and delivered at Nairobi this 8th day of May, 1998.

T. S. LUVUGA

DEPUTY REGISTRAR

I certify that this is a true copy of the original.

DEPUTY REGISTRAR