



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU**

Civil Appeal 127 of 2003

SOUTH NYANZA SUGAR COMPANY LIMITED..... APPELLANT

AND

SAMWEL OSEWE OCHILLO P/A OCHILLO & COMPANY ADVOCATES.....RESPONDENT

(An appeal from the judgment and decision of the High Court of Kenya at Kisii (Mr. Justice Wambilyangah) dated 20th December, 2002

in

H.C.C.C. NO. 174 OF 2001)

JUDGMENT OF THE COURT:

The appeal before us is brought by *South Nyanza Sugar Company Ltd*, the appellant hereinafter. The respondent, *Samuel Ochillo* is an advocate in Kisii and trades as such in the name of Ochillo and Company Advocates. The appeal arises in this way.

By a plaint dated and lodged in the High Court at Kisii on 25th October, 2001, the respondent claimed from the appellant the sum of Kshs. 2,689,500.00/- as fees due to him from the appellant in respect of various cases which the respondent said he had, as an advocate, defended in various courts on the instructions of the appellant. Accompanying the plaint was a letter by the respondent to the Deputy Registrar of the High Court and the letter was in the following terms:-

“DATE 25/10/01.

DEPUTY REGISTRAR,

HIGH COURT, KISII.

Dear Sir,

RE: KISII HCC NO. 174 OF 2001

SAMUEL OCHILLO VS SOUTH NYANZA SUGAR LTD.

We have the honour to refer to the above case and wish to advise that the above intended suit is being filed under S. 48 and 49 of the Advocates Act as it involves recovery of costs due to an advocate therefore this suit is exempted from paying court fees. We annex photocopies of the said sections of the Act and a high court decision.

Kindly register the same and issue summons to enter appearance without any further delay.

Thanking you in advance,

Yours faithfully,

OCHILLO & CO. ADVOCATES.”

A Deputy Registrar, whose name is not apparent from the record, endorsed on the letter:-

“Approved. No court fees to be paid.

DEPUTY REGISTRAR,

25/10/2007.”

We are ourselves not aware that an advocate who is suing a client or a former client for his or her professional fees is exempted from paying filing fees on the plaint. The Civil Procedure Act itself does not appear to deal with the issue of payment of fees but **Order IV** which is headed “**INSTITUTION OF SUIT & ISSUE OF SUMMONS**” provides at **rule 2(2)**:-

“Every plaint to be filed shall be presented to the registry during office hours together with any fee payable on its filing and each such plaint shall be date-stamped with the date on which it was so presented which shall be the date of filing the suit notwithstanding any dispute as to the amount of the fee payable.”

That rule does not exclude plaints filed by advocates claiming fees from their clients or former clients. Then there are the provisions of **Order 32** which allow institution of suits in “*forma pauperis*”. The respondent was not and could not have claimed to be entitled to sue as a pauper.

Instead the respondent cited the provisions of **sections 48** and **49** of the Advocates Act, Chapter 16 of the Laws of Kenya. The two sections provide as follows:-

“48(1) Subject to this Act, no suit shall be brought for the recovery of any costs due to an advocate or his firm until the expiry of one month after a bill for such costs, which may be in summarized form, signed by the advocate, or a partner in his firm, has been delivered or sent by registered post to the client, unless there is a reasonable cause, to be verified by affidavit filed with the plaint, for believing that the party chargeable therewith is about to quit Kenya or abscond from the local limits of the court’s jurisdiction, in which event action may be commenced before expiry of the period of one month.

(2) Subject to subsection (1), a suit may be brought for the recovery of costs due to an advocate in any court of competent jurisdiction.

(3) Notwithstanding any other provisions of this Act, a bill of costs between an advocate and a client may be taxed notwithstanding that no suit for recovery of costs has been filed.”

There is absolutely nothing in any of these provisions which would justify the extraordinary claim made in the respondent’s letter to the Deputy Registrar. Then **section 49** provides as follows:-

*“Where, in the absence of an agreement for remuneration made by virtue of **section 45**, a suit has been brought by an advocate for the recovery of any costs and a defence is filed disputing the reasonableness or quantum thereof -*

(a) no judgment shall be entered for the plaintiff, except by consent, until the costs have been taxed and certified by the taxing officer;

(b) unless the bill of costs on which the suit is based is fully itemized, the plaintiff shall file a fully itemized bill of costs within fourteen days from the date of service of the defence, or such further period as may be allowed by the court, and shall serve a copy thereof on the defendant, and, if the total amount of such bill exceeds the amount sued for, the prayer of the plaintiff shall, subject to the court’s pecuniary jurisdiction, be deemed to be increased accordingly and all consequential amendments to the pleadings may be made;

*(c) no court or filing fee shall be payable on filing **a bill of costs** required by this section but, if thereby the amount for which judgment is prayed in the plaint is deemed to be increased under paragraph (b), the plaintiff shall pay to the court **such court or filing fee as may be appropriate to the increase; and***

(d) at any time after the bill of costs has been filed, and before the suit has been set down for hearing, any party to the action may take out a summons for directions as to whether such bill should be taxed by the taxing officer before the suit is heard.”

Once again we are at a total loss to understand how these provisions can be read to mean that an advocate suing his client is exempted from paying court filing fee on a plaint. The fee that is not payable is for an itemized bill of costs to be filed under paragraph (b) of **section 49** and that section specifically provides that if the itemized bill of costs filed thereunder exceeds the amount claimed in the plaint, the latter amount is to be deemed to have been increased and the plaintiff filing the bill must pay the fee for the increased amount in the plaint.

The contents of the respondent’s letter to the Deputy Registrar at Kisii were simply false and we are surprised that a Deputy Registrar acceded to the request and directed that no fee was payable on the filing of the plaint. The Deputy Registrar, however, had no power to exempt the respondent from paying the requisite fee with the result that the plaint was not properly filed and that being so, there was no valid plaint upon which the learned Judge of the superior court could proceed to deliver his judgment. The judgment was based on no valid plaint.

Dealing with a similar situation in the Ugandan case of **UNTA EXPORTS LTD VS CUSTOMS** [1971] EA 648, Goudie, J. stated as follows at page 649 letters E to F:-

***“I have no doubt whatsoever that both as a matter of practice and also as a matter of law documents cannot validly be filed in the civil registry until fees have either been paid or provided for by a general deposit from the filing advocate from which authority has been given to deduct court fees*”**

With respect, we agree and would adopt that principle as being aptly applicable to the issue we are dealing with.

The respondent at some stage applied to the court by way of a notice of motion to be allowed to pay part of the court fee payable for filing the plaint and the plaint he filed on 25th October, 2001, be deemed to have full force and effect as if such part of court fees had been paid in the first instance. That motion is at page 61 of the record and was dated 22nd November, 2001, nearly one month after the plaint had been filed. We, however, do not see any orders of the Judge allowing that motion. Mr. Odunga, learned counsel for the appellant, told us that the motion was never heard. The respondent himself failed to appear before us to say if he paid the fees. It was only after we had completed hearing the appeal that another advocate came into the court to tell us that he had been instructed to apply for an adjournment as the advocates for the respondent were said to be negotiating with the appellant’s advocates. Needless to

say we could not have possibly granted an adjournment after we completed hearing the appeal.

The appellant complained in ground 12 of its memorandum of appeal that:-

“The Learned Judge failed to consider the fact that the suit before him was utterly incompetent, frivolous and vexatious and strictly did not lie and, therefore, he could not have dealt with it in the manner and way he did.”

Based on what we have already said herein, this ground of appeal must succeed. There was no valid plaint upon which Wambilyangah, J. could have based his judgment of 20th December, 2002. We allow the appeal, set aside the judgment and decree of the High Court, and substitute therefor an order striking out the plaint filed by the respondent in the High Court on 25th October, 2001. We award to the appellant the costs of the suit in the High Court and we also award to the appellant the costs of this appeal. Those shall be the final orders of the Court.

Dated and delivered at Kisumu this 30th day of November, 2007.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. O. O’KUBASU

.....

JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR