

IN THE COURT OF APPEAL
AT NAIROBI

(Coram: Kneller, Hancox and Nyarangi, JJ A.)

CIVIL APPLICATION NAI 51 OF 1985

BETWEEN

THE HON THE ATTORNEY GENERAL APPLICANT

AND

GEOFREY NDUNGU THEURI RESPONDENT

(Application for extension of time to file the notice of the intended appeal from an order of the High Court of Kenya at Nairobi (O'kubasu and Abdullah, JJ) dated May 20, 1985

In

Misc Application 72 of 1984)

RULING OF THE COURT

Mr Theuri asks this court to award him the costs of this reference because he succeeded in persuading the court to reverse the decision of the single judge of appeal, and costs follow the event. He claimed he had done much research into the facts for the reference and into the law relating to such a reference, into the judicial exercise of the discretion vested in a single judge of appeal by the amended rule 4 of the Court of Appeal Rules and

into the question of whether or not the time for lodging a notice of appeal under rule 74(2) (ibid) should be extended.

Mr Shields, the chief state counsel, for the Attorney General, opposed the award of costs to Mr Theuri because he was not an advocate. He submitted that all he was entitled to was what he had spent necessarily and properly on paying the fees for filing documents and serving them and the expenses of attending the hearing of the application and the reference.

Starting from the provisions in the Court of Appeal Rules relating to any decision about the payment of costs, we find that the court may assess them or direct them to be taxed, and any decision as to the payment of costs, not being a decision whereby the amount of the costs is assessed, shall operate as a direction that the costs be taxed. Rule 105 (1).

The registrar (or Deputy Registrar) of this court is the taxing officer and has the power to tax the costs between party and party of or arising out of any application or appeal of this court. Rules 2 and 108 (1).

‘Application’ and ‘appeal’ do not, however, include ‘ a reference’ according to their definitions in the Rules, but although the term ‘ reference’ is in the side note to rule 54(1), which provides ‘a reference’, yet that rule, in itself, stipulates that any person being dissatisfied with the decision of a single judge of appeal in any civil matter may apply to the single judge informally at the time when the decision is given or by writing to the registrar within seven days thereafter to have any order, direction or decision of a single judge varied, discharged or reversed by the court, rule 54(1)(b). It is in the rules, and in effect, a reference is just another application and the Deputy Registrar is the taxing officer for it as for an ‘appeal’ or an ‘application’.

And such costs are to be taxed in accordance with the rules and the scale set out in the Third Schedule of the Rules. Rule 108(2).

There in the Schedule will be found a provision that the Deputy Registrar must allow the reasonable expenses of a party who appeared in person at the hearing of an application or an appeal (and those of witnesses who give evidence at any such hearing). Para 19.

Now what Mr Theuri seeks, we believe, is an award that will include not only a sum for the work he did in preparing this matter for the application to the single judge of appeal and for the work he did for the reference to this court but also another sum for the notional costs of briefing an advocate for both matters or part thereof.

Mr Shields is, of course, correct when he says that Mr Theuri cannot rely on the provisions of The Advocates (Remuneration) Order because Mr Theuri is not an advocate.

In England, by order 62 rule 28A of The Rules of The Supreme Court Parliament has provided an exception to the principle that by an award of costs a successful party is only to be indemnified against costs which he has incurred. The exception is that a successful litigant in person (in England) who suffers a pecuniary loss can recover for work done by him up to 2/3 of that which would have been allowed for that work if a solicitor had done it. Disbursements are allowed in full provided they would have been allowed if incurred by a solicitor. A notional disbursement such as fees for counsel or part of these fees was not covered because the successful litigant in person had not incurred them. See Lloyd, J in McLeod; Johnston-Hart v Aga Khan Foundation QBD, July 7, 1983. The Law Society's Gazette Wednesday October 5, 1983, p2437.

Here in Kenya we do not have such an order and rule in our legislation and we respectfully draw the attention of the rules committee to the English ones for introduction, if it thinks fit, into the Civil Procedure Rules.

Returning to Mr Theuri, we find he is entitled, as a successful litigant in person, to an indemnity from the respondent Attorney against the costs he has in fact incurred in bringing this application to the single judge of appeal and then of this reference to court ,

because costs follow the event, unless the court or judge shall for good reason otherwise order, and we cannot find any good reason to order otherwise. Section 27(1) Civil Procedure Act (cap 21).

We cannot make any order against the Council of Legal Education its Secretary at the relevant time or now, or the Principal of the Kenya School of Law because none of them was a party to the application or the reference.

The Attorney can, of course, we respectfully suggest, decide out of which vote by Parliament for his chambers or for the Council of Legal Education the cost should be approved and paid to Mr Theuri.

The costs are limited to the payment Mr Theuri incurred necessarily and properly for this application and reference, and they include reasonable expenses for his attendance at both.

We acknowledge and appreciate the extent of Mr Theuri's work and research in both applications, and particularly the fact that he listed the authorities and copied the unreported ones for us in obedience to our rule 26.

We can do no more for him because we apply, and do not create, any law in such matters.

We take one more step, however, in the interest of both parties, or so we think, and we fix these costs for the application and the reference together at one sum of Kshs 1,200.00 in the hope of ending this litigation. This course should obviate their taxation or a reference under rule 109 from the Deputy Registrar to a single judge of appeal, or an adjournment by him to the court, or application to the full court by any party dissatisfied with what the single judge did.

Orders accordingly.

Dated and delivered at Nairobi this 30th day of January, 1986.

AA Kneller

Judge of Appeal

ARW Hancox

Judge of Appeal

JO Nyarangi

Judge of Appeal

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

DEPUTY REGISTRAR