



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION

MISCELLANEOUS CIVIL SUIT 245 OF 2018

NILKUNJ RATILAL DODHIA.....APPLICANT

VERSUS

SHASHIKANT MEPA SHAH.....1ST RESPONDENT

SHANTILAL K SHAH.....2ND RESPONDENT

MANOJ SHAH.....3RD RESPONDENT

PIYUSH MEPA SHAH.....4TH RESPONDENT

ASHOK KUMAR MEPA SHAH.....5TH RESPONDENT

BUDHICHAND MEPA SHAH.....6TH RESPONDENT

RULING

1. This is a Reference on taxation of a Party and Party Bill of Costs in which the Applicant challenges two items. The two are the Taxing Officer's holding on instruction fees and his decision to make an award for getting up fees.
2. The Taxation emanates from a short-lived attempt by the Applicant to commence a derivative suit on behalf of Kenmac Limited against the six Respondents. The attempt was made in an omnibus motion dated 14th May 2018 which included 6 prayers of injunction. In a Ruling of 7th December 2018, the Court dismissed the entire application.
3. Following that dismissal the Respondents filed a Party to Party Bill of Costs dated 31st October 2019 in which they sought instruction fees of Kshs.2,700,000/= and getting up fees of Kshs.900,000/=. In declining the request for Kshs.2,700,000/= and granting the impugned sum of Kshs.600,000/= the Taxing master held:-

“On item 1, I do agree with the Applicant’s submissions that Schedule 6 of the Advocates Remuneration Order provides for the basic minimum instruction fees for presenting or opposing any other proceedings under the Companies Act other than winding up proceedings. The amount is Kshs. 15,000/-. How to depart from this basic minimum to allow the item at Kshs. 2,700,000/- cannot be justified. However, having perused the record and appreciated the amount of work and given the number of the respondent I will exercise discretion and award Kshs. 600,000/- for the instruction fees in respect of the 6 Respondents.”

4. In submissions made in support of the Reference to this Court, counsel for the Applicant criticizes the holding of the Taxing Officer as generalized and not in keeping with the need to specify the reasons why an increase in instruction fees was justified (Kyalo Mbobu T/A Kyalo & Associates Advocates v Jacob Juma [2015]). Counsel argues that the matter was not complex, was not novel and was not involved in documents.
5. For the Respondents, it was submitted that, although the question of leave to bring a derivative action was not novel, the issues raised in the application were complex as they involved consideration of whether the Applicant was a shareholder of the company as well as the law on transmission of shares of a deceased shareholder. Second, that the Respondent presented extensive evidence and argument on the merits

of the application for leave to institute a derivative action. Further, that the matter was of importance to the parties.

6. The law is that a Court sitting on a reference interferes with the decision of the Taxing Officer only if it is shown that an error of principle was committed in the assessment of costs or the assessment is so absurd that it has to be construed as an overt infraction of principle.

7. It is common ground that the proceedings that gave rise to the taxation were in the nature of a request to commence a derivative action. For that reason, no suit was before Court in the ordinary sense of the word. As agreed by the parties, and held by the Court, the place to look for the fees for those proceedings is subparagraph 1(f) of schedule 6 which reads:-

(ii) To present or oppose any other proceedings under the Companies Act.....kshs.15,000/=

8. To the rule on instruction fees is the following important provision:-

“Provided that:-

(i) the taxing officer may take into consideration other fees and allowances due to the advocate (if any) in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings, a direction by the trial judge, and all other relevant circumstances.”

9. As correctly submitted by the Applicant, where the Taxing Officer deems it fit to depart from the minimum fees then the officer ought to give specific reasons for such departure. As Lady Justice Aburili held in Kyalo Mbobu.

10. The advocate/respondent opposed the reference vehemently contending that he did voluminous complex work, argues applications for injunctions successfully and attended court severally and perused heavy documentation to justify the increase in the instructions fee.

11. Indeed, that may be so, as shown by the lengthy itemized bill of costs whose specific items on court attendance, research and perusals have not been objected to, substantially.

12. However, it was expected that the taxing officer would apply himself to those facts and make formal specific pronouncements regarding what he considered as relevant factors and or principles that guided him in exercising his judicial discretion to increase the instructions fee by one million Kenya Shillings, especially in a case where already the value of the subject matter could be ascertained from the pleadings.

13. It would seem that the Taxing Officer may not have given regard to this principle when he held, without specificity, that:-

“Having perused the record and appreciated the amount of work and given the number of the respondent I will exercise discretion and award Kshs.600,000/= for instruction fees...”

14. I would think that when the Rules Committee provided fees of Kshs.15,000/= under paragraph 1(f) of the schedule 6 for presentation or opposition to any other proceedings under the Companies Act it would have had in mind that one such proceeding would be a request for leave to take out derivative proceedings under Part XI of The Companies Act. It must therefore be that any proceedings that would involve a discussion of the principles in the grant or refusal of such permission would be suitable for remuneration of the minimum fees set out unless it was demonstrated that the proceedings were truly extraordinary in nature and importance, amounts involved, interest of the parties, general conduct of the proceedings and other relevant circumstances. In this matter the Respondents concede that the proceedings for leave were not novel. For purposes of determining whether or not the request for permission is merited it behooves on the Court to examine (without carrying out a mini trial) the evidence adduced by the Applicant in support of the plea for permission. That is the run of the mill in that type of proceeding. It has not been suggested that in this matter the Court undertook an extraordinary exercise.

15. However, the Respondents are right when they argue that the proceedings were somewhat unique in that it involved a discussion as to whether the Applicant, in the first place, had locus to take out a derivative action not being a shareholder. This could be a relevant matter in considering an increase in remuneration. That said, it may not be justification for increasing the minimum fees fortyfold.

16. Alongside the request to proceed with the matter as a derivative action, the applicants had a request for 6 injunctive orders. Under schedule 6 subparagraph (A)(c) vi, remuneration for presenting an application for a temporary injunction is Kshs.3,000/= and under subparagraph (c) viii to present or oppose an application ,where the application is opposed ,the sum is not less than Kshs.5,000/=. For the fact that there were 6 prayers, a sum of Kshs.30,000/= in that regard may be reasonable.

17. To this amount and for the reason that the application for permission also involved a discussion on locus it would be fair to increase the sum of Kshs.15,000 by about four times to make Kshs.60,000/= which when added to Kshs.30,000/= gives a sum of Kshs.90,000/=. That is the amount that is fair on instruction fees.

18. On getting up fees, schedule 6 is clear. Getting up fees is only for Trial or Appeal. These proceedings are neither category and getting up fees should not have been allowed.

19. In the end the reference is allowed as follows:-

i. Instruction fees is reduced from Kshs.600,000/= to Kshs.90,000/=.

ii. Item (2) on getting up fees is disallowed altogether.

iii. Each party to bear costs on this reference.

DATED, SIGNED AND DELIVERED IN COURT AT NAIROBI THIS 19TH DAY OF MAY 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17TH April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Ochieng holding brief for Ondungo for the Applicant.

Miss Amayo for the Respondent.