REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

CIVIL APPEAL 105 OF 2000

ATSANGO CHESONI……..……..….APPELLANT

- AND -

DAVID MORTON SILVERSTEIN …...…….……RESPONDENT

(A determination of the question of costs arising from the Judgment of Ransley & Ojwang,

JJ. delivered on 13th May, 2005)

RULING

I. COSTS FOR TWO COUNSEL ON THE HIGHER SCALE: BACKGROUND TO RESPONDENT'S CLAIM

The substantive question, on a claim of professional negligence in medical care, was determined in the Judgment delivered by *Ransley* (now retired) and *Ojwang, JJ*. on 13th May, 2005.

The last words in the Judgment thus read:

[*per Ransley, J*] –

"In the result I would dismiss this appeal with costs to the respondent";

[*per Ojwang, J*] –

"In the result [I] hereby dismiss this appeal, with costs to the respondent."

As the respondent was only responding to an appeal that had been lodged against a decision of the Medical Practitioners and Dentists Board acting as a tribunal, he had not had an opportunity to make representations on costs, until the time of judgment. Upon judgment being delivered, learned counsel *Mr. Georgiadis*, who appeared for the respondent with learned counsel *Mr. Gachuhi*, asked for leave to address the Court on costs, and to make a case for costs on the higher scale for two counsel.

II WRITTEN LAW HAS A LACUNA ON COSTS: RESPONDENT'S SUBMISSIONS

1. Legal Basis for Award of Costs in Quasi-criminal Matters

Counsel noted that the provision for appeal was incorporated in the Medical Practitioners and Dentists Act (Cap 253, Laws of Kenya), s. 20(6) thereof stipulating that –

"*A person aggrieved by a decision of the Board under the provisions of this section may appeal within thirty days to the High Court and in any such appeal the High Court may annul or vary the decision as it thinks fit."*

Though opening the door to the aggrieved person, *Mr. Georgiadis* urged, the term "person aggrieved" is not defined in the definitions section (s. 2); and nothing is stated on how the costs- burden would fall.

Learned counsel was asking the Court to be guided by certain considerations, in relation to costs. It was submitted, firstly, that the main cause was a particularly complex case; it was the first time the *procedural*, as opposed to the *medical*, dimension of operations of the Medical Practitioners and Dentists Board had been judicially considered.

Secondly, counsel urged, the appellant would not fall within the category of complainants contemplated as "persons aggrieved", within the meaning of s. 20(6) of the Act aforesaid. The appellant, counsel submitted, was only a *witness* in the case and, in the appeal before this Court, should be regarded as a busybody who probably lacked *locus standi.*

Counsel urged the Court to go by discretion, in accordance with s. 27 of the Civil Procedure Act (Cap 21, Laws of Kenya) which thus provides:

"*(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:*

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

"*(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."*

Mr. Georgiadis drew analogies with English Court decisions regarding medical appeals which, as in the instant matter, were of a quasi-criminal nature. Counsel cited a Privy Council decision, *Fox v. General Medical Council* [1960] 3 All E.R. 225 which related to a decision of the Disciplinary Committee of the General Medical Council. The Judicial Committee in that case, on the question of costs following the dismissal of the appeal, held:

"The respondents have asked for their costs of the appeal and their Lordships know of no ground on which they can refuse the application" (p. 231, *per Lord Radchiffe*).

In *Sivarajah v. General Medical Council* [1964] 1 All E.R. 504, the Disciplinary Committee at the General Medical Council had adjudged that the appellant had been guilty of infamous conduct in a professional respect, and had decided that the appellant's name be erased from the medical register. The Judicial Committee of the Privy Council dismissed the appeal, and held that "the appellant must pay the costs of the appeal" (p. 508).

From the foundation of such persuasive authority, *Mr. Georgiadis* urged that there was, in the instant case, a basis for the award of costs for two counsel on the higher scale.

Essentially, counsel attributed blame to the appellant for lodging an appeal which was as complex and expensive as it was wanting in conviction. *Mr. Georgiadis* submitted that "the appellant was an *ex post*

facto complainant, probably nudged to issue the letter of complaint." In these circumstances, it was urged, the Court's discretion to award costs, be so exercised as to make costs follow the event.

Regarding the claim of costs in respect of two counsel on the higher scale, counsel anchored his case on, firstly, the conduct of the appellant, and secondly, the inherent complexity of the subject-matter. Counsel submitted that, granting of a certificate for costs for two counsel depends on whether the Court considers the matter fit for such a certificate.

2. Conduct of a Complainant who lodges an Unsuccessful Appeal

Of the Court's general discretion in the award of costs, it is thus stated in *Halsbury's Laws of England*, 4th ed Reissue, vol. 10, at para. 16:

"*The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice."*

The same work goes on to state, in relation to the conduct of a party as it touches on costs (at para. 17):

"*In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including:*

(1) the conduct of the parties ……"

Conduct of the parties, in this regard, includes (para 17, *loc. cit.*):

"*(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol;*

"*(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;*

"*(c) the matter in which a party has pursued or defended his case or a particular allegation or issue; and*

"*(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim."*

Mr. Georgiadis urged that if it is assumed that the appellant was "a person aggrieved", for the purpose of s. 20(6) of the Medical Practitioners and Dentists Act (Cap. 253), then it would be necessary to look at *her conduct* before, as well as during the proceedings; and in particular the issue whether it was reasonable to pursue the matter in Court. The matter in question, counsel urged was of overwhelming importance to the respondent, as it had the potential to result in his "professional death." The claim, *Mr. Georgiadis* submitted, was "grotesque for a doctor of long standing"; it was "maliciously gratuitous."

Learned counsel urged to be most disturbing, the background to the matter which came before the Medical Practitioners and Dentists Board and subsequently, before the High Court. Prior to the meeting of the said Board, one *Dr. Matseshe* had put up publications in the media which were pejorative of the respondent; this was followed by a Preliminary Inquiry Committee which took up the matter *ex mero motu*, coming up with blame on the respondent which it placed before the said Board; and six weeks thereafter, the appellant now lodged a *complaint before the Board*, against the respondent; and again, the appellant prosecuted no matter before the Board, she only came as a *witness*.

Mr. Georgiadis submitted that the appellant's conduct had been highly questionable; while *Dr. Matseshe* published depreciatory material about the respondent, the appellant saw to a process of injuring the respondent's professional standing, well knowing that it was contrary to medical professional ethics for

the respondent to attempt to defend himself outside the profession: even as *Dr. Matseshe* posed as a migrant Doctor working in the United States, and therefore not part of the Kenyan medical profession, the appellant who is his cousin gave "tacit acquiescence" to the impugning of the respondent's professional standing.

When the appellant spoke before the Medical Practitioners and Dentists Board, *Mr. Geogiadis* submitted, "she waxed eloquently and threatened the tribunal to convict [the respondent] despite her lack of facts and lack of medical knowledge"; and he urged that such an assault could not be spontaneous, but was "meant to defame and destroy professionally." Counsel urged that the scheme of the appellant must have been to destroy the respondent professionally, because he would not have a chance to say anything in defence, from the time when the deceased in the main cause had died, in 1999 to the time of hearing the case, some five-to-six years later.

Learned counsel raised questions as to the *bona fides* of the appellant and her associates, when they expressed objections as to the regimen prescribed for the deceased while he was hospitalized: for they refused to allow the conduct of *post-mortem* examination to ascertain the cause of death, and yet they still laid blame at the doors of the appellant, and subjected the appellant's professional standing to an unwarranted attack.

3. Inherent Complexity of the Matter

Mr. Georgiadis urged that costs be certified for two counsel on the higher scale, also because of the complexity of the matter which had to be defended against the appeal; because of "the effort, special knowledge and responsibility involved in the handling of the appeal." Counsel urged that he could not have successfully conducted the case without the assistance of *M/s Kaplan & Stratton Advocates*; and he had had to make use of voluminous documents on questions of medical practice, much of which was alien to him.

Mr. Georgiadis was not seeking costs in respect of the tribunal hearing at the Medical Practitioners and Dentists Board, even though the foundation of the appeal was laid there, because of the quasi-criminal nature of the hearing at the tribunal stage.

On the principle that should guide this Court on *costs*, counsel drew our attention to the Court of Appeal decision in *Pollock House Ltd. v. Nairobi Wholesalers Ltd*. (No. 2) [1972] E.A. 172, in which the following passage (*per Sir Charles Newbold*, P. at p. 175) appears:

"Application has been made for a certificate for two advocates. We should like to say that neither the fact that both sides happened to be represented by two advocates, nor the fact that one or both sides regard it as a matter of importance, nor the fact that the other side accepts the application for a certificate for two advocates, are conclusive. The determination by this Court whether the case is a fit one for a certificate for two advocates must be dependent upon the *appreciation by the Court of the nature of the application*. In this case we have no doubt whatsoever in saying that this is not a fit case for a certificate for two counsel and therefore no certificate will be granted" [emphasis supplied].

While urging that whether or not to give a certificate of costs for two counsel was dependent on the discretion of the court, *Mr. Georgiadis* submitted that the record placed before the Court was of considerable magnitude, carrying exhibits on proper medication and on first line of treatment – and this revealed the complexity of the matter.

III. DISMISSAL OF APPEAL WITH COSTS, IN GENERAL TERMS –

HAVE THE JUDGES BECOME *FUNCTUS OFFICIO?*

The two Judges in the main cause, as already noted, spoke in similar general language when they dismissed the appeal *with costs.* But upon the pronouncement of the judgment, the respondent who had no document of defence against the appeal, now asked for an opportunity to address the Court on costs.

Was it proper to allow such an address? Had the judges become *functus officio*, on the question of costs?

Learned counsel *Mr. Adere* urged that the Judges had completed their mandate, from the moment they delivered their judgment, and they no longer had the jurisdiction to make further orders on costs, as counsel for the respondent was demanding. *Mr. Adere* submitted that the respondent ought to have made a formal application for the review of the judgment.

Learned counsel urged that the statement appearing in the judgment, that the appeal had been dismissed "with costs", did have legal implications which can no longer be varied in the manner being proposed by the respondent: namely (i) that the costs would *not* be on the higher scale; and (ii) that costs would *not* be for two counsel – save by formal application. On the basis of the judgment in its form as delivered, *Mr. Adere* submitted, "a decree can be drawn to the effect that the appeal was dismissed with costs, and that is all. After 13th May, 2005 it is no longer possible to draw a different decree on costs."

IV. THE SENSE OF THE ADVOCATES (REMUNERATION) ORDER

Mr. Adere urged that only the lower-scale costs would apply, in view of the provision in para. 50 of the Advocates (Remuneration) Order, which reads thus:

"*subject to paragraphs 22 and 58 and to any order of the court in the particular case, a bill of costs in proceedings in the High Court shall be taxable in accordance with Schedule VI and unless the court has made an order under paragraph 50A, where schedule VI provides a higher and a lower scale the costs shall be taxed in accordance with the lower scale."*

Mr. Adere's contention was that, within the ambit of the judgment as delivered, no order *had been made* as contemplated in paragraph 50A; and therefore, taxation in this matter must only be in accordance with the *lower scale*.

The said paragraph 50A thus provides:

"*The court may make an order that costs are to be taxed on the higher scale in Schedule VI on special grounds arising out of the nature and importance or the difficulty or urgency of the case; the higher scale may be allowed either generally in any cause or matter or in respect of any particular application made or business done."*

Mr. Adere urged that the informal application made for a higher scale of costs immediately following the delivery of judgment, ought to be disregarded; for such a case could only have been properly made "as the Court was hearing the appeal … or at the same time as the submissions." Counsel submitted: "A party does not wait to see the judgment of the Court first, then apply for costs for two counsel on the higher scale."

In what situations does the certification of costs for two counsel apply? *Mr. Adere* urged that it does not apply in respect of *appeals* heard in the High Court; and he was relying on para. 59 of the Advocates (Remuneration) orders, which thus provides:

"*(1) The costs of more than one advocate may be allowed …. In causes or matter in which the judge at the trial or on delivery of judgment shall have certified under his hand that more than one advocate was reasonable and proper having regard, in the case of the plaintiff, to the amount recovered or paid in settlement or the relief awarded or the nature, importance or difficulty of the case and, in the case of a defendant, having regard to the amount sued for or the relief claimed or the nature, importance or difficulty of the case."*

Mr. Adere gave the foregoing provision a technical construction which embraced only proceedings involving "defendant" and "plaintiff", but excluded proceedings in which the parties were "respondents" and "appellants". Counsel urged that the proceedings before this Court had not been a "trial", and that the judgment as delivered, had made no certification in respect of the requisite number of advocates for either

party.

Learned counsel contended that it was inappropriate to apply the Advocates (Remuneration) Order to the instant matter, because that instrument "applies to civil cases, as recognized under the Civil Procedure Act"; and that instrument applies only to contentious and non-contentious matters in the High Court. Counsel submitted that the proceedings in the main cause had not arisen from the Civil Procedure Act (Cap. 21, Laws of Kenya), nor from the rules made there under; but had arisen from the *Medical Practitioners and Dentists Act* (Cap. 253, Laws of Kenya). Counsel urged that costs were not an issue, in a case such as the one in question here; and he cited similar cases in which costs had not at all been in issue: *Munene v. Republic* (No. 1) [1969] E.A. 583; *Munene v. Republic* (No. 2) [1978] KLR 105.

V. A QUESTION OF THE COURT'S DISCRETION

Learned respondent's counsel, *Mr. Gachuhi* submitted that there indeed was an application before the Court, and this *application* was not seeking to review an order for costs: there already was an order for costs, made in the Court's exercise of jurisdiction within the framework of s. 20(6) of the Medical Practitioners and Dentists Act (Cap. 253, Laws of Kenya). The High Court, it was urged, was seised of this application as in any other case coming up before it; so it was not necessary for a party to pray for an order for costs, and the matter was entirely subject to the discretion of the Court.

Counsel submitted that costs would *ordinarily* be on the lower scale; but in this case, the appeal had been opposed by two counsel. It was submitted that the proceedings in this case had been, in nature, much like they would be in a trial; and the Court should have regard to the substance, rather than the form.

VI. ANALYSIS, AND DETERMINATION OF THE QUESTION

We believe it not to be a point of disagreement, that the basis of an award of costs is as provided in s. 27 of the Civil Procedure Act(Cap. 21, Laws of Kenya), namely that this is a matter regulated by *judicial discretion*. It is also well known that such discretion must be exercised judicially, which means that its exercise must accommodate any statutory or related directions in place, and any principles that may be in force, in judicial practice; and its exercise must pay regard to the vital facts and circumstances of the particular case.

The law of costs is more associated with civil matters, than any other sphere of justiciable issues; and it is thus not surprising that the Advocates (Remuneration) Order primarily contemplates civil litigation. There are, however, other kinds of litigious matters which lie on the fringes of the civil domain, yet matters which, still, are amenable to the award of costs; in this category may be classed judicial review matters; constitutional claims; quasi-criminal proceedings that occasion further proceedings entailing costs, etc. We would hold that the Court retains its discretion on costs, in such matters peripheral to the civil claim proper, and may exercise the same as the Court deems fit. This holding is supported by persuasive case authority which we have already considered: *Fox v. General Medical Council* [1960] 3All E.R. 225; *Sivarajah v. General Medical Council* [1964] 1 All E.R. 504. We did ourselves, in the main cause herein, order that the appellant would pay costs to the respondent.

As already noted, the respondent had had no occasion, from the beginning to the end, in the conduct of the appeal, to file a document of prayer regarding costs; and only at the end, when judgment was pronounced, did the respondent raise the issue of costs for two counsel, and on the higher scale. We are not in agreement with learned counsel for the appellant, *Mr. Adere*, that the question was not properly raised and, therefore, should not now be considered.

If the respondent did not raise the question, then, quite clearly, the taxation of costs would have been on the lower scale, in accordance with para. 50 of the Advocates (Remuneration) Order; but since we hold that the question was properly raised, and that this Court had the jurisdiction to make more particularized orders as a follow-up to its judgment, it follows that we can act by virtue of para. 50A of the Advocates (Remuneration) Order, to consider the level of costs to be paid. In this behalf, the Court may also make

specific orders on the number of counsel in respect of which costs are payable.

The factual matters that must guide the Court are two: (i) the complexity of the subject which counsel had to handle; and (ii) the conduct of the judgment-debtor.

We have no doubts that the subject taken up on appeal was a novel and complex one, mostly focused on the interfaces between the fields of law and medicine; and learned counsel had to rely on voluminous material on an alien professional field, and to make the most complex submissions. The Court is alive to the stupendous task which counsel discharged, in helping it to apprehend the issues better, and this by itself, we believe, would merit the award of costs on the higher scale.

That position is confirmed by our view of the conduct of the appellant, who we believe not to have shown transparency, as she saw to the mounting of the professional negligence case which, as the Court held, had no evidentiary foundation, but a case which clearly was most detrimental to the respondent as a medical practitioner.

From the foregoing assessment of law and facts, we hereby certify costs in terms of the judgment, for two counsel, this to be on the higher scale in respect of one counsel. The costs shall bear interest at Court rate as from the date of this Ruling.

This order shall form part of the decree to be extracted from the judgment delivered on 13th May, 2005.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 17th day of February, 2009.

ALNASHIR VISRAM **J.B. OJWANG**

JUDGE **JUDGE**