



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Winding Up Cause 52 of 1998

IN THE MATTER OF MIDCO TEXTILES LIMITED

AND

IN THE MATTER OF COMPANIES ACT, CHAPTER 486, LAWS OF KENYA

RULING

The application before me has been brought pursuant to the provisions of Rule 11 of the Advocates (Remuneration) Order.

It has been brought by the company, with a view to setting aside or varying the decision which was delivered by the taxing officer on 9th July 2004.

By the said decision, the learned taxing officer did tax the costs payable by the company, at Kshs.21,045/-.

It is the company's case that the said costs were only in relation to an interlocutory application, in relation to which no leave had been obtained, as should have been done pursuant to Order 50 rule 13 (2) of the Civil Procedure Rules. Therefore, as the respondent had not sought or obtained leave of the court to have the Bill of Costs taxed, the whole process of taxation is now said to have been faulty. Indeed, the company contends that the taxation was null and void, for want of jurisdiction.

For those reasons, the company asks the court to set aside the costs, as assessed in both Winding-Up Causes Number 51 of 1998 and 52 of 1998.

However, the respondent believes that the taxation process was very much in order, as it was carried out pursuant to an order issued by the Court of Appeal. The said orders were made in Civil Appeals, Number 13 of 2000 and 14 of 2000.

In order to have a clearer picture of the circumstances prevailing, it is necessary to delve into the history of the matter.

Two petitions were filed against Midco Holdings Limited and Summit Textiles Limited, respectively. Those petitions were filed in Winding-Up Cause, Numbers 51 and 52 of 1998.

When faced with the prospects of being wound-up, the companies filed applications under the provisions of Rules 5 (2) and 201 of The Companies (Winding-Up) Rules, seeking orders to restrain the petitions from being advertised.

By the said applications, the companies also sought a stay of proceedings. The companies also asked for leave to file affidavits in opposition to the Petition.

The reasons for seeking leave to file the affidavits in opposition was that the companies had failed to take appropriate action, in that regard, within such time as is prescribed.

When the applications came up for hearing, the petitioners raised a preliminary objection, on the grounds that the respondents thereto, (being the companies) had no locus standi. At that point in time the companies had not yet filed any affidavits in opposition to the petitions, hence the assertion that they lacked locus standi.

After giving consideration to the preliminary objection, the learned judge overruled the same, and proceeded to hear the application. Eventually, the learned judge ordered that there be a valuation of the shares held by the petitioners.

Following the decision by the learned judge of the High Court, the petitioners felt aggrieved, and therefore preferred appeals against the said decision. The said appeals were number 13 and 14 of 2000; and the same were heard and determined expeditiously. Indeed, by 14th July 2000, the Court of Appeal delivered its unanimous verdict.

First, they made it clear that the superior court had erred, by ordering that the petitioners' shares be valued. The court said;

“The respondents did not pray in the application to strike out the petition or allude in the affidavit in support or further thereto, that the petitioners’ shares be valued as was ordered by the learned Judge. That order with respect, could not be made, not only because it was not asked for, but for the very reason that after striking out the petition, the Judge thereafter, had no basis on which to order for the valuation of the shares.”

And on the issue as to whether or not the companies had had locus standi to file or prosecute the application, the Court of Appeal said;

“It is also our view that a company intended to be wound up, must, be entitled to take part in the petition, show its opposition to the petition by filing an affidavit to that effect under rule 31 of the Rules, failing which the company shall be in the same situation as a defendant who has not filed a defence in an action.”

For those reasons, (amongst others) the Court of Appeal allowed the appeals. They also ordered as follows;

“The rulings of the superior court together with all consequential orders are set aside and vacated. The appellants shall have the costs of this appeal and of the application striking out the petitions in the superior court.”

In the light of that clear verdict, the applicant was wrong to contend that;

“The court of Appeal only awarded costs. It did not say that the costs were to be paid.”

Obviously, whenever the Court does award costs to any party, that implies that the said costs are to be paid to that party. There cannot be need for any further orders, specifically saying that the costs be paid, for the same to become payable.

However, there are times when the court will order that costs be paid forthwith. In such instances, the time for payment will have been specified. So, the question that needs to be addressed is when costs should be paid, if the Court did not specify that they be paid forthwith.

Ordinarily, costs would become payable at the conclusion of the case in which they are awarded, unless the court expressly directs otherwise. In my understanding, the power to give directions on the issues of costs, including the timing for taxation and payment thereof, is provided for by Section 27 of the Civil Procedure Act.

But, in this matter, the Court of Appeal did not direct that the costs be paid forthwith. It is for that reason that the company is invoking the provisions of Order 50 rule 13 (2) of the Civil Procedure Rules. That rule stipulates as follows;

“Unless the court otherwise orders for special reasons to be recorded, costs awarded upon originating summons, motion, chamber summons or other process shall be taxed at the conclusion of the suit.”

The company then said that the petitions herein were still pending; and that therefore, there was yet to be a conclusion of the suit.

It is on that basis that the company submitted that the Bill of Costs was taxed prematurely.

But the respondent responded to that contention, by reminding the company that it did not raise any objection, at the stage when the taxation was taking place. The respondent also said that the petitions had been settled, save only for the valuation of the shares.

To my mind, provided that there were any outstanding issues on the petitions, it could not be said that they had been concluded.

But that does not necessarily imply that the provisions of Order 50 rule 13(2) of the Civil Procedure Rules would automatically come into play. I say so, because, “court” is defined, at Section 2 of the Civil Procedure Act, as;

“the High Court or a subordinate court, acting in the exercise of its civil jurisdiction.”

Now, whilst, there is no doubt that the petitions were brought before the High Court, it must be borne in mind that the order for costs, herein, was made by the Court of Appeal. That would imply that the said order could not be the subject of interpretation under the Civil Procedure Rules.

In HOMI DARA ADRINWALLA –VS- JEANNE HOGAN & ANOTHER, [1996] E.A. 290 at page 291, the Hon. MUSTAFA J. said;

“I hold that unless the court directs the immediate taxation and payment of costs in an interlocutory application there should be only one taxation of an action, and costs of an interlocutory application should be held over until the final disposal of the suit. It is undesirable to have to tax a number of bills in an action.

In suitable instances a successful party can apply for immediate taxation and payment of costs in an interlocutory matter so as to prevent hardship, or for reasonable cause.”

In the same vein, the learned judge did note that in the case of PHILIPS –VS- PHILIPS & OTHERS (1879) Q. B. D. 60, the headnote read as follows;

“An application by a defendant in an action in the Queen’s Bench Division, to strike out the statement of claim as embarrassing, having been refused by a Divisional Court, the defendant appealed, and the Court of Appeal made an order “that the judgement of the court below be reversed with costs of this appeal and of the proceedings in the court below.” The defendant applied to the master to tax the costs, which he declined to do on the grounds that they were costs of an interlocutory application, and the taxation must stand over till the termination of the action.

Held, by the Court of Appeal, that the practice of the Common Law Divisions to have only one taxation of costs in an action does not apply where costs are given by the Court of Appeal, and that under an order of the Court of Appeal directing payment of costs without any intimation that the taxation and payment be postponed, the party to whom they are ordered to be paid is entitled to have them taxed and paid forthwith.”

Those words were adopted as correct by the learned judge. However, I do note that that is a decision of the High Court of Tanzania. Therefore, I must ask myself if the ruling therein is in line with the law in Kenya.

In my considered opinion, the said decision is also reflective of the legal position in Kenya. I say so because Rule 105 (2) of the Court of Appeal Rules provides as follows;

“For the purposes of execution in respect of costs, the decision of the Court directing taxation and the certificate of the taxing officer as to the result of such taxation shall together be deemed to be a decree.”

In other words, there is nothing interlocutory about an order which the Court of Appeal gives on the issue of costs, or on the other issues.

The judgement of the Court of Appeal is a final and conclusive adjudication of the matters which were before the said court. Therefore, even if it were true that the petitions were still pending, the High Court could not hereafter issue any orders which would vary or reverse the pronouncements already made by the Court of Appeal.

Although the company contends that there still remains the process of having the petitioners’ shares valued, I doubt that that is the position. I say so because, in its judgement, the Court of Appeal did express the view the learned judge of the superior court was not entitled to order that the shares be valued; not just because that order was not sought, but also because there would have been no basis for making such an order, once the petition had been struck out.

However, if the petitions were still alive, that fact could still not, in any manner whatsoever, alter the judgement of the Court of Appeal.

For those reasons, I find that the Bill of Costs was not on an interlocutory application. It was filed pursuant to the judgment of the Court of Appeal. Therefore, I find no legal basis upon which to state, as the applicant had invited me to do, that the decision of the learned taxing officer should be set aside or varied. In the circumstances, the application dated 24th November 2005 is dismissed with costs.

Dated and Delivered at Nairobi this 14th day of November 2006.

FRED A. OCHIENG

JUDGE