



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 268 OF 1998

1. KAYAM MADHANY

2. NIZAR MADHANY

3. AMIR MADHANY

4. HASSANALI MADHANY (Together known and Suing on behalf of the MADHANY FAMILY

5. KENYA SUNSHINE PRODUCTS LIMITED

6. KAMUTA INVESTMENTS LIMITED PLAINTIFFS

VERSUS

INDUSTRIAL PROMOTION SERVICES (K) LTD. 1ST DEFENDANT

PREMIER FOOD INDUSTRIES LTD. 2ND DEFENDANT

FRIGOKEN LIMITED 3RD DEFENDANT

RULING

This suit is between Kayam Madhany and 5 others as plaintiffs and Industrial Promotions Services (Kenya) Limited and 2 others as defendants. The parties will be referred to as plaintiffs and defendants respectively in this ruling. On 19.5.1999, the parties herein recorded the following orders:- “By Consent: -

- 1. The Plaintiffs granted leave to file an amended plaint within 28 days from the date hereof.***
- 2. All costs incurred by the defendants to date to be paid within 28 days of being agreed or taxed including an appeal therefrom. If not agreed Bill of Costs to be filed within 3 weeks from today. (Emphasis is mine)***
- 3. The Defendants are not required to plead to the amended plaint until payment of costs as aforesaid.***
- 4. This order not to prejudice the Defendants in any way whatsoever including but not limited to the Limitation of Actions Act, Chapter 221 Laws of Kenya.***
- 5. Liberty to apply to the Court.”***

The order was signed by Mr. Billing for the plaintiffs and Mr. Magan for the defendants.

There was no agreement between the advocates regarding the issue of “the costs which had been incurred by the defendants to date” and in terms of paragraph 2 of the consent order the defendants filed a bill of costs for a total sum of Shs.14,085,244/=. That bill came up for taxation by the Deputy Registrar of this court (C. O. Kanyangi Esq) on two dates namely 26.5.1999 and 7.10.1999 and was finally taxed in the sum of Shs.2,088,244/= after the sum of Shs.11,997,000/= had been taxed off.

There is no major dispute regarding most of the items in the bill and in fact all but one are not the subject of the contest in these objections. What is disputed and is indeed the subject of the two objections before me is item No. 6 in the bill, which comprises instructions fees.

Neither party appears to have been entirely satisfied with the ruling of the learned Deputy Registrar. Consequently, each party objected to the decision. The first objection in point of time is that by the defendants dated 12.7.2000 in which they complained that the taxing officer erred both in law and in fact in arriving at his decision. They therefore sought to review the quantum of the instructions fees assessed by the Deputy Registrar and to have substitute therefore, the instructions fees claimed in their Bill of Costs as originally filed or such other sum as deemed appropriate by the court.

On their part, the plaintiffs did not decide to raise any complaint against the taxation until 7 months after the event. It was thus not until 2.10.2000 that they lodged their Chamber Summons application for the review of the taxation. In their objection, they sought the reduction of quantum of the instructions fees assessed by the Learned Taxing Officer and to have substituted therefore, a reasonable instruction fees and/or such other sum as deemed appropriate.

The two objections were taken under paragraph 11 of the Advocates (Remuneration) Order and were heard together. According to Mr. Magan, the Deputy Registrar did not have any discretion to reduce the basic instructions fees prescribed in Schedule VI of the Advocates (Remuneration) Order, his discretion in the matter being restricted to increasing such fees, if he was so minded. Accordingly, even if the taxing officer accepted the figure suggested by the plaintiffs as representing the value of the subject matter of the suit i.e. the sum of Shs.230,000,000/=: the basic minimum instructions fees that should be allowed thereon under Schedule VI (1) of the Advocates (Remuneration) Order should, at the very least, have been Shs.3,575,244/=. In those premises, Mr. Magan further submitted, it was patently wrong for the taxing officer to have taxed the instructions fees at Shs.2 million only. Mr. Magan also claimed that the taxing officer erred by not assessing correctly the true value of the subject matter of the suit which according to him was Shs.929,172,257/=. Based on this figure, the basic instructions fees should have been the sum stated in the Bill of Costs namely Shs.13,977,000/=:

In his response, Mr. Billing submitted that there were no complex issues of law or fact involved in the suit and consequently the taxing officer was wrong to tax the bill of costs in the manner he proceeded. He also stated that the taxing officer had the discretion to reduce the instructions fees. In that respect it was necessary, Mr. Billing further stated, to take into account the fact that the matter never proceeded to hearing as the parties had dealt only with interlocutory applications prior to the consent order. He therefore submitted that as the suit had not been heard, the taxation should not have been conducted as if the suit had been finalised.

I think I should begin by considering the question whether or not the suit had been finalised. Regarding that I am not entirely satisfied that Mr. Billing was being very candid in his submissions. I say so because when he and Mr. Magan appeared before the taxing officer for the taxation of the bill, Mr. Billing did not raise any question regarding whether or not instructions fees should be allowed. Indeed the taxing officer proceeded on the footing that the suit had been withdrawn fully as against the defendants by a notice filed in court on 5.10.1999. Given that position, Mr. Billing cannot now turn around and state that the suit was not withdrawn or that instructions fees were not payable. In any case that would be contradictory to the wording of the consent order recorded herein by the parties whereby:-

“All costs incurred by the defendants to date shall be paid by the plaintiff.”

Quite obviously costs incurred by the defendants up to 19.5.1999 included instructions fees. In view of

that, the taxing officer was fully entitled to allow instructions fees.

Having determined that the taxing officer was entitled to consider and allow a reasonable sum for instructions fees, I turn now to consider whether the taxing officer was right in determining that only Shs.2 million out of the sum of Shs.13,977,000/= claimed as instructions fees in the bill of costs should be allowed.

Since this suit did not reach judgment or settlement, the value of the subject matter can only be determined from the pleading. Based on that, Mr. Billing asserted that the value was Shs.230,000,000/= while Mr. Magan on the other hand submitted that the value was, as aforesaid Shs.929,172,257/=. In my judgment, both learned counsel are plainly wrong. Mr. Billing has clearly under assessed the value while Mr. Magan has exaggerated it.

It is trite law that a party cannot be granted orders which are not sought in the claim. In view of that we do not have to go beyond the prayers in the plaint in order to determine the value of the plaintiffs' claim against the defendants. We simply have to look at the prayers in the plaint. Going by that principle, I determine the value of the subject matter of the suit to be:-

(a) Shs.230,000,000/= claimed in paragraph 39(a) of the plaint. The claim in sub-paragraph (b) of paragraph 39 is in the alternative and does not therefore increase the aggregate figure.

(b) Shs.6,695,413/= claimed in paragraph 39(f).

(c) Shs.2,476,844/= as claimed in paragraph 34 and repeated in paragraph 39(g).

(d) Shs.6,000,000/= as claimed in sub-paragraph (p) of paragraph 39.

(e) Shs.230,000,000/= claimed in paragraph w(vi).

The total value of the suit is therefore Shs.475,172,257.00. Schedule VI (1) (b) of the Advocates (Remuneration) Order provides:-

“1. INSTRUCTIONS FEES

(b) To sue in any proceedings described in paragraph

(a) where a defence or other denial of liability is filed; or to have an issue determined arising out of interpleade r or other proceedings before or after suit; or to present or oppose an appeal where the value of the subject matter can be determined from the pleadings, judgement or settlement between the parties and -

<i>That value exceeds</i>	<i>But does not exceed</i>	
<i>Sh.</i>	<i>Shs.</i>	<i>Shs.</i>
<i>-</i>	<i>500,000</i>	<i>35,000</i>
<i>500,000</i>	<i>750,000</i>	<i>45,000</i>
<i>750,000</i>	<i>1,000,000</i>	<i>55,000</i>
<i>over 1,000,000</i>	<i>fee as for Shs.1,000,000</i>	

plus an additional 1.5 per cent.”

Based on the figures stated above, my calculations indicate that the basic instructions fee payable on Shs.475,172,257/= is Shs.7,167,583/70.

There are numerous other items claimed in the plaint in respect of which it is clearly not possible to give a value at this stage. They include such items as damages for the alleged fraudulent misrepresentation, value of a large number of shares, exemplary damages and the like. All these claims must be taken into account in determining the instructions fees to be allowed. In addition, the nature of the suit must also be considered. In that respect, although Mr. Billing for the plaintiffs does not accept it, it is clear that the claim is big and complex. The plaint runs to 34 paragraphs and has numerous prayers. It covers virtually all the branches of law of tort and of contract. For all those reasons, I agree with Mr. Magan's submission that the Deputy Registrar should have increased the basic fee instead of reducing it as he did. Having said so however, I think we should keep a sense of proportion. In that regard, I feel that the substantial sum of Shs.7,167,583/70 which I propose to allow as the basic instructions fees goes a long way towards meeting the defendants' reasonable instructions fees. Consequently, I intend to allow only a modest sum of Shs.500,000/= to cover the value of all the other unquantified claims. The total instructions fees is therefore assessed at Shs.7,667,583/70.

For the above reasons, my finding is that in taxing the instructions fees at Shs.2,000,000/=, the taxing officer proceeded on mistaken principle and did not exercise his discretion judicially. Accordingly, the taxation is reviewed and the instructions fees increased to Shs.7,667,583/70. In addition to that sum, the defendants will be entitled to the other sums allowed by the taxing officer and which were not the subject of these objections. The plaintiffs will bear the costs of these proceedings. There will be orders accordingly.

Dated at Nairobi this 14th day of May, 2001.

T. MBALUTO

JUDGE