



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Misc Appli 429 of 2004

MIT'S ELECTRICAL COMPANY LIMITEDPLAINTIFF

VERSUS

NATIONAL INDUSTRIAL CREDIT BANK LIMITED.....DEFENDANT

RULING

The plaintiff by its chamber summons brought under Rule 11 (1) and (2) of the Advocates (Remuneration) Order, seeks the following orders:

- (1) That the ruling delivered on 24th January 2005 by the Honourable Principal Magistrate Mrs. Owino on behalf of Honourable taxing master Mrs Omondi be set aside;
- (2) That there be substituted thereof judgment in favour of the Applicant in the sum of kshs 94, 000/- in respect of item 1 and kshs 31, 333/- in respect of item 2 of the bill of costs dated 9th November 2004 or such other sums as this Honourable court may deem just to allow;
- (3) That alternatively, this Honourable court do direct that the plaintiff's bill of costs dated 9th November 2004 be taxed by another taxing master.

In support of the application-learned counsel, Mr. Kangethe began by informing the court that during taxation, the subject of the present reference, parties agreed by consent to all the items as presented in the bill except item No. 1 and 2. Those two items were the subject of taxation before the deputy Registrar Mrs. Omondi.

It is perhaps useful to set out the background of this matter. The applicant filed a case in subordinate court, namely RMCC No. 4374 of 2004 against the Respondent and another person. An interim mandatory injunction was granted in favour of the applicant against the Respondent for the released of motor vehicle KAN 777C. The Respondent failed to so release and the applicant filed contempt proceedings in the High Court under section 5 (1) of the Judicature Act (Cap 8). In the contempt proceedings the applicant was awarded costs, which were the subject of taxation before the deputy Registrar Mrs Omondi, which is now the subject of the present application.

Mr. Kangethe faulted the finding of the deputy registrar in her finding that the contempt proceedings were without value. Indeed the deputy registrar stated

“.....the subject matter was the refusal to comply with a court order i.e. to release the motor vehicle and not the motor vehicle per se – so that to introduce value of the motor vehicle and make it the subject matter is to my mind stretching the meaning of “subject matter” unfairly to the respondent’s disadvantage.”

Mr. Kangethe submitted that the value of the motor vehicle was stated in the contempt proceedings as kshs 3, 615, 633/- and that value was not disputed by the respondent. Learned counsel for the respondent, Mr. Wanjama supported the finding of the deputy registrar and reiterated that the value of the subject motor vehicle at the contempt proceedings was not material because the proceedings were merely to enforce a court order, and hence the Respondent did not have to dispute the value. He further stated that the value of the motor vehicle is yet to be determined at the hearing in the subordinate court and once that determination is made, the applicant will tax its bill on that value at that court.

The other ground expounded by the applications counsel related to the deputy registrar's finding that the contempt proceedings were interlocutory, which fell within schedule VIA paragraph O (Viii), thus entitling the applicant to an amount of shs 2, 500 on item 1. Mr. Kangethe argued that the contempt proceedings were filed in the High Court. Further that had the contempt proceedings been at the lower court it would have been correct to find that they were inter locutory under schedule 6A paragraph O (Viii). He added that the contempt proceedings were a special jurisdiction, which did not require the filing of a plaint. Counsel referred to schedule 6 A paragraph (a) and said it recognized that a suit can be instituted by Notice of Motion.

Schedule 6A paragraph (a) provides: -

“To sue in any proceedings (whether commenced by plaint, petition originating summons or notice of motion)”

Mr. Kangethe also referred to section 2 Civil Procedure Act, the definition of suit. It is defined as:

“Suit” means all civil proceedings commenced in any manner prescribed.”

Counsel ended his argument on this ground by saying that even if the deputy registrar was right to have taxed item 1 under Schedule 6A paragraph O (Viii), the award of kshs 2, 500 was the minimum and the deputy registrar ought to have increased that amount.

Mr Wanjama in supporting the ruling of the deputy registrar stated that the fact was that the contempt proceedings were between the applicant and N.I.C. That those two parties have a pending case in the subordinate court and consequently the contempt proceedings filed in the high court were interlocutory.

Mr. Kangethe finally submitted that the consent entered into, in regard to all the items of the bill of cost, except items 1 and 2, was an admission of the parties that the proceedings were under schedule 6A paragraph (a) and not paragraph O (Viii). My finding on this argument is that a consent, unless it specially states so, cannot be binding the deputy registrar on items that were left for her taxation. I therefore reject this argument.

Mr. Wanjama on item No. 2 argued that the term,

“Getting up fee” contemplates where there is a full trial and where evidence is adduced and contempt proceeding was not such a trial and accordingly the applicant was not entitled to getting up fees.

That is the summary of the arguments of counsels. I will start to consider first whether indeed the contempt proceedings were inter locutory proceedings and whether they fall within the contemplation of Schedule 6A paragraph (a). The Judicature Act gives the jurisdiction of entertaining contempt proceedings to the high court and not to the subordinate court. That on its own clearly shows that contempt proceedings have an independent life apart from the proceedings going on in the subordinate court. Schedule 6A paragraph (a) has two words, which need definition, which determine whether an action falls under that schedule. The first is **“to sue”**. The Oxford Reference a dictionary of law defines “sue” as:

“To make a claim for a remedy in the civil matters by issuing court proceedings.”

The applicant made a claim for remedy for the enforcement of an order for the release of the motor vehicle.

The other word in the aforesaid schedule was “**commenced**”. This work is defined in the pocket Oxford dictionary as: “**Begin**”.

Indeed the applicant did commence the contempt proceeding and in so doing commenced them by Notice of Motion after leave was granted.

Interlocutory proceedings is defined as:

“The preliminary stages in civil proceedings, occurring between the issue of the originating process and the trial.” Oxford Reference Dictionary.

Considering the aforesaid definitions I find and I hold that the contempt proceedings are not interlocutory to the proceedings in the subordinate court, they had a determinable beginning and a determinable end when costs were awarded. If indeed they interlocutory, the costs would not have been taxed without a specific order of the court that costs can be taxed before the conclusion of the suit.

The other issue I have to consider is whether the proceedings had a subject matter. Here I must disagree with the deputy registrar. The subject matter to my mind was the motor vehicle KAN 777C which was still being detained by the respondent. That subject matter was given a value by Satya Gandhi as kshs 2, 802, 500/- that was the net value. To argue that it was not in issue and therefore the respondent did not dispute that value is too simplistic. The respondent was confronted with an application for contempt, an application that was supported with an affidavit and clearly a fact contained in that affidavit if not denied is deemed as admitted: see Order 6 Rule 9 (1) Civil Procedure Rules. I do therefore find and hold that there is a subject matter that can be determined from the pleadings and that subject matter is the motor vehicle whose net value is stated to be kshs 2, 802, 500/-.

I wholly accept the arguments of Mr. Wanjama on item No. 2, getting up fee. The item clearly contemplates where counsel is involved in preparation of witnesses and witness statements etc. this was not the case here. The application was supported by affidavit and no viva voce evidence was adduced.

The order of this court therefore is: -

- (1) That the applicant is entitled to taxation of item No. 1 of the bill of costs dated 9.11.2004, and the subject matter to be considered in the taxation of that item shall be kshs 2, 802, 500/-.**
- (2) The applicant’s item No. 2 of the bill of costs dated 9.11.1004 is disallowed.**
- (3) That this court directs that the applicant’s bill of cost dated 9.11.2004 be remitted back to chief Magistrate’s court, Milimani, for taxation of item No. 1 as per the finding of this court in (1) above.**
- (4) That there shall be no order of costs in respect of the application dated 18th Mach 2005.**

Dated and delivered this 6th day of July 2005.

MARY KASANGO

JUDGE