



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL OF KENYA**  
**AT MOMBASA**  
**Civil Appeal 203 of 1995**

**SAMAKI INDUSTRIES (NAIROBI) LIMITED.....**  
**APPELLANT**

**AND**

**SAMAKI INDUSTRIES (KENYA) LIMITED.....**  
**.....RESPONDENT**

**(Appeal from judgment and decree of the High Court of Kenya at Mombasa (Mbaluto, J.) dated  
25<sup>th</sup> February, 1993**

**IN**

**H.C.C.C. NO. 482 OF 1990)**

**\*\*\*\*\***

**RULING ON REFERENCE**

The successful respondent in this appeal had its bill of costs taxed by the taxing officer of this court, Aggrey Muchelule Esquire. The appellant is dissatisfied with the quantum of fees awarded and has referred the bill to a single judge of this court under Rule 109(2) of the rules of this Court. Mr. Nanji appears for the referring appellant and Mr. Hamza Jiwaji appears for the successful respondent. Mr. Nanji objects to the quantum of costs awarded in respect of items numbered 2 and 3 in the bill of costs.

Item 2 aforesaid in is respect of fee (party & party) for "Instructions to Defend Appeal from (sic) Civil Appeal No. 203/1995" and item 3 aforesaid is in respect of party and party costs (fees) for "Instructions to oppose counter-claim".

Mr. Nanji's objection to item 2 is on quantum of fees awarded. Mr. Jiwaji had claimed a sum of Shs.457,000/-. The learned taxing officer awarded a sum of shs. 250,000/-.

Mr. Nanji's objection to item No. 3 is as to its propriety ab initio. He argued that as there was no reference to any counter-claim in the appeal itself any fees in respect of any alleged instructions to oppose a counter-claim are not claimable. Instructions to oppose a counter-claim is not, Mr. Nanji argued, in any way separate or distinct from opposing the appeal. He argued further, that there was no appeal against the result of the counter-claim and that the issue of counter-claim did not arise at all at that stage.

I must keep in mind that I am not sitting on appeal from the taxing officer's decision. My jurisdiction here emanates from Rule 109(1) of the rules of this court. This sub-rule empowers me to determine the question as to the justice of the case may require. The sub-rule therefore gives me discretion to inquire, albeit judicially, into the inadequacy or excessiveness (as relevant) of the quantum of costs awarded. I also have the jurisdiction to decide if the taxing officer, ought or ought not to have allowed a particular item.

The quantum of costs in respect of an appeal is governed by paragraph 9(2) of the third schedule under rule 108 of the rules of this Court which reads:

"9(2). The fee to be allowed for instructions to appeal or to oppose an appeal shall be such sum as the taxing officer shall consider reasonable, having regard to the amount involved in the appeal, its nature, importance and difficulty, the interest of the parties, the other costs to be allowed, the general conduct of the proceedings, the fund or person to bear the costs and all other relevant circumstances."

This sub-paragraph give discretion to the taxing officer to consider all the said issues and then arrive at what he would consider a just figure.

The issues involved in the appeal were without doubt complex. As I have said elsewhere, in connection with the subject-matter of the appeal, a coveted trade-mark was involved. The learned taxing officer considered that trade mark cases are generally rare and by nature complex. He also considered the monetary value of the subject-matter (conceded by Mr. Nanji at at least Shs. 10,000,000/-). Mr. Nanji stated that the instruction fee (minimum) simply in the superior court, under the old scale (when the suit was filed), would be in the region of Shs.68,000/= and under the new revised scale in the region of Shs.100,000/-. This is just the basic fee and normal rule in regard to a suit which is heard on merits and determined would be at least twice the amounts. If a suit (for instance) is filed when the old scale was applicable, an completed when the new scale is applicable, the taxing officer considers both the scales in arriving at a proper figure of quantum of instruction fee.

The factor which the learned taxing officer did not properly consider when assessing the instructions fees was that two weeks prior to the hearing of the appeal the respondent was put on notice that the appeal was going to be withdrawn. It was however struck out as it was incompetent. The general rule is that the costs should not be allowed to rise to such a level as to confine access to the courts to the wealthy. See Premchand Raichard Limited & Another v. Quarry Services of East Africa & Others (1972) E.A.162.

The successful litigant ought to be fairly reimbursed but not so as to punish the unsuccessful litigant.

In my view the learned taxing officer awarded too high a figure for instructions fees for opposing the appeal and I hereby reduce the same to Shs.150,000/-.

I come now to item 3 of the bill of costs. Sub-paragraph (2) of paragraph 9 of the said third schedule provides for instructions fees for appeal or opposing an appeal. In this instance there was but one appeal filed in which there was no reference at all to any counter-claim. Where an appeal is filed there is but one record of appeal. Never have I seen a separate record of appeal in respect of counter-claim which may have been in the superior court. The issue of counter-claim did not arise at all and I think the learned taxing officer erred in awarding Shs.250,000/- for "Instructions to opposed counter-claim." There was not counterclaim, nor cross-appeal. I do not understand how there can be fees for instructions to oppose a counter-claim in this appeal. It is wrong to allow such an item and I totally disallow item 3.

In the circumstances this reference succeeds and the figure of quantum of bill of costs arrived at by the taxing master is reduced to Shs.175,000/-. The referring appellant will have costs of this reference which to avoid a further taxation, I assess the same at Kshs.5,000/= plus court fees paid for seeking this reference.

Dated and delivered at Mombasa this 31<sup>st</sup> day of January, 1997.

A.B. SHAH

.....

JUDGE OF APPEAL