



REPUBLIC OF KENYA
Chiriatti v Kahlili & others

High Court, at Mombasa
January 2, 1991

Molo J

Civil Case No 816 of 1987

Civil Practice and Procedure - costs - taxation of costs – objection to the decision of taxing officer – circumstances when the High Court can interfere with taxing officer’s decision - whether a formal proof should be regarded as a defended cause for the purposes of Rule 1 A(b) of schedule VI Advocates Remuneration Order.

Counsel for the decree holder filed his bill of costs for taxation in this suit which had proceeded as an undefended cause.

Under instruction fees counsel charged Kshs 25,000 on the basis that since the matter had proceeded to formal proof, it ought to have been treated as a defended cause and fees thereby charged under rule 1A(b) of schedule 6 of the Advocates Remuneration Order.

Held:

1. The Court is entitled to interfere with the order of the Taxing Officer only if the Court is satisfied that the award of the taxing officer is so high or so low as to amount to injustice to one party.
2. It is true that damages have to be proved before a party can obtain them but it would clearly be wrong to hold that because damages have to be proved such cases must always be treated as defended even where there is in fact no defence or any other denial of liability.
3. The Taxing Officer was exercising his discretion and merely because the Court would have allowed a slightly higher sum was no reason to interfere with his exercise of discretion.

Application dismissed.

Cases

Premchand Raichand Ltd & another v Quarry Services of East Africa Ltd & others (No 3) [1972] EA 162

Statutes

1. Law Reform Act (cap 26)
2. Fatal Accidents Act (cap 32)
3. Advocates (Remuneration) Order (cap 16 Sub Leg) rule 11(2)

Advocates

Mr Kasmani for the Decree Holder.

January 2, 1991, Molo J delivered the following Ruling.

Mr Kasmani for the decree holder has brought this objection against the taxation by the taxing officer of this court in respect of item no 3 in his bill of costs dated 31st October 1988 and filed in the Court on the 14th November 1988.

The item objected to is “Instructions to file action against both above defendants for recovery of damages for costs and interest arising from motor accident under the Law Reform Act and Fatal Accidents Act, damages awarded in the sum of Shs 1,769,935. The sum claimed against that ie item no 3 was Shs 25,000, but the taxing officer taxed off Shs 13,000 thus allowing Shs 12,000 as instructions fee. The advocate for the decree holder objects to that decision, of the taxing officer and he has accordingly applied to this Court by way of Chamber Summons under rule 11(2) of the Advocates (Remuneration) Order.

The decree holder had sued three persons for damages arising from a motor traffic accident and of the three people sued only one filed a defence while the other two neither entered appearance nor filed any defence. The suit was brought against Abdullah Hemed Khalili, as first defendant, Salim A Al-Amody as second defendant, and Domenico Manicini as third defendant.

It was the third defendant who filed the defence but neither the first nor the second defendants filed a defence nor entered appearance and interlocutory judgment was subsequently obtained against them. On 15th September 1988, the decree holder proceeded to formally prove his claim before Mr Justice Bosire and on the 19th October 1988 the learned judge gave judgment to the plaintiff in the sum of Shs 1,604,795.90 as general and special damages. It is accordingly incorrect for Mr Kasmani to say that judgment was given to the decree holder in the sum of Shs 1,769,934. It would appear that Mr Kasmani calculated interest on that sum added the interest on the damages awarded to him and then claimed costs upon that sum with interest added. I do not think he is entitled to do so and it is clear the taxing officer did not allow him to do so. If I understood Mr Kasmani correctly, his complaint against the taxing officer is that instructions fee would have been allowed under rule 1A(b) of schedule VI of the Advocates (Remuneration) Order and not under schedule 6A1(a).

Mr Kasmani appears to argue that the matter was a defended one in the sense that the decree holder had to plead and subsequently prove his damages and that accordingly the matter should have been dealt with under paragraph (b). Apart from that contention, Mr Kasmani did not allege that the taxing officer made an error of calculation or anything of that kind. This Court is entitled to interfere with the order of the taxing officer only if the Court is satisfied that the award of the taxing officer is so high or so low as to amount to injustice to one party – (see *Premchand Raichand & Another vs Quarry Services of East Africa Ltd and Another* (No 3) [1972] EA (p 162) to which Mr Kasmani referred me. Again where the taxing officer makes an error of law then that must entitle this Court to interfere with his award. So that in this case if this court were to be satisfied that it was schedule 6A1 (b) which ought to have applied and the taxing officer erroneously applied schedule 6A1(a) then that is an error of law which would entitle this Court to interfere with the award of the taxing officer. Did the taxing officer commit such an error? The answer to that issue must depend on whether the proceedings were or were not defended. It is clear that neither the first nor the second defendant filed any defence or any other denial of liability. The matter proceeded before Mr Justice Bosire ex-parte and on the date of the hearing neither the first nor the second defendant attended to oppose the decree holder’s suit in any way. It is true that damages have to be proved before a party can obtain them, but it would clearly be wrong to hold that because damages have to be proved such cases must always be treated as defended even where there is in fact no defence or any other denial of liability as was the case here.

I am satisfied that if that had been the intention of the law giver, there was nothing to prevent it adding after the word ‘filed’, in paragraph (b) of schedule A1, words like “or in any case where damages have to

be formally proved". The first and second defendants did not in any way deny their liability to the plaintiff. Accordingly, the taxing officer was clearly right in applying paragraph (a) of the schedule and refusing to apply paragraph (b).

I do not see the relevance of the words 'Other proceedings' upon which Mr Kasmani addressed me later. These words appear in paragraph (b) of the schedule and I do not see how they can help the plaintiff in this matter once it is held that it is paragraph (a) which is applicable. I have held that it is paragraph (a) which is applicable and accordingly I do not see how these words are relevant. Accordingly, the application fails on that point of law.

On the question of whether the taxing officer's award is so low as to amount to an injustice to the plaintiff, I do not think that this is so. As the taxing officer rightly points out, this was a regular run of the mill case and there were no special complications involved in it. The minimum scale fee under paragraph (a) was Shs 11,023 and I do not understand Mr Kasmani to complain against that. The taxing officer allowed an extra sum bringing the total to Shs 12,000. It is not alleged that in doing this he committed any error of principle and in my view he exercised his discretion correctly. It may well be that had I been sitting as the taxing officer myself I would have probably allowed the plaintiff a sum slightly higher than the Shs 12,000, the taxing officer allowed him. But that is not the point; the taxing officer was exercising his discretion and merely because I would have allowed a slightly higher sum is no reason for me to interfere with his exercise of discretion. In my view there is no substance in this application and I accordingly order it dismissed with costs.