IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WICKS CJ, MADAN & WAMBUZI JJ A)

CIVIL APPEAL NO 33 OF 1976

ROGAN-KAMPER.....APPELLANT

VERSUS

GROSVENOR.....RESPONDENT

RULING

(Appeal from a Judgment of the High Court at Nairobi, Chanan Singh J, dated 31st July 1975, in Civil Case No 786 of 1971)

March 1, 1978 the following Rulings were delivered.

Madan JA: Costs, this reference to the full court under rule 109(5) of the Court of Appeal for East Africa Rules, 1972, is all about costs. It arises from the decision of a single judge, Law JA, given on a reference to him under rule 109(2), from the decision of the Registrar in his capacity as the taxing officer. Rule 109(2) and (5) provide:-

> "(2) Any person who contends that a bill of costs as taxed is, in all the circumstances, manifestly excessive or manifestly inadequate, may require the bill to be referred to a Judge and the Judge shall have power to make such deduction or addition as will render the bill reasonable. Save as in this sub-rule provided, there shall be no reference on a question of quantum only.
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> (3) .....
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> (4) .....
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> (5) Any person dissatisfied with a decision of a Judge given under sub-rule (1) or sub-rule (2) may apply to the Court to vary, discharge or reverse the same. Such application may be made either informally to the Judge at the time of the decision or by wiring to the Registrar within seven days of that time."

The position would appear to be that on either reference as aforesaid the powers of both the judge and the court are limited in that the only matter which can be referred to a judge under sub-rule (2) is whether a bill of costs as taxed is, in all the circumstances, manifestly excessive or manifestly inadequate, and the judge has no jurisdiction to entertain a reference on a question of quantum only; similarly, under sub-rule (5), the court may do no more than only to vary, discharge or reverse the limited decision of a judge given under sub-rule (2). The appellant filed a bill of costs in which he claimed Shs 15,000/- for the instructions

fee, and shs 15,000/- as the brief fee for senior counsel. The taxing officer had to tax the bill in accordance with the principles laid down in paragraph 9(2), Third Schedule, of the Rules, which lays down:-

> "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."

The taxing officer reduced the instructions fee to shs 12,000/- and the senior counsel's fee to shs 14,000/-. After hearing the reference, Law JA, reduced these two figures to shs 8,000/- and shs 10,000/- respectively. The taxing officer may allow a fee for instructions which he shall consider reasonable; the judge, on a reference to him, may make a deduction or addition thereto which will render the bill reasonable only if he is of the opinion that a bill of costs as taxed, in all the circumstances, is manifestly excessive or manifestly inadequate. Are there two tests of reasonableness which the taxing officer must work under, and the test of manifestly excessive or manifestly inadequate which the judge must perceive, synonymous. Do they bear the same, concept for if they do then these two judicial officers are to work with a similar approach when, taxing and reviewing a bill of costs respectively, and in deciding that a bill is either not excessive or not insufficient. I think the meaning of the expressions "manifestly excessive" and "manifestly inadequate" used in rule 109(2) is intended to convey the concept of reasonableness in paragraph 9(2). That which is manifestly excessive or inadequate cannot be reasonable. That which is reasonable cannot be manifestly excessive or inadequate. I think these expressions connote the same datum point.

It is fairly easy to, understand the meaning of the word "reasonable". The dictionary meaning (Cassels p.951) is - "endowed with reason; rational, reasoning,governed by reason; conformable to reason, sensible, proper."

It must mean that which does not outrage or jolt the mind, that which does not give rise to confrontation. But what it meant by "manifestly excessive" or "manifestly inadequate". I consider to experience such a feeling of visible excess or inadequacy there must be a reactive impact which jars the mind with its apparent immensity or with its apparent insufficiency, a reactive impact that there is obviously to, much or too little, which requires to be set right because it is outside the ordinary proper measure, and both unfair and unequal.

If, after such a reaction, and upon a study in all the circumstances, the sum allowed falls outside the bracket of reasonableness, it is manifestly excessive or inadequate as the case may be and a judge may regulate it on a reference to him. In some cases the changing economic circumstances due to evolutionary processes may require the circumference of the bracket of reasonableness to be widened to allow a larger sum for instructions fee than that allowed in comparable cases in the past. But caution has to be exercised in increasing the fees for instructions so that legitimate litigation does not become inaccessible to common citizens on account of its expensiveness.

With respect, Law JA, correctly directed himself when he said, as he understood rule 109(2), a judge will not substitute what he considers to be the proper figure for that allowed by the taxing officer unless, in the judge's view, the sum allowed by the taxing officer is outside reasonable limits so as to be manifestly excessive or inadequate.

Law JA also pointed out that there was an earlier appeal, involving the parties to this application which covered substantially the same ground as the appeal from which this appeal stems; in the earlier appeal the successful party claimed an instructions fee of shs 6,000/- and was allowed shs 4,000/-.

Law JA, also referred to some comparable cases, which were cited to him and said that it would appear that the taxing officer in the instant case allowed almost double the fees allowed in recent years in comparable cases cited to him. He held that in this case the taxing officer had allowed unreasonable large

amounts so that the bill, in all the circumstances, and making allowance for the effects of inflation, was manifestly excessive and should be reduced. He followed this up with the two reductions which I have already set out.

I must confess that the instructions fee and the brief fee for senior counsel allowed by the taxing officer which I have mentioned lead me irresistibly to think that both these figures were on first sight plainly too high, and upon further reflection, they fall outside the bracket of reasonableness. Law JA, was right in ordering them to be reduced as he did. I would dismiss the reference with costs.

Wambuzi JA. I have had the advantage of reading in draft the ruling prepared by Madan JA. It is also my view, if I may say so with respect, that Law JA directed his mind properly on the relevant law and carefully considered the issues before him. I find nothing that has been argued before us on the reference to justify interference by the full court. Quite clearly rule 109(2) of the Rules of this Court enables an aggrieved party to refer the question of quantum if he contends that either a bill of costs as taxed is manifestly excessive or manifestly inadequate. If either contention is correct then the bill as taxed cannot be reasonable having regard to the matters specified in paragraph 9(2) of the Third Schedul to the Rules of this Court. This Court would therefore be under a duty to interfere. I am aware that these are matters which differ from case to case but even then I do not accept the contention argued before us that there can be no comparable cases which can guide either the taxing officer or the court in arriving at a reasonable bill of costs. I concur in the order proposed by Madan JA.

Wicks CJ. I have read in draft the ruling of this reference prepared by Madan JA and agree with it.

It was submitted that the law has changed since our present Rules came into force. That now on a reference the judge applies the test whether or not a fee is “reasonable” which is a different concept to the former test of “question of principle”.

We were referred to the case of *Pioneer Investment Trust v Amarchand* [1968] E.A. 386. That concerned a reference made under rule 6(2) of the Rules of Court, now superceded by our present Rules. Rule 6(2) provided:

> “Any person aggrieved by any decision of the Registrar may within seven days by notice in writing require that the matter be referred to a Judge for his decision and the Judge may make such order thereon as the justice of the case may require: Provided that if such decision of the Registrar has been made in his capacity as taxing officer no such reference shall be made on any question of quantum only, but any question of principle may be referred as aforesaid.”

There “the justice of the case” was found to be synonymous to a “question of principle”. This concept is to be found in our present rule 109(2) and in paragraph 9(2) of the Third Schedule when assessing a sum which is neither “manifestly excessive” nor “manifestly inadequate” one arrives at an amount which is “reasonable”. In this respect our present Rules have in no way altered the law and we can properly refer for guidance to authorities decided before they came into force.

Madan JA and Wambuzi JA agreeing, the reference is dismissed with costs.

March 1, 1978

WICKS CJ, MADAN & WAMBUZI JJ A