IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Wambuzi, Law JJ A & Miller Ag JA)

CIVIL APPEAL NO 14 OF 1978)

Between

DEVSHI DHANJI ....PLAINTIFF

DHANJI RAMJI ....PLAINTIFF

SHIVJI NARAN ....PLAINTIFF

AND

KANJI NARAN PATEL...DEFENDANT

KANJI RAMJI PATEL ....DEFENDANT

KHIMJI VASTA PATEL ....DEFENDANT

JUDGMENT

LAW JA The appellants were the defendants in a suit filed by the respondents as plaintiffs. I will refer to them as "the defendants" and "the plaintiffs", respectively. The suit was dismissed with costs, with a certificate for two counsel. The plaintiffs appealed, but their appeal was dismissed, see *Patel v Dhanji* [1975] EA 301. The nature of the suit is described in the headnote to that report, as follows:

The [plaintiffs] were members of an institution and were

> engaged in disputes with the office-bearers, the [defendants], and the majority of members of the institution. [The plaintiffs] alleged that they were refused access to the balance sheets and accounts of the institution for 1962 to 1972 and to the membership lists. They sued for declarations that they were entitled to inspect the accounts and lists. The trial judge dismissed the suit ...

The instant appeal concerns the successful defendants' bill of costs in the High Court. They claimed an instruction fee of Shs 50,000 plus Shs 25,000 for second counsel, or Shs 75,000 in all. The taxing officer reduced these sums to Shs 27,000 and Shs 9,000 respectively, or Shs 36,000 in all. The plaintiffs were not satisfied. They referred the taxing officer's ruling to the High Court, contending that the amount allowed by him in respect of instructions fee was grossly excessive in the light of the basic prescribed instructions fee in cases of this nature, which is Shs 750. The reference came before Platt J. He correctly directed himself on the relevant law, principles and practice. He held that there were defects in the taxing officer's ruling, in that he had over-emphasised the importance of the case, and the "great responsibility" on the

part of the defendants' advocates to take "detailed instructions". The judge was of the view that the defendants were clearly not entitled to the large increase over the basic instructions fee awarded to them by the taxing officer. What was he then to do? He was well aware, having directed himself in accordance with such authorities as *D'Souza v Ferrao* [1960] EA 602 and *Steel Construction v Uganda Sugar Factory Ltd* [1970] EA 141, that the general practice, where a fee has to be re-assessed on general principles, is to remit the matter to the taxing officer; but that in proper cases the reviewing judge can deal with the matter himself. This the judge proceeded to do.

He reduced the instructions fee to Shs 10,000 plus one-third, or Shs 13,333 in all. According to the record, Mr Joshi, who appeared for the defendants in the court below, had said "I would like this Court to finalise the taxation." It was Mr Bhandari, for the plaintiffs, who wanted the bill to be remitted to the taxing officer. As Platt J noted in his judgment, "The defendants ask me to tax the bill here. The plaintiffs ask me to remit the bill to another taxing master."

The defendants now appeal to this Court, the first ground of appeal argued by Mr Lakha, for the defendants, being that the judge should not have interfered, as he had not found that the taxing officer had acted on any wrong principle. I think this ground can easily be disposed of. The judge found defects in the taxing officer's ruling. He also found that the sum awarded by the taxing officer was so excessive that he reduced it by nearly two-thirds, having commented earlier in his judgment thatif

> this Court should consider that the sum awarded was manifestly excessive it may be a necessary inference that there has been an error in principle.

Clearly the judge drew the inference that there had been an error of principle in this case, in that the taxing officer had over-emphasised the difficulties, importance and complexity of the suit, which was basically a simple matter involving only two issues: the right of the plaintiffs to be given copies of the accounts of the institution and to inspect the list of members. The difficulties and complexities arose, not out of the nature of the suit, but out of the bitter enmity existing between the parties, which led to an undue expansion of a basically simple case, which in the event took thirteen days to try, the original issues being largely overlooked and ignored by all concerned. As I remarked in the course of my judgment in *Patel v Dhanji* [1975] EA 301, 303, "When bitter differences arise between members of a communal household, the inevitable consequence seems to be that reason flies out of the window." I would not disturb the judge's decision to interfere in this case and I would dismiss the first ground of appeal.

The second ground of appeal relates to what action the judge should have taken, having decided to interfere. In Mr Lakha's submission, he should have remitted the matter to the taxing officer, with his directions, in accordance with the general practice as laid down in a long line of authority.

He should have declined to deal with the matter himself, although invited to do so by Mr Joshi who then appeared for Mr Lakha's clients in this appeal. I am inclined to agree that the defendants are not bound by the stand taken by Mr Joshi in the court below, if he was asking the judge to do something contrary to the general practice. But a judge has jurisdiction to tax a bill himself. As was said by Gould Ag V-P in *D'Souza's* case [1960] EA 602, "Though the general practice is as indicated in the foregoing passages, the reviewing judge can and sometimes does deal with the matter himself." It is a question of discretion. Did Platt J in this case rightly exercise his discretion when he decided to deal with the matter himself, instead of following the general practice and remitting the matter to the taxing officer?

The judge gave the following reasons for acting as he did:

> Mr Bhandari is within his rights to ask for that [ie remitting to the taxing officer] to be done, and that is the usual practice. Mr Joshi is equally entitled to ask this Court to finalise this matter. It then becomes a matter of convenience. In my opinion it would be more convenient to finalise the matter which has become protracted, even though the objector feels that the normal practice should be followed. The reason is that the taxing officer will have to go through afresh taking now three if not four judgments into consideration. It will be matter of exegesis upon exegesis. It is

> better to conclude the matter here ...

Having regard to the history of this unusual case, I think the judge came to the right conclusion. The parties to this litigation are obviously determined to contest every point, however unmeritorious or trivial. This is the third time that they have visited this Court. If the bill is remitted to the taxing officer for re-assessment, there is bound to be another reference, and yet another appeal to this Court. What started as a simple plaint has snowballed to a wholly disproportionate extent. I shudder to think what sums must have been expended on this useless litigation. The parties must be protected from the consequences of their own folly. That is what the judge obviously thought, and I respectfully agree with him. In my view, the circumstances and history of this case fully justified the judge's decision to finalise the matter. I also think that his assessment of the instructions fee was eminently reasonable and was based on correct principles. I would not interfere with it. I would dismiss the appeal.

There remains the cross-appeal filed by the plaintiffs. The first ground is that the instructions fee allowed by the judge was manifestly excessive. For the reasons already given, I consider that this ground fails.

The second ground is stated as follows-

> The judge having allowed the reference, was wrong in refusing to make an order that the [defendants] should refund the taxed-off amount of Shs 32,849 to the [plaintiffs].

What happened was that when the taxing officer taxed the defendants' bill of costs at Shs 80,183/75, the plaintiffs' advocates paid that sum to the defendants' advocates. As a result of the reference, Shs 32,849 was taxed off, and the plaintiffs were entitled to be repaid that sum. They applied accordingly, but the judge ruled that as both sides had given notice of their intention to appeal, the money should remain in the defendants' advocates' trust account pending determination of the appeal. Mr PN Khanna submits that the judge was wrong in this respect, and I agree with him. The plaintiffs were entitled to be paid this sum, and I would order that it be paid to them without delay. The more difficult question is whether the plaintiffs are entitled to interest on this sum by way of restitution, having been deprived of its use for more than one and half years. Section 91(1) of the Civil Procedure Act seems to me to apply to this aspect of the appeal. When a party is entitled to restitution by way of an order for the refund of costs, the Court may make a consequential order for the payment of interest. Should such an order be made in the circumstances of this case? Mr Lakha submits that it should not, and that it would be quite wrong for the defendants to have to pay interest as they have not had the use of the money, which is lying in a trust account, where it does not earn interest, pursuant to an order of the court. A similar situation arose in *Harnan Singh s/o Jhanda Singh v Jamal Pribhai* (1956) 23 EACA 226.

Money had been paid into Court as security for costs by an intending appellant to the Privy Council. His appeal succeeded, and he applied for payment of interest by the respondent by way of restitution for the period that the money was lying in Court. The High Court judge refused to order the payment of interest, and the Court of Appeal agreed with him, on the ground (as I understand it) that the appellant had paid the money into Court of his own initiative and the respondent was unable to obtain any benefit from it while it lay there. The principle appears to me to be the same in this appeal. The plaintiffs paid the original taxed costs to the defendants; they became entitled to repayment of the amount taxed off by the judge in his judgment on the reference; they did not secure repayment because the judge ordered the money to remain in a trust account where it earned no interest and the defendants obtained no benefit from it. The position would have been the same if the judge had ordered the money to be paid into Court. The conclusion I reach is that the defendants should not be ordered to pay interest on that money by way of restitution.

I would accordingly order that the appeal should be dismissed with costs, and the cross-appeal allowed to the limited extent of ordering that the defendants do pay to the plaintiffs the sum of Shs 32,849 within seven days, but without interest. I would award the plaintiffs one-third of the costs of the cross-appeal.

Wambuzi JA. I agree entirely with the judgment delivered by Law JA which I had the benefit of reading in draft. I have nothing useful to add. I concur in the orders he has proposed and, as Miller Ag JA also

agrees, there will be an order in the terms proposed by Law JA.

Miller Ag JA. I have had the benefit of reading the draft judgment of Law JA with which I agree and have nothing to add.

Order accordingly.

Dated and delivered at Nairobi this 24th day of November 1978.

S.W WAMBUZI

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JUDGE OF APPEAL

E.J.E LAW

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JUDGE OF APPEAL

C.H.E MILLER

....

AG JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR