



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), MAKHANDIA & KANTAL, J.J.A.)

CIVIL APPEAL NO.84 OF 2017

BETWEEN

**THE KENYA ANTI-CORRUPTION COMMISSION.....APPELLANT**

**AND**

**MARSHALLS EAST AFRICA LTD.....1<sup>ST</sup> RESPONDENT**

**DELPHIS BANK LTD.....2<sup>ND</sup> RESPONDENT**

(Appeal from the Ruling of the High Court of Kenya at Nairobi (J. Sergon, J.) dated 23rd October 2015 in H.C.C.C. (O.S) No. 1111 of 2003)

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**JUDGMENT OF THE COURT**

By an originating summons, the appellant sued 17 defendants, including the two respondents in this appeal claiming that 95% of the shares in the 6th to the 17th defendants' companies in the summons were acquired by the 1st defendant (**Kamlesh Pattni**) through the proceedings of the Goldenberg scandal and that the attempt to transfer those shares to Ketan Somaia (the 5th defendant) would be of no legal effect. Simultaneously, with the originating summons, the appellant took out an application for the appointment of a receiver/manager, which application was granted *ex parte*. Before the originating summons could be heard, a settlement was recorded and the summons compromised.

Because they felt that they were wrongly sued in the first place, the respondents in this appeal filed a bill of costs in the sum of Kshs. 60,470,778/= and Kshs. 80,573,021/=, respectively. The Deputy Registrar taxed the two bills at Kshs. 5,266,320/= and instruction fees at Kshs. 5,000,000/= for each.

Dissatisfied with the award of Kshs. 5,000,000/= in instructions fees, the appellant filed a reference to the High Court seeking that the award of instructions fees be set aside and the bill be remitted to another taxing officer for fresh taxation of item 1 in each bill on the ground that the award of costs was manifestly excessive; that the taxing officer made fundamental errors when he found that the respondents were associated with the rip-off through the Goldenberg scandal when in fact they were not accused of theft of any public funds and hence did not have to defend themselves; that the taxing officer erroneously took into account the fact that the originating motion prayed for the placing of the 6th to 17th defendants in the originating summons under receivership yet the appointment of receivers was on an interim basis pending the hearing and determination of the suit; and that it was erroneous for the taxing officer to come to the conclusion that the matter was complex based merely on the volume of the record and without stating any specific issue that made him come to that conclusion.

In opposing the reference, the respondents pointed out that the Goldenberg scandal was so complex that a commission of inquiry had to be established to unravel the mystery; that *prima facie*, the suit was complex and therefore the taxing officer was right to so find. It is also argued that the suit required the defendants to defend themselves and explain why it was necessary to set aside orders appointing the interim receiver; that even the Judges before whom the originating motion was placed came to the same conclusion that the matter was complex; that the appellant acted in bad faith in instituting the originating summons, explaining those proceedings were swiftly commenced and unceremoniously terminated; that even learned counsel for the appellant, Dr. Kamau Kuria, admitted that the matter was complex.

After considering these arguments, the learned Judge (Sergon, J) properly delineated the applicable principles in such references noting that he could only interfere with the decision of a taxing officer if it was shown that the taxing officer erred in principle or that he took into account irrelevant factors or that the award given was, on the face of it obviously high or low.

In the learned Judge's view;

**“The matter in question was not simple and straightforward. It is on record that the plaintiff’s own lead counsel, Dr. Gibson Kamau Kuria admitted before the court that the dispute was complex. Justices Ojwang and Mwera, too came to the same conclusion that the matter was not simple but a complex one. After a careful re-evaluation of the material placed before this court, I find that the case facing the two defendants was complex.**

**It took the intervention of government to appoint a commission of inquiry with the aim of unmasking the truth in the Goldenberg saga”.**

Even though the originating summons was not heard on merit, the Judge was nonetheless of the view the prayer for the appointment of an interim receiver was not an ordinary interlocutory application because the order substantially affected the operations of the two respondents and caused “shock waves” to their shareholders.

That finding aggrieved the appellant who has brought this appeal on the following ten grounds; that the learned Judge erred in failing to find that: the respondent had not filed any defence or response to the main suit and that the award of costs in respect of instruction fees by the taxing officer was therefore manifestly excessive in the circumstances; the Taxing Officer misdirected himself by finding that the respondents had been associated with the Goldenberg scandal and had an obligation to defend themselves; the Taxing Officer misdirected himself by taking into account the fact that the originating summons prayed for placing of the 6th to 17th defendants under receivership without qualifying that the prayer was merely interim; the Taxing Officer misdirected himself by assuming that the matter was complex based merely on the volume of documents involved; the Taxing Officer misdirected himself by overstating the importance of the case to the parties; failed to find that the Taxing Officer failed to take into account the general conduct of the proceedings; the award of Kshs. 5 million as instruction fees to each of the respondents was excessive and arrived at without any basis; that the shares sought to be transferred did not belong to the respondents but the 5th defendant as such the respondents were not bound to lose in the process; that allowing the award to stand would lead to unjust enrichment of the respondents at the expense of the appellant; and that the Taxing Officer erred in principle, took into account irrelevant factors and awarded an award that was manifestly high.

The respondents for their part found no basis upon which this Court would interfere with the manner the Judge exercised his discretion and therefore prayed that we dismiss the appeal. In particular, they contended that, from the pleadings it was clear that the dispute was complex. In the pleadings it was alleged that some 95%, translating to billions of shillings, of the shares in the 6th to 17th defendants that had wrongfully been acquired by the 1st defendant from the proceeds of the Goldenberg scandal was transferred to 5th defendant; that in the scandal the Government paid, respectively to the Goldenberg companies Kshs.5.8 Billion and Kshs. 13.5 Billion; and that as a result of the foregoing the court appointed a receiver/manager in respect of the 6th to the 17th defendants’ assets. This, in their opinion therefore was not a simple matter.

At the onset of our consideration of the issue in controversy in this appeal, it is apposite to bear in mind the following well- known principles enacted in law and enunciated by a long thread of judicial decisions. **Section 27** of the Civil Procedure Act provides that:

**“27(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:**

**Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”**

To paraphrase the foregoing and the *dicta* in the various decisions;

i. Costs are awarded at the unfettered and absolute discretion of the court. This discretion must be exercised judicially and in accordance with reason and justice; it must not be exercised arbitrarily. There must be some material upon which the discretion can be exercised. See *Halsbury’s Laws of England*, 4th Edition (Re-issue), (2010), Vol.10. para 16; See also **Farah Awad Gullet V CMC Motors Group Limited**, Nakuru Civil Appeal No. 206 of 2015, where this Court held:

**“...it is our finding that the position in law is that costs are at the discretion of the court seized of the matter with the usual caveat being that such a discretion should be exercised judiciously, meaning, without caprice or whim and on sound reasoning (see *Githiaka versus Nduriri [2004] 2KLR*).”**

ii. An appellate Court will only interfere with the exercise of discretion if the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take some matters into consideration and in doing so arrived at a wrong conclusion. See **Mbogo & Another V. Shah** [1968] E.A. 93.

Subject to such conditions and limitations as may be prescribed, and the provisions of any law, costs will be awarded whether the suit or appeal was determined on merit or compromised by consent or terminated on court’s own motion or even upon withdrawal.

iii. Costs are awarded to compensate the successful party for the trouble taken in prosecuting or defending the case and not to punish the unsuccessful party.

See **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others**,

Supreme Court Petition No. 4 of 2012 where it was stated thus:

**“So the basic rule on attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party; rather, it is for compensating the successful party for the trouble taken in prosecuting or defending the suit. In Justice Kuloba’s words [Judicial Hints on Civil Procedure, at p.94]:**

**“[T]he object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure...Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action.”**

iv. It is a basic rule that costs follow the event unless there is good reason not to award costs. See: *Judicial Hints on Civil Procedure*, 2<sup>nd</sup> Edition, at p.94 - 95 by Richard Kuloba.

v. Good reason for not awarding costs will depend on the peculiar circumstances of each case basis. The general practices on this question however shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs. See Supreme Court’s decision in the case of Jasbir Singh Rai (supra).

vi. A successful party can be denied costs if it is proved that but for his conduct the action would not have been brought. See Supreme Court of Uganda in Impressa Ing Fortunato Federice V. Nabwire (2001) 2 EA 383.

Applying these principles to the matter before us, the broad question for us is whether the learned Judge properly exercised his discretion in awarding instructions fees.

First, we reiterate that the Judge reminded himself of the applicable principles; that the court could **“only interfere with the decision of a taxing officer if it is shown that the taxing officer erred in principle or that he took into account irrelevant factors or that the award given is on the face of it obviously high or low”**.

In declining to interfere with the award of instruction fees, the learned Judge noted that the suit sought to recover 95% of the shareholding of the 6th to the 17th defendants; and that that percentage was, no doubt substantial, translating to billions of shillings. The Judge also took into consideration the fact that the court had appointed a receiver/manager over the assets of certain companies including the respondents; that the prayer for the appointment of an interim receiver was not an ordinary interlocutory application because the order substantially affected the operations of the two respondents, not to mention the “shock waves” it caused the shareholders of the respondents; that it took a plethora of applications to have the appointment of the receiver/manager revoked; and that the appellant did not carry out due diligence to ascertain whether or not the protagonists in the Goldenberg scandal had shares in the respondents. The Judge further noted that whether or not a matter is complex will depend on the evidence, and where evidence has not been led, the court will base its decision on what it can glean from the pleadings; that the value of the subject matter in a dispute is equally important; that precisely because of its complexity, the Government established of a Commission of Inquiry into the Goldenberg scandal; and the huge volumes of record filed by the parties in this dispute was itself evidence of its complexity.

The Judge found support in the opinion of the appellant’s own counsel, Dr. Gibson Kamau Kuria who admitted before the court that the dispute was complex. There was also a similar holding by Ojwang and Mwera, JJ (as they were then). The learned Judge made the ultimate factual finding that the award on instructions fees in favour of the respondents was neither low nor high and therefore not punitive.

Upon our own evaluation of the foregoing, we find no material upon which we can justifiably overturn the learned Judge. The Judge exercised his discretion judicially. He based his decision on relevant material and it is obvious to us, from the grounds we have set out above that he did not misdirect himself in any way.

We cannot agree more that a suit to recover 95% of the shareholding of nearly nine companies is not a simple matter, illustrated by billions of shillings allegedly involved, the voluminous record both in the court below and even before us. The appointment of a receiver/manager over the companies was bound to paralyze and divest the powers of the directors of the two companies and vest them in the receiver/manager. One would be tempted to believe the respondents’ assertion that by hurriedly instituting the action against the respondents, without conducting due diligence and by subsequently withdrawing the action, the appellant’s initial action was actuated by malice.

Because of the public interest nature and the economy effect of the Goldenberg scandal the Government appointed a Commission of Inquiry into the scandal. As we respectfully agree with the Judge, we reiterate that there can be no doubt, from what we have said that the dispute was not only complex but also novel.

This appeal, for these reasons, must fail. It is accordingly dismissed with costs.

**Dated and delivered at Nairobi this 27<sup>th</sup> day of September, 2019.**

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**