



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA

Civil Appeal 45 of 2005

AKHTAR SHAHID BUTT

MODERN COAST BUILDERS & CONTRACTORS.....APPELLANTS

AND

DAVID KINUSU SIFUNA T/A SIFUNA & COMPANY ADVOCATES.....RESPONDENT

*(Appeal from the ruling of the High Court of Kenya
at Mombasa (Sergon, J) dated 15th April, 2002*

in

H. C. C. C. NO. 355 OF 2002

JUDGMENT OF THE COURT

On 24th May, 2002, **Akhtar Shahid Butt**, the 1st appellant herein, instructed his advocates David Kinusu Sifuna T/A Sifuna & Company Advocates, the respondent, to file a petition in the superior court for the winding up of M/s Modern Coast Builders & Contractors, the 2nd appellant.

The petition, which was filed on the aforesaid date, named **Shahid Parver Butt** as the respondent. The petition was never set down for hearing. The 1st appellant and the respondent settled the matter out of court, within only 12 days of its filing, and a consent order to mark the petition as withdrawn was filed in Court on 5th June, 2002. Thereafter, the respondent presented its bill of costs for taxation. They claimed Kshs.1,860,000/= in respect of the instruction fee to file petition. The claim for that fee is worded as follows:

“Instructions to file petition to wind up the company with total assets valued at Kshs.80,000,000/=, Kshs.1,860,000/=”.

The taxing officer reduced the instruction fee by Kshs.860,000/= and awarded Kshs.1 million. Aggrieved by that decision, the applicant filed a reference under rule 11 (2) of the Advocates (Remuneration) Order (“the Order”) before the superior court (Sergon, J) who, in a brief Ruling, dismissed the applicant’s reference. The learned judge said, in part:

“I have perused the entire record placed before me. The record reveals that the taxing officer considered in detail the matter on instruction. He formed the opinion that the petition before this court was complex and complicated. The taxing officer agreed with the submissions of the plaintiff that the parties had to go through volumerious (sic) documents before commencing the matter. It is also clear from the reason given by the taxing officer in his letter dated 1st July, 2003 that he considered the importance and amount of work undertaken by the plaintiff before filing the petition”.

Initially the 1st appellant and the 2nd appellant obtained leave under rule 11 (3) of the Order to challenge the decision of the superior court but the 2nd appellant sought and was granted leave to withdraw the appeal under rule 93 (5) of this Court's rules. The memorandum of appeal outlined the following six grounds which will henceforth be considered in relation to the 1st appellant only:

- “1. The learned Judge erred in fact and in law in confirming the decision of the Taxing Officer without giving any or any sufficient reasons.**
- 2. The Learned Judge erred in fact and in law in holding that the Taxing Officer had considered all relevant factors before taxing the subject Bill of Costs and in not finding that the Taxing Officer had taken into account irrelevant and extraneous considerations while exercising his discretion in this matter.**
- 3. The Learned Judge erred in fact and in law in holding that the sum of Kshs.1,000,000/= at which the instruction fees on the subject Bill of Costs was taxed was reasonable and in not finding that the said sum was excessive, arbitrary and unreasonable in the circumstances of the matter.**
- 4. The Learned Judge erred in fact and in law in finding that 100,000% increase of the basic instruction fee was not excessive in the circumstances of this matter.**
- 5. The Learned Judge erred in law and in fact in confirming the decision of the Taxing Officer in taxing the instant Bill of Costs as against the 2nd Appellant.**
- 6. On the whole, the findings of the Learned Judge are insupportable in law and in fact.”**

Essentially, the only issue before us revolves around the instruction fee taxed at Kshs.1 million. The 1st appellant says it is manifestly excessive and unjust. In his submissions before us, Mr. M. F. Khatib, learned counsel for the 1st appellant, argued that there was nothing complicated about the petition filed in the superior court; that the petition was compromised soon after it was filed; that there was no valuation annexed anywhere in the documents before the court to show that the company's assets were worth Kshs.80 million; that the minimum fee prescribed for instructions on petitions for winding up in the Advocates (Remuneration) Order, Schedule 6 (1) (f) was Kshs.9,000/=; and that the superior court took into account irrelevant factors in reaching its decision, and gave no reasons for the decision. He relied on the case of ***Thomas James Arthur vs Nyeri Electricity Undertaking Civil Appeal No. 9 of 1961*** in urging us to set aside the award.

In reply, Mr. P. O. Buti, learned counsel for the respondent, submitted that the taxing officer had applied the correct principles and had come to the right decision after noting that the subject matter was of a complex nature. He argued that this court should not interfere with the taxing officer's discretion except where he had made an error of principle.

Having considered the submissions made by both counsel, the facts and circumstances surrounding this case, and the law, we have come to the conclusion that this appeal has merit. We have carefully looked at the petition for winding up of the company filed by the respondent in their capacity as the advocates of the 1st appellant. That is indeed the only professional work done by the respondent which is the subject of the instruction fee. As we noted earlier, the matter was settled within 12 days of the filing of the petition. Now, let us look at the petition in a little more detail to understand the nature of what the respondent says is a “complex” matter. The petition names only one respondent. Of the 11 paragraphs in the petition, covering a little more than two pages, nine are of a descriptive or formal nature, and only two paragraphs (16 lines) explain the reason for the presentation of the petition to wind-up the company. The prayer sought is that the company be wound up.

That, we must say, is a normal, simple, straightforward winding-up petition. There is nothing complex about the petition, and we are unable to discern any “voluminous” documents that the learned judge seemed to think the advocates had to peruse before commencing the matter.

We are of the view that the learned judge was clearly in error in coming to the conclusion that the taxing officer had applied the correct principles and had come to the right decision.

In Schedule VI (1) (f) of the Advocates (Remuneration) Order, 1997 it is provided that the instruction fee shall be (subject to the taxing officer's discretion to increase or decrease) Kshs.9,000/= to present or oppose proceeding under rule 5 (1) of the Company's (winding-up) Rules. That is the proper rule that ought to have been applied by the taxing officer, who, erroneously applied paragraph 1 (a) of the same Schedule.

We are of the view that the instruction fee awarded to the respondent was manifestly excessive, unjust and completely out of proportion to the work carried out by them. The taxing officer failed to correctly apply the principles set out in ***Joreth vs Kigano (2002) EALR 93***, and the learned judge was in error in not setting aside the award.

Accordingly, and for reasons stated, we allow this appeal, set aside the order and decree of the superior court dated 15th April, 2004 endorsing the decree and order of the taxing officer in respect of the instruction fees and substitute the same with an award of Kshs.150,000/= for instruction fee. The applicant shall have the costs of this appeal, and the costs in the superior court. Those shall be our orders.

Dated and delivered at Mombasa this 16th day of October, 2009.

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR