REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1471 OF 1974

INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION.....PLAINTIFF

VERSUS

PETER DANIEL OTACHI.....DEFENDANT

JUDGMENT

On 20th September 1976, when this case came up for hearing before me, the plaintiff was granted judgment against the defendant, on admissions made by the defendant in his defence, with costs as prayed for in the plaint together with the costs of the application for judgment on admissions.

The plaintiff then lodged a bill of costs in Court and it was listed for taxation before the Senior Deputy Registrar. When it came up for taxation, on 24th November 1976, it was not taxed because apparently, according to the record, Mr Deverell, who appeared for the decree-holder, was not satisfied with the service effected on the judgment debtor by the Kisii Court. On 15th February 1977, the bill again came up for taxation before the Senior Deputy Registrar when Mr Ojiambo, who then appeared for the decree-holder, asked for dispensation of service as the defendant could not be traced at the address given by him in his memorandum of appearance. The Senior Deputy Registrar then made orders dispensing further service on the judgment debtor and standing over the taxation generally. Later, the Senior Deputy Registrar added a note on the record which reads as follows:

When the advocates take a date for taxation please see that it is listed before Sachdeva J as I am not inclined to grant the fee claimed at item 35, being Shs 3,623 paid to Private Eye Ltd without a special order of the judge, this being a party-and-party bill.

On 6th April 1977, the advocates for the decree-holder applied for the matter to be listed for mention before me as it was so fixed for 27th April 1977.

On that date, Mr Ojiambo appeared before me for the decree-holder, and stated that the mention had arisen out of an order made by the Senior Deputy Registrar refusing to allow item 35 in the decree-holder's bill of costs, being the sum of Shs 3623 for fees paid to Private Eye Ltd for service of summons upon the judgment debtor. He added that service of summons had been effected on the judgment debtor at Kisii, that he would let me have a photocopy of the fee note of Private Eye Ltd to show that the items claimed were justified. Mr Ojiambo argued that the matter was being mentioned before me under sections 3A and 27 of the Civil Procedure Act and that I had discretion whether or not to allow these

costs.

Rule 2 of the Advocates (Remuneration) Order (hereinafter referred to as “the order”) provides as follows:

> The remuneration of an advocate of the High Court by his client in contentious and non-contentious matters, the taxation thereof and the taxation of costs as between party and party in contentious matters in the High Court and in subordinate courts (other than Muslim courts) shall be in accordance with this Order.

Under rule 10 of the Order, the Registrar and his deputies, *inter alia*, are qualified to act as taxing officers of the High Court. The relevant provisions of rule 11 of the Order provides as follows:

> (1)Should any party who was entitled to appear on the taxation of a bill of costs object to the decision of the taxing officer, he may within fourteen days after the signing of the officer’s certificate of taxation give notice in writing to the taxing officer of his objection, stating the ground thereof and requiring to be furnished with a certified copy of the officer’s decision, whereupon he will be entitled to be supplied therewith upon payment of such fee (if any) as may be prescribed.
>
> (2)The objector shall thereupon be entitled to proceed by chamber summons to have his objection heard and determined by a judge of the High Court, such summons to be filed within twenty-one days after the issue of the certified copy of the officer’s decision and to be supported if necessary by affidavit and to be served upon all other parties who were entitled to appear on such taxation.

This then is the clearly laid down procedure in such cases, which obviously has not been followed. With respect to the Senior Deputy Registrar, it was his duty as a taxing officer to tax the bill of costs as he considered just in the circumstances and to leave it to the aggrieved party to pursue the matter further as it chose to do. Mr Ojiambo invites me to exercise my inherent powers under section 3A of the Civil Procedure Act which provides as follows:

> Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

With respect to Mr Ojiambo I see no injustice or abuse of the process of the court in asking the decree-holder to comply with the statutory provisions of the law in, firstly, getting his bill of costs taxed, and then moving further in the matter. In *Taparu v Roitei* [1968] EA 618, 619, Trevelyan J had this to say in an appeal to the High Court which, according to the statute, lay in the first instance to a Magistrate’s Court of the first class:

> The only authority which might be claimed to permit this to be done would seem to be section 97 [now section 3A] of the [Civil Procedure] Code which provides that: ‘Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or prevent abuse of the process of the court.’ I am unable to accept that this court has inherent jurisdiction to hear appeals. A Court’s inherent jurisdiction should not be invoked where there is specific statutory provision which would meet the necessities of the case: *Hasmani v National Bank* (1937) 4 EACA 55 …

Section 3A of the Civil Procedure Act is not a panacea for all ills. I might add that I am not unaware of the provisions of rule 12 of the order which read as follows:

(1)With the consent of both parties, the taxing officer may refer any matter in dispute arising out of the taxation of a bill for the opinion of the High Court.

(2)The procedure for such reference shall follow that of a case stated but shall be to judge in chambers.

In the instant case the defendant had filed a defence and was, therefore, entitled to be served with the bill of costs. The Senior Deputy Registrar dispensed with service of the bill upon the defendant. That was presumably in the exercise of his discretion under the *proviso* to rule 72 of the Order.

Be that as it may, the fact remains that the provisions of rule 12 cannot apply since both the parties have not consented to this reference and neither has the procedure of a case stated been followed.

So far as I am aware, there is no provision in the Civil Procedure Code or the rules for the “mention” of a case. This is a procedure peculiar to the criminal law where there are no pleadings or other interlocutory written applications (except usually for the charge sheet). Unfortunately a practice has developed under the civil procedure to “mention” cases in the interest of expediting them. This is a practice I would not like to see gaining ground and the Registrar should ensure that it is not abused, and that where a specific procedure is laid down for taking up a civil matter further, it should be followed.

Mr Ojiambo has also sought to rely on section 27 of the Civil Procedure Code. It is true that the costs of and incidental to all suits are in the discretion of the court or judge and the court has full power to determine by whom, and out of what property and to what extent such costs are to be paid. However, I have already awarded the costs of this action as well as the costs of the application for judgment on admissions contained in the defence to the decree-holder. Rule 52 of the Order provides:

The costs awarded by the Court on any matter or application shall be taxed and paid as between party and party unless the Court in its order shall have otherwise directed.

I had not directed otherwise, and when appropriate taxing officers have been appointed for that purpose, I do not consider that it is the court’s function to embark upon the actual mechanics of taxing a bill of costs. For these reasons, I rule that the present application before me is misconceived and premature and I dismiss it with order as to costs.

Arising out of this application there are two matters which have caused me concern and to which I feel I must refer. Firstly, according to the decree-holder’s bill of costs item 35 reads: “Fee paid to Private Eye Ltd for service of summons (fee note 415 attached).” When I pointed out to Mr Ojiambo that no fee note was attached, he told me that it was in his brief file; but he appeared to be reluctant to part with it and promised to let me have a photocopy of it. Up to the time of the writing of this ruling, he has not done so. This is most irregular as the Court expects to see all relevant original invoices and vouchers on which claims are based on its file, and it in effect amounts to an untruthful statement.

Secondly, there is a letter on the court file of this case signed by a person named “KB Macey” which is addressed to the Senior Deputy Registrar of this Court and which reads as follows:

On 15th February, this taxation was marked SOG because you wish to see the Chief Justice about the matter of Shs 3623 – the enquiry agent’s charges. It appears that you have not yet dealt with this and we would be most grateful if you would find time to do so as in the meantime this suit is hanging fire.

Being amazed by the unusual last two words in this letter, I inquired of Mr Ojiambo who this person was. I was informed that she was a lady; and my further inquiry revealed that she was not an advocate.

The attention of the decree-holder's firm of advocates is drawn to sections 36 and 38 of the Advocates Act. While any person employed by an advocate and acting within the scope of that employment may prefer or draw out a letter relating to any legal proceedings, the ultimate responsibility for it lies on the shoulders of the advocate concerned and attention is also drawn to the proviso to section 39(1) of the Advocates Act which provides as follows:

> Provided that, in the case of any document or instruments [under section 38(1)] drawn, prepared or engrossed by a person employed, and whilst acting within the scope of his employment, by an advocate or a firm of advocates, the name and address to be endorsed thereon shall be the name and address of such advocate or firm.

Any letter addressed to the Court towards finalisation of a case is a step in the proceedings and it must be signed by advocates only.

The employment of service of private process servers to effect service of court process is a comparatively recent phenomenon in this country, and I feel that I should say something about it for the guidance of taxing officers. Rule 16 of the Order provides as follows:

> Notwithstanding anything contained in this Order, on every taxation the taxing officer may allow all such costs, charges and expenses as authorised in this Order as appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same, no costs shall be allowed which appear to the taxing officer to have been incurred or increased through over-caution, negligence or mistake or by payment of special charges or expenses to witnesses or other persons, or by other unusual expenses.

In my view the above rule embodies two distinct principles. Firstly, the taxing master may allow all such costs, charges and expenses as appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party. Secondly, save as against the party who incurred the same, no costs shall be allowed which appear to the taxing officer to have been incurred either: (i) through over-caution, negligence or mistake; or (ii) by payment of special charges or expenses to witnesses or other persons, or by other unusual expenses.

Normally, the payment of charges to such agents could be construed as special charges or other unusual expenses and in view of the mandatory provisions of this part of rule 16, the taxing officer would have no option but to refuse it. Such charges cannot be claimed as a matter of course and if a litigant expects to receive them, he must show to the taxing officer that they had been necessary or proper for the attainment of justice or for defending the rights of any party, and subject, of course, always to the over-riding consideration that they are reasonable in the circumstances.

Somewhat similar provisions are contained in the Rules of Supreme Court (England), order 62, rule 28, which provides as follows:

> (1)This rule applies to costs which by or under these rules or any order or direction of the court are to be paid to a party to any proceedings either by another party to those proceedings or ...
>
> (2)Subject to the following provisions of this rule, costs to which this rule applies shall be taxed on the party and- party basis, and on a taxation on that basis there shall be allowed all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed.

This is clearly a party-and-party bill, as the Senior Deputy Registrar has quite properly noted. The definition of “party-and-party costs” appeared in *Smith v Buller* [1875] LR 18 Eq 473, 475 (per Sir R Malins V-C), as being:

... all that are necessary to enable the adverse party to conduct the litigation, and no more. Any charges merely for conducting litigation more conveniently may be called ‘luxuries’ and must be paid by the party incurring them.

I have emphasised the words “more conveniently” as, in my view, they are aptly applicable to the circumstances of the instant case. If a party considers it more convenient to employ the services of an expensive private agency to effect service of summons there is no reason why it should be allowed to saddle the opposing party with such costs unless he can justify them as necessary or proper in the circumstances of the case.

The practice was also laid down in *Re Blyth and Fanshawe, ex parte Wells* (1882) 10 QBD 207 that an unusual expense will only be allowed against the party who incurred it. In *Re Ratanshaw Bejonji Sutaria’s Application* [1960] EA 656, 658, Horsfall Ag CJ observed:

... if a party chooses to pay his witness something extra to more fully reward or compensate him for giving evidence on his behalf this is a luxury which was not necessary to secure the witness’ attendance and it should not be allowed as an expense recoverable from the other party on a party-and-party taxation.

That was a claim for witness expenses but I think the underlying principle is the same.

The taxing officer, therefore, has to determine whether such charges have been necessary or properly incurred. The words “necessary” and “proper” have been exhaustively considered by Kerr J in *Garthwaite v Sherwood* [1976] 1 WLR 705, where the judge also traced a number of earlier decisions on this subject. At page 708, he observed:

In this connection it is helpful to remind oneself of what was said by Sachs J in *Francis v Francis and Dickerson* [1956], p 87, 95. The passage in question is conveniently cited in *Cordery on Solicitors* (6th edn) (1968), page 311, which says: ‘Proper’ includes costs not strictly necessary but reasonably incurred for the purpose of the proceedings … It then quotes the following passage from this judgment: ‘When considering whether or not an item in a bill of costs is “proper” the correct viewpoint to be adopted by a taxing officer is that of a sensible solicitor sitting in his chair and considering what in the light of his then knowledge is reasonable in the interests of his lay clients … (He) should be deemed a man of means adequate to bear the expense of the litigation out of his own pocket – and by “adequate” I mean neither “barely adequate” nor “super-abundant.”

In my judgment there should accordingly be no rule of practice that such expenses are only to be allowed in exceptional cases. The correct practice should be for the taxing master to ask himself in each case, on the basis of the passages which I have read, what was or would have been the proper course for the solicitor to adopt in the particular circumstances. Furthermore, although *In Re Foster* [1878] 8 Ch D 598 was concerned with the hearing of an appeal, as is this case, the principle should be precisely the same whether the solicitor is attending for the purposes of a trial or for the purposes of an appeal. The question is always: was the expenses of the solicitor’s personal attendance, instead of appointing local agents, necessary or proper in the circumstances"

In deciding as above the taxing officer will need answers to questions like: what attempts were made,

and why could not the summons be served by a court process server in the normal course of his duties" Why could substituted service by post or otherwise not be effected, and would that have been cheaper" Why could not an authorised agent at Kisii (or even at Kisumu) be employed to serve the process" Why was it necessary to employ the services of a private agent to travel all the way from Nairobi to Kisii to effect service" Are the travelling expenses and other disbursements reasonable in the circumstances" The taxing officer will also have to have regard to what are “authorised” charges for such eventualities in the Order as the first part of rule 16 requires. The taxing officer will also no doubt bear in mind that, without item 35, which is in the sum of Shs 3623, the total amount of the rest of the bill is Shs 1603/50 only (ie less than half of item 35), and that the amount of instruction fees allowable in such matters does not exceed Shs 500.

The taxing officer will, of course, have to insist upon being supplied with the “fee note” of Private Eye Ltd (a matter in which I have not been fortunate so far) and he will then have to decide either to allow item 35 as it stands, or allow part of it as reasonably necessary or proper expenses or disallow it altogether.

Order accordingly.

Dated and Delivered at Nairobi this 11th day of May 1977.

S.K.SACHDEVA

JUDGE