



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
LAND CAUSE NO. 55 OF 2014



BETWEEN:

BERTHA BERNADETTE MORTIMER and 5 OTHERS

PLAINTIFF

-AND-

ALI PASELI

DEFENDANT

CORAM: ANNELINE KANTHAMBI

ASSISTANT REGISTRAR

Ms. I. Mndolo

Counsel for the Plaintiff

Mr. M. Chipeta

Counsel for the Defendant

Mrs. J. Chilimampungu

Court Clerk

ORDER ON A MOTION TO STRIKE OFF DEFENCE

The Background:

The matter came on a notice of appointment to tax costs taken out by the defendant herein following an order made in his favour by the Assistant Registrar on the 30th of November 2015 on an application to dismiss the plaintiff's action for want of prosecution. However the plaintiff's counsel expressed reservations and raised issues with the proceedings before they begun.

The first point raised by counsel for the defendant was that there was an appeal against the very order that forms the basis of the present taxation proceedings. That, a notice of appeal to a judge in chambers was filed but had not yet been issued by the court. Citing Order 62 rule 8, counsel averred that the present taxation proceedings be stayed pending the determination of the appeal. Counsel also brought to the attention of the court that the notice of appointment to tax cost was filed on the 4th of March 2016 whereas the notice of appeal in question was filed on the 7th of December 2015. Counsel further observed that the plaintiff had not filed a taxation bundle. For the reason advanced she objected to the taxation proceedings taking place as scheduled.

In reply counsel for the defendant averred that the law says that an appeal is not on its own a stay of that appeal or judgment. That the order against which the applicants are appealing dismissed the action with costs, and that order is still in force since it has not yet been set aside or stayed. That the argument of having filed a notice of appeal does not add up.

As regards Order 62 rule 8 paragraph 4, the argument is that the said rule does not prevent taxation proceedings. That the word used is 'may', implying that if the defendant chooses to wait for the appeal to tax costs, then the court of appeal has jurisdiction to deal with costs at that stage. And that if the defendant opts to proceed with the taxation then the court of appeal will only have to deal with costs on appeal. That, there is nothing in the rule that prevents proceeding with taxation in the present case.

Referring to the non-compliance with the rule as found in Order 62 rule 29 paragraph 7, on taxation bundle, counsel argued that looking at the matter there aren't many documents to be considered and the bill itself is to give any party a picture of what happened. He further argues that almost all the documents that are attached to the bill are on the file as such there is no prejudice suffered by the plaintiff with the noncompliance. He submitted that taking substantive justice into consideration, the objection does not contain substance at all. In view of the arguments advanced he prays that the taxation proceedings proceed.

I had reserved a ruling in order to consider carefully the arguments raised by both learned counsel.

The Issues

The main issue for determination is whether in the light of the objections raised the matter ought to proceed to taxation.

The Determination

It must be noted from the outset that the matter had first come to court and registered as an *ex-parte* summons for an order of injunction on the 25th September 2014 which was granted on the 26th September 2014. Take notice also that on this order being granted no order as to costs was made. Then the matter came on the 13th day of January 2015 for an *inter partes* hearing to discharge the order of interlocutory injunction. The hearing did not take place and the court ordered each party to bear their own costs. The summons was rescheduled and took place on the 16th of February 2015, and the court reserved its ruling. In its ruling dated 16th March 2015, the court awarded the costs of the application to the plaintiffs. Since then, the next hearing that took place was on a summons for an order dismissing the action for want of prosecution, taken out by the defendant on the 30th of October 2015, the outcome of which informs the present application. In his ruling, the Assistant Registrar made an order dismissing the plaintiff's action for want of prosecution and awarded the

defendant “costs to be taxed if not agreed”. It is obvious that the parties did not agree on the costs hence the present proceedings.

The Arguments

Coming to the first issue raised herein, whether the present taxation should be pending, Counsel for the plaintiff argues that Order 62 rule 8 provides the stage at which taxation proceedings ought to take place and that regard being had to the fact that the notice of appeal was filed first then the appeal, and regard being had to O62 R 8 para 4 should have been heard first before the taxation.

Order 62 rule 8 paragraph 4 states that *“in the case of an appeal the costs of the proceedings giving rise to the appeal as well as the costs of the appeal **may** be dealt with by the court dealing with the appeal.”*

Counsel for the defence correctly points out that the word used is “**may**”, meaning that it is not mandatory. There is discretion granted to a court then to determine if the costs can be taxed at appeal or at the court of first instance. On the other hand looking at the circumstances of the case, and indeed considering the nature of the appeal as well, I am more inclined to take on counsel for the defendant’s side on this point. While it is true that the notice of appeal was filed on the 7th of December 2015, and is yet to be issued by the court, and that it was filed earlier than the notice for appointment to tax costs, which was filed with the court on the 4th of March 2016; and while it is also true that the basis of the appeal is the order of the Assistant Registrar made on the 30th of November 2015, which order also forms the basis of the present proceedings, I do not see how proceeding with the taxation at this point would prejudice the interest of justice, considering that even in their notice of appeal, the plaintiff is not contesting the award of the costs. Meaning, that whatever has transpired between the defendant and the plaintiff thus far, the defendant is entitled to the costs of the application that was determined in their favour. Besides, there has not been any stay of or setting aside of the order awarding the defendant costs.

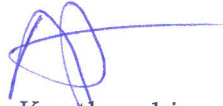
However, regard being had to Order 62 rule 29 paragraph 7, the defendant is required, for taxation purposes, to file with the taxation bundle, the documents listed thereunder. As counsel for the plaintiff rightly observes, the defendant’s counsel has not brought to the fore any exceptions to the rule. He has advanced an argument on the brevity of the documents involved as well as that no prejudice has been occasioned. Admittedly, there aren’t many documents that would eventually form part of the assessment bundle, but the rule still requires that they be filed. It should have been easy for counsel to comply with. Ignoring the rule just because the documents involved aren’t many does not seem to be a good reason. If we take that route how then do we determine the amount of documents that ought to be there before they are included in a bundle, where do we begin and where do we stop?

As a matter of principle, I am of the firm belief that the rule provides for the filing of the documents listed for the proper determination of the costs because then the other party understands what they are having to respond to and if need be respond accordingly. Therefore, there should be a valid legal exception advanced if this rule has to be disregarded. None has been advanced in this case and I have not been provided with precedence in support of the exemption sought by counsel.

In view of the reasons advanced above, I hereby stay the present proceedings pending the filing of the requisite documents by the defendants, after which the matter is to be set down for the taxation of costs as ordered by the Assistant Registrar.

Each party to bear its own costs.

Made in **Chamber** this 28th day of April 2017.



Anneline Kanthambi
ASSISTANT REGISTRAR