



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 537 OF 2013

BETWEEN

YUSUF MTENGERENJI.....PLAINTIFF

AND

JANET FATCH KAMANGA.....1ST DEFENDANT

UNITED GENERAL INSURANCE COMPANY LIMITED.....2ND DEFENDANT

Coram: **WYSON CHAMDIMBA NKHATA** (ASSISTANT REGISTRAR)

Ching'ande - of Counsel for the plaintiff

Mndoro-of Counsel for the defendant

Galafa- Court Clerk and Official Interpreter

RULING

Following the Registrar's order on assessment of damages made on the 28th of July 2017, the plaintiff was awarded costs of this action. Subsequently, the Counsel for the plaintiff filed for taxation of costs. Prior to the hearing of the taxation of costs, the defendants filed a notice of preliminary objection to the bill filed by Counsel for the plaintiff. This a ruling on the preliminary objections raised by the defendants.

The preliminary objections as outlined on the notice are as follows:

1. That the Claimant having been awarded the total sum of K1,705,500.00 as damages the costs herein ought to be assessed at the Subordinate Court scale pursuant to s.31(1) of the Courts Act as this is a matter the Claimant ought to have commenced in the Magistrate's court and not the High Court.
2. Alternatively, the court should not assess the bill of costs presented for the sum of K49,698,480.60 considering the amount of damages awarded to the claimant totalling K1,705,500.00 but order the claimant to present before the court a proper and reasonable bill of costs proportionate to the amount of damages.
3. Notwithstanding 2 above, the format used for the bill of costs is contrary to the format in Appendix 2, Part II of Order 62 of the Rules of the Supreme Court from which the bill of costs herein has been adopted with the effect that the claimed costs are higher than they would have been had the correct format been used.
4. The hourly expense rate of K46,000.00.

The parties appeared before this court on the 7th of February 2018. On the first objection, Counsel for the defendant argued that this matter ought to have been commenced at the Subordinate Court. She contended that the award for damages in this matter was K1,705,500.00 which in a way entails that the matter was supposed to be commenced at the Subordinate Court. She therefore contends that the court ought to assess the costs at Subordinate scale pursuant to s.31(1) of Courts Act.

In the alternative Counsel for the plaintiff argues that the bill herein is in the sum of K49,698, 480.60 and even if the court was to hold that the costs be assessed at High Court scale, they pray the court orders that the plaintiff prepares a reasonable bill of costs proportionate to the damages awarded. It is stated that it is non-starter for Counsel to claim close to K50,000,000.00 in a matter whose damages were assessed to close to K2,000,000.00.

It is further argued that the plaintiff used the format under the Rules of the Supreme Court. It is argued that the bill of costs does not conform to the one in appendix two Part II of Order 62 of Rules of Supreme Court. Counsel argues that the way the bill of costs has been presented has an effect of increasing the costs.

Finally, Counsel for the defendant lamented on the proposed K46,000.00 hourly rate by Counsel for the plaintiff. She argued that the matter herein was merely a personal injury case and did not raise complex issues. It is also stated that Counsel for the plaintiff boasts of 24 years standing at the bar. She

therefore called upon the court to consider the case of **Barrows Investments Limited v MPICO Limited** Commercial Case Number 6 of 2013 in which the judge took into consideration the importance of the case and the magnitude of the claim. Even though the amount was half a billion the hourly rate allowed was K10,000.00.

In response, Counsel for the plaintiff contends that the issues raised by Counsel for the defendant are idle and ought to have been brought up during taxation of costs. On the issue whether the matter ought to have been commenced at the High Court must be considered in terms of commencement and not when the award is made by the court. He contends that it is different when the claim is certain. It is also his contention that the defendants never objected all along but allowed the plaintiff to incur costs at High Scale. Further, he invites the court to see the originating summons in that there was a likelihood the award could have been at High Court scale.

On the issue that the plaintiff ought to bring a reasonable bill, Counsel for the plaintiff argues that the idea of bringing the issue of costs to court is that the court should determine what a reasonable bill would be. He therefore suggests that the defendants should be referring to some aspects of the bill itself other than seeking a reworked bill.

The law prescribes that a defeated litigant be liable in costs to the successful litigant. The quantum of such costs is to be what was reasonable to prosecute the proceedings. In the case of Fullerton v. Matsqui, 74 B.C.L.R. (2d) 311, Justice Cumming adopted these words:

"The fundamental principle of costs as between party and party is that they are given by the court as an indemnity to the person entitled to them. Party-and-party costs are in effect damages awarded to the successful litigant as compensation for the expense to which he has been put by reason of the litigation."

In this case, the defendants are aggrieved with the quantum sought by Counsel for the plaintiff. Basically, they have issues with the taxation of the costs at High Court scale and the hourly rate proposed by Counsel for the plaintiff among other issues.

On the issue whether this matter was supposed to be commenced at the Subordinate Court, Counsel for the defendants is basing her argument on the quantum of damages awarded to the plaintiff. She is of

the view that the same is within awards made at the Subordinate Court hence this matter ought to have been commenced at the Subordinate Court. It would appear however that this is not the position of the law. In the case of **Mwenebungu v Malawi Railways Ltd (1)** [1992] 15 MLR 349 (HC) Justice Mwaungulu (as he was then) stated as follows:

In my opinion, according to our statute, the fact that less than the jurisdiction of the court has been awarded by the High Court does not necessarily mean that the costs should be on a subordinate court scale.

The case of **Mwenebungu** further suggests a test to be applied in making a determination if the case ought to have been commenced at the High Court or Subordinate Court. It is stated as follows:

Enquiry was to be made with reference to the character of the action, and not the amount claimed. The amount actually recovered on a trial was one factor to consider in assessing whether the plaintiff, at the time proceedings were instituted, had had reasonable grounds to believe that he would recover more than K2 500-00. A court had to look at the facts available to the plaintiff and his legal advisors at the time when the writ was issued, in making this assessment.

Counsel for the defendant argues that the damages herein ought to have been far beyond K2,000,000.00. It is contended that the court ought to have made an aggregate of K3,400,000.00 but the court was of the view that there was mitigation in the loss of earnings in that the plaintiff had been partially cured and could do some jobs. The award was reduced resulting to an award less than K2,000,000.00. With this in mind, I have all reason to believe that this was a matter that was rightfully commenced at the High Court.

I now turn to the issue of reasonability as argued by Counsel for the defendants that the damages having been pegged at close to K2,000,000.00 the costs could not be pegged at close to K50,000,000.00. This court is aware that assessment of costs involves a consideration of myriad factors, including the seniority of the lawyers involved, the nature of the work being done as well as whether the work done was strictly necessary to prosecute or defend a party's position in Court. That aside, the court ought to consider the reasonableness of the costs. In the case **Lin Jian Wei v Lim Eng Hock Peter** [2011] SGCA 29 the Court endorsed the view that there must be a sensible correlation

between costs, on one hand and the value of the case, its complexity and importance on the other hand. The court further opined that costs that are plainly disproportionate to the value of the claim cannot be said to have been reasonably incurred. In my opinion, the Court ultimately has to consider striking a balance between justly rewarding legal professionals and ensuring that access to justice is not progressively eroded by exorbitant legal costs. I must therefore state that this court shall bear this mind in this exercise.

On the issue of the hourly rate, Counsel for the Plaintiff proposes K46,000.00. The defendant is of the view that K46,000.00 is on the higher side considering the nature of the case and the experience that Counsel has standing at the bar. She further argued that in the case of **Barrow investment Ltd v MPICO Malls Ltd** Commercial Case Number 6 of 2013 Justice Mtambo ordered payment of an hourly rate at K10,000.00 taking into consideration the importance of the case to the parties and the magnitude of the claim and having resolved all issues of doubt in favour of the defendant/respondent as the paying party. Nevertheless, Counsel for the plaintiff is of the opinion that the Judge used a wrong set of rules in the determination of the hourly rate. He therefore suggests that the way to proceed is to use the 2005 notice by the Registrar which pegged the hourly rate at K10,000.00. It is his opinion however that the same be applicable with necessary adjustments with regard to economic trends.

In my view, what is clear is that there is no clearly defined guide that is accordingly calibrated to guide the taxing master in determination of the hourly rate. The taxing master is left with his discretion and the attendant circumstances such as the experience of Counsel and the nature of the matter among others. In this case, if this court was to agree with Counsel and follow the notice by the Registrar of 2005, I take note that the same has not been revised for a considerable period and is likely to cause unfairness on the recoverability by the successful party. On the other hand, it goes without saying that revising it to the proposed rate by Counsel for the plaintiff would lead to unreasonable award with regard to the damages that were awarded in this matter. I shall therefore settle for K15,000.00 being the hourly rate.

At this point, I beseech Counsel for the plaintiff to file a revised bill of costs which conforms to the one in Appendix two Part II of Order 62 of Rules of Supreme Court.

Costs are in the cause.

MADE IN CHAMBERS THIS 21ST DAY OF MARCH 2018.



WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR