IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

M.S.C.A. CIVIL APPEAL NO.14 OF 1986

(Being Civil Cause No.86 of 1985)

BETWEEN:

W.W. MKWEPU NAKANGA & COMPANY ..... APPELLANT

AND

KACHINGWE & COMPANY LIMITED ..... RESPONDENT

BEFORE: The Honourable Mr. Justice Banda, J.A.
The Honourable Mr. Justice Unyolo, J.A.
The Honourable Mr. Justice Kalaile, J.A.

Nakanga, Counsel for the Appellant
Msisha, Counsel for the Respondent
Phiri/Gausi (Mrs), Court Reporters
Kadyakale, Law Clerk

JUDGMENT

Unvolo, J.

This is an appeal against the decision of the High Court on a review of taxation of costs.

The history of the matter is as follows: the respondents instituted civil proceedings in the court below claiming damages from a bus company, which is not a party to this appeal, following a road accident. The appellant firm was instructed to act for the respondents in the matter. The bus company entered a defence and also put up a counterclaim against the respondents. The matter went to trial and at the end of the day, the court below dismissed the respondents' claim but found for the bus company on the counterclaim and entered judgment for the sum of K5,529.26 and costs of the action. In due course, the bus company submitted its bill of costs (party and party costs). These were taxed by consent, in the sum of K10,551.33. We mention this just by the way otherwise those costs have no real relevance to the matters in issue in this appeal. Subsequent to this the appellant submitted its own bill, a solicitor's and own client bill, claiming a total sum of K26,818.33 from the respondents. Messrs. Savjani and Company represented the respondents at the taxation before the taxing master and have so represented them since.

The main controversy between the parties revolved around four items in the said bill. These were: instructions fee on the claim, instructions fee on the counterclaim, brief fee on the claim and brief fee on the counterclaim. Mr. Msisha, for the respondents, argued that no separate instructions fee was

payable on the counterclaim. Learned counsel contended that the same was also true of the brief fee. Finally, it was submitted that the amounts claimed were also grossly excessive. After considering the arguments, the learned taxing master took the view that separate instructions fees and brief fees were payable on both the claim and the counterclaim but reduced the amounts claimed thereon. A total sum of K20,000.00 was claimed on these four items. Of this the sum of K12,900.00 was taxed off thereby reducing the appellant's costs, cum disbursements, to K11,841.00 and taxing the same accordingly.

The respondents applied for a review. At that review, Mr. Msisha reiterated his earlier arguments that no separate instructions fee or brief fee was payable on the counterclaim but only one set covering both the claim and the counterclaim. He also submitted that the amount allowed by the taxing master for refreshers was astronomical and wrong in principle. Mr. Nakanga, on the other hand, contended that since a counterclaim is an independent action or cross-action, two separate instructions fees were payable for the claim and the counterclaim, so too brief fees. Mr. Nakanga contended further that the amount awarded for refreshers was reasonable. After reviewing the matter and considering the authorities cited before him, the learned taxing master accepted Mr. Msisha's arguments and taxed off both the instructions fee and the brief fee earlier awarded vis-a-vis the counterclaim. The amount awarded for refreshers was also reduced from K4,000.00 to K2,000.00. All this resulted in the appellant's costs being reduced from K11,841.00 to K7,341.00. We will say more on these matters later in this judgment.

The appellant applied for a further review by a judge in chambers contending that the taxing master fell into error in holding that no separate instructions fee and brief fee were payable on the counterclaim and in reducing the amount allowed for refreshers. The said review came before the Honourable Chief Justice who, after considering the matter and the authorities cited, rejected Mr. Nakanga's objections and upheld the taxing master's decision in its entirety. The appellant now appeals to this Court against that decision.

We have indicated that Mr. Nakanga's main line of argument has consistently been that separate instructions fee and brief fee are payable on the counterclaim since a counterclaim is an independent action or cross-action. We would agree that in most instances a counterclaim is a cross-action although, of course, in some instances the same may only operate as a defence. There can also be no doubt that costs may be payable on taxation with reference to a counterclaim. These would be costs incurred by reason of such counterclaim. See Medway Oil and Storage Company vs. Continental Contractors (1921) A.C. 88.

The question of instructions fee is dealt with under item 10 of Order 62/A2/22 of the Rules of the Supreme Court. It is to be noted there that the fee or allowance herein, the

amount of which is discretionary, is described as:-

> "Instructions for trial or hearing of any cause or matter whatever the mode of trial or hearing or for the hearing of any appeal".

The Rule goes on, and this is significant, to state that under the said Item only one allowance will be made for instructions in any action, cause or matter or for any final or interlocutory appeal in the action, cause or matter. And Order 62/A2/23 provides that the Item here is intended to cover the doing of any work not otherwise provided for and which was necessarily or properly done in preparation for a trial, hearing or appeal and includes the taking of instructions to sue, defend, counter-claim, appeal or oppose. For all such work one allowance will be made for instructions fee. This means that where the costs sought in any action are referrable to both a claim and counterclaim, as in the present case, the bill must indicate with regard to a claim for instructions fee that counsel took instructions both to sue and to defend the counterclaim and the taxing master or the court, as appropriate, will bear this in mind in determining, in the exercise of his or its discretion, the amount to be awarded. Perhaps we should mention that the situations in point on this aspect are where in an action the plaintiff succeeded on the claim and the defendant lost on the counterclaim or, conversely, the plaintiff, as in the present case, failed on the claim and the defendant succeeded on the counterclaim. In the former situation, the plaintiff succeeds on both the claim and the counterclaim whereas in the latter it is the defendant who succeeds both on the claim and the counterclaim.

Where, however, both the claim and the counterclaim are dismissed or where both these succeed with costs, the rule upon taxation (party and party) is that the claim should be treated as if it stood alone and the counterclaim should bear only the amount by which the costs of the proceedings have been increased by it unless the court directs otherwise. See the Medway case and also Milican and another vs. Tucker and others (1980) 1 All E.R. 1083. But there again there would be one allowance for instructions fee relating to work necessarily and properly done in prosecuting or defending the claim or counterclaim, as appropriate. In short we agree with the court below that only one allowance for instructions fee was payable in the instant case. And concerning the counterclaim here, it was the view of both the taxing master and the Honourable Chief Justice that the nature of the case was such that the counter-claim could not have increased the costs of the proceedings substantially in that the facts on the claim were principally the same as those on the counterclaim. This was a finding of fact and we find no reason to disagree with the same. Accordingly, Mr. Nakanga's argument on this aspect must fail.

We now advert to the two allowances sought for brief fees on the claim and the counterclaim. On this point the Honourable Chief Justice observed at page three of his ruling as follows:

"I now turn to the brief fees. I think it is important to look at the basis of the brief fee. Where the profession is split, the solicitor will deliver a brief to counsel who will then charge his fee on it. This is done when the case is ready for trial. In our fused profession one person, say an advocate, deals with all matters right from inception of the case to the end. There can therefore be only one brief fee for the entire action. I do not see any justification for two brief fees."

With respect we share fully in the observation made by the Honourable Chief Justice and agree with the conclusion he reached. In our judgment whether or not a case also involves a counterclaim only one allowance for brief fee is payable and we so find. What we might however add is that the presence of such a counterclaim is a circumstance the taxing master would no doubt consider in exercising his discretion and deciding how much should be awarded under that item. In the instant case, it is to be noted that the Honourable Chief Justice took the view that the amount actually awarded by the taxing master was reasonable considering that the counterclaim was based on the same facts as the claim. He therefore refused to interfere with the taxing master's award in this respect. We too are of the same view and can find no basis for interfering. Consequently, Mr. Nakanga's argument on this ground must fail.

Finally, we turn to refreshers. Mr. Nakanga's complaint on this aspect was that the taxing master erred on review by reducing the number of refreshers from two to one. He submitted that this was wrong because the trial lasted fourteen hours and in terms of Order 62/A2/50, there should have been two refreshers after taking off the first five hours in respect of the first day of hearing. On a careful reading of the taxing master's ruling, it becomes clear and we are satisfied that the taxing master was throughout mindful of the fact that he had earlier allowed two refreshers and that what he did at the said review was merely to reduce the amount earlier allowed for the two refreshers from K4,000.00 to K2,000.00. In other words the K2,000.00 represents the amount allowed on review in regard to the two refreshers. We thereby reject Mr. Nakanga's argument here.

There is one other matter we wish to refer to in conclusion on the question of refreshers. It is noted that in past taxations a refresher has been calculated at two-thirds of the amount allowed for brief fee. We are informed that this has been the practice over the years but how the same came to be is not known. There used to be the so called two-thirds rule under Order 62/A2/44 of the Rules of the Supreme Court. Under that rule a junior counsel in England was entitled to two-thirds of the fee payable to his leader. But as observed by the Honourable Chief Justice in his ruling in the present case, that rule was abolished a long time ago, in 1966 to be precise. We can find

no basis for calculating or allowing refreshers at two-thirds of the amount allowed for brief fee. In our judgment, the amount which may be allowed for a refresher fee or refresher fees is in the discretion of the taxing master. See Order 62/A2/50, already mentioned.

All in all this appeal must fail and is dismissed with costs.

DELIVERED at Blantyre this 5th day of September, 1988.

(Signed) _____

BANDA, J.A.

(Signed) _____

UNYOLO, J.A.

(Signed) _____

KALAILE, J.A.