



REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PROBATE CAUSE NO. 466 OF 2013

IN THE MATTER OF THE ESTATE OF J [REDACTED] K [REDACTED] (DECEASED)

AND

IN THE MATTER OF AN APPLICATION UNDER SECTION 16, 17, 20(1) AND 55 OF THE DECEASED ESTATE (WILLS, INHERITANCE AND PROTECTION ACT, 2011) FOR THE REMOVAL OF THE 2<sup>ND</sup> RESPONDENT AS THE ADMINISTRATOR AND REPLACEMENT THEREOF WITH THE APPLICANT

BETWEEN

S [REDACTED] J [REDACTED] K [REDACTED] ..... APPLICANT

AND

W [REDACTED] K [REDACTED] ..... 1<sup>ST</sup> RESPONDENT

F [REDACTED] K [REDACTED] ..... 2<sup>ND</sup> RESPONDENT

CORAM: WYSON CHAMDIMBA NKHATA

- Mr. Kamkwasi, of Counsel for the Plaintiff
- Mr. Chipembere, of Counsel for the Defendant
- Mr. Chitsulo, Official Interpreter/Court Reporter

**ORDER ON ASSESSMENT OF COSTS**

[REDACTED]

The applicant commenced the action herein for an order of interlocutory injunction restraining National bank of Malawi Limited from transferring funds belonging to the late [REDACTED] K [REDACTED] to the administrator of the estate pending revocation of Letters of Administration and costs of this action. Through a judgment dated on the 8<sup>th</sup> of August 2016 by Justice Kenyatta Nyirenda the applicant turned out successful in his action and he was granted costs of this action as well. The parties appeared before this court on the 21<sup>st</sup> of March 2018 for hearing on assessment of costs. I reserved my ruling on the matter which I must now consider.

I thought I should begin by mentioning that this court is aware that this process must ensure that only costs which are necessary and proper for the administration of justice are allowable. The principle upon which these costs should be taxed is that the successful party should be allowed costs reasonably incurred in prosecuting or defending the action. In the case of **Fullerton v. Matsqui**, 74 B.C.L.R. (2d) 311, Justice Cumming adopted these words: 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 my view, therefore, the taxing master must hold a balance: On one hand, the successful litigant, who has been awarded the costs so that he is made whole by being able to recover costs necessarily incurred and on another the unsuccessful party so that he does not pay an excessive amount of money. Order 31 rule 3 of the Courts (High Court) (Civil Procedure) Rules 2017 states that the Court shall also have regard to:

- (a) the conduct of all the parties;*
- (b) the amount or value of any money or property involved;*
- (c) the importance of the matter to all the parties;*
- (d) the particular complexity of the matter or the difficulty or novelty of the questions raised;*
- (e) the skill, effort, specialized knowledge and responsibility involved;*
- (f) the time spent on the case; and*
- (g) the place where and the circumstances in which work or any part of it was done.*

In this case, I went through the bill of costs as presented by Counsel for the applicant. He is claiming K15,664,890.00 in total. Firstly, on the issue of the hourly rate, Counsel for the applicant proposes K15,000.00 per hour. He is of 16 years standing at the bar. Counsel for the respondent however is of the view that the same has no basis in law. He contends that the court has discretion to decide the rate taking into account among other things the complexity, difficulty and novelty of the issues involved. He is of the opinion that in this case K10,000.00 per hour would suffice in that the case did not require specialized skills or knowledge being a case involving an injunction. Be that as it may, I am of the view that the rate sought for is in tandem with prevailing

rates by lawyers of reasonably comparable skills, experience and reputation rendering a similar service as in the case herein. I will allow the K15,000.00 per hour as sought for by Counsel for the applicant.

#### PREPARATORY WORK

Counsel for the applicant is claiming 8 hours for attending upon the client to take instructions and weighing whether or not to commence legal proceedings. He further states that he corresponded with the client and took and prepared proof of evidence. He further seeks 6 hours for attending upon and with other parties including the respondents. I take note that there was no objection by Counsel for the respondents. However, I am inclined to allow 5 hours and 4 hours for the conferences with the client and other parties respectively.

#### DOCUMENTS PREPARED

On documents prepared, upon weighing the submissions both Counsel and upon going through the record, I thought I should allow the following rates with respect to various documents prepared:

| DOCUMENT     | No. of Docs | Time/document | Total   |
|--------------|-------------|---------------|---------|
| Notices      | 8           | ½ hr          | 4 hrs   |
| Summons      | 4           | 1 ½ hrs       | 6mins   |
| Affidavit    | 13          | 2 hrs         | 26 hrs  |
| Subpoena     | 1           | ½ hr          | ½ hrs   |
| Orders       | 4           | ½ hr          | 2hrs    |
| Letters      | 10          | 1hrs          | 10hrs   |
| Trial Bundle | 1           | 2hrs          | 2hrs    |
| Total        |             |               | 50½ hrs |

#### DOCUMENTS PERUSED

On documents perused, upon weighing the submissions both Counsel and upon going through the record, I thought I should allow the following rates with respect to various documents perused:

| DOCUMENT           | No. of Docs | Time/document | Total   |
|--------------------|-------------|---------------|---------|
| Notices            | 5           | 30mins        | 2 ½ hrs |
| Summons            | 1           | 30mins        | 30mins  |
| Affidavit          | 1           | 2hrs          | 2hrs    |
| Skeletal arguments | 3           | 2hrs          | 6hrs    |
| Order/Judgment     | 2           | 2hrs          | 4hrs    |
| Letters            | 3           | 1hrs          | 3hrs    |
| Total              |             |               | 18hrs   |

## CASE AUTHORITIES

Apparently Counsel or the applicant has listed 41 cases and is claiming 3 hours for each. On the other hand, Counsel for the respondents is arguing that the cases are of different lengths and yet Counsel for the applicant is seeking 3 hours for each. He further argues that Counsel applied there or four of the case and yet he lists 41 cases. He therefore moves the court to trim the cases to 10 and award half an hour for each. I agree that it is always important to exercise due diligence in handling every matter no matter how simple it may look. However, in a case like the one herein involving an injunction restraining a bank from transferring one's estate does not really warrant reading 41 cases. I shall trim them to 20 and award an hour for each.

## BOOKS AND STATUTES

On the books and statutes, Counsel claims to have referred to order 29 rule 1 and rule 1(2) of the Rules of the Supreme Court. He further refers to ss.16, 17(1), 20, 32, 33, 43, 55 and 62. I wish to agree with Counsel for the respondents that 2 hours for each of the provisions is on the higher side. I shall adopt an hour for each.

## ATTENDANCES (INCLUSIVE OF TRAVELLING AND WAITING)

On this regard Counsel for the respondents bemoans the inconsistencies. He points out that Counsel for the applicants is asking for 2hrs for some documents and 5 hours for others. Further Counsel is asking for 7hrs for attending trial and 5 hours in others. Counsel is of the view that the inconsistencies should be used against the applicants. Have weighed and gone through the court record I allow 2 hours for every attendance on filing documents which appears to be 21 times. I further allow 3 hours for each attendance for trial and it appears there were 3 times.

## GENERAL CARE AND CONDUCT

The court takes note that the applicant is claiming 50% of part 3 for preparation of trial and then 80% of part 3 General Care and Conduct. I wish to join Counsel for the respondents in that the narrations for the two are more or less the same. Clearly, it is a redundancy. I shall disregard the part on preparation for trial and make an award for General care and Conduct. On this part 80% is not warranted for. It was just an injunction and letters of administration. I shall adopt 60% of Part 3.

## DISBURSEMENTS

On disbursement the applicant is claiming K210,000.00 being K40,000.00 for stationery, K30,000.00 for printing and photocopying, K60,000.00 for telephone and K80,000.00 for travelling. Counsel for the respondents argues that the same have not been supported by any evidence. In my view, there is abundant

evidence that the same were indeed incurred. I expected Counsel for the respondents to challenge the amounts allocated for each. Further to this, Counsel for the respondents has issues with the K80,000.00 on travelling in that it has already been claimed under attendances. I believe the same are different in that under attendances Counsel for the applicant is claiming for time spent travelling and waiting at the court while under disbursements Counsel is claiming for fuel refund used in travelling to court. I shall allow K260,000.00 for disbursements.

#### TAXATION

I am of the view that 8 hours is reasonable. I further award 30 mins for the notice to appointment to tax costs and 2 hours for attending taxation proceedings. On the part of General Care and Conduct I believe 50% is just and fair. In total this part shall be awarded K236,250.00.

I therefore tax the bill as follows:

| PART                     | TIME          | AMOUNT                |
|--------------------------|---------------|-----------------------|
| Preparatory work         | 9 hrs         | K135,000.00           |
| Documents prepared       | 50½ hrs       | K757,500.00           |
| Documents perused        | 18hrs         | K270,000.00           |
| Case authorities         | 20hrs         | K300,000.00           |
| Books and Statutes       | 10hrs         | K150,000.00           |
| Attendances              | 57hrs         | K855,000.00           |
| Total for Part 3         |               | K2,332,500.00         |
| General Care and Conduct | 60% of Part 3 | K1,399,500.00         |
| Taxation                 |               | K236,250.00           |
| 16.5 % Surtax            |               | K677,036.25           |
| Add disbursements        |               | K260,000.00           |
| <b>TOTAL</b>             |               | <b>K5,040, 286.25</b> |

The costs are taxed at **K5,040, 286.25**.

MADE IN CHAMBERS THIS 3<sup>rd</sup> OF SEPTEMBER, 2018

**WYSON CHAMDIMBA NKHATA**

ASSISTANT REGISTRAR