HENRY CHIPALE AND KABWE MUNICIPAL COUNCIL

SAKALA, J. S.
TH RD
5 APRIL AND 3 MAY, 2000
S.C.Z. JUDGEMENT NO. 9 OF 2000
S.C.Z. /8/13/99 (Appeal No. 20/99)

Flynote

Civil procedure - taxation of bill of costs - question of jurisdiction of Master of Supreme Court to tax bill of costs incurred in High Court.
Taxation of bill of costs - whether in order to proceed in absence of Party without due regard to circumstances.

Headnote

Following a Supreme Court judgement, the appellant took out a notice before the Master of the Supreme Court for taxation of the bill of costs incurred in the High Court. The Master of the Supreme Court set 28th January 2000 as the date of taxing the bill. On that date the appellant appeared in person. The respondent was absent. The Master of the Supreme Court ruled that he would proceed with the matter since Kabwe Municipal Council had been served with the notice of hearing. The Master also explained to the appellant that he was not entitled to legal costs except disbursements on costs incurred during the preparation of the record of appeal. The Master then awarded the appellant the sum of K33,049,100.00 plus ten percent taxation fees and seventeen and half percent V.A.T. On 31st January the appellant applied to lift up the allocatur. The respondent was again absent. The respondent subsequently filed a stay of execution of the allocatur of costs on taxation pending the hearing of the inter parte application to set aside or vary the same. Counsel for the respondent argued that the Master did not consider the application before him judiciously. He simply gave the appellant what he asked for. Further that since the appellant was not a lawyer he could not possibly have incurred costs amounting to almost K50 million. Counsel also argued that the Master of the Supreme Court had no jurisdiction to tax a bill of costs incurred in the High Court.

Held:
The Master of the Supreme Court for purposes of taxation of costs incurred in the High Court is not a taxing master or Taxing Officer. The application for Taxation before the Master of the Supreme Court was, therefore, misconceived .
The Application to set aside the allocatur is granted.

Cases referred to:
(i) Kambikambi v. Zambia Railways Limited S.C.Z. No. 6 of 1999.
(ii) Patel and Patel v. Monile Holding Company Ltd. S.C.Z. No. 6 of 1993.
(iii) Water Wells Limited v. Jackson S.C.Z. No. 4 of 1984.

For the Applicant M. Musonda, Musonda and Company.
For the Respondent In Person.

Judgment

SAKALA J.S. delivered the judgment in Chambers.

This is an application to set aside or vary the allocatur of costs dated 31st January, 2000 issued

by the Master of the Supreme Court, but stayed by this court on 9th February, 2000 pending the hearing of this inter partes summons.

The brief facts leading to the application are that on 24th November, 1999, we dismissed the substantive appeal by the Appellant against a decision of the High Court Registrar refusing to award the Appellant damages for loss of business and damages for libel. However, we awarded the appellant costs in the court below to be taxed in default of agreement. In that appeal the appellant had also complained against the failure by the Registrar to award him costs for all his appearances in the High Court up to and including an assessment and ruling on assessment. We agreed with the appellant that it is a general rule that a successful party ought to have costs in the action unless there is a good reason for denying the costs.

Following upon our judgment of 24th November, 1999, the appellant took out a notice before the Master of the Supreme Court for the taxation of the bill of costs incurred in the High Court. The Master of the Supreme Court set 28th January 2000 as the date of taxing the bill. On that date Mr. Chipale, the Appellant, appeared in person. There was no appearance for the Respondent, Kabwe Municipal Council. Mr. Chipale informed the court that he had served a notice of taxation on Kabwe Municipal Council and that there was no explanation as to why they had not appeared. In a brief ruling the Master ruled that he would proceed with the matter since Kabwe Municipal Council had been served with a notice of hearing and that there was, to that effect, an affidavit of service filed on the same day. The Master then explained to Mr. Chipale that he was not entitled to legal costs except disbursement and costs incurred during the preparation of the record of appeal and other personal expenses. Mr. Chipale made a very brief submission as follows:-

> "I used to drive a Mercedes Benz car as such I incurred costs."

Thereafter the Master made the following ruling:-

> "I have gone through the receipts attached hereto and the amount tabulated in the bill of costs. In the absence of any challenge from the Advocate for the respondent who were duly served with the bill of costs for his disbursement, I am satisfied that the applicant incurred the expenditure as per bill of cost filed. I therefore allow the bill and order that the applicant be refunded his money in the sum of K33,049,100.00 plus ten percent taxation fees and seventeen and half percent V.A.T."

On 31st January Mr.Chipale applied to up lift the allocatur. Kabwe Municipal Council did not again appear on this day. But subsequently the advocate for Kabwe Municipal Council applied exparte for stay of execution of the allocatur of costs on taxation issued by the Master pending the hearing of the inter partes application to set aside or vary the same. The application was supported by an affidavit. The Appellant subsequently filed an affidavit in opposition. There were further affidavits filed by both parties. To avoid any possible prejudice and on account of the jurisdictional view I take of this application , I will not delve into these affidavits. They are nevertheless on record. But I am satisfied that Kabwe Municipal Council was duly served with the notice of the Appellant's bill of taxation. From the record I am also satisfied that the Master allowed the whole bill consisting of 24 items. The total calculated costs is K47,885,961.18. I accept that this is indeed a substantial amount of money incurred by an Appellant who appeared in person.

Mr Musonda, appearing for Kabwe Municipal Council, complained that even if the Master was satisfied that there was due service of the notice, he should have still considered granting an adjournment to ascertain whether Kabwe Municipal Council had indeed been properly served

with the notice. He submitted that this approach was more critical given that the Appellant had been appearing in person, there could have been a likely possibility that he was understandably emotionally and passionately involved in the matter and that as such he would have been over zealous. Counsel also argued that apart from procedure, the Master did not consider the application before him judiciously. He simply gave the Appellant what he asked for in his notice and failed to consider whether the Appellant was registered with Zambia Revenue Authority for purposes of V.A.T. Mr. Musonda contended that the huge sum claimed as costs ought in itself to have put the Master on guard and to exercise circumspection asking himself the question: Can a litigant appearing in person recover close to K50 million in costs? Counsel pointed out that this court has consistently stated that even in a case where a defence has collapsed, still the Plaintiff is required to prove his case and that the court cannot simply give the Plaintiff whatever has been claimed simply because the defendant has failed to put up a defence. Mr. Musonda specifically criticized certain items in the bill and submitted that even where advocates are involved, the attitude of the court has always been to consider costs or such costs as will have been reasonably incurred will be awarded and not all costs, not everything and not anything.

Mr. Musonda drew the attention of the court to a number of authorities where this court has set out limits of costs for instance in *Kambikambi v. Zambia Railways Ltd. (1)* where we said that the costs awarded to a litigant appearing in person were to be"... limited to disbursements for the preparation of the record of appeal and travelling and hotel expenses." He also drew the attention of the court to specific cases where the court has always taken a view that justice can only be done by having the matter heard on merits and that it is not in the interest of justice to deny a party the right to have his case heard; for instance in *Patel and Patel Vs. Monile Holdings Company Ltd.* (2) this court said:-

> "We appreciate that, according to the note to Order 13/9/5 of the Supreme Court Practice (The White Book 1988,) even if a defendant tells a lie about his reasons for delay, a default judgment should be set aside if a triable issue is disclosed."

And in *Water Wells Ltd. v. Jackson (3)* we held:-

> "Although it is usual on an application to set aside a default judgment not only to show a defence on the merits, but also to give an explanation of that default, it is the defence on the merits which is the more important point to consider."

We further held:-

> "If no prejudice will be caused to a plaintiff by allowing the defendant to defend the action then the action should be allowed to go to trial."

I take note that the Appellant appeared in person but the submissions by the learned counsel have a basis in law and are amply supported by the decisions of this court.

For the foregoing reasons the Respondent's application in these proceeding on both procedure and substantive issues of merits is bound to succeed. But more importantly, Mr. Musonda has raised the issue of jurisdiction of the Master of this court to tax a bill of costs which costs were incurred in the High Court. Mr. Musonda pointed out that in this court's judgment there was no direction that the Master can tax the costs incurred by the Appellant in the High Court. Mr. Musonda submitted that the absence of such specific direction meant that the Master of the Supreme Court did not have power to have the costs assessed before him, since the costs having arisen in the High Court, they ought to have been taxed by the Deputy Registrar who is the Taxing Master of that court.

Mr. Chipale who appeared in person filed a written statement in support of this submissions. Indeed, having appeared in person and not a lawyer himself, he was not in a position to address the court on the issues of procedure, merit and of jurisdiction.

In our judgment of 24th November, 1999, we specifically stated that Mr. Chipale be awarded costs in the court below to be agreed and in default to be taxed. We did not award Mr. Chipale costs in the Supreme Court. The application for taxation of costs was made in the Supreme Court under Rule 15 of the Supreme Court Act. In the same vein this application before this court was made under Rule 15 of the Supreme Court Act. But according to our law all questions relating to costs in the High Court ought to be referred to a taxing officer of that court. (See Order 40 of the High Court Rules). The High Court Rules define a taxing officer to mean: a Taxing Master or an Assistant Registrar. A Taxing Master under those rules is the Registrar of the High Court, the Deputy Registrar or the District Registrar. (See Order 2 of the High Court Rules). For costs incurred in the Supreme Court, Order 15 clearly states that unless the costs have been assessed by the Court, they are to be taxed by the Master or any other officer of that court. In this case the Taxing Master in the Supreme Court is the Master of the Supreme Court.

I am satisfied that the Master of the Supreme Court for purposes of taxation of costs incurred in the High Court is not a Taxing Master or Taxing Officer. The application for Taxation before the Master of the Supreme Court was, therefore, misconceived. On this ground too this application was bound to succeed. The application to set aside the allocatur of costs is accordingly granted. The allocatur is set aside with liberty to apply before the appropriate officer of the court in which the costs were incurred. I make no order as to costs before this court in these proceedings.
