SUPREME COURT OF NOVA SCOTIA
Citation: *Ng'ang'a v. Mburu*, 2018 NSSC 117

Date: 20180511
Docket: *458404*
Registry: Halifax

Between:

Michael Ng'ang'a

Applicant

v.

Peter Kiarie Mburu

Respondent

DECISION AS TO COSTS

Judge:	The Honourable Justice Patrick J. Duncan
Heard:	By Correspondence
Final Written Submissions:	March 19, 2018
Counsel:	Michael Donovan, Q.C., for the Applicant Tim Hill, Q.C., and Allison Reid, for the Respondent

By the Court:

Introduction

[1] The plaintiff brought a motion for production of six emails listed in the defendant's Affidavit Disclosing Documents. The entire text of three emails was disclosed in hard copy prior to the hearing and the defendant agreed to also provide an electronic copy of them. The defendant produced the other three emails in a partially-redacted form, asserting a claim of solicitor-client privilege over the redacted information. The defendant agreed to provide an electronic copy of those emails in their redacted form.

[2] A hearing was conducted to respond to the plaintiff's request for an order:

> 1. To require the defendant to provide unredacted copies of the three emails over which privilege was claimed; and
> 2. To require the defendant to produce all six emails in "native" form, in order for the plaintiff to examine the "metadata" embedded in the emails.

[3] In a decision reported as *Ng'ang'a v. Mburu* 2018 NSSC 26:

> 1. I rejected the claim of solicitor-client privilege over redacted information in the three emails, and ordered that copies of those emails be produced without redaction; and

2. I ordered that the six emails in question be produced in electronic form (as already agreed to by the defendant), but refused the request that they be produced in "native" form.

[4] The parties have been unable to agree on the question of costs following this decision.

Positions of the parties

[5] Counsel for the plaintiff submits that:

1. Costs should be governed by **Tariff C,** which provides a range of costs between $750 to $1000 on a motion hearing taking more than one hour and less than a half day;

2. The plaintiff was substantially successful;

3. Costs should be fixed in the amount of $1,000 payable in the cause, and for these reasons:

   (a) the quantum of costs would still only reflect a modest contribution to the actual costs incurred in the preparation for and presentation of the case.

   (b) the defendant yielded to some of the production requests, but only after the motion documents were filed, resulting in costs that could have been avoided; and

(c) the matter was complex, and required the preparation and filing of a large volume of materials.

[6] Counsel for the defendant:

1. agrees that costs are to be assessed in accordance with the provisions of **Tariff C;**

2. submits that the results were mixed, and the results cannot be shown at this point to have any impact on the determination of the merits of the claim. Therefore, each party should bear their own costs;

3. proposes, in the alternative, that costs should be fixed at no more than $500, arguing that:

(a) an award at the high end of the scale would be disproportionate to the issues in dispute;

(b) the issues were not complex and the materials filed were not voluminous;

(c) the oral submissions of counsel for the plaintiff were “largely responsible” for the amount of court time used for the hearing; and

(d) costs should be reduced to recognize that the defendant had consented to most of the items sought in the motion for production.

Analysis

[7] It is common ground, and I agree, that the range of costs falls within the scale of $750 to $1,000 set out in **Tariff C**. I am aware of the discretion afforded the court by **Rule 77** to deviate from the scale in appropriate circumstances.

[8] I agree with the position of the defendant that the results were mixed. The issue is whether, notwithstanding this outcome, costs should be assessed and, if so, in what amount.

[9] I do not agree with the plaintiff's characterization of the issues as being complex, or that the materials in support were voluminous, when seen in the context of how those considerations are assessed in comparable matters. The determination of solicitor-client privilege is always an important question and can arise in complex circumstances of fact and law. This motion was not one of those situations. There was one affiant for each party (one being a solicitor's affidavit) and no cross examination.

[10] I agree with counsel for the plaintiff that it is appropriate to consider the impact on costs where a party only concedes a point in issue after a substantial portion of costs have been incurred by the ultimately successful party. In this case, however, the substantive question of privilege was at the core of the defendant's

objection to release of the emails and yielding on that point on some emails but not others did not result in an impactful difference in the length of the hearing, *i.e.*, the resulting duration of the hearing would still fall within the scale under consideration.

[11] Even if the defendant had agreed to produce all the emails in an unredacted form, the issue of whether the defendant should be required to provide those emails in native form had to be determined. That was a discrete question which was resolved in favor of the defendant.

Conclusion

[12] The results of the motion were mixed. I am not satisfied that this is a case where an assessment of costs to be paid in the cause is warranted. Each party will bear their own costs.

[13] Order accordingly.

Duncan, J.