THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMAPALA

TAXATION APPEAL NO. 35 OF 2017

(ARISING FROM HCCS 472 of 1996)

AND

IN THE MATTER OF THE ADVOCATES (TAXATION OF COSTS (APPEALS AND REFERENCES) REGULATIONS SI 267-5

AND

IN THE MATTER OF THE ADVOCATES

(TAXATION OF COSTS) (APPEALS AND REFERENCES) REGULATIONS S.I 267-5

YESERO MUGENYI……APPELLANT

VERSUS

HOIMA DISTRICT ADMINISTRATION…….RESPONDENT

BEFORE JUSTICE RICHARD WABWIRE WEJULI

JUDGEMENT

The Appellant lodged this appeal under section 62 (1) and (5) of the Advocates Act Cap. 276 and regulation 3 of the Advocates (Taxation of Costs) (Appeals and References) Regulations S.I 267-5 seeking to set aside and substitute with a larger instruction fee the taxing master's award of Ugx. 90,000,000/ (ninety million shillings only) delivered in **HCCS number 472 of 1996** and for costs of the application to be awarded to the appellant.

The grounds of the appeal are that; the Learned Taxing Officer erred in law and in fact in ignoring the special circumstances surrounding this case and awarding UGX. 90,000,000/= as instruction fees, which amount was manifestly inadequate and secondly, that it is fair and equitable that the learned taxing officer's taxation award be set aside and substituted with an enhanced instruction fee more reflective of the value of the subject matter, the principle of consistency in awards and the overall unique circumstances of the suit.

The appeal is supported by the affidavit of Mr. Anthony Bazira and the Affidavit in reply is deposed to by Lujumwa Nathan. The affidavit in rejoinder was deposed to by Mr. Yesero Mugenyi the appellant. Both Counsel filed written submissions.

The Appellants were represented by Byenkya Kihika and Company Advocates while the Respondents are represented by Kabega, Bogezi and Bukenya Advocates.

The background of this application is that Court delivered judgment in **Yesero Mugenyi versus Hoima District Administration HCCS No. 472 of 1996** in favor of the Appellant/Plaintiff. Pursuant to order 3 of the said Judgment and decree, a valuation of land was ordered and carried out putting the value for compensation payable to the appellant at 8,230,000,000/=(eight billion, two hundred and thirty million shillings).

The appellant then filed Civil Application No. 1067 for final orders to give legal effect to both the judgment and decree. Subsequently, on 28th April, 2017 Justice Christopher Madrama Izama issued final judgment in favor of the Plaintiff/ Appellant and awarded costs for both Civil Application No.1067 and HCCS No. 472 of 1996.

The Plaintiff/Applicant then filed a bill of costs which was taxed and allowed at UGX.

108,210,000/=. The Plaintiff/ Appellant being dissatisfied with the instruction fee awarded at UGX. 90,000,000 by the taxing master filed this Appeal.

Appellant's Counsel contended that the instruction fee of UGX. 90,000,000/= (ninety million shillings) is manifestly inadequate when one considers the value of the subject matter in the suit from which the bill of costs arose. The subject matter in HCCS No. 472 of 1996 as ascertained from the judgment based on a valuation by the Chief Government Valuer is Shs 8,230,000,000/= as awarded in Civil Application No. 1067 of 2016.

He submitted that based on the principle of consistency with recent awards and similar situations, an award of 10% of the value of the subject matter as professional fees was modest and it would be a misdirection to have otherwise.

He cited several cases in which after taxation of costs the award was based on or adjusted to 10% or thereabouts of the value of the subject matter. The cases cited included; **NIC vs. Pelican Services Limited, Court of Appeal Civil Reference No. 13 of 2005, Bank of Uganda Vs Trespert Ltd, Civil Appeal No.3 of 1997 SCU, Sietco Vs Noble Builders, C.App/ No.31 of 1993 SCU.**

He invited Court to consider the principles of taxation of costs stated in the case of **Makula International Ltd vs. Cardinal Nsubuga & anor (1982) HCB 11** that;

i) That costs should not be allowed to raise to such levels as to confine access to courts to the wealthy.

ii) That a successful litigant ought to be fairly reimbursed for the costs he had to incur in the case; iii) That the general level of remuneration of advocates must be such as to attract recruits to the profession; iv) That so far as practicable there should be consistency in the award made.

He cited the decision of Justice S.T Manyindo in the case of **Nicholas Roussos V Gulam Hussein Habib Virani and Nasmudin Habib Virani in Civil Appeal No.6 of 1995** to argue that advocates should be well motivated but it is also in the public interest that costs be kept to a reasonable level so that justice is not put beyond the reach of poor litigants.

Counsel submitted that the **Sixth (6th) schedule to the Advocates (Remuneration and Taxation of costs) Rules SI 267-4** which allows for consideration of the value of the subject matter during taxation. He argued that while the scale fee must be taken into account, it is not the only consideration and contended that every consideration permitted by the Regulations and applicable to a given case affects, in a way or the other, the assessment of the instruction fee.

He cited Regulation 6 of the **Advocates (Remuneration and Taxation of Costs) Rules** and submitted that this was a complex matter because it was only after 21 years of litigation and correspondences that a final judgment was entered. It is also worthwhile to note that it was not until further research was carried out and Misc. Application no. 1067 of 2016 commenced, heard and eventually disposed of that a final judgment was entered. He prayed that this appeal be resolved in favor of the Appellant, with costs.

In reply Counsel for the Respondent In reply, Counsel for the Respondent challenged the Application by seeking to impeach the legality of the consent/compromise on the decree in CS 472/1996 entered by the parties on 18th July 2011 and the continuation of this Application pending the determination of an earlier filed application between the parties. He argued that the determination of these two would determine whether the decision of the taxing master should be upheld.

Respondent's Counsel submitted that M.A 309 of 2010 has never been heard or determined on its merits and that until M.A 309 of 2010 is resolved, Civil Application of 1067 of 2016 was illegally before the Court. He cited the case of **Makula International Vs Cardinal Nsubuga (1982) HCB 11** to urge court not to sanction illegality, as he argued the application to be.

On whether the consent/compromise on the decree entered into by the parties is valid. The respondent's Counsel submitted that that the consent/compromise had been properly endorsed before a Judicial Officer in a properly constituted Court.

He argued that that the consent on the decree concluded all matters between all the parties and court should not ignore the importance and validity of the consent on the decree.

He cited the case of **Dison Okumu and 9 others vs. Uganda Electricity** Transmission Company Limited, HCCS No. 49 of 2014, where Justice Musota stated that once a compromise is entered and the court endorses it the same becomes effectively a court order or decree.

The respondent's Counsel submitted that the taxation from which this appeal is premised was based on illegal proceedings. He prayed that this Court recognizes the existence of the consent/compromise on decree by the parties and should therefore refer the matter back to the taxing officer. Or in the alternative, but without prejudice to the foregoing, the court should respect the taxing officer's decision that was made fully aware of the principles that he was basing his decision on and the taxation reference be resolved in favor of the respondent and dismissed with costs to the respondent.

In rejoinder the Appellant's Counsel reiterated their earlier submissions and submitted that the matter before court is a taxation reference arising from a taxation ruling of His

Worship Thaddeus Opesen regarding taxation of costs and has never been on the issues raised by counsel of the respondent in his submissions.

In specific reference to whether the taxation appeal and proceedings from which it arises should be halted pending-determination of M.A 309 of 2010, the Appellants counsel rejoined that the said M.A No. 309 of 2010 was fixed, heard and dismissed on 22nd June, **2011** before Her Lady Justice Irene Mulyagonja and not 22nd June, **2018** as submitted by the Respondent's Counsel. There was never need to serve the Ms. Kabega, Bogezi & Bukenya Advocates who assumed instructions on January, 2018 as the matter was handled by the respondent's former lawyers Ms. Mwesigye Mugisha and Co. Advocates.

Without prejudice to that, at page 6 of his submissions, the Respondent admits to abandoning the said Misc. App. No. 309 of 2010. They therefore cannot allege that the same matter is still pending determination. The Court legally enter final judgment and it has never been appealed against. He cited the case of **Gaira Mathew and 5 Ors versus Jeff Lawrence Kiwanuka and 3 Ors Misc. App. No.261 of 2016 in which** Justice Remmy K. Kasule held that, a judgment of court can only have its terms altered through a competent appeal process and under supervision of a competent court of law, otherwise it must be obeyed and fulfilled in its entirety. To treat it otherwise is to make the Court act or appear to be acting in vain. This must never be allowed".

He contended that this is a reference of a taxation award, the allegations by the Respondent that the original judgment was misinterpreted and wrongly attempted to be affected are not the subject matter of the appeal and should be disregarded by this court.

Regarding the issue of complexity, Rule 6 of the Advocates (Remuneration and Taxation of Costs) Rules and submitted that this was a complex matter because it was novel in

the principle of final orders where interim orders are granted pending certain actions being taken by the parties. It involved extensive consultation and reading. It has added on jurisprudence in Uganda in this area. In addition, the case took over 21 years of active proceeding and correspondences to arrive at a final judgment. He prayed that this appeal be resolved in favor of the Appellant with costs.

JUDGEMENT

I have duly considered the appeal, the record of proceedings and submissions of Counsel and the authorities they cited. I have also addressed myself to the relevant law.

In his submissions, Respondents Counsel sought to have the appeal impeached on grounds that the parties had entered a consent/compromise on the Decree in CS 472 of 1996 and it had never been set aside. He argued that should there be any ambiguity in the consent decree, then the contra preferentum rule should be invoked against the Appellants for the reason that it is them who extracted the consent decree.

Under Section 33 of the Judicature Act, this court is mandated to handle matters before it so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided. It is on this premise that I will address and address the issue of the consent/compromise raised by the Respondents.

My understanding of the Respondents' contention is that following the compromise, the Appellants were not entitled to raise the Bill of costs and claim in the instant Appeal

I have scrutinized both the Decree and the Consent/Compromise on the said Decree and with due respect to counsel, I find his arguments and submissions misconceived,

bordering on a misrepresentation, for the reason that, the decree upon which the parties compromised is only in respect of general damages which had been awarded in HCCS 472/1996.

Even if therefore as Counsel for the Respondent submits, the consent/compromise on the decree entered into by the parties is valid, the Consent /compromise only addresses how the Shs 15,000,000 was to be paid. It is in partial fulfillment of the judgment and does not in any way have a bearing on the Bill of costs from which the Shs 90,000,000 stems, the subject of this taxation appeal.

The argument that the rule in the contra preferentum doctrine should be invoked against the Appellants is therefore misconceived as well. The operation of this doctrine is that the construction of the document least favorable to the person putting it forward should be adopted against him. In this case, there is no ambiguity that would warrant the interpretation of this document or that the intention of the parties could have been to deny the Appellant a claim, in the first place, for professional fees.

Secondly, the Respondents Counsel contended that this taxation reference and the proceedings from which it arises should be halted by this Court pending determination of Miscellaneous Application 309 of 2010.

Whereas the respondent's Counsel contended that the said **Miscellaneous Application 309 of 2010** was never dismissed and implores the Appellant to present evidence of the dismissal, the court system shows that M.A No. 309 of 2010 was closed by dismissal. The taxation reference cannot therefore be halted because according to the court records **Miscellaneous Application No. 309 of 2010** was dismissed on 22nd June, 2011.

Whether the taxation award can be varied

The established position of judicial practice is that, save in exceptional cases, a Judge will not alter a fee allowed by the taxing officer, merely because in his opinion he should have allowed a higher or lower amount- per Mulenga JSC, as he then was, in **Bank of Uganda v Banco Arabe Espaniol Supreme Court Civil Application No. 23 of 1999**. He further stated that, an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the taxing officer exercised, or applied a wrong principle.

In this regard, application of a wrong principle can be inferred from an award of an amount which is manifestly excessive or manifestly low. And that even if it is shown that the taxing officer erred on principle the Judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties.

In a more recent case **First American Bank of Kenya v Shah and Others [2002] 1 EA 64**, the principles are expounded upon as follows;

1. The Court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle;

2. It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration Order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge;

3. If the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially 215 have affected the assessment and the Court is not entitled to upset a

taxation because in its opinion, the amount awarded was high;

4. It is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary;

5. The mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary.

The question that should be constantly asked in appeals or references from taxation decisions is whether the taxing master in exercising his discretion did so judiciously or that the Taxing Master properly directed himself/herself on the law.

Counsel contended that this was a complex matter because it was novel in the principle of final orders where interim orders are granted pending certain actions being taken

by the parties and that and it had added on jurisprudence in Uganda in this area. In addition, the case took over 21 years of active proceeding and correspondences to arrive at a final judgment and involved extensive consultation and reading.

In the case of **Republic V the Minister of Agriculture exparte W'njuguna & Others**

[206] 1 EA 359 (HCK), the High Court of Kenya held that;

"……. The complex elements in the proceedings that guide the exercise of

the taxing officer's discretion must be specified cogently and with conviction. The nature of forensic responsibility placed upon counsel when they prosecute the substantive proceedings must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of

the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time consuming the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details

of such initiative by counsel must be specifically indicated apart, of course, from the need to show if such works have not already been provided under a different heard of costs…"

I have perused the record of proceedings before the tax master, on the file in the instant case, and I have not found evidence by the Plaintiff/Appellant, to prove his claim that he indulged in more work than a lawyer in similar circumstances would have done. Except for the duration that the matter took between commencement and closure, there is no evidence to justify additional fees. The Plaintiff/Appellant should have exhibited to the Taxing Master, evidence of the expert involvement brought on board, to illustrate how much skill was involved.

In the absence of such proof the taxing master was entitled to believe that the responsibility exhibited by Plaintiff/Appellant was not exceptional.

The Taxing Master took into account the protracted and time consuming proceedings and added 6,328,500/ as noted in the extract from the taxing

master's ruling where in awarding 90,000,000/ as instruction fees stated that *"..... Given the fact that this is an old case which involved quite an effort to conclude, I award Shs. 90,000,000/ as instruction fees on item 1".*

Looking at the extract from the ruling of the tax master above, I have no doubt that the taxing master in exercising his discretion did so judiciously and properly directed himself to the law. He complied with the provisions of the 6th schedule of the Advocates Remuneration and Taxation of Costs Rules and also took into account the exceptional circumstances of this particular case, that is to say its old age and the effort involved to its conclusion.

Regarding the principle of consistency, the value was ascertained in the judgment and there is a clear laid out procedure in the 6th schedule on taxation of the ascertainable value. That is precisely the scale that the learned taxing master relied on in this particular taxation. Both methods cannot be applied at the same time.

The taxing Master followed the scale under Schedule 6 1(a) (IV) of the **Advocates (Remuneration and Taxation of costs) Rules** to determine the instruction fees based on the ascertained value of Ush 8,230,000,000/=.

Where the taxing master has properly directed himself on the law and acted judiciously as has been in the instant case, then this court cannot interfere with his decision. This position was most succinctly put in the case of **Nicholas Roussos versus Gulamhussein Habib Virani and Nasmudin Habib Virani, Civil Appeal 6/95**, where Manyindo. D.C.J

(as he then was), held that the Court should interfere where there has been an error in

principle but should not do so in questions solely of quantum as that is an area where the Taxing Officer is more experienced and therefore more apt to the job. The court will intervene only in exceptional cases.

This appeal solely queried the quantum awarded.

I find no justification to interfere with the award. In the event, the appeal fails.

As such the taxing masters' award is upheld and this appeal is dismissed with costs to the Respondents.

Judgment delivered on the 1st of March 2019

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RICHARD WEJULI WABWIRE

Judge