**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL DIVISION)**

**MISCELLANEOUS APPLICATION NO. 625 OF 2014**

**(Arising from Civil Suit No. 672 of 2005)**

1. **DR. D.B. KYEGOMBE**
2. **MRS. B.V. KYEYUNE:::::::::::::::::::::::::::::::::::::::APPLICANTS**

**VERSUS**

 **ERIDAD F. NTANDA:::::::::::::::::::::::::::::::::::::::::::REPONDENT**

**BEFORE THE HON. MR. JUSTICE HENRY PETER ADONYO**

**RULING**

The Applicants, Dr. D.B Kyegombe and Mrs. B.V Kyeyune bring this application under Section 62(1) of the Advocates Act Cap 267 and Regulation 3(1) of the Advocates (Taxation of costs) (Appeals and References) Regulations SI 247-1; seeking orders that the award of Ug. Shs. 10,000,000 as instruction fees for filing High Court Civil Suit No. 672 of 2005 be set aside, that an amount of Ug. Shs. 1,577,500 be awarded instead as the appropriate instruction fees and costs of the application.

The application is premised on a number of grounds set forth in the affidavit of Mbogo Charles, an advocate well versed with the facts in relation to the application.

In brief, he deposed that His Worship Thaddeus Opesen conducted the taxation of HCCS No. 672 of 2005 on the 5th day of June 2014 in which he ruled that a claim on instruction fees ought not to be pegged on the alleged value claimed in the plaint, but rather on the tested and proven value given in the judgment. Further that the Registrar considered Ug. Shs. 31,000,000 and general damages of Ug. Shs. 9,000,000 as part of the subject matter claim and hence came up with a total instruction fee. Mr Mbogo deposed that the Registrar wrongly and erroneously considered the aggregate work done to complete the case and the subject matter value and awarded Ug. Shs. 10,000,000.

The Respondent did not file an affidavit in reply. Both parties filed written submissions and attached authorities which are on record and have been duly considered.

The principles to be applied by an appellate court while reviewing an award by a taxing master were laid out by the **Hon. Justice S.T Manyindo**, DCJ as he then was, in the case of
**Nicholas Roussos versus Gulam Hussein Habib Virani and Nasmudin Habib Virani** in **Civil Appeal No.6 of 1995.**

In that case he held;

*“…that court should interfere where there has been an error in principle but should not do so in question’s 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…”*

The principles of taxation of advocates of bills on a reference have time and again be stated by the courts, following the decision in the case of **Premchand Raichand Ltd. & Another versus Quarry Services of East Africa Ltd. & Others [1972] EA 162**. They were re-stated in the case of **Akisoferi Ogola versus Akika Othieno & Another, C/A Civil Appeal No. 18 of 1999** as follows: -

 i) The court will only interfere with an award of costs by the taxing officer if such costs are so low or so high that they amount to an injustice to one of the parties.

ii) Costs must not be allowed to rise to such a level so as to confine access to the courts only to the rich.

iii) That a successful litigant ought to be fairly reimbursed for costs he or she has to incur.

iv) That the general level of remuneration of advocates must be such as to attract recruits to the profession, and finally,

 v) That as far as possible there should be some consistency in the award of costs.

Justice S.T Manyindo in the case of **Nicholas Roussos case (supra)** went further to find thus;

*“…it is important that advocates should be well motivated but it is also in the public interest that cost be kept to a reasonable level so that justice is not put beyond the reach of poor litigants...”*

What is important is that a taxing officer exercises the correct thought process and once the thought process has been exercised the award will be upheld on appeal. **See:** **Alexander Okello versus M/s Kayondo and Co. Advocates Civil Appeal NO. 1 of 1997.**

Further, it should be noted that that Instruction fees ought to be based on the amount of work involved in preparing for the hearing, the difficulty and importance of the case and the amount involved. **See: Patrick Makumbi versus Sole Electrics (U) Ltd. Supreme Court Civil Appeal No. 11 of 1994.**

In the instant case, Justice Lameck N Mukasa granted general damages of Ug. Shs. 9,000,000/= along with the following orders in 672/05:

*“An order for specific performance do hereby issue and the Defendants are directed to demarcate and plot out the plantation measuring approximately 23 acres from the main title Singo Block 186 Plot 16 Kabugo and execute a transfer thereof in favour of the Plaintiffs upon the Plaintiff’s payment within 60 days from the date of this judgment of the balance on the purchase price in the sum of Shs 28,000,000/=…”*

The Respondent’s counsel claimed Ug. Shs. 50,000,000 as instruction fees based on the value of Ugx 500,000,000 being the subject matter value in High Court Civil Suit No. 672 of 2005.

The learned registrar ruled:

“*Instruction fees in my view are charged on the aggregate work done to complete a case. Of course other things are also considered and these include the subject matter, among other things. Taking all these factors into consideration, the amount of Shs 50,000,000/= claimed as instruction fees is on the higher side. I substitute it with Shs 10,000,000/=.*

In the often cited case of **Premchand Raichand Ltd. & Another versus Quarry Services of East Africa Ltd. & Others** (supra) the court adopted the approach for assessing an instruction fee which was proposed by Pennycuick, J. in the English case of **Simpson Motor Sales (London) Ltd. versus Hendon Corporation [1964] 3 All E.R. 833**. In the **Premchand** case it was held that the correct approach in assessing a brief fee was to be found in the **Simpson Motor Sales** case in which Pennycuick, J. ruled:

*“One must envisage a hypothetical counsel capable of conducting the peculiar case effectively but unable or unwilling to insist on the particularly high fee sometimes demanded by counsel of pre-eminent reputation. Then one must estimate what fee this hypothetical character would be content to take on the brief.”*

From this decision, it can be deduced that each case has to be decided on its own merits and circumstances. For example, a lengthy or complicated case involving lengthy preparations and research will attract higher fees and in a variable degree, the amount of the subject matter involved may have a bearing. **See:** **Patrick Makumbi & Another versus Sole Electrics** (supra).

The instant case of HCCS No. 235 of 2005 was a matter which was filed on the 15th day of September, 2005 and was finally disposed of on the 8th day of April, 2013. This is a period of nearly eight years. This is clearly a considerably lengthy period I must presume involved lengthy preparations indicating that the advocate was involved in the suit well beyond preliminary levels, time which the taxing master must have taken into account.

What is however clear to me in this matter is that there is no dispute that counsel is entitled to instruction fees for carrying out the instructions given in the main suit. The main contention is to the amount. I note that the ruling of the taxing master which gave rise to the current appeal clearly explain the value of the subject matter which it ascertained.

What is of concern is the alleged excess in instruction fees. For the record, **Regulation 57 of the Advocates ( Remuneration and Taxation of Costs) Regulations S.I. 267-4** provides that in all causes and matters in the High Court and magistrates courts, an advocate shall be entitled to charge as against his client the fees prescribed by the Sixth Schedule of these regulations. That sixth schedule provides under Item 1(iv) for instruction fees payable in respect of suing where the value of the subject matter can be determined from the judgment. This regulation itemizes what amount can be levied. This means that an instruction fees award has to be derived from the judgment if it is ascertainable. In the instant matter, the subject matter value was already proven by court as being Shs. 30, 000,000/=. I find it strange that the taxing master had to reconsider the subject matter value a second time after agreeing that the instruction fees ought not to be pegged on the alleged value claimed on the plaint but rather on the one which was tested and proven by court.

I would therefore agree with the submission of the counsel for the Applicant e that the change of mind by the Learned Registrar was uncalled on the basis that were there to be any reason for other considerations other than the aggregate work necessary to complete the work and hence necessitating the payment of higher instructions fees, then there should have been a specific application for a certificate made in that direction made to the court to allow a claim for such higher fee than what was legally provided for with indication by what percentage such higher fees claimed was to be allowed. This was not the case here, though with my findings indicating that there was no justification for the Learned Registrar while giving due consideration to the amount of work done to complete the case at the same time reconsidered the subject matter value of the land which was clearly given in the judgment of court.

It is clear to me that the provisions of the law must be followed and in the case of Instruction fees this ought to be charged based on what the law provides after the considering the correct finding by the learned Registrar that a claim on instruction fees ought not to be pegged on the alleged value claimed in the plaint but rather on the tested and proven value given in the judgment.

On this basis, I would find that the award of Ug. Shs. 10,000,000/= as instruction fees was not made in accordance with clear findings of the court and hence outside the provisions of the law under which it is provided for.

**Orders:**

This application is allowed in part in that I set it aside the decision of the taxing master in regards to the Instructions fees and refer the issue back to the said taxing master to take into account the scale provided for under **Item 1 (iv) of the Sixth Schedule of the Advocates (Remuneration and Taxation of Costs)** since the value of the subject matter was clearly established by the court in its judgment of the 8th day of April, 2013, especially at its pages 2, thereof.

The Costs of the Application is awarded to the Applicant.

I do so order accordingly.

**Henry Peter Adonyo**

**Judge**

**30th October, 2014**