

QA1THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
(Coram: Egonda-Ntende, JA / JCC.)

CONSTITUTIONAL PETITION NO. 0028 OF 2012

BETWEEN

MBABALI JUDE=====PETITIONER

AND

EDWARD KIWANUKA SSEKANDI=====RESPONDENT

RULING

Introduction

1. This is a ruling on a reference to a single judge of this court arising out of a taxation order by the Registrar of this court made on the 26th February 2015. The Registrar taxed and allowed the respondent's bill of costs at a sum of shs.29, 940,440.00. Following initiation of execution against the petitioner, the petitioner belatedly initiated a reference in relation to the said bill of costs. My brother, Kakuru, JA / JCC., granted him time to file a reference out of time, on the 9th November 2018. The reference came before me on the 22nd November 2018. I proceeded to hear the same in spite of the absence of the petitioner as I was satisfied that he had been notified of the hearing date.
2. In any case the duty of the judge to whom a decision of the registrar is referred is to determine the matter in accordance with rule 110 (3) of the Rules of the Court of Appeal. This rule states in part,

‘110. Reference on taxation

(1) Any person who is dissatisfied with a decision of the registrar in his or capacity as a taxing officer may require any matter of law or principle to be referred to a judge for decision.; and the judge shall determine the matter as the justice of the case may require.

(2)

(3) Any person who contends that a bill of costs as taxed is, in all the circumstances, manifestly excessive or manifestly

inadequate may require the bill to be referred to a judge, and the ~~judge may make~~ such deduction or addition as will render the bill reasonable.

(4) Except as provided in sub rule (3) of this rule, there shall be no reference on a question of quantum only.

(5) An application for a reference may be made to the registrar informally at the time of taxation or by writing within seven days after that time.'

Submissions of Counsel

3. Mr Ocaya appearing for the respondent submitted that this reference should fail on both grounds. On the first ground of the taxation having proceeded *ex parte* he submitted that the taxation proceeded *ex parte* in accordance with the law. The petitioner was served and did not turn up at the taxation.
4. In relation to ground no.2 which was that the sum allowed was manifestly excessive Mr Ocaya submitted that this ground was too general as it did not specify a single item that was excessive. It should be dismissed. He referred me to the case of Attorney General v Florine Barlene, Court of Appeal Civil Application No. 79 of 2003, (unreported).
5. Mr Ocaya further submitted that this court should have regard to the decision of the Supreme Court in case of Paul Kawanga Semwogerere v Attorney General in which an award of Shs.60,000,000.00 was made. The award in this case is a fraction of the award in that case. He prayed that the award should not be reduced.

Analysis

6. The petitioner set forth 2 grounds for his reference. Firstly that the taxation proceeded in the absence of the petitioner who had not been notified of the date. Secondly that the award is manifestly excessive in the circumstances of the case being a constitutional petition.
7. I have examined the ruling of the taxing master and the record of the court. The taxing master was satisfied that the petitioner had been served with notice of taxation but did not turn up. She decided to proceed, *ex parte*, in accordance with Rule 8 of the Third Schedule to the Rules of the Court of Appeal that allows the taxing master to do so, in the absence of a party who was notified of the date for taxation. The taxing master was entitled to proceed as she did.

8. It is not enough simply to claim that one was not served. The proper approach for the petitioner would have been to seek to set aside that taxation order on the ground that he was not aware of the date before the registrar who had heard it *ex parte*.
9. Notwithstanding the foregoing I have examined the record of the court. There is evidence of an affidavit of service upon the petitioner's advocates at the time notifying them of the date for the taxation of the respondent's bill of costs. Neither the petitioner nor his advocates turned for the taxation hearing. This ground has no merit. It fails.
10. I shall now proceed to examine this matter on the second ground that the sum allowed was manifestly excessive.
11. I am unable to accept the submission of Mr Ocaya that ground 2 of this reference should fail on the basis that it is too general. The authority he provided is in relation to formulation of grounds of appeal. It does not apply to references. What is required is for this court to examine the bill as presented and the taxation proceeding and ruling and determine if any of the items claimed are manifestly excessive.
12. The guiding principles with regard to taxation of costs have been discussed in the cases of Premchand Raichand Ltd. & Another v Quarry Services of East Africa Ltd. & Others [1972] EA 162; Bank of Uganda vs Banco Arabe Espaniol Supreme Court Civil Application No. 23 of 1999; Attorney General v Uganda Blanket Manufacturers (1973) Ltd, Supreme Court Civil Application No. 17 of 1993 (Unreported); Akisoferi Ogola v Akika Othieno & Another, Court of Appeal Civil Appeal No. 18 of 1999.
13. In the case of Makumbi v Sole Electrics (U) Ltd [1990-1994] 1 EA 306 (SCU) at page 311, the Supreme court re-stated the said principles in the following words:

'The principles governing taxation of costs by a taxing master are well settled. First, the instruction fee should cover the advocates' work, including taking instructions as well as other work necessary for presenting the case for trial or appeal, as the case may be. Second, there is no legal requirement for awarding the appellant a higher brief fee than the respondent, but it would be proper to award the appellant's counsel a slightly higher fee since he or she has the responsibility to advise his or her client to challenge the decision. Third, there is no mathematical or magic formula to be used by the taxing master to arrive at a precise figure. Each case has to be decided on its own merit and

circumstances. For example, a lengthy or complicated case involving lengthy preparations and research will attract high fees. In a fourth, variable decree, the amount of the subject matter involved may have a bearing.

Fifth, the taxing master has discretion in the matter of taxation but he must exercise the discretion judicially and not whimsically. Sixth, while a successful litigant should be fairly reimbursed the costs he has incurred, the taxing master owes it to the public to ensure that costs do not rise above a reasonable level so as to deny the poor access to Court.

However, the level of remuneration must be such as to attract recruits to the profession. Seventh, so far as practicable there should be consistency in the awards made. See *Raichand v Quarry Services of East Africa Limited and others* [1972] EA 162, *Nalumansi v Lule Supreme Court of Uganda* civil application number 12 of 1992 (UR), *Hashjam v Zanab* [1957] EA 255 and *Kabanda v Kananura Melvin Consulting Engineers Supreme Court* civil application number 24 of 1993 (UR).'

14. Instruction fees ought to be reasonable and the considerations are enshrined in Rule 9 (2) of the Third Schedule to the Rules of this court which were reiterated in the case of Lanyero Sarah Ochieng & Anor v Lanyero Molly, Court of Appeal Civil Reference No. 225 of 2013 (unreported) as the following :

1. The value of the subject matter where money is involved.
2. The nature of the subject matter.
3. The importance of the case.
4. Difficulty or complexity of the case.
5. General conduct of proceedings if it is long, tedious and taxing.
6. Interest of the parties and the public; value addition to national jurisprudence.
7. Other costs to be paid.
8. The agency or party to pay.'

15. The respondent claimed shs.850,000,000.00 as instruction fees. The taxing master found this grossly excessive. She awarded shs.15,000,000.00 as instruction fees. I am afraid that this type of award would leave only the extremely wealthy in this country able to litigate before the Constitutional Court making constitutional justice a preserve of the wealthy or well connected. See Makumbi v. Sole Electrics (U) Ltd (supra). In the case of Attorney General -vs- Uganda Blanket Manufacturers (1973) Ltd,

Supreme Court Civil Application No. 17 of 1993 (Unreported), Odoki, JSC
(as he then was) stated:

...while a successful litigant ought to be fairly reimbursed the costs he has had to incur, a taxing officer has a duty to the public to see that costs do not rise to above a reasonable level so as to deprive access to court for all but the wealthy'

16. The judgment of the Constitutional Court found that there was no matter or question for constitutional interpretation. This was a fairly simple matter decided on the basis that the court had no jurisdiction. The matter was neither difficult nor complex. I would have thought a sum of shs.3,000,000.00 would have been adequate but to exceed shs5,000,000.00 was clearly manifestly excessive in the circumstances of this case. I would award to the respondent Shs.3,000,000.00 (Shillings Three Million) only as instruction fees
17. Under Rule 9 (3) of the third schedule instruction fees will include, perusals, correspondence, attendances and consulting authorities. In that regard items 2-7, 10, 11, 12, 13, 16, 17, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, 30, 32, 33, 36, 37, 38 and 39 that relate to perusals ought not to have been claimed and allowed. And all those that relate to attendances the sums claimed are far higher than the sums allowed in the scale of costs under the Third Schedule to the Rules of this court. Such items ought to have been reduced accordingly. I shall determine the costs for attendances in accordance with the scale of costs set out in the Third Schedule to the Rules of court. I therefore allow Shs.13,000.00 (thirteen thousand shillings only) for all attendances by the court clerk at a rate of shs.1000.00 per attendance. For counsel's attendance in court, I shall allow an amount totalling Shs. 15000.00 (fifteen thousand shillings only) at a rate of Shs. 7500.000 per attendance.
18. The fees for drawing documents shall include the fees for making copies and fees for making copies will only come into play where there is more than one party to be served, which is not the case here. If there was an additional copy to be made it would be in respect of such additional party rather than for all copies made in the matter if I understood rule 10 of the third schedule to the Court of Appeal Rules correctly.
19. Secondly the scale charges that provide for fees for making copies allow shs500.00 for a folio for the first copy and then shs.200.00 for other copies. What was claimed did not follow the scale charges.

20. For the foregoing reasons I would not allow items 9, 15, 24, 35 and 41. The sums claimed were far in excess of what the law permits. In consideration of the scale costs in the Third Schedule, I would allow items 8, 14, 23 and 34 at a total sum of shs 33,500.00 (thirty three thousand five hundred shillings only).

21. Lastly the rules for making copies were made for an analogue world, rather than the digital world that we have embraced. There is no justification for the claim for making copies unless it is disbursements given that it is almost effortless now to make exact copies of documents digitally prepared.

22. Under Rule 13, of the third Schedule to the rules of this court, if more than a quarter of the profit costs are deducted from the bill the successful party loses the right to claim any sums related to the drawing of the bill of costs. Having reduced the instructions fees from shs.850,000,000.00 to shs.15,000,000.00 the registrar should not have allowed items 40 to 49 totalling to Shs.302,000.00 which relate to the bill of costs.

23. Disbursements are provided for under Rule 4 of the Third Schedule. It states,

‘(1) Disbursements shall be shown separately at the foot of the bill of costs.

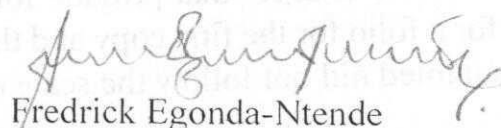
(2) Receipts for disbursements shall be produced to the taxing officer at the time of taxation.

(3) No disbursement shall be allowed which has not been paid at the time of taxation.’

24. I have not seen any evidence that rule 4 (2) of the third schedule was complied with. No receipts were presented for all the disbursements claimed. In the result no item for disbursements ought to have been allowed.

25. The respondents bill of costs now stands allowed at the sum of Shs. 3,061,500.00 only.

Signed, dated and delivered at Kampala this 8th day of February, 2019



Fredrick Egonda-Ntende

Justice of Appeal / Justice of the Constitutional Court