IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 076 of 2016

In the matter between

THE ELECTORAL COMMISSION …… APPELLANT

VERSUS

KIDEGA NABINSON JAMES …… RESPONDENT

Heard: 9 May, 2019.
Delivered: 30 May, 2019.

Civil Procedure *—Taxation of costs — appellate court may intervene where there has been an error in principle —the court will not intervene in questions solely of quantum which are regarded as matters which taxing Officers are particularly fitted to deal with —The principle of indemnity requires that only costs "reasonably incurred" as opposed to all "necessary costs," may be recovered —no costs are allowed in respect of more counsel than one appearing in a proceeding, unless the trial judge has certified the attendance as being proper in the circumstances of the case —a party may apply for a certificate of complexity where a higher fee is considered appropriate.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] This appeal is made under section 62 of the *Advocates Act*, and Regulation 3 of the *Advocates (Taxation of Costs) (Appeals and References) Regulations*, wherein the appellant seeks to set aside an award of shs. 56,262,140/= following the taxation of the bill of costs, as being excessive in the circumstances of the case. The taxation Order was delivered on 11th November, 2016. It is contended by the applicant that the Taxing Officer erred on law and in fact when he allowed

costs for two counsel, without an order of the trial Judge to that effect. It is further contended that it was wrong for the Taxing Officer to have taken into account the supposed complexity of the case without any certificate of complexity having been granted by the trial Judge. Lastly, the applicant avers that the award of shs. 40,000,000/= as instruction fees was inordinately excessive in the circumstance of the case.

[2] The background to the application is that the respondent filed an election petition against the appellant and a one Aciro Lucy Otim, following challenging the validity of the election of the latter as Member of Parliament for Aruu North Constituency, in an election organised by the former and held on 18th February, 2016. Judgment was entered in favour of the respondent on 14th June, 2016 by which the appellant was ordered to pay 50% of the costs of the petition. The respondent filed his bill of costs on 10th August, 2016 claiming a total of shs. 313,872,900/= which the Taxing Officer on 11th November, 2016 taxed down to shs. 56,262,140/= a sum that the appellant now challenges as having been arrived at erroneously.

[3] The respondent did not file an affidavit in reply but his counsel submitted that the Taxing Officer awarded instructions fees of shs. 20,000,000/= to M/s Ladwar, Oneka & Co Advocates, and a similar sum of shs. 20,000,000/= to M/s Ogik & Co. Advocates, the two firms which represented the respondent in the underlying election petition. The rest of the amount complained of is constituted by disbursements. Counsel for the respondent argued that certification of two counsel is only required when the advocates come from the same firm. Election petitions are time and other resource intensive on the part of the advocates that represent the litigants, hence the relatively enhance remuneration that courts usually award. Counsel had to traverse different parts of the constituency gathering evidence and this justifies the award on account of complexity. The award took into account awards in comparable matters and the rate of inflation.

The Taxing Officer properly exercised his discretion and therefore the appeal should be dismissed.

The scope of an appeal from a taxation order;

[4] The circumstances in which a Judge of the High Court may interfere with the Taxing Officer's exercise of discretion in awarding costs generally are;

i. Where there has been an error in principle the court will interfere, but questions solely of quantum are regarded as matters which taxing Officers are particularly fitted to deal with and the court will intervene only in exceptional circumstances.
ii. The fee allowed was higher than seemed appropriate, but in a matter which must remain essentially one of opinion; it was not so manifestly excessive as to justify treating it as indicative of the exercise of a wrong principle.

(see *Thomas James Arthur v. Nyeri Electricity Undertaking, [1961] EA 492* and *Bank of Uganda v. Banco Arabe Espanol, S.C. Civil Application No. 23 of 1999).*

[5] Taxation of bills of costs is not an exact science. It is a matter of opinion as to what amount is reasonable, given the particular circumstances of the case, as no two cases are necessarily the same. The power to tax costs is discretionary but the discretion must be exercised judiciously and not capriciously. It must also be based on sound principles and on appeal, the court will interfere with the award if it comes to the conclusion that the Taxing Officer erred in principle, or that the award is so manifestly excessive as to justify treating it as indicative of the exercise of a wrong principle or that there are exceptional circumstances which otherwise justify the court's intervention.

[6] Considering that the process of taxation of costs relies heavily on the discretion of the Taxing Officer, the parties have a right to know the considerations upon which that discretion was exercised. The order awarding a specified amount ought to speak for itself by giving reasons. The judgment debtor must know why

and on what grounds the specified amount has been passed against him or her. The courts have justified the requirement for self explanatory orders on three grounds: (i) the party aggrieved has the opportunity to demonstrate before the appellate or revisional court that the reasons which persuaded the authority to reject his case were erroneous; (ii) the obligation to record reasons operates as a deterrent against possible arbitrary action by executive authority invested with judicial power; and (iii) it gives satisfaction to the party against whom the order is made. The power to refuse to disclose reasons in support of the order is of an exceptional nature and it ought to be exercised fairly, sparingly and only when fully justified by the exigencies of an uncommon situation (see *English v. Emery Reimbold and Strick Limited, [2002] 1 WLR 2409* and *Cullen v. Chief Constable of the Royal Ulster Constabulary [2003) 1 WLR 1763*).

Only costs "reasonably incurred" may be recovered;

[7] The fundamental principle of costs as between party and party is that they are given by the court as an indemnity to the person entitled to them; they are not imposed as punishment on the person who must pay them. Party-and-party costs are in effect damages awarded to the successful litigant as compensation for the expense to which he has been put by reason of the litigation (see see *Malkinson v. Trim [2003] 2 All ER 356*), The rationale for the award was explained by Justice Cumming in *Fullerton v. Matsqui, 74 B.C.L.R. (2d) 311, 12 C.P.C. (3d) 319, 19 B.C.A.C. 284, 34 W.A.C. 284*).

[8] The principle of indemnity requires that only costs "reasonably incurred" as opposed to all "necessary costs," may be recovered. The effect of the principle of indemnity applied to party and party costs is that a party is entitled to have all costs reasonably incurred in the defence of his or her rights not as a complete compensation or indemnity, but only in the character of an indemnity. Parties are therefore bound in the conduct of their respective cases to have regard to the fact that the adversary may in the end have to pay the costs. The successful

party cannot be allowed to indulge in a “luxury of payment.” For that reason, in a party and party taxation of costs, any charges merely for conducting litigation more conveniently will be called “luxuries” and must be paid by the party incurring them. The costs chargeable under taxation as between party and party are limited to all that which was necessary to enable the adverse party to conduct the litigation, and no more.

[9] Therefore, orders for party and party costs made under section 27 of *The Civil procedure Act*, must be construed as permitting recovery only of reasonable and necessary fees and litigation costs by a successful party who has substantially prevailed. What is reasonable and necessary will, of course, depend on the nature and facts of the individual case, the degree of work required, and the skill, and experience of the advocate performing the work.

<u>The requirement of a certificate of two counsel;</u>

[10] In the instant case, the respondent was represented by two law firms; M/s Ladwar, Oneka & Co Advocates, and M/s Ogik & Co. Advocates. Joint representation is obviously based upon a division of service or responsibility. It is in essence association of more than one advocate, who are not in the same firm, in a matter in which neither alone could serve the client as well. The team assumes joint responsibility for the representation. By their very nature, legal instructions differ materially and may cover a wide range of activities including but not limited to; framing the theory of the case, evaluating alternative methods of presenting the evidence, cross-examining witnesses, formulating legal arguments, etc. all aimed at ensuring that reason, rather than emotion, dictates the proper tactical response to unforeseen developments in the courtroom. Each advocate in a joint representation is working on the same case and rendering service in one or more of these areas. The advocates pool their resources of intellect and capital to serve a common client. In situations like that the legal fees

are a single billing to a client covering the fee of two or more advocates, otherwise known as division of fees.

[11] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. The lawyers ought to divide or share the fee on either the basis of the proportion of services they render or by agreement between the associating or participating advocates since they all assume responsibility for the representation as a whole upon the instructions of a single client. It does not require disclosure to the client of the share that each is to receive. Therefore, advocates who jointly undertake to prosecute or to defend a lawsuit are entitled, in the absence of any agreement to the contrary, to share equally in the compensation, and it is immaterial which advocate furnished the most labour and skill (see *McCann v. Todd, 203 La. 631, 14 So. 2d 469 at p. 472 (1943*). Each participant in the joint representation is assumed to have contracted for his *pro rata* share of the fee by failing to stipulate otherwise before undertaking to represent the client.

[12] By reason of the general principle that an award of party and party costs permits recovery only of reasonable and necessary fees and litigation costs by a successful party who has substantially prevailed, no costs are allowed in respect of more counsel than one appearing in a proceeding, unless the trial judge has certified the attendance as being proper in the circumstances of the case. Rule 41 (1) of *The Advocates (Remuneration and Taxation of Costs) Rules*, S.I. 267-4, provides as follows;

> The costs of more than one advocate may be allowed on the basis hereafter provided in causes or matters in <u>which the judge at the trial or on delivery of judgment shall have certified under his or her hand that more than one advocate was reasonable and proper</u>, having regard, in the case of a plaintiff, to the amount recovered or paid in settlement or the relief awarded or the nature, importance or difficulty of the case and, in the case of a defendant, having regard to the amount sued for or the relief claimed or the nature, importance or difficulty of the case. (Emphasis added).

- Then item 1 (B) (XI) of the Sixth Schedule stipulates;
  (xi) In any case in which the costs of more than one advocate have been certified by the presiding judge or magistrate, as the case may be, the instruction fee allowed and other charges shall be increased by one-half to cover the second advocate; (Emphasis added).

[13] In the instant case, the trial judge did not certify costs of more than one advocate. While litigation by way of election petitions is of great importance to the democratic process, the parties themselves and their constituents, the trial court must be mindful of the fact that proceedings of this nature are not commercial disputes between corporations, involving millions of shillings but disputes between people of usually quite modest means. The tendency of one or all parties to engage in disproportionate expenditure on legal costs has to be curbed. The proportionality of costs to the value of the result is central to the just and efficient conduct of civil proceedings.

[14] In the case of *Pallock House Ltd v. Nairobi Wholesalers Ltd. (No.2) [1972] E.A. 172*, at page 175, it was held that the determination by court whether the case is a fit one for a certificate of two advocates must be dependent upon the appreciation by the court of the nature of the application. The trial judge in the underlying election petition not having awarded a certificate of complexity, only costs of one counsel are recoverable. The Taxing Officer therefore misdirected himself when he awarded fess of two counsel. The first ground of appeal this succeeds.

The requirement of a certificate of complexity;

[15] As regards the second ground of appeal faulting the Taxing Officer for having considered the complexity of the matter in the assessment of the legal fees recoverable, under the *6th Schedule* of *The Advocates (Remuneration and taxation of costs) Regulation, Item 1 (a) (ii),* a party may apply for a certificate of complexity where a higher fee is considered appropriate. The mere fact that

counsel does research before filing pleadings and then files pleadings informed of such research is not of itself 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 (see *First American Bank of Kenya v. Shah and others, [2002] 1 EA 64*).

[16] It follows that where the responsibility entrusted to counsel in the proceedings is quite ordinary and calls for nothing but normal diligence such as must attend the work of a professional in any field; where there is nothing novel in the proceedings on such a level as would justify any special allowance in costs; where there is nothing to indicate any time-consuming, research-involving or skill engaging activities as to justify an enhanced award of instruction fees or where there is also no great volume of crucial documents which counsel has to refer to, to prosecute the cause successfully or where the matter was not urgent, a certificate of complexity will not be granted. Counsel did not apply for and no certificate of complexity was issued by the trial Judge. The Taxing Officer therefore misdirected himself when he considered complexity as one of the criteria guiding the assessment of the legal fees recoverable. The second ground of appeal too succeeds.

[17] Lastly, as regards the argument that the amount awarded was excessive, taxation *de novo* will be ordered by an appellate court when the original taxation proceeded on a basis of a fundamental misapplication of the law. A taxation *de novo* should not be ordered unless the following conditions are met; (i) that the original taxation was null or defective; (ii) that the interests of justice require it;; and (iv) no injustice will be occasioned to the other party if an order for taxation *de novo* is made. These conditions are conjunctive and not disjunctive. I find that the conditions are met in this case and therefore it is proper that the bill of costs should be remitted to the Taxing Officer for taxation de novo.

[18] Having found that the taxation was fundamentally flawed for having proceeded on the basis of an erroneous application of the law, it is not proper for this court to express any views on the quantum awarded, lest it fetters the discretion of the Taxing Officer in that regard.

Order :

[19] In the final result, the appeal succeeds. The award is set aside, and the bill of costs is hereby remitted back to the Deputy Registrar for taxation. Each party is to bear their costs of this appeal.

_____

Stephen Mubiru

Resident Judge, Gulu

Appearances:

For the appellant : State Attorney.

For the respondent : Mr. Walter Okidi Ladwar.