IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 111 of 2019

In the matter between

ODONG RICHARD OCAYA **APPELLANT**

And

1.OWEKA PETER

2.OKELLO DENIS OWEKA

3.OKOT PETER **RESPONDENTS**

Heard: 20 March, 2020
Delivered: 22 May, 2020.

Civil Procedure *— Taxation of Bill of costs — Application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or manifestly low— Even when 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. — 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.*

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. 62,303,600/= following the taxation of the bill of costs, as being excessive in the circumstances of the case. The taxation Order was delivered on 4th July, 2019. It is contended by the applicant that the Taxing Officer erred on law and in fact when he proceeded to tax the respondents' bill of costs ex-parte without proof of service, the bill of cots itself was not drawn according to scale, he allowed disbursements without corresponding proof of expenditure, and consequently the resultant award, especially the instruction fees, is manifestly excessive, harsh and unjustified.

[2] The background to the appeal is that the appellant filed Civil Suit No. 69 of 2013 in the Chief Magistrates Court at Gulu, against the respondent seeking recovery of land. The appellant did not take any further step in that suit for nearly six years until 3rd December, 2018 when it was dismissed with costs to the respondents for want of prosecution. Counsel for the respondents filed a bill of cots which was fixed for taxation on 4th July, 2019. Counsel for the appellant was served with a taxation hearing notice on 20th June, 2019 but on the day fixed for taxation neither the appellant nor his counsel was in court. Taxation proceeded ex-parte resulting in an award of shs. 62,303,600/= The appellant was on 4th July, 2019 served with a notice to show cause why execution should not issue and that prompted him to file this appeal.

[3] The 2nd respondent's affidavit in reply refutes the appellant's claim of lack of proper service of the taxation hearing notice. He avers that the appellant's counsel was duly served and the taxing officer was justified when he proceeded ex-parte since neither the appellant nor his counsel turned up for the taxation hearing. In the supporting written submissions, counsel for the respondents M/s Masaba, Owakukikoru-Muhumuza and Co. Advocates argued that the bill of

costs was drawn according to scale, service of the taxation hearing notice was effected yet the appellant and his counsel for some unexplained reason never turned up for the taxation, hence the ex-parte taxation was justified, the Taxing Officer applied the correct principles in determining the quantum, the terminated proceedings were an abuse of court process since the appellant had subsequently filed another suit; Civil Suit No. 11 of 2015 in the same Chief Magistrates Court at Gulu, over the same subject matter against the respondents, seeking similar relief. The amount awarded therefore is reflective of the complexity of the terminated proceedings and the dilatory conduct of the appellant in prosecuting that suit.

[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; where the award is so manifestly excessive as to justify treating it as indicative of the exercise of a wrong principle.

[5] In this regard, application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or manifestly low (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).* Even when 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.

[6] It was argued that the bill of costs was not drawn to scale. This was not illustrated nor substantiated by any submissions of counsel for the appellant. It was contended further that the Taxing Officer was not justified in proceeding ex-

parte. According to Order 9 rule 20 (1) (a) of *The Civil Procedure Rules*, where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, if the court is satisfied that the notice of hearing was duly served, it may proceed ex parte. In the instant case the affidavit of service sworn on 21st June, 2019 and filed in court on 4th July, 2019 indicated that counsel for the appellant was served on 20th June, 2019 at 1.30 pm. There is no explanation for his absence and that of the appellant on 4th July, 2019 when the taxation was to proceed. Accordingly, the Taxing Officer was justified in proceeding ex-parte. There is no merit in the two grounds.

Quantum awarded;

[7] As regards the quantum awarded, 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.

[8] 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*).

[9] 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*). 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.

[10] 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. Considering that the dismissal occurred after closure of proceedings and before any further step was taken in the proceedings, and award of shs. 62,303,600/= is so manifestly excessive as to justify treating it as indicative of the exercise of a wrong principle. The mere fact that counsel did research before filing pleadings and then filed 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*).

[11] 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 Magistrate. The Taxing Officer therefore misdirected himself when he considered complexity as one of the criteria guiding the assessment of the legal fees recoverable. This ground of appeal thus succeeds.

[12] When the amount awarded is found to have been excessive as a consequence of the Taxing Officer having proceeded on a basis of a fundamental misapplication of the law, taxation *de novo* will be ordered by an appellate court. 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*.

Order:

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

Delivered electronically this 22nd day of May, 2020 ……Stephen Mubiru……..

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : ……..

For the respondent : …..