THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

TAXATION CIVIL REFERENCE NO.25 OF 2017

BETWEEN

UGANDA TAXI OPERATORS & DRIVERS' ASSOCIATION:::APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY ::::::::::::::::::::::::::::::::::::RESPONDENT

(Reference from the Ruling of the Deputy Registrar of the Supreme Court (Mr. A.G. Opifeni) upon taxation of costs in Civil Appeal No.13 of 2015)

RULING OF JUSTICE MUGAMBA, JSC.

This is a reference under Rule 106 of this court from the ruling of the Deputy Registrar in his capacity as a taxing officer, wherein the applicant's Bill of Costs of Shs. 5,001,593,500/= (shillings five billion, one million, five hundred ninety three thousand, five hundred) was taxed and allowed at Shs. 51,593,000/= (shillings fifty-one million, five hundred ninety three thousand). Out of the over Shs. 5,000,000,000/= (shillings five billion) claimed, Shs. 50,000,000/= (shillings fifty million) was awarded as instruction fee.

The brief background to this reference is that the appellant, a company limited by guarantee, sued the respondent for refund of monies retained by the respondent as Value Added Tax (VAT) since 2001 in respect of the appellant's taxi parks operations which the appellant company carried out on behalf of the then Kampala City Council (KCC), now Kampala Capital City Authority (KCCA). By 2010

the respondent had retained from the appellant Shs.3, 903,136,565/= (shillings three billion, nine hundred three million, one hundred thirty six thousand, five hundred sixty five) as Value Added Tax.

In the High Court, the issue for determination was whether the plaintiff was liable to pay VAT for its services of management of taxi parks and taxi operators in Kampala City. The High Court resolved the issue in favour of the respondent (URA). Being dissatisfied with the decision of the High Court, the appellant appealed to the Court of Appeal vide Civil Appeal No. 15 of 2013. The Court of Appeal allowed the appeal, set aside the decision of the High Court and ordered the respondent to refund all the VAT amounting to shs3,903,136,565/= (shillings three billion, nine hundred three million, one hundred thirty six thousand, five hundred sixty five) which had been collected from the appellant. Court further ordered for the refundable amount to carry interest at the rate of 2% per month compounded from the time it was paid until the date of the judgment and thereafter the decretal amount was to carry interest at the rate of 10% p.a. from the date of the judgment till payment in full.

The respondent consequently appealed the decision of the Court of Appeal to the Supreme Court vide Civil Appeal No. 13 of 2015. This Court upheld the judgment and orders of the Court of Appeal in their entirety. It dismissed the respondent's appeal and awarded the appellant costs in this Court and in Courts below.

The applicant's Bill of Costs was taxed by the Deputy Registrar in his capacity as the taxing officer. It is against the decision of the taxing officer that this reference is referred to me.

The memorandum of reference filed to this court is dated 27th March 2018 and has three grounds framed as follows:

1. **That the Bill of Costs to the tune of Shs. 51,000,000/= is in all circumstances manifestly low.**
2. **That the Taxing Officer erred in principle in not taking the principle of consistency in award of costs without considering the value of the subject matter.**
3. **That the Taxing Officer erred in principle in not taking the principle which requires that costs be kept at a reasonable level so as to encourage younger recruits to the legal profession.**

At the hearing of the reference Mr. Abbas Bukenya represented the applicant. The respondent was represented by Mr. George Okello, Assistant Commissioner Litigation, Uganda Revenue Authority assisted by Ms. Gloria Twinomugisha, Supervisor Litigation, Uganda Revenue Authority, and Ms. Juliet Mutesi

Submissions

Counsel for applicant submitted that the taxing master in his ruling never considered the value of the subject matter but that he only noted that the court had described the appeal as not a complex one.

It was counsel's submission that the basis of the main appeal was the refund sought by the respondent to a tune of Shs. 3,903,136,565/= (shillings three billion, nine hundred three million, one hundred thirty six thousand, five hundred sixty five), which was eventually awarded to the appellant by the Court of Appeal at the compound interest of 2% per month. According to counsel, after computing the interest, the total amount recoverable was automatically increased to approximately 35,000,000,000/= (shillings thirty five billion). He contended that trial of the case to conclusion took a period of over 8 years.

Counsel cited **Alexander J'Okello Vs Kayondo & Co. Advocates, SCCA No.1 of 1997,** where it was held that the value of the subject matter is important in the taxation of costs including other factors like the amount of time and work involved, including the complex nature of the case.

Counsel argued that this court should be consistent in its awards on instruction fees and he cited **Bank of Uganda Vs Trespert Ltd, SCCA No3 of 1997, Sietco Vs Noble Builders, SCCA No.31 of 1993 and National Insurance Corporation vs Pelican Services Limited, Court of Appeal Reference No.13 of 2005** to the effect that this court considered instruction fees to be 8% -10% out of the value of the subject matter.

It was counsel's contention that the award of Shs. 50,000,000/= (shillings fifty million) to the applicant as instruction fees was at a

percentage of 0.14% of the subject matter which he considered to be excessively and manifestly low.

Counsel submitted that the appeal involved interpretation and application of tax statutes. He said that in the lower courts it was a question of interpretation of the provisions of the Value Added Tax Act. Counsel contended that it was not a normal suit but one which required innovation and skill to interpret tax statutes hence it was a unique suit in litigation which was unprecedented.

Counsel submitted that the applicant relied on case law from different Commonwealth countries. Counsel further contended that the difficulty was brought about by failure on the part of the respondent to properly interpret the law and apply it to tax statutes.

Counsel contended that the applicant instituted the case in order to stop unlawful and illegal taxation by the respondent and that the said taxation had caused much loss to the applicant in form of interest on unpaid loans, loss of business repute and cancellation of applicant's contract with KCCA for management of taxi parks in Kampala City.

In conclusion counsel proposed a figure of Shs. 2,000,000,000/= being 5.7% of the decretal amount as costs to be awarded to the applicant by this court.

Respondent's submission

Counsel for the respondent raised a preliminary objection on a point of law saying that this application was incompetent under Rule 106(5) of the Rules of this Court. Counsel contended that the

applicant did not formally make the current application to the registrar of this court informally at the time of taxation, nor did the applicant apply formally in writing within seven days after delivery of the said ruling.

In that respect Counsel cited **Utex Industries Vs Attorney General, SCCA No.52 of 1995** and **Uganda Revenue Authority vs Consolidated Properties Ltd, Civil Appeal No.31 of 2000.** He contended that those authorities are to the effect that the time limits set by the statutes are matters of substantive law and not mere technicalities and that as such they must be strictly complied with. Counsel prayed that the application be dismissed with costs to the respondent.

In response to the reference, counsel submitted that the learned taxing master rightly exercised his discretion in awarding costs and that he had ably executed his duty. Counsel contended that the taxing master exercised his discretion judiciously.

Counsel cited the cases of **Banco Arabe Espanol vs Bank of Uganda, SCCA No.8 of 1998** and **American Express International Banking Corporation vs Atul Kumar Sumantbhai Patel, SCCA No.05 of 1985.**

Counsel submitted that neither the pleadings (Memorandum of Appeal) in this court nor the judgment indicated the amounts in issue.

He stated that what was in dispute on appeal before this court was not the money recoverable in VAT as paid by the applicant but rather interpretation of the provisions of the Value Added Tax Act especially Sections 16(3),18,19(1) and Paragraph 1 (n) of the Second Schedule of the Value Added Tax Act. It was counsel's contention that there was no amount of money involved in the appeal.

Counsel submitted that the longevity of the matter is not the determinant factor for award of costs. He went on to state that this court did not award certificate of two counsel.

On the difficulty of the case, counsel submitted that the case was not a novel one given that other similar matters had been decided in the Tax Appeals Tribunal and that those cases have far reaching effect. He added that reliance on cases from Commonwealth jurisdictions did not mean novelty or complexity of the case because they had been referred to by lower courts.

Counsel argued that there was no evidence to the effect that the applicant had suffered losses in form of the alleged unpaid loans and cancellations of its contract with KCCA.

Counsel submitted that the other costs already paid to the applicant by consent in the High Court and the Court of Appeal of Shs. 800,000,000/= (shillings eight hundred million) are a relevant consideration in the award of instruction fees in the present matter.

Counsel prayed for the reference to be dismissed with costs to the respondent.

Applicant's submissions in rejoinder

Counsel for the applicant in response to the point of law, submitted that then counsel for the applicant had made an oral application for reference and had requested for copy of the proceeding after the ruling was read to the parties.

Counsel reiterated his earlier submission and further submitted that while the matter involved interpretation of points of law, the applicant sought also to recover the amount of money paid as VAT to the respondent.

Consideration of the court

I am disturbed by the way the record of reference was prepared. Upon perusal of the record and the entire pleadings in it, I found no judgment of this court from which this reference emanates. Needless to say the judgment is very crucial in the determination of this reference. Be that as it may, the court has on its own exertion secured a copy of the same.

On the preliminary point of law. The applicant argued that its counsel made an informal oral application after the taxing officer delivered the ruling. This is contested by counsel for the respondent. I have perused the scanty record of reference and particularly looked at page 8 of that record made on 18th August,2017 when the said ruling was delivered. There is no record of the alleged oral application made on behalf of the applicant. What is inescapable to note is a letter by the applicant's counsel addressed to this court requesting for

certified copies of the proceedings in order to enable the applicant to pursue the reference.

In the interest of justice, given that the parties have filed their pleadings as court had requested them to do, I proceed to determine the reference on its merit. The objection is not upheld therefore.

The principles governing the taxation of costs are contained in sub-paragraphs 2 and 3 of paragraph 9 in the Third Schedule to the Rules of this Court as follows:

"(2) The fee to be allowed for instructions to appeal or to oppose an appeal shall be a sum that the taxing officer considers reasonable having regard to the amount involved in the appeal, its nature, importance and difficulty, the interest of the parties, the other costs to be allowed, the general conduct of the proceedings, the fund or person to bear the costs and all other relevant circumstances.

(3) The sum allowed under sub-paragraph (2) of this paragraph shall include all work necessarily and properly done in connection with the appeal and not otherwise chargeable including attendances, correspondence, perusals and consulting authorities."

The above principles have been applied and developed by this court in various cases which include **Attorney General vs Uganda Blanket Manufacturers Ltd, Civil Application No. 17 of 1993, Bank of Uganda vs Banco Arabe Espanol, Civil Application No.**

33 of 1999, Paul K. Ssemogerere & Another vs Attorney General, Civil Application No.5 of 2001, Nicholas Roussos vs Gulamhussein Habib Virani & Another, Civil Appeal No.6 of 1995 and **Muwanga Kivumbi vs Attorney General, Civil Reference No.38 of 2017,** among others.

On the instruction fee, it was strongly contended by counsel for the applicant that the appeal to this court had value attached to the subject matter. In this respect counsel submitted that what was involved was a refund of money amounting to Shs. 3,903,136,565/= (shillings three billion, nine hundred three million, one hundred thirty six thousand, five hundred sixty five), awarded to the appellant by the Court of Appeal at the compound interest of 2% per month. He went on to state that after computing the interest, the value of the subject matter recoverable would amount to approximately 35,000,000,000/= (shillings thirty five billion). This argument was opposed by the respondent who retorted that the appeal was on interpretation of the provisions of the Value Added Tax Act rather than on the value attached to the subject matter.

I have carefully perused Appeal No.13 of 2015 from which this application emanates. There the appellant who appealed to this court against the judgment of the Court of Appeal is the respondent in this reference. The applicant opposed the appeal successfully and was awarded costs.

There was only one ground of appeal. It read:

"Whether the management of Taxi Operations and Parks within Kampala City Council are incidental to the supply of Passenger transport services and hence exempt under the VAT Act"

The above ground was acknowledged by Justice Mwondha JSC who wrote the lead judgment when she stated on page 10:

"There was only one ground of appeal to the effect that the learned justices of the Court of Appeal erred in law and fact when they held that the provision by the respondent of management of taxi operators and Taxi Parks in and around Kampala City is incidental to the principal services of passenger transport services and hence exempt from tax."

The taxing master was of the same view when he stated as follows:

"This court therefore, entirely agrees with the appellant's counsel's submissions that what actually formed the basis of the appeal in the Supreme Court was not the money decreed by the Court of Appeal to be refunded, but the question of law regarding whether the provision by the Respondent of Management of Taxi operators and Taxi Parks in and around Kampala City was incidental to the principal service of passenger transport services and hence exempt from tax."

From the above ground and finding of the tax master, it is crystal clear that the main appeal was about interpretation of the provisions of the Value Added Tax Act on whether the applicant's service of management of the Taxi Parks on behalf of Kampala City Council

were incidental to the supply of passenger transport services and hence tax exempt, which this court answered in the affirmative.

It is trite law that the awards or the damages awarded in the appeal unless they were issues for determination in the appeal do not constitute value of the subject matter of the appeal.

In **Attorney General and Another v James Mark Kamoga and Another ,Civil Appeal No.2 of 2008,** Justice G.M.Okello JSC, stated as follows:

"It seems clear to me from the above summary of the arguments of counsel for both parties that the applicant's attack was targeted at the quantum of what was awarded by the taxing officer as instructions fee in item I in the respondents' bill of costs.

The learned taxing officer while assessing the instructions fee said:

> ***'The value of the subject matter in this appeal is a relevant factor in assessment of instruction fee. Although the appeal originates from an order reviewing a consent judgment in the High Court, the consent judgment was in respect of prime property in Mbuya comprising five plots with developments thereon. The valuation Report puts the value at Shs. 1, 293,000,000='***

Then she concluded:

'In view of the importance of the appeal, calling for research and clarity in presentation of arguments, the value of the subject matter, the principle of consistency in awards and the factors of inflation since the Uganda Blanket's case, I shall award a sum of Shs. 70,000,000= as instruction fee - - - .'

As shown above, sub-paragraph (2) of paragraph 9 of the third schedule to the Rules of this Court permits a taxing officer, while assessing what in a given appeal is a reasonable sum for instructions fee, to have regard, inter alia, to *'the amount involved in that appeal.'* The pertinent question that arises is what constitutes *'the amount involved in the appeal?'*

Mulenga, JSC, as he then was, had an opportunity to deal with the issue in *Bank of Uganda* (supra) where he said:

'Undoubtedly, in his ruling the learned taxing officer took the view that the monetary claim in the principal suit was "the amount involved in the appeal." With respect, however, this was a misdirection. Although the principal suit and therefore, the monetary claim therein, was found to be and was actually affected by the outcome of the appeal, the monetary claim was not involved in the appeal. It was not an issue or a question to be determined in the appeal.'

I agree with the above interpretation of sub-paragraph (2) of paragraph 9 as to what constitutes *'the amount involved in the appeal.'*

It can be deduced from the above passage that the test to be applied to determine what constitutes '*the amount involved in the appeal' is* the question whether the amount was an issue or a question to be determined in the appeal. The sole damages awarded in the appeal or the value of the subject matter of the appeal as argued by Mr. Tibaijuka, do not constitute *;the amount involved in the appeal'* unless they were issues for determination in the appeal.

The excerpt of her ruling reproduced here above shows that the taxing officer was conscious of the principles governing taxation but like in the *Bank of Uganda case* (supra), she also fell into the error of taking the view that the monetary value of the subject matter of claim in the principal suit constitutes *'the amount involved in the appeal'* to be taken into account in assessing instruction fee. As stated in *Bank of Uganda case* (supra), that is a misdirection. The value of the suit land was not an issue or a question for determination in the appeal. The issue or question for determination in the appeal was whether the Court of Appeal was wrong on the High Court review of the consent judgment entered into by the parties before the Deputy Registrar. The learned taxing officer, therefore, erred in taking into account the value of the suit land contained in the valuation report...". My underlining for emphasis

The reasoning of Justice G.M.Okello JSC in **Attorney General and Another v James Mark Kamoga and Another** (supra) was recently

applied by Justice Mwangusya JSC in **Mbale Resort Hotel (U) Ltd Vs Babcon (U) Limited, Taxation Civil Reference No.18 of 2018** when he stated as follows:

"I agree with above position. The claim for costs from arbitration and awards which were awarded by High Court do not constitute the amount involved in the appeal and are not value of subject matter since they were not issues for determination in the appeal."

I find that the appeal was on the interpretation of provisions of the Value Added Tax Act as correctly submitted by counsel for the respondent. I find that there was no value attached to the subject matter in the appeal.

Having found that the subject matter of the appeal had no value attached I turn to the issue of whether the Bill of Costs to the tune of Shs. 51,000,000/= (shillings fifty one million) is in all circumstances manifestly low.

Counsel for the applicant submitted that the award of Shs. 50,000,000/= (shillings fifty million) to the applicant as instruction fee was excessively and manifestly low. He proposed a fee of Shs. 2,000,000,000/= (shillings two billion). On the other hand the respondent supported the award by the taxing master and contended the taxing master had rightly exercised his discretion.

In **Paul K. Ssemogerere and Anor v Attorney General, (supra)** this court stated as follows:

"In our consideration of what should be a reasonable instruction fee and which is consistent with justice to all the parties in the instant case, we shall begin by referring to what the East African Court of Appeal said in the case of Premchand and Raichand -vs- Quarry Service (supra) as what should be the test in assessing a brief fee (which is the same as instruction fee under the Rules of our Court). We agree with what that Court said on page 164, which is this:

'The correct approach in assessing a brief fee is, we think, to be found in the case of Simpson's Sales (London) Ltd. -vs- Herndon Corporation (1964), A L.L.E.R. 833 when Pennychick said:

'One must envisage an hypothetical counsel capable of conducting the particular 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.'

In our view, there is no formula by which to calculate the instruction fee. The exercise is an intricate balancing act whereby the taxing officer has to mentally weigh the diverse general principles applicable, which, sometimes, are against one another in order to arrive at the reasonable fee. Thus while the taxing officer has to keep in mind that the successful party must be reimbursed expenses reasonably incurred due to the

litigation, and that advocates' remuneration should be at such level as to attract recruits into the legal profession, he has to balance that with his duty to the public not to allow costs to be so hiked that courts would remain accessible to only the wealthy. Also while the taxing officer is to maintain consistency in the level of costs, it is settled that he has to make allowance for the fall, if any, in the value of money. It is because of consideration for this intricate balancing exercise that taxing officer's opinion on what is the reasonable fee, is not to be interfered with lightly. There has to be a compelling reason to justify such interference. See Premchand Raichand Ltd. case (supra). Attorney General -vs-Uganda Blanket Manufacturers Ltd. (supra); and Departed Asians Property Custodian Board -vs-Jaffer Brothers (supra)..."

Undoubtedly the applicant's proposal of Shs. 2,000,000,000/= (shillings two billion) as instruction fee is manifestly high and unreasonable. If granted by this court it would be doing injustice to the respondent.

It is persuasive that in **Nicholas Roussos v. Ghulam Hussein Habib Virani and Nasmudin Habib Virani** [supra], Justice S. Manyindo, DCJ as he then was, considered and reduced the fees awarded by the taxing officer from Shs. 36,000,000/= (shillings thirty six million) to Shs. 6,000,000/= (shillings six million) holding as follows:

"While it is important 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... In the circumstances, I am of the view that the instruction fees as taxed by the Taxing officer were unduly excessive." The emphasis is added.

I appreciate that the applicant did commendable work in successfully defending the sole ground of appeal and judgment of the Court of Appeal. I am of the view that the applicant should be well reimbursed for that effort.

I find that the instruction fee of Shs. 50,000,000/= (shillings fifty million) awarded to the applicant though it is not manifestly low, it is not adequate reimbursement to the applicant considering the effort exerted in successfully defending the appeal.

In **Attorney General v Uganda Blanket Manufacturers, Civil Application No.17 of 1993,** the Supreme Court stated:

"Fifth, 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. However the general remuneration of advocates must be such as to attract worthy advocates to the profession. There must be as far as it is practicable consistence in the awards in order to do justice between one person and another and so that a person contemplating litigation can be advised by his advocate very approximately what, for the kind of case contemplated, is likely

to be his potential liability for costs. Premchand Raichand v. Quarry Services (No.3 (supra).” Emphasis above is added.

Having found that the instruction fee was inadequate, in determining fair reimbursement for the applicant I am required to strike a balance between need to fairly reimburse the applicant who is the successful litigant and make sure that the instruction fee I award is reasonable so as not to deprive litigants (respondent) access to court which will in turn be doing injustice to it.

I have taken into account the fact that the bill of costs of the High Court and the Court of Appeal by consent Order dated 1st June 2017 was settled at Shs. 800,000,000/= (shillings eight hundred million).

After taking into consideration all the above principles and the circumstances of this case, I am of the view that the instruction fee of Shs. 100,000,000/= (shillings one hundred million) is adequate, fair and reasonable.

I must comment on the applicant's submission regarding the need for consistency in awards, never mind that his submissions were on comparison with other cases where this court had considered the instruction fee to be extent of percentage of the value of the subject matter. I have already held above that there was no value attached to the subject matter in this case. While it is incumbent on courts to strive to have consistency in taxation of the Bill of Costs this can not always be done with mathematical precision. Each case comes with its peculiar circumstances which influence the determination of

instruction fees. Secondly the determination of what instruction fees to award is within the discretion of the taxing master.

In **Muwanga Kivumbi v Attorney General (supra),** Justice Opio Aweri JSC stated as follows;

"Due to the differences in cases, uniformity and consistency may at times be defeated. Moreover, other factors ought to be considered by the taxing master as stipulated in R.9(2)."

In **Attorney General v Uganda Blanket Manufacturers** (supra) this court stated as follows

"Third, there is no principle of law to the effect the decision of taxing officer must be subjected to the application of a magic formula which when applied would result in a precise figure being arrived at in an almost automatic manner. Every case must be decided on its own merit and its peculiar circumstances, such prolixity of the case in its preparation and any peculiar complications in its presentation in Court. In every variable degree, the amount of the subject matter involved may have a bearing though this may not always be so. See Pardhan Vs Osman (1969) EA 528. Fourth, it is well established that the taxing officer must exercise judicially and not capriciously Pardhan vs. Osman (supra)."

I recognize the need for consistency in awards as advanced in the case of **Premchand Raichand v. Quarry Services (supra)** but in

reality each case is attended by its peculiarities which the taxing officer should take into account before arriving at a fair award.

On the issue of a certificate for two counsel, the taxing master found no evidence of its award. Upon perusal of the judgment of this court I find no evidence of it either.

In the result, this reference partly succeeds. The instruction fee is increased to Shs. 100,000,000/= (shillings one hundred million). This is what I consider to be fair, just and reasonable in the circumstance of this case. Accordingly, the total bill of costs is increased to Shs. 101,593,000/= (shillings one hundred one million five hundred ninety three thousand).

Given my conclusion in the resolution of this reference, I make no order as to costs.

Dated at Kampala this ....18th..... Day of .....June.....2020

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Hon Justice Paul Mugamba

JUSTICE OF THE SUPREME COURT