THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBBUNAL AT KAMPALA

MISCELLANEOUS APPLICATION NO. 9 OF 2017

(ARISING FROM TAX APPEALS TRIBUNAL APPLICATION NO. 26 OF 2010 AND TAX APPEALS TRIBUNAL APPLICATION NO. 28 OF 2010)

HERITAGE OIL AND GAS LTD ==========APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY ==========RESPONDENT

RULING

This ruling is in respect of an application seeking orders that the bills of costs filed by the respondent in Tax Appeals Tribunal Application No. 26 of 2010 and Tax Appeals Tribunal Application No. 28 of 2010 be struck out.

The facts giving rise to this application are as follows: The applicant filed Tax Appeals Tribunal applications No. 26 and 28 of 2010 to review a capital gains tax assessment by the respondent. Both applications were heard and dismissed with costs by the Tax Appeals Tribunal.

The applicant was represented by Mr. Godfrey Akena, Mr. Akim Muwonge while the applicant by Mr. Rodney Golooba and Mr. Paul Ojambo.

On 25th October, 2017, the applicant prompted by the filing of Bills of Costs in respect of the said TAT applications No. 26 and 28 of 2010, filed this application for orders that the bills of costs filed by the respondent in the said applications be struck out.

The applicant's case was set out under the affidavits sworn in support of the application and in rejoinder by Paul Atherton, its director, He deponed that the respondent was represented by its employees who are remunerated by salaries. He further deponed that the respondent did not incur instruction fee under paragraph 1 (a) (iv) of the 6th Schedule of the Advocates (Remuneration and Taxation of Costs) Regulations and that

therefore the respondent is not entitled to tax any costs under the Advocates (Remuneration and Taxation of Costs) Regulations.

The respondent's case is set out under the affidavit in reply sworn by Diana Mulira Kagonyera and the respondent's written submissions. The respondent's case is that the instant application is *Res Judicata* the tribunal having determined the questions as to whether the Respondent is entitled to costs in TAT applications No. 26 and 28 of 2010. The respondent also contended that the Tribunal having pronounced itself on the question of costs is *functus officio.* The respondent contended that it is equal before and under the law and entitled to all reliefs including costs, which are available to any successful litigant before court and that it ought not to be discriminated against.

The applicant contended that it appealed against the rulings in the main applications on merit to the High Court. It seeks to overturn the Tribunal award of costs by praying for an order that respondent pays the costs of appeal and in the Tribunal. Therefore the claim that it did not appeal against costs is incorrect.

The applicant further submitted that the Tribunal cannot *be functus officio* in respect of a taxation of costs matter which was not before it when it made tis rulings on merits on the capital gains tax dispute. The applicant contended that this application was brought before the taxing officer who placed it before the Tribunal as its raises points of law.

The applicant major contention is that respondent having been represented in the main applications by salaried employees, rather than a firm of advocates is not entitled to file Bills of Costs under the 6th Schedule of the Advocates (Remuneration and Taxation of Costs) Rules. The applicant cited a number of authorities. In Total (Uganda) Ltd. V Uganda Revenue Authority Reference no. 26 of 2003 where the court stated that "the respondent had paid no instruction fees; it was therefore wrong in principle to allow that item. The respondent's payment of high salary and payment of bonus to its in- house lawyers to motivate them cannot justify award of instruction fees where it had been paid". Therefore the applicant argued that the respondent which was represented by its in-house lawyers is not entitled to draw a bill of costs.

In reply, the respondent submitted that this application is *Res judicata* because the question as to whether the respondent is entitled to costs is a matter that has been conclusively determined by the Tribunal in TAT applications No, 26 and 28 of 2010. The Respondent cited section 7 of the Civil Procedure Act in support of its contention.

The respondent submitted that its entitled to costs. That costs follow the event unless the court or judge has good reasons otherwise. Under S. 21 of the Tax Appeals Tribunal Act the Tribunal has powers to award costs.

In rejoinder, the applicant submitted that the respondent failed to address the issue of it being represented by in-house lawyers. The applicant cited The Commissioner General v Toyota Tanzania Tax Application 1/2003 where an advocate of the High Court who appeared as Principal Legal Officer of the Tanzania Revenue Authority was denied instruction fees.

Having read the affidavits of the parties and their submissions, the Tribunal rules as hereunder.

It is not in dispute that applications 26 and 28 of 2010 between the said parties were heard and determined by the Tribunal. In the said applications the Tribunal awarded costs to the successful party. S. 21(5) of the Tax Appeals Tribunal Act empowers it to award costs against any party, including an applicant. There are a number of reasons costs are awarded. At times to serves as a deterrent, others times as a punishment to frivolous litigants or simply to reward a successful party. To hold that the respondent is not entitled to costs would open a Pandora box where all types of claims including frivolous and vexations ones would be filed against it denying it equal protection of the law as envisaged by Article 21 of the Constitution which reads “All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law”.

Once a Tribunal sits and hears a matter and makes an award it becomes *functus officio*. It cannot hear or listen and determine a matter it has already decided. It cannot act as a court of appeal to its own decision. The power to review a Tribunal's decision lies with the High Court by way of appeal under S. 27 of the Tax Appeals Tribunal Act.

The applicant contended that it filed that this application before the Registrar. The Registrar realizing that it contained points of law referred the matter to the Tax Appeals Tribunal panel. We wish to categorically statet that once the Tribunal has awarded costs the Registrar does not have any powers to set aside the award. The Registrar's duty stops at being the taxing officer of the bill of costs.

The Tribunal notes that the award of costs was not stated out in the memorandum of appeal by the applicant. The applicant contended that it will seek to overturn the Tribunal's award of costs by praying for an order that respondent pays the costs of appeal and in the Tribunal. That makes this application irrelevant and misconceived. The applicant should go ahead and argue its appeal instead of filing this application.

In respect of res judicata it is clear if one does raise a matter before a court that person cannot raise it after a determination has been made. Under Oder 2 Rule 1 of the Civil Procedure Rules

> "Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his or her claim in order to bring the suit within the jurisdiction of any court."

A claim includes one for costs. In the event the applicant did not raise it during the trial it cannot file a separate application for and against costs.

Nevertheless the Tribunal notes that though both parties did not extensively address the issue of costs both prayed for costs during the main applications. The doctrine of *Res Judicata* is set out under section 7 of the Civil Procedure Act in the following terms;

> *"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the*

same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised and has been heard and finally decided by that court".

Explanation 1 - The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior to it.

Explanation 2 - For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation 3 – The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation 4 - Any matter which might and ought to have been a ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in that suit.

Explanation 5 - Any relief claimed in a suit, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation 6 – Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and other, all persons interested in that right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation 4 above states that any matter which might and ought to have been a ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in that suit.

In **Mulla the Code of Civil Procedure by Sir Dinshaw Fardunji Mulla 18th edition** the learned author stated as follows at page 228 in respect of Explanation 4 of Section 11 of

the Indian Code of Civil Procedure which is in *pari materia* with section 7 of our Civil Procedure Act.

" *The plea of res judicata applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and to pronounce judgment, but to every point which properly belonged to the subject of the litigation, and which the parties exercising reasonable diligence might have brought forward at the time. The principle underlying explanation IV is that res judicata is not confined to issues which the court is actually asked to decide but covers issues or facts which are so clearly part of the subject matter of the litigation and so, clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them".*

The tribunal must in this regard answer the following questions;

Did the question whether the Respondent is entitled to instructions fees a question that properly belonged to the discussion of costs in TAT applications No. 26 and 28 of 2010?

Was it an issue that the Applicant exercising reasonable diligence might have brought forward at that time?

Was the question as to whether or not the Applicant is entitled to charge instruction fees so clearly a part of the discussion of the Respondent's claim to costs and could clearly have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them?

In TAT applications No. 26 and 28 of 2010, the Respondent made a claim for costs. This claim was considered and granted by the Tribunal.

It is not in dispute that the term 'costs' includes instruction fees. The Applicant knew or ought to have known that the claim for costs made by the Respondent in the said applications envisaged a claim for instruction fees.

The Applicant also knew that in TAT application No. 26 and 28 of 2010 the Respondent was being represented by its employees who are entitled to salaries and not instruction fees.

The Applicant had the opportunity during the hearing of the said applications to object to the Respondent's claim for costs upon the grounds that the Respondent being represented by its employees was not entitled to charge instructions fees. They did not avail themselves of this opportunity.

We believe that the question as to whether the Respondent is entitled to instructions fees was a question that properly belonged to the subject of the litigation of the Respondent's claim for costs in the said applications.

We also believe that the Applicant exercising reasonable diligence might have brought forward at that time the question as to whether the Respondent is entitled to charge instructions fees.

We also believe that the question as to whether the Respondent is entitled to charge instructions fees so clearly formed a part of the litigation in respect of the Respondent's claim for costs before the tribunal in the said applications that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

We accordingly find that this application is *res judicata.* Having found so we will not proceed to resolve the other issues raised.

The application being *res judicata* is accordingly dismissed with costs.