

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
AT KAMPALA**

5 **CORAM:** **HON.LADY JUSTICE C.K.BYAMUGISHA,JA**

CIVIL APPLICATION NO.1/04

BETWEEN

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ZACHARY OLUM&ANOTHER:.....APPLICANTS

AND

15 ATTORNEY GENERAL:.....RESPONDENT

*[A reference to a single Justice from a decision and order of the taxing officer
Dated 23/12/03 in Constitutional Petition No.6/99]*

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RULING

This is a taxation reference filed under the provisions of **Rule 109(1)** of **The Court of Appeal Rules Directions, 1996**. The rule gives a right to any person who is
25 dissatisfied with the decision of a Registrar in his or her capacity as a taxing officer, to refer any matter of law or principle to a single justice for determination as the justice of the case may require.

The background to this reference can be summarised as follows: the applicants filed
30 Constitutional petition No.06/99 in this Court seeking declarations that **section 15(now 14) of Parliament (Powers and Privileges) Act** was unconstitutional and contravened certain provisions of the Constitution. The petition was determined in favour of the applicants who filed a bill of costs to the tune of *shs* 172,845,000/= in this court for taxation. After a delay of almost two years, the learned taxing officer in

his ruling awarded them the sum of *shs* 10,537,500/=. Being dissatisfied with the award, they filed the instant reference based on the following grounds:

- 5 **1. The amount of *shs*. 10,000,000/= allowed as instruction fee to file and prosecute Constitutional Petition No.6/99 under item 1 of the applicants' bill of costs is manifestly inadequate in all circumstances of this Constitutional Petition.**
- 10 **2. The taxing Officer erred in law when he disallowed the instruction fees under item 11 of the applicants' bill of costs for opposing the respondent's preliminary objections.**
- 3. The taxing officer erred in law when he disallowed the costs of drawing up the petition and affidavits in support of the same under items 2 and 4 respectively of the applicants' bill of costs.**
- 15 **4. The taxing officer erred in law when he disallowed the costs of preparing and binding of copies of the petition and the accompanying affidavits, the costs of preparing and binding 8 copies list of authorities under items 23, 24 and 25 respectively of the applicants' bill of costs.**

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It was proposed to ask this court for the following orders

- (a) the taxing officer's total award of *shs* 10,537,500/= be set aside.
- (b) The court determines the matter as the justice of the case requires.
- (c) The respondent pays the costs of this reference.

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The matter came before for final disposal on 19/07/04. Mr Joseph Balikudembe represented the applicants while Mr Hosea Lwanga State Attorney represented the respondent. In his submission Mr Balikudembe complained that the instruction fee of *shs* 10,000,000/= awarded by the taxing officer was manifestly inadequate. He pointed out that the petition was of great public importance and as such the instruction fee that was allowed by the taxing officer was too low. He also pointed out that the amount to be awarded in cases of this nature has been settled by the Supreme Court and this Court. He cited two decisions namely

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Paul Ssemogerere & Another v Attorney General SCCA No.5/2001 and

P.K.Ssemogerere & Another v Attorney General CCA No.08/03.

In the first authority, the Supreme Court was being asked to vary the decision of a single Judge who had reduced the applicants' taxed bill of costs from *shs* 351,959,000/= allowed by the taxing officer to *shs* 31,959,000/=. The learned single Justice of the Supreme Court awarded the applicants instructions fee of *shs* 30 million. This amount was increased to *shs* 60 million. In the second case that was cited, the taxing officer had awarded *shs*. 8 million as instruction fee. This amount was increased to *shs* 80 million for two counsel. Mr Balikudembe invited me to increase the amount in the range of 40-60 million shillings or to a reasonable figure. Further counsel submitted that the learned taxing officer not only made an error of law but that he was biased. He referred to a ruling of the same taxing officer made in May '04 in Constitutional Petition No.8/03 -**Fox Odoi & Another v Attorney General** in which he followed the decisions already cited and awarded 90 million shillings as instruction fee.

In reply, Mr Lwanga the learned State Attorney supported the award of 10 million shillings as instruction fee as being adequate and justified. He referred to the principles governing taxation of bill of costs as laid down in the numerous authorities. He cited the following authorities **Premchand Raichand Ltd & another v Quarry services of East Africa Ltd & others [1972] EA162, Makula International v His Eminence Cardinal Nsubuga & another [1982] HCB 11, Patrick Makumbi & another v Sole Electrics (U) Ltd SCCA No.11/94.**

The principles laid down are the following:

1. Instruction fee should cover advocates work including taking instructions as well as other work necessary for presenting the case for trial or appeal as the case may be.
2. That there is no mathematical 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.
3. In a variable degree, the amount of the subject matter involved may have a bearing.
4. The taxing officer has discretion in the matter of taxation but he must exercise the discretion judicially not whimsically.

5. While a successful litigant should be fairly reimbursed the costs he has incurred, the taxing master owes it to the public to ensure that the costs do not rise above a reasonable level so as to deny the poor access to the court.
6. So far as practicable there should be consistency in awards made.

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The learned State Attorney referred to other authorities such as **Nicholas Roussos v Gullan Hussein Habib Viran & Others CA No.30/98** where instructions fee of shillings 30 million allowed by the taxing officer was reduced to shillings 8,500,000/= upon reference to a single Judge. **Emmanuel Pinto v Athanasius Kivumbi**

- 10 **Constitutional Petition No.5/97** - instruction fee of shs 3 million awarded by the taxing officer was increased to shs 3,308,500/= on reference to a single Judge of this Court. **Bank of Uganda v Banco Arabe Espanol CACA No.17/99**, a claim of shs 200 million was claimed as instruction. The taxing officer awarded shs 18 million as instruction fee. The amount was increased to shs 25 million on a reference to a single
- 15 Judge. He invited me not to interfere with the award.

In determining whether the instruction fee awarded by the taxing officer was reasonable in the circumstances of the case, the court has to bear in mind that the taxing officer was exercising his discretion when he awarded the sum in question. The

20 factors that have to be borne in mind were set out by the Supreme Court in its ruling in the case of **Paul Ssemogerere & Another v Attorney General** (supra). At page 20 the Court said:

"In our view, there is no formula by which to calculate the instruction fee. The

25 *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 the advocates' remuneration should be at*

30 *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 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 the intricate balancing exercise*

that the taxing officer's opinion on what is reasonable fee, is not to be interfered with lightly. There has to be a compelling reason to justify such interference".

5 What the court was stating was a rule that has been established over the years that a higher court should not interfere with the exercise of discretion by a lower court unless it can be shown that wrong principles were followed or that the award was excessive or manifestly too low in the circumstances of the case.

10 In the instant application, the taxing officer while dealing with the issue of instruction fee, and how much should be awarded relied on the principles on taxation of the bill of costs set out in the case of **Makumbi & Another v Sole Electric (U) Ltd** (supra) which are that there is no mathematical formula in arriving at a precise figure and each case has to be decided on its own merits in the circumstances. In arriving at the figure of 10 million, the learned taxing officer was of the opinion that the matter was
15 not peculiar or priceless as had been submitted by counsel for the applicants. Furthermore he considered the figure of 150 million abnormally excessive and exploitative of public funds thus the award of 10 million.

I have perused the record of the proceedings in the petition. The amount of time spent
20 in prosecuting the petition was quite short because the hearing lasted one day. The petition was not complicated and the number of authorities cited were quite few. However, the nature of the petition was novel and a historical precedent was established. The applicants are entitled to a reasonable figure and I find that the award by the taxing officer was manifestly too low in the circumstances of the case. I will
25 interfere with the award by increasing the amount of instruction fee to *shs* 20 million which I consider to be reasonable in the circumstances of this case.

As regards the fee of opposing the preliminary objections, I think this is properly
30 covered under paragraph 9(3) of the 3rd Schedule to the Rules of this Court. It provides as follows:

"Instruction fees payable shall include all the work necessarily and properly done in connection with appeal and not otherwise chargeable, including the attendances, correspondences, perusals and consulting authorities".

The applicants had claimed a sum of 20 million shillings. The learned taxing officer disallowed the claim. Instead he awarded them *shs* 200,000/= attendance fee for the two days they spent in court when the objections were argued. Mr Balikudembe drew my attention to a recent ruling of the same taxing officer wherein he allowed another litigant instruction fee for arguing preliminary objections. In fact a fee of *shs* 30 million was awarded under that item.

It is trite law that awards should be consistent so that parties do feel that the taxing officer is not being fair. Doing the best I can in the circumstances of this case, I would award the sum of *shs* 10 million as instruction fee to oppose the preliminary objections.

The rest of the grounds complained that the taxing officer erred in not allowing costs for drawing up the petition and the accompanying affidavits and the cost of binding copies of the petition and list of authorities. I have perused the record of this court, I have failed to find any bound copy or copies of the petition or list of authorities. This item was properly disallowed.

As for drawing up the petition and making copies thereof, the taxing officer disallowed items on the ground that the rule cited by counsel for the applicants was procedural and persuasive and good guidance in the taxation of bill of costs arising out of constitutional petitions. According to him paragraph 10 of the 3rd Schedule to the rules of this Court is not directly related to petitions. The taxing officer was right in stating that paragraph 10 relates to drawing up of documents for appeal purposes. But in my considered opinion, he was wrong to disallow all the items claimed under that head as if no petition or copies of the same were drawn up. The scale of costs set out under the schedule should have been used to guide the taxing officer in assessing a reasonable sum since it was obvious that the applicants drew up petitions and made copies of the same. **Rule 4(2) of Modifications to the Fundamental Rights and Freedoms (Enforcement Procedure) Rules, 1992, Directions, 1996(L.N. No.4/96)** requires a petitioner to file eight copies of the petition for use by court and for service on the Attorney General. Since we have no rules in place for determining costs in constitutional petitions, the taxing officer should have been guided by the scale of

costs in our rules to award a sum commensurate with the expenses incurred in preparing the petition and making copies of the same as the law requires. The applicants had claimed a sum of *shs* 15,000/= and 32,000/= for making 8 copies; *shs* 7,000 for drawing up 2 affidavits and *shs* 3,500/= for making 8 copies thereof.

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I think the learned taxing officer, with respect, was wrong to disallow all the items as if the applicants incurred no expenses on the items I have shown above. I would, therefore, allow those items as presented in the bill of costs as they appear to me to be reasonable. It will give a sum of *shs* 47,500/=

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On full consideration of the facts and circumstances of this case and taking into account the law and the authorities cited by both counsel, I will exercise my discretion and interfere with the award of the taxing officer. Consequently I will award the sum of *shs* 30, 585,000/= as the total sum of the applicants' bill of costs. The sum should take care of the fee for appearing before the taxing officer and of this reference.

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Dated at Kampala this 29th day of July 2004.

C.K.Byamugisha

Justice of Appeal

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