

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
REFERENCE NO. 225 of 2013**

(ARISING OUT OF ELECTION APPEAL NO. 32 OF 2011)

1. LANYERO SARAH OCHIENG

2. ELECTORAL COMMISSION.....APPELLANTS

VERSUS ,

LANYERO MOLLY.....RESPONDENT

CORAM: HON. MR. JUSTICE KENNETH KAKURU

Single Justice of Appeal

RULING

TAXATION REFERENCE TO A SINGLE JUSTICE

This is a reference on taxation from the Ruling and Order of the Registrar /Taxing officer, Her Worship Mary Babirye in Election Petition Appeal No. 32 of 2011, dated 30th October 2013, to a single Justice of this Court.

The appellant Lanyero Sarah Ochieng was at the hearing of this reference represented by **Mr. John Mary Mugisha** who appeared together with **Mr. Severino Twinobusingye**.

Mr. George Maiteki appeared for the respondent, Ms. Molly Lanyero.

For clarity, this reference has been preferred by Ms. Molly Lanyero who was the unsuccessful party in Election Appeal No. 32 of 2011, in which she was a respondent. Costs in that appeal having been awarded to Lanyero Sarah Ochieng, the successful party in that appeal, she filed in this court on 19th March 2013 a bill of costs totaling shs. 749,975,000/-.

On 30th October 2013 that bill of costs was taxed and allowed at shs. 105,545,000 by the Assistant Registrar /Taxing officer Her Mary Babirye.

The respondent being dissatisfied with Ruling and order of the taxing officer preferred this reference on the following grounds.

- 1. THAT the learned Registrar erred in law and fact when she failed to apply properly known and precedence principles of taxation in the election petition thus arriving at a wrong decision occasioning a miscarriage of justice.***
- 2. THAT the learned Registrar erred in law and fact when she allowed a taxed bill of cost which was manifestly excessive thus arriving at a wrong decision occasioning a miscarriage of justice.***
- 3. THAT the learned Registrar erred in law and fact when she awarded UGX. 105,545,000/= (one hundred five million five hundred forty five thousand shillings only) as taxed bill of costs and allowed UGX.50000000/= (fifty million shillings only) and Ug shs .35000000/ (Thirty Five Million shillings only) as instruction fees for Counsel and his assistant respectively without any legal basis thus arriving at a wrong decision occasioning a miscarriage of justice.***
- 4. THAT the learned Registrar erred in law and fact when she failed to properly evaluate evidence on record in taxation of the bill of costs thus arriving at a wrong decision occasioning a miscarriage of justice.***

Mr. George Maiteki learned counsel for the respondent argued all the grounds together. He submitted that the learned Asst. Registrar erred when she failed to apply the principles of taxation in election petitions and when she awarded costs that were manifestly excessive and thus occasioned a miscarriage of justice. He submitted that awarding shs.50,000,000/- and shs.35,000,000/- as instructions fees to both the lead counsel and the assisting counsel was an error as the amounts awarded were manifestly excessive in the circumstances of the case. That the learned taxing officer failed to take into account the principles of law governing taxation of costs in

this court. He asked this court to exercise its discretion and reduce that amount to a sum that is reasonable in the circumstances of this case.

He also submitted that the learned taxing officer did not take into account the law when she taxed the rest of items set out in the bill of costs. That she awarded costs in respect of drawing of pleadings that do not correspond with the exact folios in those specific pleadings and or documents. He asked court to re-evaluate that evidence and award the costs in accordance with the law.

Mr. John Mary Mugisha learned counsel for the appellant opposed this reference. He supported the taxation ruling and the order of the taxing officer.

Mr. Mugisha submitted on the principles a taxing officer must take into account before making an award of costs. He cited a number of authorities of the Supreme Court and this court in support of his arguments which are all set out in his list of authorities. I am very grateful for that. I shall refer to those authorities later.

In general both Mr. Maiteki and Mr. Mugisha repeated the submissions they had earlier made before the taxing officer. I was availed those written submissions which I have also perused.

Mr. John Mary Mugisha asked this court to uphold the Ruling and order of the taxing officer.

I have listened carefully to the submissions of both counsel. I have also perused the pleadings before me, I have requested for and was availed the records in respect of High Court Election Petition No. 002 of 2011 and Court of Appeal Election Appeal No. 32 of 2011 from which this reference emanates all of which I have also carefully perused. I have read the authorities cited to me by both counsel.

In respect of Reference on taxation of costs in this court **Rule 110(1), (3) and (4)** of the Rules of this court provides as follows

110. Reference on taxation.

(1) Any person who is dissatisfied with a decision of the registrar in his or her capacity as

a taxing officer may require any matter of law or principle to be referred to a judge for decision; and the judge shall determine the matter as the justice of the case may require.

(2) *For the purpose of sub rule (1) of this rule, any decision extending or refusing to extend time for the lodging of a bill of costs or any exercise by the registrar of the overriding discretion given him or her by paragraph 12 of the Third Schedule to these Rules shall be taken to involve a matter of principle.*

(3) *Any person who contends that a bill of costs as taxed is, in all the circumstances, manifestly excessive or manifestly inadequate may require the bill to be referred to a judge; and the judge may make such deduction or addition as will render the bill reasonable.*

(4) *Except as provided in sub rule (3) of this rule, there shall be no reference on a question of quantum only.*

A taxing officer in this court is required to comply with **Rule 9** of the third schedule of the Rules of this court.

It provides as follows

9. Quantum of costs.

(1) *The fee to be allowed for instructions to make, support or oppose any application shall be a sum that the taxing officer considers reasonable but shall not be less than one thousand shillings.*

(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 subparagraph (2) of this paragraph shall include all the work necessarily and properly done in connection with the appeal and not otherwise chargeable, including attendances, correspondences, perusals and consulting authorities.*

(4) *Other costs shall, subject to paragraphs 10, 11 and 12 of this Schedule, be awarded in accordance with the scale set out in the following paragraphs or, in respect of any matter for which no provision is made in those scales, in accordance with the scales applicable in the High Court.*

The principles to be taken into account therefore have already been set out in the above law specifically in sub-rule (2) of the **Rule 9** above.

Learned counsel Mr. John Mary Mugisha was alive to the law when he submitted that the following ‘Bench marks’ are required to be taken into account by the taxing master.

1. *The value of the subject matter where money is involved.*

2. *The nature of the subject matter.*

3. *The importance of the case.*

4. *Difficulty or complexity of the case.*

5. *General conduct of proceedings if it is long, tedious and taxing.*

6. *Interest of the parties and the public; value addition to national jurisprudence.*

7. *Other costs to be paid.*

8. *The agency or party to pay.*

He also correctly submitted that from the authorities he cited the following principles have evolved.

1. *Costs must not be allowed to rise to such a level so as to confine access to courts only to the rich.*

2. *A successful litigant ought to be fairly reimbursed for costs he or she has to incur.*

- 3. *The general level of remuneration of advocates must be such so as to attract recruits to the profession.***
- 4. *As far as possible there should be some consistency in the award of costs.***
- 5. *There is no mathematical or magical formula used by a taxing master to arrive at a precise figure. Each case has to be decided on its own merits and circumstances.***
- 6. *Instructions fee should cover the advocate's work, including taking instructions as well as other work necessary for presenting the case for trial or appeal as the case may be.***
- 7. *The taxing master should find the appropriate scale to the schedule and then consider whether the basic fee should be increased or reduced by considering the value upon the work and the responsibilities involved.***

Mr. Maiteki agrees with Mr. Mugisha.

The disagreement however, is whether or not the learned taxing officer properly applied the said principles and bench marks.

The Rules of this court and the above principles do not distinguish between a civil appeal and an election appeal.

However, this distinction between the two is covered under the principle set out in **Rule 9(2)** of schedule 3 of the rules of this court (Supra) which requires a taxing officer to decide each case on its own merit and circumstances.

An election petition and an election appeal in my view differ in a fundamental way from ordinary civil suits and ordinary civil appeals.

In election petition pleadings at the High Court emanate from a special category of laws. The

Electoral Laws. Evidence is by affidavit and the pleadings are generally bulky. There is no specific value in respect of the subject matter. Issues are generally few and very specific.

For the above reasons I am inclined to follow the principles of taxation as set out by this court and the Supreme in Election Appeals.

The authorities cited to me include the following:-

1. AKISOFERI MICHAEL OGOLA -VS- AKIKA OTHIENO EMMANUEL & ANOTHER COURT OF APPEAL NO. 18 OF 1999 .

2. OBIGA KANIa -VS- WADRI KASSIANO EZATI & ANO. C.A. CIVIL REFERENCE NO. 32/2004.

3. NGOMA NGIME-VS- ELECTORAL COMMISSION & HON. WINNIE BYANYIMA ELECTION PETITION APPEAL NO. 11 OF 2002.

4. NANGIRO JOHN -VS- THE ELECTORAL COMMISSION ELECTION PETITION APPEAL NO. 26 OF 2006.

I will also consider the other authorities cited to me.

This court will only interfere with award of costs by the taxing officer if the costs awarded are manifestly low or high that they amount to injustice to one of the parties A.M Ogola vs Akilca Othieno and Another (Supra) (See also **Rule 110(3)** of the Rules of this Court) (Supra). In the **Ogola case** (Supra) this Court reduced the award in respect of instruction fees from shs. 10,000,000/- to shs. 7,000,000/- for leading counsel and from shs.4,000,000/- to shs. 2,500.000/- for Junior counsel.

In the case of **Obiga Kania** (Supra) this court upheld an amount of shs. 8,000,000/- on instructions fees. The taxing officer had reduced the fee from shs. 80,000,000/-. The respondent had contended

that shs. 8,000,000/- was manifestly excessive.

In **Ngoma Ngime** case (Supra) the taxing officer in this court reduced the bill of costs from shs. 602,983,000/- to shs. 49,840,5000/-. In doing so he observed as follows;-

“I agree with counsel for the appellant that election petitions are of interest to the candidates, the electorate and the whole country. This is more so in a young country like Uganda. If elections in the majority of Constituencies or even a substantial number of them are flawed, this will certainly blot the image of the country in the eyes of the international community. It may lead to political instability and affect donor and investor confidence in the country.

Elections are an expression of the democratic will and choice of the people. The electorate have an interest in seeing that their favourite choice is not unfairly denied electoral victory.

The candidates and parties to the petition will have invested resources, time and emotion in the electoral process. It would be the worst thing to occur to them in life if their political ambitious are unjustly frustrated. ”

Further in his Ruling, the learned Asst. Registrar again observed as follows

“Elections are held every after 5 years, barring intervening political upheavals that may postpone their being organized. The law provides for a speedy disposal of election petitions and appeals. They are not an everyday occurrence in the Courts. It is partly on account of their rarity that during and prior to the conduct of election petitions and appeals counsel have to literally shelve all other legal matter. They put in a lot of time and industry in preparation. They are therefore entitled to commensurate remuneration.

On the other hand the public must not be deterred from seeking political elective office nor be impeded in seeking legal redress when cheated in elections by an award of exorbitant costs. ”

I entirely agree with the above observation I adopt the reasoning of the learned Asst. Registrar. I wish only to add as follows:-

That the *National Objectives and Directive Principles of State Policy* set out in this country's Constitution encourage all citizens to actively participate in their own governance. In this regard the Constitution provides as follows:-

11: Democratic Principles

(i) The state shall be based on democratic principles which empower and encourage the active participation of all citizens at all levels in their own Government.

(ii) All the people of Uganda shall have access to leadership positions at all levels, subject to the Constitution.

(iii)

(iv)

(vi)

In addition to the above **Article 78** of the Constitution sets out the composition of Parliament, in which it states that Parliament shall consist among others, one woman representative for every District, youth, workers, persons with disabilities and other groups as Parliament may determine.

Article 32 provides for affirmative action in favour of marginalized groups on basis of gender, age, disability and any other reasons created by history, tradition, custom, for the purpose of redressing imbalances which existed against them.

The circumstances of this case, are that this is an election appeal in respect of an election for a woman member of Parliament for Lamwo a newly created District, in the North of this Country which areas was under insurgency for over 20 years.

Costs that are manifestly excessive have a chilling effect on all persons present and future who have an interest in standing for any elective office. This in turn has a negative impact on the whole

democratization process in this Country. Every person in this country who participates in the electoral process as a candidate at any level has to seriously consider the consequences of an election petition and especially the resultant legal costs. Courts in this country have generally awarded much higher costs in election petitions and election appeals. This in my view should not be so. The parties to this petition and their electorate had an interest in the petition. The whole country had an interest. A person who losses an election petition should not be solely and personally punished by being condemned to pay excessive legal costs.

Elective offices must not be a preserve for the rich. Legal costs in election petitions must not be used as a weapon against political opponents.

High legal costs in election petitions have the effect of reversing affirmative action for marginalized groups such as women, youth and persons with disabilities.

I have perused the court records and I have found nothing to suggest that this was an extra ordinary appeal. Only four grounds of appeal were framed for consideration by this court. In substance there were only two grounds as the others were general.

The first respondent's record of appeal is only 232 pages. It appears the appeal was argued in one day. The Judgment of this Court is only 32 pages. I have not been able to find anything difficult, special or complicated as submitted by Mr. Mugisha. This was an ordinary election appeal.

For the above reasons I agree with Mr. Maiteki that the instruction fees of shs. 50,000,000/- in respect of leading counsel and shs. 35,000,000/- in respect of assisting counsel is high and manifestly excessive in the circumstances of this case.

I would reduce that amount to shs. 15,000,000/- for leading counsel and shs. 8,000,000/- to assisting counsel.

Rule 10 of schedule of the Rules of this Court provides as follows;-

10. Fees for drawing documents.

"The fee for drawing a document shall include the preparation of all copies for the use of the party drawing it and for filing and service when only one other party or

one advocate for other parties has to be served; but where there are additional parties, fees may be charged for making the necessary additional copies.”

In this election appeal there was only one respondent, therefore fees for drawing documents also included the preparation of all copies required. The learned taxing officer erred when she awarded costs in respect of production of copies separately. Therefore the following items are disallowed 5,7,9,13,15,17,19,21,23,72,74 and 82. These items total to shs. 1,750,000/-.

Having taxed off more than one third of the bill of costs the taxing officer should have disallowed all the costs for drawing, filing and serving and attending taxation of the bill of costs as required by **Rule 13** of schedule three of the Rules of this Court.

I have therefore taxed off the following items:-71, 73, 75, 77, 79, 80, 81, 83, 84, 86, 88, 89, 90, 91, 94, 100, 103, 106,107, and 110. These items total shs. 855,000/-.

I have found no reason to interfere with taxing officer’s discretion in the rest of the items.

In the result, the appellants’ bill of costs is reduced to shs. 15,000,000/- instruction fees for lead counsel, shs. 8,000,000/- instructions fees for supporting counsel.

The amount disallowed on the other items above total to shs. 2,605,000/-.

The bill of costs is accordingly reduced from shs. 105,545,000/- to shs. 40,940,000/-.

I so order.

Dated at Kampala this 30th day of June 2014

HON. MR. JUSTICE KENNETH KAKURU

JUSTICE OF APPEAL