THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 95 OF 2004

LUMWENO & CO. ADVOCATES ========== APPELLANT

VERSUS

TRANSAFRICA ASSURANCE COMPANY LTD======== RESPONDENT

CORAM: HON. MR. JUSTICE RICHARD BUTEERA, JA
HON. LADY JUSTICE SOLOMY BALUNGI BOSSA, JA
HON. MR. JUSTICE KENNETH KAKURU, JA

JUDGMENT OF HON. KENNETH KAKURU, JA (Dissenting)

The issue before us in this appeal as I understand it is whether or not an advocate is entitled to full instruction fees upon receipt of instructions, and whether the subsequent progress of the matter is irrelevant.

Mr. Hatim Lumweno an advocate practicing in the name and style of M/s Lumweno and Company Advocates had been instructed by the respondent to defend them in a contentious matter, a suit at the High Court in which the value of the subject was stated to be Shs. 4,594,845,060/=. There seems to be no contention on that.

Apparently the respondent drew and filed a written statement of defence and made two or three appearances in Court. Subsequent to that the respondent withdrew instructions from him and instructed another advocate to complete the case.

There upon the appellant filed an advocate/client bill of costs which the taxing master taxed and allowed as instruction fees of Shs. 47,135,950/= based on the value of the subject matter.

The respondent being dissatisfied with the ruling of the Registrar appealed against the said ruling by way of references to the Hon. Principal Judge, The Hon. Mr. Justice James M. Ogoola, PJ.

The Principal Judge set aside the ruling of the taxing master and remitted the matter for taxation to be based on the principle of proportionality. The appellant appealed to this Court.

I have listened to the arguments of both counsel in this matter. I have also perused the court record and the authorities submitted by both parties.

The learned Principal Judge set out the issue before him in the following terms:-

> *"Whether an advocates instruction fees stipulated under the sixth schedule of the Advocates (Remuneration and Taxation of Costs) (amendment) Rules 1986 are adjustable proportionately in line with the quantity of work done by an advocate for his client or whether such fees are chargeable simply on a sliding scale in accordance with the quantum of the subject matter of the suit or dispute"*

The learned Principal Judge at page 3 of his Judgment again rephrased the issue as follows:-

> *"Is an advocate's instruction fees pro-ratable to match the amount of work actually performed by the advocate in his/her client's case or is it a static figure which has reference only to the quantum of the underlying claim in the suit"*

The learned Principal Judge then concluded at P.7 of his judgment as follows:-

> *"I find that in the instant case, the taxing officer's discretion was exercised on a wrong principle, namely, that the full instruction fee to defend a suit is earned the moment a defence has been filed.*

The learned Principal Judge came to the above conclusion following the decision of the **East African Court of Appeal** in the case of **Mayers vs. Hamilton [1975] E.A page 16** in which **SPRY Ag V P** held that:-

> *".....an advocate will not ordinarily become entitled at the moment of instruction the whole fee which he may ultimately claim"*

And he also relied on **Regulation 2 (2) (b)** which is now **3 (2)** of the **Advocates (Professional Conduct) Regulations** which reads as follows:-

3(2) *whenever an advocate intends to withdraw from the conduct of a case such an advocate shall;*

(a) *Give..... sufficient notice*

(b) *Refund to his former client such proportionate professional fees as has not been earned by him in the circumstances of the case.*

The **Mayers case (supra**) was decided in 1975. First and foremost the facts of that case are different from the one at hand.

Secondly the appeal was decided upon the interpretation of Schedule vi of the Advocates (Remuneration) Order which has since been repealed (Statutory Instrument No. 258-5 Volume xiii P.3620 (Laws of Uganda 1964 subsidiary legislation). It provides as follows:-

"SCHEDULE VI

COSTS IN THE HIGH COURT

Subject as herein provided the fee for instructions shall be as follows:-.....

Provided that:-

(1) The taxing officer may at his discretion take into consideration the other fees and allowances (if any) to the Advocate in respect of the work which any such allowances.....the nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings and all other relevant circumstances"

As already noted above these rules which date as far back as 1959 were revoked by Rule 57 of Statutory Instrument No. 123 of 1982 which brought into force the 'The Advocates (Remuneration and Taxation of Costs) Rules 1982'.

Schedule six of the new rules differs in a fundamental way from the same schedule of the old rules. Because of the prevailing inflation at the time, i suppose, costs were to be determined by percentages and not on specific amounts.

Whereas for example under the old rules (258-5) 1(c) provided in part in respect of the maximum fees chargeable as follows:-

(c) "To sue or defend in any other case present or oppose an appeal where the value of the subject matter can be determined from the pleadings or the judgment"

Where such value exceeds (Shs)	**But does not exceed (Shs)**	**Shs.**
2,000	**3,000**	**300**
3,000	**5,000**	**500**
5,000	**10,000**	**750**
10,000	**20,000**	**1,000**
20,000	**100,000**	**2,000**
100,000	**200,000**	**4,000**
200,000		**5,000**

The maximum fees chargeable in any case the value of which exceeded 200,000/= was fixed by the rules as Shs. 5,000/=

In the sixth Schedule of 1992 Rules percentages were applied. **Rule 9(c)** of that schedule provides that where the value of the subject matter exceeds 20,000,000/= one percent is chargeable on any every amount in excess of 20,000,000/=.

A glance at the fees chargeable under the old rules and those chargeable under the 1992 clearly indicates in my view that the latter rules were addressing inflation that had at the time eroded the value of the Uganda shilling. The introduction of the percentages was to address this mischief.

These new rules did not reproduce the proviso in the old rules upon which the **Mayers case (supra)** had been decided. The learned trial judge therefore applied a wrong principle when he decided the reference based on that case. I find that, for the above reason the **Mayers case** is no longer good law.

With all due respect I do not agree with **His Lordship Justice Madrama, J** who while considering a case similar to this appeal **(Lion Assurance Company Ltd versus Kasekende Kyeyune and Lutaaya Advocates); High Court Misc. Application No. 358 of 2013** in respect of the Mayers case (supra) he stated as follows:-

> *"The decision of the East African Court of Appeal sitting as Nairobi in the above case was clearly based on the discretionary powers of a Taxing Master confirmed by the revoked proviso quoted above. There is clearly a lacuna in the law in so far as the current regulations do not deal with the situation in an advocate/client bill of costs where the advocate does not pursue the suit to its logical conclusion"*

I do not agree that there is a lacuna in the law. Even if it were, it would not be the duty of any court of law to substitute itself for the legislature and fill in the lacuna.

Again with respect I do not agree with **Hon. Madrama, J** when in **The Lion Assurance (supra)** he held as follows:-

> *"In the circumstances where the advocate has not completed instructions i.e. by completing handling of the suit he or she was instructed to file, the logical thing to do would be to establish the actual instruction fees according to the scale where the subject matter of the suit is ascertained.*
>
> *Secondly because the appellant subsequently instructed other counsel while the same suit is pending the duty is on the counsel (sic) to negotiate the question of fees because the client cannot be charged twice".*

I think the intention of the legislature has to be ascertained from the statute. It cannot be inferred from what court considers to be logical. It is too subjective a test. Judges are not called up to apply their opinions of sound policy so as to modify the plain meaning of statutory words unless of course doing otherwise would result into an absurdity or would lead to manifest injustice. (See **Nokes vs. Doncaster Amalgamated Colieries [1940] AC 1014** and **Mattison versus Hert [1854] 23 LJ CP 108**.

I would borrow the words of **Lord Loreburn L.C in Vickers versus Evans [1910] AC** at P.444 where he states that;

"It is a strong thing to read into an act of Parliament words which are not there and in absence of clear necessity, it is a wrong thing to do"

In this particular case the law granting discretionary power to the taxing master to award costs taking into consideration "all other relevant circumstances" was repealed.

It means in my humble view that the taxing master is restricted now only to apply schedule six of the current regulations and award costs only as set out under those regulations. Nothing more nothing less.

Regulation 28 of Statutory Instrument 267-2 cited by the learned Principal Judge read together with Regulation 4 of Statutory Instrument No. 267- 4 is to the effect that "No advocate shall charge a fee which is below the specified fee under the Advocates (Remuneration and Taxation of Costs) Regulations. I fact it is a disciplinary offence to do so. In my view a taxing master cannot award costs less than what is stipulated under the rules. What has to be ascertained therefore is the fee chargeable in contentious matters in High Court under the current rules.

For clarity I have reproduced the sixth schedule in part.

Sixth Schedule.

Costs in the High Court and Magistrates Courts.

1. Instruction to sue or defend –

(a) Subject as hereafter provided, the fees for instructions shall be as follows:-

(i) To sue in an ordinary suit in which no appearance is entered under Order XXXVI of the Civil Procedure Rules where no application for leave to appear and defend is made, the fee shall be 65 percent of the fees chargeable under item 1(a) (iv) of this Schedule;

(ii) To sue or defend in a suit to which the provisions of Order XXXVI of the Civil Procedure Rules apply in which an application for leave to appear and defend was made and refused, the fee shall be 75 percent of the fee chargeable under item 1(a)(iv) of the Schedule;

(iii) In a suit where settlement is reached prior to confirmation of the first hearing date of the suit the fee shall be 85 percent of the fee chargeable under item 1(a) (iv) of this Schedule;

(iv) Tom sue or defend in any other case or to present or oppose an appeal where the value of the subject matter can be determined from the amount claimed or the judgment-

(A) Where the amount does not exceed 500,000 shillings – 12 ½ percent on the amount claimed;

(B) Where the amount exceeds 500,000 shillings but does not exceed 5,000,000 shillings - 12 ½ on the first 500,000 shillings and 10 percent on the next 4,500,000 shillings;

(C) Where the amount exceeds 5,000,000 shillings but does not exceed 10,000,000 shillings – 12 ½ percent on the first 500,000 shillings and 10 percent on the next 5,000,000 shillings;

(D) where the amount exceeds 10,000,000 shillings but does not exceed 20,000,000 shillings – 12 ½ percent on the first 500,000 shillings and 10 percent on the next 4,500,000 shillings, 7 ½ percent on the next 5,000,000 shillings and 5 percent on the next 10,000,000 shillings;

(E) Where the amount exceeds 20,000,000 shillings – 1 percent on the excess of 20,000,000 shillings;

The wording of the law is very clear. It clearly stipulates the fees chargeable in all instances.

Under 1 a (i), (ii) & (iii) the law clearly set out circumstances under which less than the full fees may be charged and even then the law specifies the percentages to be applied in each case.

The scale for instruction fees to sue or defend in any other case or to present or oppose an appeal where the value of the subject matter can be determined from the amount claimed or judgment is set out under 1(a) IV A-E (above).

Nowhere in schedule six does the law give power to the taxing master to award less for any reason or to compute fees on pro-rata basis.

I think the question here is not whether or not instruction fees are earned by an advocate upon receipt of instructions. It is whether or not an advocate is entitled to the full instruction fees upon receipt of instructions.

I have found nowhere in the law any proposition that an advocate cannot be paid full instruction fees upon receipt of instructions, save as set out in Rule 1(a) (i), (ii) (iii) of Schedule Six (set out above).

I do not accept the argument of Mr. Tumusingize learned counsel for the respondent that where a client withdraws instructions from an advocate before the determination of the suit such an advocate is not entitled to full instruction fees. This argument is not supported by any law. It seems to revolve around a notion that paying full instruction fees in such circumstances would amount to unjust enrichment and is unfair.

This is a very subjective test. Unfair to who? The terms of payment in respect of Advocate client fees are determined by law. The law stipulates the amount of instruction fees payable upon instructions. One party who decides to withdraw from the contract, which is in effect a breach, cannot turn around and demand for a refund that is not provided for in the law that sets out the contract terms.

This kind of transaction is by no means unique, in fact it is common place in contemporary commercial transactions.

For example a person who purchases a train ticket from Kampala to Mombasa via Nairobi has to pay the full fare before boarding. If he or she opts to remain in Nairobi then he or she is not entitled to a refund of the fare from Nairobi to Mombasa. Similarly a student who accepts admission at a University and pays full tuition may not be entitled to refund if he or she decides to abandon the University in the middle of the Semester, and if he or she enrolls at another University in the middle of a semester he or she may have to pay the full fees.

Again most hotels would not refund a guest who has booked the full fare and paid but has not shown up. This cannot be considered to be paid unjust enrichment or unfair. Parties must be

prepared to face the consequences of their decisions and actions. They must also comply with terms of their contracts.

The principle of unjust enrichment as set out in the case of **Fibrosa spolka Akcyjana versus Fairbaim Lawson Combe Barbour Ltd [1943] AC 32** is based on refund of consideration upon frustration of a contract. It is therefore not applicable in this case. Here there is no failure of consideration.

I do not agree that the case of **Foreth Ltd vs. Kigano and Associates [2002] 1 EA 92** applies here as submitted by Mr. Mugenyi counsel for the appellant. The observations made at page 100 and 101 of that judgment in respect of instructions were made *obiter*.

The learned Principal Judge cited Regulation 2(2) which is now 3(2) of the Advocates Professional Conduct Regulations as a basis for his holding.

The learned Principal Judge in that aspect held as follows:-

> ***"The above quoted Regulation 2 (2) (b) is pivotal. First, it embraces the principle of appropriate refund of an advocate's professional fees upon the withdrawal of the advocate from the conduct of his client's case. Second, the refund is to be proportionate to the work done by the advocate – i.e. fees that have "not been earned" by the advocate. Third, the measure by which the proportionality of the fees to be refunded is determined is stated to be the "circumstances of the case". In other words, the amount of the refund is not to be determined by any standard or mechanical or magical formula – that somehow fits all situations. Rather, it is to be determined by reference to the circumstances of each case".***

With utmost respect to the learned Principal Judge, i respectfully disagree. The above regulation now 3(2) applies, in my view, in instances in which an advocate decides to withdraw from the conduct of a case and not in circumstances in which a client withdraws instructions from an advocate. The wording of that regulation is clear;

> *"Whenever an advocate intends to withdraw...."*

If the legislature had intended the same position to apply *"whenever a client withdraws instructions from an advocate"* it would have clearly stated so, in the Regulations. It did not. This cannot in my view be inferred from the above rule.

Rule 3 (2) a clearly excludes instances in which a client withdraws instruction from an advocates as it provides that:-

> **3(2)** *whenever an advocate intends to withdraw from the conduct of case, the advocate shall -*
>
> ***1)*** *Give his or her client, the court and the opposite party sufficient notice or his or her intention to withdraw.*

This regulations clearly could not apply in instances in which a client is the one withdrawing instructions, as in such case an advocate would not be required to give the same client a notice of withdrawal. It would have to be the client giving the advocate notice instead.

Secondly the regulation refers to professional fees and not instruction fees. I do not agree that professional fees compasses all fees including instruction fees. I have found no legal basis for that proposition.

I am inclined to think that the law makers found it important and necessary to have a uniform formula for computing of instruction fees to protect the legal professional from unhealthy competition resulting from market forces and all the vices that go with it. Uniform fees shield the legal profession from clients who hop from one advocate to the other, by making it unfavourable for them to do so. If the reason for withdrawal of instructions is as a result of professional misconduct or incompetence of an advocate, clients have recourse to the disciplinary measures set out in the law in which refund of fees may be an available remedy.

I would also like to clarify that in this particular case the bill of costs was between an advocate and his client, which is commonly referred to as Advocate/Client bill of costs.

This bill of costs differs from one between opposing parties is contentious matters, which is referred to as inter party bill of costs.

Where a court for example condemns a party to pay costs, to another, the decree holder is required to file a bill of costs under schedule six (above). The party paying costs will only pay the instruction fee once in respect of that particular case irrespective of the number of advocates who would have handled the matter on behalf of the decree holder, unless of course court by a certificate permits costs for more than one counsel.

However each of the advocates who were instructed by the decree holder have a right to file their individual advocate/client bill of costs and each of them in my view would be entitled to full instruction fees.

This is because each of them was instructed differently. The same principle applies where the decree holder instructs jointly at the commencement of the suit two or more advocates and where a certificate of more than one counsel has not been granted by court.

Be that as it may, in this particular case, I find that the taxing master applied the correct principle. Since the bill of costs was between a client and his advocate the rules require that the actual instruction fee allowed be increased by one third.

However, in this case the appellant had clearly accepted 27,000,000/= as full and final settlement of his instruction fees. This is contained in the letter to the respondent dated 21st November 2002. That amount was duly paid. The appellant is thus estopped by record and conduct from claiming anything more than that. See **Section 114** of the **Evidence Act (CAP 29).**

I accordingly find and hold as follows:

1) **An advocate in any contentious matter before the High Court or a Magistrates Court is entitled to full instruction fees as set out in Schedule Six of Statutory of the Advocates (Remuneration and Taxation of Costs) Regulations Statutory Instrument No. 267-4 at the time of receipt of instructions and the subsequent progress of the matter is irrelevant.**
2) **An advocate is not required to refund instruction fees where a client withdraws instructions from an advocate, who has acted upon such instructions.**

3) **The appellant demanded and accepted 27,000,000/= as full final payment of his instruction fees and is stopped from claiming and or demanding anything more than that from the respondent.**

In the result I would allow this appeal in part. I would set aside the judgment of the High Court and substitute it with this judgment. I would order the respondent to pay costs at the High Court and meet two thirds of the costs of this appeal.

It is so ordered.

Dated at Kampala this 25th day of February 2014.

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HON. KENNETH KAKURU

JUSTICE OF APPEAL.