THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

HCT - 00 - CC – CA - 0011 - 2008

(ARISING FROM MISCELLANEOUS APPLICATION NO. 316 OF 2008)

JOBBING FIELD PROPERTIES LTD :: APPLICANT

VERSUS

LUMONYA BUSHARA & CO ADVOCATES :::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE GEOFFREY KIRYABWIRE

JUDGMENT

This appeal was brought by way of chamber summons under section 62(1) Advocate Act rules 2 and 3 Advocates (taxation of costs) Regulations seeking orders that;

1. The ruling and order of the Registrar or taxing officer in Misc. Application No. 136/2008 be set aside;
2. The bill of costs be taxed by the judge;
3. The costs of the appeal be provided for

The grounds of appeal are that;

1. The Registrar erred in law when he awarded the respondent an exorbitant sum of ug.shs.150,000,000/= (one hundred fifty million Uganda shillings) on item 11(instruction fees) of the bill of costs in accordance with the guidelines under the sixth schedule of Advocates (Remuneration and Taxation of Costs) Regulations S.I 267-4 and yet the proper sum should have been Ug.Shs.27,374,400/= (Twenty seven million, three hundred seventy four thousand four hundred shillings only).

2. The Registrar erred in law when he purported to tax the bill of costs based on complexity of the matter yet there was no order by the judge specifying the fraction or percentage by which the higher fee was to be awarded pursuant to proviso 1 under item 1 of the sixth schedule.

3. The Registrar erred in law when he purported to apply his knowledge of the mediation proceedings involving the parties to the taxation proceedings which did not relate to the mediation contrary to Rule 22 of the Commercial Court Division (Mediation Pilot Project) Rules 2003

This application arises as a result of a disagreement between Lumonya Bushara & Co Advocates and their client, Jobbing Field Properties Ltd, over the fees payable to the former by the latter for professional services rendered.

I shall now review the circumstances and decisions that led to this appeal. The respondent law firm represented the applicant company in the case of **Jobbing Field Properties Ltd .V. Bugisu Cooperative Union Ltd High Court Civil Suit No.220 of 2007** which was settled by way of consent Judgment entered into by both parties. It was also agreed that each party would bear its own costs.

The respondents then proceeded to file an advocates/client bill of costs such that the advocates could be paid for their services rendered. The advocates/client bill of costs was placed before the learned Registrar His Worship. Emmy Mugabo who taxed it at ug.shs.150,000,000/= (One hundred fifty million Uganda shillings) as instruction fees.

The applicant is represented by Mr. Bautu while the respondents are represented by Mr. Nangwala

I shall now address my self to the appeal at hand.

The first ground of appeal is that, the Registrar erred in law when he awarded the respondent an exorbitant sum of Ug.Shs.150,000,000/= (One hundred fifty million Uganda shillings) on item 11 (instruction fees) of the bill of costs in accordance with the guidelines under the **sixth schedule of Advocates (Remuneration and Taxation of Costs) Regulations** and yet the proper sum should have been Ug.Shs.27,374,400/= (Twenty seven million, three hundred seventy four thousand four hundred shillings only).

Mr. Bautu, counsel for the applicants submitted that the bill of costs as presented by the respondent was subject to **Reg. 57** of the **Advocates (Remuneration and Taxation of Costs) Regulations** which provides that;

> *"In all causes and matters in the high court and magistrates courts, an advocate shall be entitled to charge as against his or her client the fees prescribed by the sixth schedule to these regulations."*

Counsel submitted that item 11 of the bill of costs (for instruction fees) was subject to be taxed under the sixth schedule and in particular under item **1(iv) of the sixth schedule** which provides for instructions to sue and defend where the value of the subject matter can be determined from the amount claimed. Counsel submitted that the Registrar/Taxing Master in awarding the Ug.Shs.150,000,000/= as instruction fees misdirected himself when he considered wrong principles of taxation and particularly in respect to item **1(iv) of the sixth schedule,** which ordinarily would have led to the award of the sum of Ug.Shs.27,374,400/= (Twenty seven million, three hundred

seventy four thousand four hundred shillings only) as the appropriate fee. The counsel for applicant further submitted that if the Registrar had considered the precedents on taxation together with the principles on the rules regarding the **schedule 6 of the Advocates (Remuneration and Taxation of Costs) Regulations**, he would have come to a more justifiable conclusion or a reasonable fee.

Counsel for the applicants referred to the cases of **Makula International Ltd .v. Cardinal Nsubuga & another [1982] HCB 11** and **Alexander Okello .v. M/s Kayondo and Co. Advocates Civil Appeal NO. 1 OF 1997**, as authorities that in exercise of his jurisdiction, the Registrar must have regard that whereas advocates must be fairly reimbursed, the Taxing Master also owes a duty to the public to ensure that the costs do not rise above a reasonable level so as to deny the poor access to court.

Counsel for the respondent on the other hand submitted that the Taxing Officer made no error of law in awarding to the respondent the sum of Ug.Shs.150,000,000/= as instruction fees. Counsel for the Respondent submitted that the taxing officer properly considered the sixth schedule to the Advocates (Remuneration and Taxation of Costs) Regulations in making his award. Counsel further submitted that under **sixth schedule item 1(b**) of the **Regulations** the figure arrived at is to be increased by 1/3 (one third) as between the advocate and client. That the taxing officer came to a block figure of Ug.Shs.150,000,000/= after taking into account the figure to be awarded by the mathematical formulae under the sixth schedule and the special fee canvassed in **Rule 6** of the **Regulations.**

Counsel for the respondent submitted that in the case of awarding a special fee under rule 6 (supra), the court does not have to apply the mathematical formulae. He referred me to the case of

Alexander Okello .v. M/s Kayondo and Co. Advocates Civil Appeal NO. 1 OF 1997

where **Justice Mulenga** held, that what is important is that a taxing officer exercises the correct thought process and once the thought process has been exercised the award will be upheld on appeal.

Counsel for the Respondent therefore submitted that the taxing officer had clearly exercised the thought process in coming up with a figure of Ug.Shs.150,000,000/=. He submitted that the said assessment was not a mathematical formulae but rather a discretionary award which should be upheld.

The principles to be applied by an appellate court while reviewing an award by a taxing master were laid out by the **Hon. Justice S.T Manyindo** (DCJ as he then was) in the case of

Nicholas Roussos .v. Gulam Hussein Habib Virani and Nasmudin Habib Virani in Civil Appeal No.6 of 1995.

In that case he held;

> *"…that court should interfere where there has been an error in principle but should not do so in question's solely of quantum as that is an area where the taxing officer is more experienced and therefore more apt to the job. The court will intervene only in exceptional cases…"*

In determining what could be regarded as exceptional cases for the intervention of court reference was made to the principles taken from the case of

Makula International Ltd .v. Cardinal Nsubuga & another [1982] HCB 11 namely;

> *"a) that cost should not be allowed to raise to such level as to confine access to courts to the wealthy.*
>
> *b) That a successful litigant ought to be fairly reimbursed for the cost he had to incur in the case.*
>
> *c) That the general level of remuneration of advocates must be such as to attract recruits to the profession and;*
>
> *d) That so far as practicable there should be consistency in the award made."*

Justice S.T Manyindo in the case of **Nicholas Roussos case (supra)** went further to find thus;

> *"…it is important that advocates should be well motivated but it is also in the public interest that cost be kept to a reasonable level so that justice is not put beyond the reach of poor litigants..."*

The above test to be applied is an objective one and this does not mean that rich litigants must be treated differently.

In applying the above, Reg. 57 provides that in calculating the advocate's fees reference has to be made to the sixth schedule of the Advocates (Remuneration **and** Taxation of Costs) Regulations. Item 1(e) of the sixth schedule provides that where the amounts exceeds Ug. Shs 20,000,000 (twenty million Uganda shillings) one (1%) percent on the excess of 20,000,000/= should be awarded. Further under the sixth schedule item 1(b) of the regulations, as between the advocate and client the fees to be allowed on taxation shall be the actual instruction fee figure allowed between party and party increased by 1/3 (one third).

Under Reg. 6 of the regulations a special fee for importance and complexity may also be taxed in addition to the remuneration provided in the regulations. It follows therefore that when determining whether or not such fee is manifestly excessive or low, regard must be had of all those considerations, should be part of the thought process and given its weight. The learned Registrar should have given reasons for increasing the basic fees which in this instance it is my finding that he did not. He just awarded a lump sum of Ug.Shs.150,000,000/=

The Sixth schedule item 1(b) of the Advocate (Remuneration and Taxation of Costs) Regulations SI 267-4 provides that

> *"As between advocate and client the instruction fee to be allowed on taxation shall be the actual instruction fee allowed as between party and party increased by one third."*

The suit in question was for the recovery of us dollars $ 1,652,690.40(one million six hundred fifty two thousand six hundred ninety Uganda shillings) equivalent to Ug.Shs.2,809,573,680/= (Two billion eight hundred and nine million five hundred seventy three thousand six hundred and eighty Uganda shillings) at the exchange rate of 1 us dollar to Uganda shillings 1,700/=. My finding is that the instruction fee according to the rules properly assessed ought to have been Ug. Shs 27,895,736/= and when increased by one third as stated above the total amount the Registrar should have awarded should have been Ug. Shs 37,194,314/=. Since the respondents also handled a counterclaim, which is

a suit in its self, on behalf of the applicants and the subject matter of the counter claim was worth Ug.Shs.1,000,000,000/= (One billion Uganda shillings an additional award in costs of Ug. Shs. 13,066,667/= (Thirteen million sixty six thousand six hundred and sixty seven shillings) should have been made and I hereby do award it.

The second ground of appeal is that the Registrar/Tax master erred in law when he purported to tax the bill of costs based on complexity of the matter yet there was no order by the judge specifying the fraction or percentage by which the higher fee was to be awarded pursuant to the proviso 1 under item 1 of the sixth schedule. A review of the sixth schedule I find does not have the said provision as cited by Counsel for the applicant. I believe he must have meant item 1 (ix) of the sixth schedule to the rules relating to complexity of the matter adjudicated on. That is what Court shall address.

Counsel for the applicant submitted that the Registrar in his ruling relied on Reg. 6 of the Advocates (Remuneration and Taxation of Costs) Regulations, which provides the tests to be applied in determining what amounts to complexity of the matter. Counsel for the applicants submits that this was not a complex matter because it was determined at mediation and a consent Judgment was registered to that effect. Counsel further submitted that the matter having been determined at mediation, the Registrar had no basis to refer to the documents such as the lease agreement among others, in his ruling as complex documents that amounted to complexity. Counsel submitted that the Registrar should have only referred to the consent judgment that was arrived at by the parties because it became a public document. He further submitted that that the documents that the Registrar referred to were mere routine documents that would be considered before instituting the case and that any advocate before commencing a matter has to peruse and read such documents.

Counsel referred me to the case of

Habre International Trading Co. Ltd .v. Francis Rutagarama Bantariza C.A No.7 of 2003
where **Justice Kanyeihamba JSC** in reference to the Taxing officer's reason to award a higher fee on the ground that the leading judgment of the court was detailed and that both sides had submitted detailed written submissions held that;

"…With respect this is not what makes a case complex or involve complicated points of law. Nor do I believe that the issue of fraud and the law applicable or its interpretation per se, necessarily make a case complex as ruled by the taxing officer. It is certainly a wrong principle applied by the learned taxing officer to say that counsel for the applicant had failed to suggest the amount of award other than the Shs.48,000,000/= which was reasonable. The same point is made by counsel for the respondent when reluctantly supporting the award of instructions fee by the taxing officer. In my view, had the taxing officer taken into account relevant factors and been guided by the correct principles, he would have awarded a much smaller sum as instructions fee."

Counsel for the applicant therefore submitted that the Taxing officer should have applied item 1(ix) of the sixth schedule to the Advocates (Remuneration and Taxation of Costs) Regulations which requires the advocate for either party to apply to the presiding Judge as the case may be, for a certificate allowing him or her to claim a higher fee. That in absence of such a certificate, the decision by the Registrar to award a special fee is erroneous and injudicious.

Counsel for the respondent however submitted that the taxing officer was right when he held that since the applicant was seeking to recover against his client, there was no need for a certificate of a higher fee. Counsel further submitted that item 1(ix) of the sixth schedule to the Advocates (Remuneration and Taxation of Costs) Regulations, envisages a situation where one party would seek to claim from the other party a higher fee than that prescribed in the schedule.

Counsel observed that the matter ended in mediation and that it was agreed that each party would bear its own costs of the suit. That neither party could therefore apply for a certificate allowing him to claim a higher fee from the other party. It was counsel for the respondent's submission that if either advocate considered that the business involved in handling the case entailed a higher fee than that prescribed in the Advocate (Remuneration and Taxation of Costs) Regulations, then such an advocate would invoke Rule 6 of Regulations as was done by the Registrar.

Regulation 6 of the Advocate (Remuneration and Taxation of Costs) Regulations provides that;

"(1) *in business of exceptional importance or of un usual complexity an advocate shall be entitled to receive and shall be allowed d as against his or her client a special fee in addition to remuneration provided in these regulations*

(2) In assessing the special fee regard may be had to

(a) The nature and extent of pecuniary or other interest involved

(b) The labour and responsibility entailed and

(c) The number, complexity and importance of the documents prepared or examined"

The issue of complexity lies with in the discretion of the taxing master having regard to the tests in Reg. 6 (2). The learned Registrar clearly applied his mind to the said Regulation (though he erroneously cited it as Rule 4). He reviewed the documents that were the subject matter of the dispute. In this regard therefore his though process was clearly correct. I am therefore satisfied that he exercised his discretion in reaching the conclusion that this matter was complex. His error was lumping everything together into one fee thus clouding how he came to the figure he awarded.

Applying therefore the above principle I would award a Special fee for complexity in addition to what has already been awarded in the sum of Ug.Shs.10,000,000/= (Ten million Uganda shillings)

Ground three is that the Registrar or tax master erred in law when he purported to apply his knowledge of the mediation proceedings involving the parties to the taxation proceedings which did not relate to the mediation contrary to rule 22 of the commercial court division(mediation pilot project) rules 2003.

Counsel for the applicant submitted that the taxing master's inference of having been a Mediation Registrar in the mediation proceedings in the case of **Jobbing Field Properties Ltd .v. Bugisu cooperative union H.C.C.S No.220 of 2007** influenced his decision in awarding the respondent the

exorbitant sum of Ug.Shs.150,000,000/= without necessarily referring to the record before him and therefore arriving at an erroneous and injudicious award.

Counsel referred me to Rule 22(1) and (2) of the commercial court division (mediation pilot project) rules which provides that;

> "(1). *every person including associated persons shall keep confidential and not use for any purpose-*
>
> a) *The fact that the mediation is to take place or has taken place, other than to inform a court dealing with any litigation relating to the dispute of the fact; and*
>
> b) *All information whether given orally, in writing or otherwise arising out of, or in connection with the mediation, including the fact of any settlement and its terms.*
>
> (2) *All information whether oral or in the form of documents, tapes, computers discs, or other media arising out of, or in connection with the mediation shall be privileged and not admissible as evidence or to be disclosed in any current or subsequent litigation or other proceedings."*

Counsel therefore submitted that by the Registrar applying his knowledge of the mediation to the taxation proceedings, the same was done in breach of the commercial court division (mediation pilot project) rules and amounted to judicial bias.

Counsel for the respondent in response submitted that Rule 22 of the Commercial Court Division (Mediation Pilot Project) Rules relates to confidentiality of proceedings arising out of mediation and a bar to admissibility of mediation proceedings in any current or subsequent litigation. He submitted that the rule 22(4) of the Commercial Court Division (Mediation Pilot Project) Rules provide that Rule 21 and 22 does not apply in so far as disclosure is necessary to implement or enforce any settlement agreement arising out of mediation. Counsel contends that Taxation of the advocate/ client bill of costs in this case is an implementation of one term of the settlement agreement arising out of the mediation, to wit, that each party shall bear its own costs. Counsel further submitted that the learned taxing officer who was also the mediator was not barred by Rule 22 or any other rule in recalling his experience during mediation to determine the complexity of the matter. That had the

matter entailed a party to party taxation of the bill of costs, the mediator would be required to grant a certificate of complexity.

It is my finding that His Worship Emmy Mugabo did not give sufficient reasons for the award of the said amount. The Registrar should not in my view have taken into account his understanding of the mediation. Rule 22 (1)and (2) of the Commercial Court Division (Mediation Pilot Project) Rules 2003 as stated above clearly provides that any information in connection to the mediation shall be privileged and inadmissible as evidence and shall not be disclosed in current and subsequent litigation or any other proceedings. Rule 22(4) of the Commercial Court Division (Mediation Pilot Project) Rules 2003 which Mr. Nangwala refers me to is in respect to the enforcement of the agreement arising out of mediation and not the advocate-client bill of costs as argued by him which is a further proceeding within the meaning of those rules.

I find therefore that the taxing master applied his knowledge of the mediation proceedings contrary to Rule 22 (1) and (2) of the Commercial Court Division (Mediation Pilot Project) Rules 2003. Actually in a court annexed mediation where a Registrar may act as a mediator it would be advisable that he/she thereafter should not act as a taxing master.

All in all, I find that the amount allowed as a fee for instructions was excessive. I would therefore disallow the instructions fee of Shs.150, 000,000/= and order that it be reduced to Shs 60,260,980/= as broken down earlier in my Judgment. I also award interest on the said sum of 6% per annum from the date of the making of the award till payment in full.

……..

Geoffrey Kiryabwire

JUDGE

Date: 23/09/09