THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-00-CC-CA-14 -2012

(Arising from Civil Suit No. 102-2011 and Misc. Application No. 156 of 2011)

NGIRABAKUNZI DAN::APPELLANT

VERSUS

DELICACY RESTAURANT LIMTED::::::::::::::::::::::RESPONDENT

BEFORE HON. LADY JUSTICE HELLEN OBURA

JUDGMENT

This is an appeal against the decision of the taxing master awarding the respondent Ug. Shs. 2,657,500/= and Ug. Shs. 6,298,500/= as costs in Misc. Application No. 156 of 2011 and Civil Suit No. 102 of 2011 respectively.

The background to this appeal is that the appellant/plaintiff filed Civil Suit No. 102 of 2011 against the respondent/defendant seeking a permanent injunction against the defendant for trademark infringement and passing off of the defendant's goods as those of the plaintiff. The appellant subsequently filed Misc. Application No. 156 of 2011 seeking a temporary injunction to restrain the respondent from any acts of infringement until disposal of the main suit.

When the application for a temporary injunction was heard and dismissed, the appellant withdrew Civil Suit No. 102 of 2011. The respondent/defendant then filed bills of costs for the main suit as well as the miscellaneous application. The bills were taxed and allowed at Shs. 6,298,500/= and Shs. 2,657,500/= for the main suit and application respectively. The appellant was aggrieved by these awards and brought this appeal particularly to challenge the instruction fees awarded.

When this appeal came up for hearing on 02/7/2012, the appellant was represented by Mr. Allan Waniala while the respondent was represented by Mr. Maxim Mutabingwa. Both counsel agreed to file written submissions and the matter was set down for a ruling.

In his written submission, counsel for the appellant argued the single ground of this appeal which he stated as "E*xcessive award for costs of the suit and application"*.

However, in the affidavit in support of the application one of the grounds of the appeal was that:

> *"The Deputy registrar erred in fact and law in awarding Ug. Shs. 2,657,500 as costs in Misc. Application No. 156 of 2011 and Ug. Shs. 6,298,500 as costs in Civil Suit No. 102 of 2011 in favour of the respondent which amounts are manifestly excessive, exorbitant and without legal and or factual justification"*.

Counsel for the appellant confined his arguments to the instruction fees of Ug. Shs. 5,000,000/= and Ug. Shs 2,000,000/= which was allowed for the main suit and application respectively. He contended that taxation was done in the absence of the court file to guide the taxing master.

It was submitted for the appellant that the taxing master never gave reasons in her ruling on how she arrived at awarding Ug. Shs. 5,000,000/= on a suit that was never heard offending section 2(i) of the Civil Procedure Act and Order 21 rule 4 of the Civil Procedure Rules which demand that reasons be given for a judgment or ruling.

Counsel for the appellant referred to the case of **Ebrahim A. Kassim & 2 Others v Habre International Ltd Reference No. 16 of 1999** where it was held inter alia that a taxing master is expected to tax each bill on its merits.

The taxing master was also criticised for not exercising her discretion judicially when she had no opportunity to look at the court file to determine issues of duration of hearing of the application, complexity and issues of law raised and argued. It was submitted that the ruling was bound to be erroneous because the taxing master had no reference to turn to.

It was also submitted for the appellant that the opening of a duplicate file was suspect as the respondent did not show how the application to open a duplicate file was made.

Counsel for the appellant further submitted that in taxation, costs must not be allowed to rise to such a level to confine access to courts to the wealthy as was pointed out in **Ebrahim A. Kassim & 2 others v Habre International Ltd** (supra) which reiterated the decision of **Premchand Raichand Ltd & Another v Quarry Services of East Africa & Others No. 3 [1972] EA 162.**

Lastly, it was argued for the appellant that in the absence of a certificate entitling an advocate to a higher fee due to complexity of a case in accordance with the 6th Schedule Rule 1(a) (ix) of the Advocates (Remuneration and Taxation of Costs) Rules there was no reason as to why the instruction fees should have been awarded.

Counsel singled out rule 1(a) (vii) (B) of the Advocates (Remuneration and Taxation of Costs) Rules which allows award of a minimum fee of Shs. 150,000/= for an opposed application. According to the appellant's counsel the taxing master should have awarded a much less fee considering that the appellant saved court's time in withdrawing Civil Suit No. 102 of 2011.

In response to counsel for the appellant's submissions, counsel for the respondent disagreed that the award of instruction fees was excessive. He argued that taxation was conducted with the consent of both counsels who agreed that the taxing master should use her discretion. Both counsels agreed to abide by the ruling. According to him no submissions were made for or against the bills upon which the taxing master would have given reasons for her decision.

Counsel for the respondent submitted that the principle of law governing taxation is that for court to interfere with the award of a taxing master, the award must be manifestly excessive as to indicate an error in principle entitling court to interfere.

He argued that the awards of both items of instruction fees in the instant case were not excessive and as such there was no error of law in the principle that would entitle this honourable court to interfere.

The respondent's counsel referred to Item 1(a) (v) and Item 1(a) (vii) of the Advocates (Remuneration and Taxation of Costs) Rules and submitted that the award of Ug. Shs 5,000,000/= was not excessive since the taxing master had discretion to award any sum not less than Ug. Shs 75,000/=. Similarly it was submitted that the award of Ug Shs 2,000,000/- was not excessive because the taxing master had a discretion to award any sum not less than Ug. Shs 150,000/=. It was also argued for the respondent that the main suit and application required a lot of preparation and research hence the award was justified.

Counsel for the respondent argued in the alternative that the respondent should not be ordered to meet costs of the appeal if this court is inclined to allow the appeal. He reasoned that the respondent made no error since it was the taxing master that exercised her discretion. It was argued further that the appellant failed to present its submissions to the taxing master and then brought the appeal and by court ordering costs against the respondent, the appellant would benefit from his wrong. Counsel cited the case of **Ngoma Ngime vs Electoral Commission & Hon Winnie Byanyima [2001-2005] HCB 81** where it was held that section 27 of the Civil Procedure Act gives the trial court discretion to award or not award costs and court for some good reason connected to the case can refuse to grant any party costs.

I have carefully considered the submissions of both counsel and assessed the relevant provisions of the laws referred to. The appellant's counsel challenged the decision of the taxing master as having offended section 2(i) of the Civil Procedure Act and Order 21 rule 4 of the Civil Procedure Rules which demand that reasons be given for a judgment.

With due respect to counsel for the appellant, I do not think these provisions are relevant to the matter before this court.

Section 2(i) of Civil Procedure Act defines judgment as:

> *"Judgment" means the statement given by the judge of the grounds of a decree or order;*

Order 21 rule 4 of the Civil Procedure Rules provides that:

> *"Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision on the case and the reasons for the decision."*

I hold the view that a taxation decision is not a judgment within the meaning of the Civil Procedure Act because a decree or an order does not arise from it rather a certificate of taxation is issued.

Turning to the Advocates (Remuneration and Taxation of Costs) Rules SI 267- 4.
Item 1(a) (v) provides that the instruction fees to sue or defend or to present or oppose an appeal in any case not provided for in the earlier provisions of the schedule shall be not less than 75,000 shillings. Item 1(a) (vii) (B) that relates to application provides that where the application is opposed, the instruction fee shall not be less than 150,000 shillings.

From my understanding of the above provisions, the taxing master is empowered to tax instruction fees to any reasonable amount not less than Shs. 75,000/= for the main suit and amount not less than Shs. 150,000/= for an application.

In the instant case, the respondent had sought for instruction fees of Shs. 6,000,000/= and Shs 3,000,000/= respectively. It was taxed and allowed at Shs. 5,000,000/= and Shs. 2,000,000/= for the main suit and application respectively. It is these amounts that are alleged to be excessive.

An instruction fee is said to be manifestly excessive if it is out of proportion with the value and importance of the suit and the work involved. In the case of **Taj Deen v Dobrosklonsky and**

Bhalla & Thakore [1957] 1 EA 379 the action concerned a suit for Shs. 5,100/= being fees claimed by a structural engineer for services rendered. The trial judge gave judgment for the amount claimed with costs. On taxation, costs amounting to about Shs. 24,000/= were allowed. The appellant claimed on appeal inter alia that the costs allowed were excessive. The appellate court found that the instructions fees allowed appeared prima facie to have been too large. Briggs J.A observed:

> *"If the costs of civil litigation are allowed to rise to a point where the claim itself becomes relatively unimportant, the law is not being properly administered, and public confidence in the courts will be destroyed."*

From the record of proceedings available to this court, I find that when the matter was called on for taxation, counsel who appeared for the appellant indicated that he was holding brief for Mr. Oketcha Michael who was travelling from Arua where he had a case. He stated that he was not ready but since it was a bill court should exercise its discretion to tax. Indeed the taxing master exercised her discretion as she had been called upon to do so and taxed the bills. Counsel for the appellant neither raised any objections about the duplicate file being used nor opposed the figures proposed when he had the opportunity to do so.

A duplicate file was opened upon which the taxing master proceeded to have the matter taxed. I have looked at the duplicate file and I find that it contained all the vital documents required for taxation. It is my firm view that it offered the reference that was needed. I do not agree that opening of the duplicate file was suspect because the respondent did not show how the application to open it was made. As far as I know there is no standard procedure for applying for opening of a duplicate file. The practise is that an application to open such a file is done by ordinary letter with duplicate copies of the file forwarded to the registrar.

To that end, I have seen on court record a letter dated 21st May 2012 from the firm of M/s Mutabingwa & Co. Advocates to the registrar of this court requesting for a duplicate file to be opened since the original file could not be found. The suspicion raised by the appellant is therefore unfounded.

The principles governing taxation of costs was laid down in the case of **Premchand Raichand Ltd & Another v Quarry Services of East Africa & Others No. 3** (supra). These are;

(i) *(a) That Costs be not allowed to rise to such a level as to confine access to the courts to the wealthy;*

(b) That a successful litigant ought to be fairly reimbursed for the costs he has had to incur;

(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.

(ii) *The court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party.*

(iii) *In considering the bills taxed in comparable cases, an allowance may be made for the fall in value of money.*

(iv) *Apart from a small allowance to the appellant for the responsibility of advising the undertaking of the appeal there is no difference between the fee to be allowed to an appellant as distinguished from a respondent.*

Similarly, in the case of **Bank of Uganda vs Banco Arabe Espaniol Supreme Court Civil Application No. 23 of 1999** Mulenga JSC stated some principles on which a Judge should interfere with a taxing officer's assessment of a bill of costs as follows:

> *The first is that save in exceptional cases, a Judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs are matters with which the taxing officer is particularly fitted to deal, and in which he has more experience than the judge. Consequently a judge will not alter a fee allowed by the taxing officer, merely because in his opinion he should have allowed a higher or lower amount.*
>
> *Secondly, an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the taxing officer*

exercised, or applied a wrong principle. In this regard, application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or manifestly low.

Thirdly, even if it is shown that the taxing officer erred on principle the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties.

It is clear from the above principles that whereas taxation of costs must not be allowed to rise to such a level that would confine access to courts to the wealthy, a successful litigant ought to be fairly reimbursed for the costs he has had to incur. In the instant case, although the main suit was withdrawn before it was heard, the respondent had to incur costs of hiring an advocate to put in its defence and subsequently represent it. It is not in dispute that this was done and there are even correspondences between both counsels on withdrawal of the suit. It would therefore be unjust not to reimburse those costs simply because the case was withdrawn before it was heard.

Based on the principles stated above, this court will not interfere with the assessment of what the taxing officer considered reasonable merely because it is deemed excessive. I cannot fault the taxing master for exercising her discretion which the appellant has not shown was done contrary to the principles on taxation. I therefore cannot interfere with her decision unless it was proved to my satisfaction that the award of the taxing officer is so high as to amount to an injustice to the appellant. Unfortunately there is no such evidence before this court.

I am therefore of the considered opinion that the taxing master exercised her discretion judicially without contravening any of the above principles and the amounts she allowed were not manifestly excessive.

In the result, this appeal is dismissed as it lacks merit. For reason that the appellant is still faced with two bills of costs to pay to the respondent and as such additional costs against him would be too burdensome, I order that each party bears his costs of this appeal.

I so order.

Dated this 13th day of December 2012

Hellen Obura

JUDGE

Judgment delivered in chambers at 3.00 pm in the presence of Mr. Lutalo Kizito Deo for the appellant and Mr. Maxim Mutabingwa for the respondent. Both parties were absent.

JUDGE
13/12/12