THE REPUBLIC OF UGANDA

THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT – 00 – CC – CA - 25 - 2010

THE REGISTERERD TRUSTEES OF THE KHOJA SHIA ITHNA SHARI ..... APPELLANTS

VERSUS

SULE PHARMACY LIMITED ..... RESPONDENT

BEFORE: HON. JUSTICE GEOFFREY KIRYABWIRE

R U L I N G

This is an appeal brought by way of Chamber summons under S. 62 of the Advocates Act (Cap 267) and R 3 of the Taxation of costs (Appeals and References Rules SI 258-6), against the decision of the Registrar in taxation. The orders sought in this appeal are that the taxation award of the Learned Registrar be set aside and be substituted with an order dismissing the bill of costs for contravening the taxation laws, and for costs of the appeal. In the alternative, the appellant prays for an order that the taxation award of the Learned registrar be set aside and substituted with an order that the Taxation Proceedings be heard de novo before another Registrar.

The chamber summons is supported by the affidavit of Richard Mwebembezi.

The main grounds of this appeal briefly are as follows;

1. That the learned Registrar erred in law and fact when she embarked on taxing a bill of costs that she had earlier dismissed with costs.

2. That the learned Registrar erred in law and fact when she failed to dispose of the preliminary objections raised by the appellants before ordering taxation to proceed exparte.
3. That the learned Registrar erred in law and fact when she taxed a bill of costs which was not fixed for hearing and neither of the parties served.

4. That the learned Registrar erred in law and fact when she taxed a bill of costs that was incurably defective for contravening the taxation laws.

5. That many of the items on the bill of costs were exaggerated and/not justified.

The brief background to this appeal is that the respondent filed a suit against the appellants, in which the respondents were successful and costs were awarded to the respondents. On 24th September 2010 the Registrar upon an exparte hearing taxed and allowed the respondent's Advocate Client bill of costs at a sum of Ushs 8,259,838/=.

In the affidavit in support of the chamber summons sworn by Mr. Mwebembezi, of Bamwe & Co. Advocates, who represented the appellants in the suit, it was deponed as follows; that when the respondent presented the bill of costs at first instance, the bill was dismissed on a preliminary point of law for want of form. Mr. Mwebembezi stated that the respondent presented another bill of costs, and that at the hearing of the subsequent bill of costs, Mr. Babigumira for the appellants raised a preliminary objection that the Registrar had no powers to hear the subsequent bill of costs, having dismissed the previous bill of costs, a decision which in the appellant's view was final and rendered the Registrar functus officio. Mr. Mwebembezi further deponed that, Mr. Serwadda who represented the respondent was unable to reply to the objection and an

adjournment was sought and granted. When the matter came up for a reply by the respondent, Mr. Babigumira was unable to attend court and the Registrar ordered the respondent to proceed exparte, without ruling on the preliminary objection.

In reply, Ms Mariam Nalugya an advocate with Makeera & Co. Advocates deponed an affidavit and stated that the bill of costs was taxed to scale and in accordance to the Advocates (Remuneration and Taxation of Costs) Rules.

In this appeal, the applicant was represented by Mr. Babigumira while the respondent was represented by Mr. Serwadda.

The position of the law relating to appeals of this nature is well settled. An appellate court may interfere with the decision of a taxing officer in well defined exceptional circumstances. In the case of ARTHUR V. NYERI ELECTRICIAN UNDERTAKING [1961] EA 492, the court held that, it is only in exceptional circumstances that the court will interfere with the costs awarded by the taxing master and in particular, it will only interfere with where the taxing officer has exercised his or her discretion unjudiciously.

Furthermore, in the case of AG V. UGANDA BLANKET MANUFACTURERS (1973) LTD (SCCA No. 3OF 1993). The Supreme Court held that the there are exceptional circumstances when the judge may interfere with a decision of the taxing master are the following.

(a) When the award is manifestly excessive or low.
(b) Where there has been a misdirection; and
(c) Where the award has been arrived at on wrong principles.

I find therefore that for this appeal to succeed, the appellant must prove these exceptional grounds.

I have considered the record on file and submissions of both counsels on this appeal. The submissions by Counsel for the respondent I need point out were really brief and did not necessarily answer all the matters raised by the appellants. That notwithstanding I now find as hereunder.

Ground one; *That the learned Registrar erred in law and fact when she embarked on taxing a bill of costs that she had earlier dismissed.*

The appellant submitted that the dismissal of the first bill of costs by the Registrar was final and as thus, the registrar had no powers to tax the subsequent bill of costs presented by the appellant. Counsel for the appellant relied on the case of **BUCKBOD INVESTMENTS LTD V NANA OTCHERE & ANOR** [1985] 1 ALL ER 283, in which the court made a distinction between the effect of a withdrawal and a dismissal of an appeal. Counsel for the appellant submitted that the remedy for the respondent after the dismissal of the first bill of costs was to appeal against the Registrar's decision.

Counsel for the respondent on the other hand submitted that a dismissal of a bill on a technical want of form in itself can not be a bar to fling a fresh one, since it is not a dismissal on the merits. He further submitted that this does not render the matter res judicata and the said action is only analogous to dismissing a suit for a technical want of form.

The doctrine of res judicata has been explained by the court in the case of DANIEL SEMPA MBABALI V. ADMINSTRATOR GENERAL [1992-1993] HCB 243, as follows;

> *"a matter is said to be res judicata when the matter in issue was directly and substantially in issue in a former suit, the subsequent suit should be between the same parties or between parties under whom they or any of them claim; the court which tried the first suit must have been competent to try the subsequent suit* ***and fourthly,***

the issue in the subsequent suit must have been finally decided by the court in the first suit." (Emphasis mine)

In the present case, the first bill of costs was dismissed by the Registrar at the stage of a preliminary objection for want of form, but the taxation of the bill of costs was not concluded by the Registrar. In the premises, it can not be said that the Registrar had no power to tax the subsequent bill of costs, since the dismissal of the first bill of costs was not based on the merits and could not be said to be a final decision of the Registrar on taxation, for which the only remedy was an appeal. For this reason, ground one of this appeal fails.

Ground two; *That the learned Registrar erred in law and fact when she failed to dispose of the preliminary objections raised by the appellants before ordering taxation to proceed.*

Counsel for the appellant submitted that it is settled law that where a preliminary objection is raised, the court should dispose of it before proceeding to hear the merits of the case. Counsel relied on the case of **NATIONAL UNION OF CLERIAL, COMMERCIAL AND TECHNICAL EMPLOYEES V NATIONAL INSURANCE CORPORATION** (SCCA NO. 17 OF 1993)(unreported).

On the other hand, counsel for the respondent submitted that the objection raised by Mr. Babigumira at the taxation hearing was a technical objection which in the practice of courts in other jurisdictions is frown upon as a technicality which erodes the delivery of substantive justice, and therefore, the learned Registrar ought not to have upheld the objection in the first place.

The law as stated in the Supreme Court decision of **NATIONAL UNION OF CLERIAL, COMMERCIAL AND TECHNICAL EMPLOYEES V NATIONAL INSURANCE CORPORATION** (SCCA NO. 7 OF 1993) is very clear. Where a preliminary objection has not been ruled on, the

court can not proceed to hear the merits of the case before ruling on the preliminary objection. The trial judge should have ruled on the preliminary objection but may defer the reasons to be given with the merits of the application.

In this case, it is clear that the Learned Registrar proceeded to hear the taxation exparte without making a ruling on the preliminary objection that had been raised by the appellants and submitted upon by both parties. This in my view was an error or misdirection by the Learned Registrar and as thus, ground two of this appeal succeeds.

Ground three; *That the learned Registrar erred in law and fact when she taxed a bill of costs which was not fixed for hearing and both parties were not served.*

The appellant argued that the Registrar proceeded to hear the taxation exparte without service of taxation hearing notice on both parties.

I note that the date for the taxation hearing was fixed in the presence of the parties, agreed to by both parties and therefore, it would be no excuse for the parties to allege that they were not served. In my view, the appellants had only themselves to blame, having agreed to the date of the taxation hearing and not appeared before the Registrar for the same. In the premises, this ground of appeal fails.

Ground four of this appeal, reads as follows;

> *"That the learned Registrar erred in law and fact when she taxed a bill of costs that was incurably defective for contravening the taxation laws."*

In my view, this ground generally covers all the other grounds raised in this appeal and therefore, the determination of the other grounds will in effect dispose of ground four of this appeal; I shall therefore not answer it specifically.

Ground Five; *That many of the items in the bill of costs were exaggerated and/not justified.*

In their submissions, the appellants did not show which of the items in the bill of costs they considered exaggerated. That not withstanding, counsel for the appellants argued that the bill was a forgery. Counsel submitted that in the affidavit in reply sworn by Ms Nalugya, it was deponed that the case was handled by Mr. Serwadda while he was still attached to Kalenge Bwanika Kimuli & Co. Advocates and subsequently, when he moved to M/S Makeera & Co. Advocates. It was therefore the appellant's submission that Mr. Serwadda having handled the case while he was in firm of Kalenge Bwanika Kimuli & Co. Advocates and then subsequently when he left that firm and joined M/s Makeera & Co. Advocates does not entitle him to all the claims presented in the bill of costs by M/S Makeera & Co. Advocates who did not do all the work. Counsel for the appellant concluded that the bill drawn by M/S Makeera & Co Advocates which never conducted the case was a falsehood. In this regard he relied on the case of **HAJI HARUNA MULAGWA V SHARIF OSMAN** SCCA NO. 38 OF 1995[reported in [2004] KALR 303].

The finding of the court in the case of **HAJI HARUNA MULAGWA V SHARIF OSMA**N (above) is to the effect that the items which would have been claimed by the previous advocate must be listed separately and annexed to the bill of the current advocate. This is not a question of form but it is necessary so as to avoid advocates claiming for work they did not do. The court in this case found that the taxing master erred in refusing to uphold the objection raised against the bill of costs presented as if all the work had been done by one advocate.

I agree with this position and probably that is what should have happened in this taxation. To avoid confusion, the items in the bill of costs should have been listed separately for the different law firms on record. This ground of the appeal therefore succeeds.

All in all premises, the appeal succeeds with costs to the appellant. Owing to the errors in respect of the taxation of the bill of costs, the taxation award made by the registrar is accordingly set aside and the taxation is ordered be heard de novo in line with the findings made above.

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Justice Geoffrey Kiryabwire

JUDGE

Date: 23/04/2012

23/04/2012

9:20 a.m.

Ruling read in open court and signed in the presence of;

- Kanyemibwa h/b for Bagumira for Applicants

In Court

- None of the parties
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 23/04/2012