

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)**

MISCELLANEOUS APPEAL NO 359 OF 2013

ARISING OUT OF MISC CAUSE NO 8 OF 2013

LION ASSURANCE COMPANY LTD}..... APPELLANT

VS

KASEKENDE, KYEYUNE AND LUTAAYA ADVOCATES}.....RESPONDENT

HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Appellant lodged an appeal under section 62 (1) of the Advocates Act and rules 3, 4 and 9 of the Advocates (Taxation of Costs) (Appeals and References) Rules against the taxation ruling of the Taxing Master in Miscellaneous Cause number 8 of 2013 is set aside, the bill of taxation is taxed according to the provisions of law and as the justice of the case demands and for costs of the appeal.

The grounds of the appeal are firstly that the Appellant is dissatisfied with the award of Uganda shillings 12,083,000/= made in favour of the Respondents on taxation by the Taxing Master. Secondly the Taxing Master did not exercise her discretion judicially. Thirdly the bill was not taxed according to the law because the Taxing Master allowed some items which were neither factual nor believable. Fourthly it is not just and equitable to pay costs that have not been incurred or which have been incurred unnecessary or which have not been judicially considered. Fifthly the Respondent's bill should be set aside and taxed according to law and judicially considered.

The appeal is supported by the affidavit of Newton Jazire the Managing Director of the Appellant Company. The facts disposed to in the application are that the applicant company retained the services of the Respondent law firm to recover US\$34,742 from DAMCO Logistics. Sometime later after mediation, the applicant discharged the Respondents from their services in the matter and the applicant has since retained the services of Yiga Advocates. The suit was never heard and it had been scheduled for a scheduling conference on the 22nd of May 2013. The deponent read and understood the ruling of the taxing master made in MA 8 of 2013. The Appellant is dissatisfied with the award of Uganda shillings 12,083,000/= made by the Taxing Master. The Appellant asserts that the Taxing Master did not exercise her discretion judicially in reaching a decision in the taxation of the Bill of Costs. Secondly the bill was not taxed according

to law because the Taxing Master allowed some items which were neither factual nor believable. The Appellants managing director maintains that it is not just and equitable to pay costs that have not been incurred or which were incurred unnecessary or which have not been judicially considered. If the registrar's ruling is not set aside, it would amount to an injustice.

The affidavit in reply is disposed to by George Kasekende, an advocate of the courts of judicature representing the Respondents. He reiterates his reply in miscellaneous Appeal No. 7 of 2013 where he deposed to the affidavit in opposition. He deposes that the Respondents had successfully carried out the instructions which involved a lot of research and were in the final stages of recovering all the monies owed when instructions were withdrawn by the Appellant as a way of denying the Respondents remuneration for the services offered to the applicant.

He asserts that the Bill of Costs of the Respondents was taxed down from Uganda shillings 54,792,120/= to **Uganda shillings 12,083,000/=** which represents a fair and equitable remuneration for the amount of work the Respondents had invested in the applicant's complex instructions. The Appellant does not dispute the fact that monies are owed to the Respondents for services rendered to it in regard to the above matter and it was upon the applicant's insistence that the Bill of Costs was filed to ascertain the fees due to the Respondents. The Appellant has not paid the Respondent the taxed costs totalling Uganda shillings **12,083,000/=** and has not shown any willingness to pay the Respondent any monies for the services rendered.

He asserts that the Taxing Master acted legally and in accordance with the Advocates (Remuneration and Taxation of Costs) Regulations and relevant authorities. Finally the Respondents Counsel asserts that the appeal is a gross abuse of court process and does not have any legal backing and should be dismissed with costs.

In rejoinder the Managing Director of the applicant avers that the Respondent's efforts invested in the suit are clearly outlined in the Bill of Costs and therefore the assertion that they put time and invested locally and internationally is intended to mislead the court. He reiterated that the Respondents did not perform any work beyond mediation and the filing of the plaint and scheduling notes filed by the Respondent and which have since been amended by the new lawyers. It was misleading to assert that the Respondents were in final stages of recovering all monies due to the applicant/Appellant. The Respondent's services were discharged by the appellant for failure to recover the money despite receiving instructions sometime in 2011.

Both Counsels agreed to file written submissions for and against the appeal. The Appellants were represented by Yiga Advocates while the Respondents are represented by Kasekende, Kyeyune and Lutaaya Advocates.

Save for the figures involved, the written submissions of counsels are substantially the same as in miscellaneous civil appeal number 358 of 2013. In that appeal the court considered the ruling of the taxing master in miscellaneous cause number 7 of 2013. Particularly what is material is the

fact that the ruling in miscellaneous cause number 7 of 2013 comprised of one line. The holding of the court on the matter in civil appeal number 358 of 2013 is as follows:

"The ruling of the Taxing Master is dated 2nd of May 2013. The ruling can be found in Miscellaneous Application Number 8 of 2013 and particularly the last paragraph. The entire ruling of the Taxing Master is contained in one sentence and one line in the following words:

"Adopting the same reasoning on all items, I allow the bill at 21,255,468/=."

Consequently the current appeal being an appeal from the ruling of the taxing master in Miscellaneous Application Number 8 of 2013 has already and substantially being handled in Civil Appeal number 358 of 2013 was the decision was delivered on 6 September 2013. Not only at the pleadings in the current appeal exactly the same, the arguments are also the same. It would be repetition for the court to rule on the same matter again. In fact counsels adopted exactly the same arguments they made in Civil Appeal number 358 of 2013 to civil appeal number 359 of 2012. Since the arguments are the same, in my opinion, the two appeals ought to have been considered together to save the time of court and the parties. The only difference is in the subject matter of the suit.

In the current appeal, it is averred for the appellants that the respondents wrote to DAMCO logistics to recover an amount of US\$178,920 pursuant to and under the principles of subrogation. Upon failure of DAMCO logistics (U) Ltd on the demand, the respondent advocates proceeded to file HCCS Number four of 2012 against DAMCO logistics (U) Ltd. The mediation efforts did not yield any settlement and the respondents proceeded to file the plaintiffs scheduling notes but not hearing was scheduled at the time and no scheduling was done. Sometime later after mediation and before any hearing before the court, the appellant being satisfied with the way the respondents were handling the suit against DAMCO logistics (U) Ltd, discharged the respondents of the obligations and retained the services of Yiga Advocates. Lastly the respondent filed an advocate/client bill of costs in Miscellaneous Application Number 8 of 2013 in which the sort the sum of Uganda shillings 54,792,124/=.

The submission of the appellant on the ground in the motion that the taxing master did not exercise had discretion judicially in reaching her decision is the same as in Civil Appeal Number 358 of 2013.

At the hearing by the Taxing Master, the Appellants Counsel argued that items number 1- 3 and items number 5 – 19 are work covered by the instruction fees according to the case of **Patrick Makumbi versus Sole Electric (U) Ltd, Civil Appeal Number 11 of 1994** where the Supreme Court held that instruction fees should cover the advocates work as well as other work necessary for presenting the case for trial. He further argued in the alternative that they should be taxed in accordance with the provisions of the law. The registrar ruled that is not true that once Counsel

has the instruction fees, he cannot claim any other monies. The taxation rules provide for activity such as drafting court papers, attendances except that it caters separately for instruction fees.

Counsel argued on the first ground that the taxing officer did not exercise her discretion judicially in reaching a decision. The guiding principle of law in relation to instruction fees in the taxation of costs has been clearly laid out in the case of **Patrick Makumbi versus Sole Electric (U) Ltd Supreme Court Civil Appeal number 11 of 1994** where it was held that instruction fees should cover the advocates work, including taking instructions as well as other necessary work for presenting the case for trial. This decision was followed in the case of **Ishanga Ndyanabo Longino vs. Bahatahwa Nyine civil appeal reference Number 16 of 2003** in the Court of Appeal; in the case of **Kabale Kwagala vs. Beatrice Ziraba Muzale Magola and another Miscellaneous Application Number 34 of 2010**. In the case of **Electoral Commission and honourable Kirunda Kivejinja vs. Hon Abdu Katuntu miscellaneous appeals numbers 001 of 2009 and 002 of 2010**, the court taxed off items numbers 2 – 165 because the court awarded instruction fees of 60,000,000/= which covered those items.

Counsel contends that instruction fees should account for work necessary for presenting the case. Consequently the registrar's decision disregarded the law and should be set aside. As far as the details are concerned, the Appellants Counsel set forth the following details:

The Registrar erred in law to award Uganda shillings 5,000,000/= in relation to item 15 for legal research conducted in addition to the instruction fees awarded. Secondly the registrar erred in law to award Uganda shillings 1,000,000/= in relation to item 18 for preparing scheduling notes in addition to instruction fees awarded. The registrar erred in law to collectively allow item 15 – 29 in her ruling and did not invoke her discretion judicially. The items included in the collective allowance was not taxed even though items 16, 17, 19, 20, 21, and 22 were billed over and above the numerical provisions of the law under the Advocates (Remuneration and Taxation of Costs) Rules. There was no justification for allowing the collective allowance of items 15 – 29 of the bill and if the ruling is upheld, it would cause injustice to the Appellant. The taxing officer's discretion is limited by the rules to allow all such costs, charges and expenses as are authorised under the rules or appear to have been necessary or proper. There was no justification for allowing the collective items.

On the second ground that the bill was not taxed according to the provisions of law because the Taxing Master allowed some items which were neither factual nor believable. Counsel submitted that the Taxing Master allowed **Uganda shillings 1,500,000/=** for items 1 and 2 for numerous meetings with the plaintiff and numerous meetings with the defendant respectively. Counsel reiterated submissions that meeting with the plaintiff or defendant was covered under the instruction fees. There is no provision for meeting with defendants as the defendants were at all material times represented by Messieurs Shonubi, Musoke and Company Advocates. He concluded that items number 1 and 2 were awarded in error.

On ground 3 Counsel submitted that the Bill of Costs should be taxed in accordance with the provisions of the law by this honourable court. Counsel reiterated earlier submissions that the failure to tax the Bill of Costs in accordance with the provisions of law occasioned injustice to the Appellants. His contention was that items 1 – 3 and items 5 – 19 were covered under instruction fees awarded. Thereafter the court should proceed to tax items number 20 – 29.

On items 1 and 2 counsel reiterated earlier arguments.

On item 3 counsels does not object to award of shillings 20,000/=.

Item 4 Counsel suggested that 25% of the instruction fees of Uganda shillings 4,800,000/= is a fair representation of the portion of work done by the Respondents. Following the decision to tax down the instruction fees in the case of *Mayers and Another vs. Hamilton and Others* [1975] EA 13, not all instruction fees should be paid where the advocate has not completed the work. Consequently the court should award Uganda shillings 1,200,000/=. On item 5 there is no objection to the ruling of the Taxing Master. Items 6, 7, and 8 should be allowed as presented by the Respondent. Item 9 should be taxed and allowed at Uganda shillings 7000/=. Item 10 should be taxed and allowed at Uganda shillings 7000/=. Item 11 where the registrar awarded Uganda shillings 335,000/= for perusal of the written statement of defence should be taxed and allowed at Uganda shillings 150,000/= under paragraph 6 (A) of the Advocates (Remuneration and Taxation of Costs) Rules. Item 12 on attendance to mediation on 1 March 2012 was awarded at Uganda shillings 200,000/= for four hours but four hours was not the correct estimation and should be allowed at Uganda shillings 100,000/= for two hours. Item 13 was allowed at Uganda shillings 50,000/= and should be allowed at Uganda shillings 20,000/=. Item 14 on attendance of mediation for March 16 2012 should not be allowed at Uganda shillings 200,000/= for four hours but at Uganda shillings 100,000/= for two hours.

Item number 15 which is a legal research is not provided for under the Advocates (Remuneration and Taxation of Costs) Rules and should be taxed of completely as its part of instruction fees. Item number 16 on several calls to opposing Counsel and not provided for in the rules. Item number 17 on e-mail correspondence with opposing Counsel are not provided for under the rules. Item number 18 for preparing scheduling notes is not provided for under the Advocates (Remuneration and Taxation of Costs) Rules was awarded Uganda shillings 1,000,000/= and should be taxed off in totality as part of instruction fees. Item number 19 should be allowed at Uganda shillings 20,000/=. Item number 20 should be allowed at Uganda shillings 5,000/= item number 21 should be allowed at Uganda shillings 20,000/=. Item number 22 should be allowed at Uganda shillings 5000/=.

There is no objection to items 23; 24, 25 and 26 of the bill.

Item 27 was awarded at 450,000/= as travel costs but actual travel costs should be awarded. The argument is that the Respondent's office is located on Lumumba Avenue right behind the

commercial court. The office of Lion Assurance Company is in Kololo and the Appellants Counsel's offices are next to Christ the King Church. All in all travel fees of 40,000/= would be reasonable fees. There is no objection to items 28 and 29.

In conclusion the Appellants Counsel prayed that the Taxing Master's ruling and award is set aside and the Appellant's bill is taxed according to the provisions of the law.

In reply the Respondents written submissions are as follows:

Counsel for the Respondent opposed the appeal. The Respondent was instructed by the Appellant to recover monies from DAMCO logistics (U) Ltd amounting to US\$198,920 under a subrogation agreement executed between the Appellant and its insurers. The Respondent filed an action against the insurance company whereupon mediation between the parties failed and the Respondent's Counsels filed scheduling notes when the case was fixed for scheduling on 10 April 2013. It is shortly after this that the Appellant withdrew instructions. Subsequently the Respondent served a fee note on the Appellant on 22 February 2013 which they note was not honoured by the Appellant. The Appellant insisted that the fees are taxed by the court and the Respondent went ahead and filed a Bill of Costs which was taxed and allowed at Uganda shillings 12,083,000/=.

The Respondent subsequently served a certificate of taxation on the Appellant would be request for the Appellant to pay the amount stated therein within five days from the date of receipt. The Appellant did not pay whereupon the Respondent brought garnishee proceedings against the Appellant's bankers Messieurs Standard Chartered Bank (U) Ltd. The garnishee paid Uganda shillings 12,083,000/= in full settlement of the fees on 11 June 2013. The ruling of the Taxing Master was made on the 2nd of May 2013.

On the grounds of the appeal, it is the Respondents case is that the Taxing Master properly exercised her discretion when she held that taxation rules provide for activities such as drawing court papers, and attendances on top of instruction fees. There was no error of law at all. The Sixth Schedule of the Advocates (Remuneration and Taxation of Costs) Regulations and particularly regulations 2, 3, 4, 5 and 6 provides for work outside the instruction fees such as drawing court papers, which the Respondent did, making copies, letters, attendances, perusals and service which were all done by the Respondent. The Taxing Master exercised her judicial discretion by awarding fees for those items.

In the case of Patrick Makumbi versus Sole Electric (U) Ltd Supreme Court civil appeal number 11 of 1994 [1990 – 1994] EA 306, it was not the holding that once instruction fees are paid, then all items in the sixth schedule should not be allowed. Counsel in reply submitted that the Respondent carried out the services claimed in items 1 to 11. Under items 1, 2 and 3, the Appellant knew about the meetings and it was for the Appellants benefit. Furthermore item number 4 is also an entitlement of an advocate from carrying out his instructions and that the

Advocates (Remuneration and Taxation of Costs) Regulations. Item numbers 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22 were taxed according to the Taxing Masters discretion.

Item number 15 involve the Respondent carrying out the necessary legal research in a bid to buttress the applicant's case. The taxing officer was justified in awarding costs of Uganda shillings 5,000,000/= owing to the amount of work carried out by the Respondents. The award is supported by item 1 (b) in the Sixth Schedule to the regulations. Instruction fees as between advocate and client as instruction fees allowed on taxation as between party to party increased by 1/3rd as held in the case of *Alexander Okello versus Kayondo and Company Advocates SCCA number 1 of 1997.*

Counsel submitted that the principles which guide court in appearance in matters of taxation are laid down in the cases of **C.C. Chandram versus Kengrow Industries Ltd, SCCA number 22 of 2002; A Kassam and 2 Others versus Habre International; and Bank of Uganda versus Banco Arabe Espanol SCCA number 8 of 1998.** Courts should not interfere with the award of a taxing officer unless there is an error in principle and should not do so on questions solely of quantum because the taxing officer is more experienced than the judge on matters of taxation. Furthermore it has been held that there is no mathematical or magic formula to be used by the Taxing Master to arrive at a precise figure and each case has to be decided on its own merits and circumstances. (See case of **Premchand Raichand Ltd And Another versus Quarry Services of East Africa Ltd and others [1972] EA 162; Patrick Makumbi versus Sole Electric (U) Ltd** (supra)). Where the taxing officer has followed the correct principles, the award will be upheld on appeal. (See case of **Makula International Ltd versus Cardinal Nsubuga and another [1982] HCB** page 11).

In **Makula International Ltd versus Cardinal Nsubuga** the principles applied are that successful litigants ought to be fairly reimbursed for the costs incurred; the general level of remuneration of advocates must be such as to attract recruits to the legal profession; and there should be consistency in awards.

As far as item number 30 is concerned, the Respondent was faced with the problem of non-acknowledgement of receipt of court documents by the Appellant when the Respondent's clerk went to effect service on it. The Respondent was faced with the following up service thrice and also visiting the Appellant's legal Counsel to effect proper service. The Appellant has not demonstrated how the Taxing Master erred on the matter of principle or failed to act judicially by taxing the Advocate/Client Bill of Costs. Unless an aggrieved party can prove to the court that the Taxing Master failed to exercise his or her discretion judicially, the court will not be compelled to interfere with the award. The Appellant failed to show how the Taxing Master failed to act within her discretion.

Finally the Respondents Counsel submitted that the award of Uganda shillings 12, 083,000/= (Not 21,255,464/= in the previous submissions of counsel and copy pasted) and the specific

award of Uganda shillings 5,000,000/= were judicially arrived at by the Taxing Master and should not be interfered with.

In rejoinder the Appellants Counsel submitted that the case of **Patrick Makumbi versus Sole Electric (U) Ltd SCCA number 11 of 1994** considered principles for the award of instruction fees. It is to the effect that the instruction fee should cover the advocates work, including taking instruction as well as other necessary work for presenting the case for trial or appeal as the case may be.

As far as item 1 is concerned it is covered by instruction fees.

Item 2 on numerous meetings is not provided for in the rules.

Furthermore, on item 4 the Appellants do not dispute that the Respondents are entitled to instruction fees for carrying out the instructions of the Appellant. The contention is that the instruction fees should be computed in proportion to the amount of work performed by the advocates. Counsel again relied on the case of **Mayers and another versus Hamilton and others [1975] 1 EA at page 13** wherein the court observed that instruction fees are awarded in contemplation of an advocate completing the whole case and that an advocate is not entitled to the whole amount of instruction fees upon receiving instructions but rather the instruction fees grows as the matter proceeds. Counsel reiterated submissions that the Respondents involvement in the suit did not proceed beyond mediation and the filing of scheduling notes as directed by the courts but which scheduling notes were withdrawn.

In specific reply to item 15 concerning legal research, the Taxing Master awarded Uganda shillings 5,000,000/= and the Respondent had relied on rule 1 (b) of the Sixth Schedule of the Advocates (Remuneration and Taxation of Costs) Rules. However, there is no merit in relying on the said rule under the case of **Alexander Okello** (supra) because legal research and scheduling notes are not catered for under the rules. If there was any complexity, it had to be factored into the instruction fees pursuant to rule 1 (a) (ix) of the Sixth Schedule which was not done. The 1/3rd rule does not apply to the Respondent's case.

Appellants Counsel further agrees with the principles applied by the courts in the taxation of bills of costs. Further reiterates submissions that the Appellant has demonstrated in the main submissions that the taxing officer had erred on matters of principle.

On the question of item 30 (which is actually item 29 of the bill) on the question of the problem faced in the service of court documents upon the Appellant, the facts asserted are a total deception of the court and award of Uganda shillings a claim of 450,000/= is not warranted. Counsel relied on the affidavit of service dated 19th of April 2013. The affidavit clearly demonstrates that the Respondents went to the Appellant's office with a copy of proceedings in miscellaneous application number 8 of 2012 and duly served it and thereafter informed the

advocate's office of what transpired at the Appellant's office. There is no statement that the Respondent went to the Appellants offices thrice.

Judgment

I have duly considered the appeal, the record of proceedings and submissions of Counsel. I have also considered the principles for taxation of costs on presentation of Advocate/Client Bills of costs.

I have already ruled on all the points addressed in this appeal in Civil Appeal No. 358 of 2013 which arose from Miscellaneous Cause No. 7 of 2013. Specifically the taxing master in Miscellaneous Cause No. 7 of 2013 adopted her ruling in MC No 8 of 2013 which is the subject matter of this appeal. In the taxation appeal judgment in Civil Appeal No. 358 of 2013 I quoted her ruling as affecting MC No 7 of 2013 in the following words:

"The entire ruling of the Taxing Master is contained in one sentence and one line in the following words:

"Adopting the same reasoning on all items, I allow the bill at 21,255,468/=."

The above sentence represents the entire ruling in miscellaneous application number 7 of 2013. The rest of the ruling is in Miscellaneous Application Number 8 of 2013 which deals with a different Bill of Costs."

In other words in considering the appeal in Civil Appeal No. 358 of 2013, I dealt with the ruling of the taxing master in Miscellaneous Application/Cause No. 8 of 2013 which is also the subject matter of this appeal. This is because the Taxing Master merely imported her ruling in MC 8 of 2013 on all items in MC 7 of 2013. By the appeal from her decision in MC 7 of 2013 I considered the entire ruling in MC 8 of 2013. In those circumstances the court cannot write the same judgment twice. In any case the Counsels, save for the amount in instruction fees, recycled the same arguments in Civil Appeal 358 of 2013 in this appeal.

I therefore adopt my entire judgment on matters of principles in Civil Appeal No. 358 of 2013 to apply with equal force to this appeal which is also between the same parties. Save for the amount in instruction fees being different which fact does not alter the final order, the entire bill of costs was set aside and the same will apply to this appeal. For the avoidance of doubt my judgment in Civil Appeal No. 358 of 2013 was delivered on the 6th of September 2013. Pursuant to my judgment in that appeal namely **Civil Appeal No. 358 of 2013 Lion Assurance Company Ltd versus Kasekende Kyeyune and Lutaaya Advocates**, the following orders shall also issue in this appeal

On the basis of my findings in the above appeal, grounds (a), (b), (c) and (d) of the Chamber Summons succeeds.

In the premises, I am satisfied that the Taxing Master did not exercise powers judicially by considering all the necessary rules and principles applicable to the items referred to in the Respondents Bill of Costs. Errors of principles as held above have been established and the Appellant's appeal succeeds.

The taxation award is accordingly set aside. The court will not tax the Bill of Costs as prayed for by the Appellants Counsel but refers it back to the Taxing Master for taxation afresh in accordance with specific rules referred to in Civil Appeal No. 358 of 2013 and the judgement of this court therein.

The costs of the appeal shall be borne by the Respondents.

Judgment delivered in open court this 16th day of September 2013

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Edmund Kyeyune for the respondent

Shafir Hakim Yiga counsel for the Appellant

Boaz Wandera: Court Clerk

Christopher Madrama Izama

Judge

16th September 2013