# THE REPUBLIC OF UGANDA

## IN THE HIGH COURT OF UGANDA AT KAMPALA

## (COMMERCIAL DIVISION)

**HCT - 00 - CC - CA - 0016 - 2013**

*(Arising out of CA No. 02 of 2004)*

**JOSEPH BYAMUGISHA t/a**
**J. B. BYAMUGISHA ADVOCATES :::::::::::::::::::::::::::::: APPELLANT**

**VERSUS**

**NATIONAL SOCIAL SECURITY FUND :::::::::::::::::::: RESPONDENT**

**BEFORE: THE HON. JUSTICE DAVID WANGUTUSI**

## J U D G M E N T:

This appeal seeks to set aside or vary the ruling and orders of the taxing master made on the 25 June 2013.

It is filed by Dr. Byamugisha Joseph, an advocate who is referred to in these proceedings as the Appellant against National Social Security Fund which is referred to in these proceedings as the Respondent.

The appeal is filed under S.6 2(1) of the Advocates Act, Rule 3(1) of the Advocates (Taxation of Costs) (Appeals and Reference) Regulations.

The relationship between the Appellant and the Respondent stretches as far back as 1987 when the Respondent retained the Appellant to do its legal work. As an Advocate to the Respondent he was involved and acted for it in its agreements with Alcon International Ltd.

The interaction between the Appellant and the Respondent however, did not go on well and disputes arose between them that ended in court.

On 20th October 2003, the Appellant was instructed by the Respondent to handle its appeal. He filed Appeal No. 2 of 2004, **National Social Security Fund and W. H. Ssentongo t/a Ssentongo and Partners V Alcon International Ltd**.

On 20th May 2011, the respondent withdrew instructions from the Appellant.
The letter withdrawing instructions in part reads;

> *"The Board has reviewed the progress and the developments of the matter and after due and careful consideration has taken a decision to withdraw the instructions from you to represent the Fund in the appeal. The decision was taken in the best interests of the Fund and all parties concerned.*
> *Please transfer to us the information and files pertinent to the appeal, which are in your possession. Additionally, please submit for our consideration your fee note for any unpaid fees and disbursements which are due and payable."*

Following this letter, the Appellant wrote a fee note seeking payment in which he demanded for Shs. 4,315,435,136= for his work in the court of Appeal. He also demanded fees for his work in the other courts.

The Respondent objected and the two failed to reach a settlement which prompted the Appellant to file an advocate-client bill of costs, the subject of this appeal.

The bill was taxed before the learned taxing master who subjected the bill of costs to schedule VI of the Advocates (Remuneration and Taxation of Costs) Rules and awarded Shs. 462,605,247= as instruction fees. The taxing master then subjected the above figure to 18% to determine VAT which he awarded at Shs. 80,257,149=. In total he taxed the bill and allowed it at Shs. 550,798,392=.

The Appellant was aggrieved and filed this appeal seeking the orders.

1. The ruling of the taxing master awarding the Appellant the sum of Shs. 346,953,935= as instructed fees for representing the Respondent in Court of Appeal Civil Appeal No. 2 of 2004, **National Social Security Fund & W. H. Ssentongo t/a Ssentongo & Partners V Alcon International Limited** made on 25th June 2013 be set aside or varied.
2. The ruling of the taxing master assessing Value Added Tax in the sum of Shs. 80,257,149= on instruction fees and the additional one third be set aside or varied.

3. Costs of this application and the proceedings before the taxing officer be provided for and for such other orders as the Judge shall deem fit.

The chamber summons are supported by the affidavit of Joseph Byambara Byamugisha sworn on 10 July 2013. In summary, the Appellant is aggrieved by the decision of the taxing master given on 21 June 2013 when taxing the Advocate/Client Bill of Costs between the Appellant and the Respondent. The Appellant's criticism of the taxing master is that the taxing master erred in awarding the sum of Shs. 346,953,935= only as instruction fees, a figure which is clearly too low in view of the subject matter, that the taxing master applied wrong principles and acted contrary to court authorities which resulted in an award that was manifestly low and that the taxing master erred in assessing value added tax in the sum of Shs. 80,257,149= on both instruction fees and the additional one third only.

**The Appellant's case:**

In brief, Mr. Masembe appearing for the Appellant, submitted that the basis of the appeal is the applicable scale by which the bill should be taxed. That although party to party costs are taxed in the Court of Appeal at a scale of 10% under Rule 9 (3) of the Court of Appeal Rules, the Registrar applied the High Court scale of 1% provided in the 6th Schedule of the Advocate Act to tax a Court of Appeal matter and that he erred in doing so.

He relied on the authorities of **Hope Ahimbisibwe V Julius Rwabirumi**; **National Insurance Corporation V Pelican**; **Bank of Uganda V Transroad**; **Sietco V Noble Builders**.

He submitted on Rule 109(3) which is to the effect that remuneration of an advocate by his/her client in respect of the appeal shall be subject to taxation in the High Court and that Section 80 of the Advocates Act provides that it shall be governed by the rules and scales applicable to proceedings in that court. That for a client who profits from a court order to go and get 10% then give 1% to his advocate is unequal treatment of an advocate.

Further, he referred to Article 273 of the Constitution of Uganda which is to the effect that the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution. That it is supposed to temper unjust application of the law, which in his view, is in the form of Rule 109(3) of The Judicature (Court of Appeal) Rules.

On the VAT question, he submitted that VAT is not charged on disbursements, and that the taxing officer made a genuine error in arriving at his final position.

The Respondent's Case:
The Respondent was represented by Mr. Rutisya and Mr. Byaruhanga.

In brief, Mr. Rutisya submitted that the law is clear; Advocate/Client bill of costs are taxed before the Registrar of the High Court and the scale to be used is the Remuneration of Advocates in the High Court.

He further stated that the Constitution provision relied on had already been dealt with by **Justice Remmy Kasule** who said that the submission that an injustice is caused to the Applicant if the bill of costs is taxed by the High Court where the scale is lower instead of the Court of Appeal where the scale is higher, is not valid in law. **Joseph Byamugisha V NSSF** Civil Reference No. 19/2012.

Mr. Byaruhanga, councel for the respondent relied heavily on **Justice Remmy Kasule's** opinion in **Joseph Byamugisha V NSSF** Civil Reference No. 19/2012. In brief, they were to the effect that there is no reason to over ride the well founded rule, both statutory and otherwise, that an Advocate/Client bill of costs be taxed by the High Court which has original jurisdiction. That the above being the state of the law, it is up to the Applicant to justify before the High Court that he is entitled to a higher fee by reason of the nature of legal services and work he rendered to the client. Further, that there is no injustice caused by the law requiring that such a bill be first filed and determined by the High Court which is the court of original jurisdiction and anyone dissatisfied with the decision of the High Court can then follow the appellate process as is established by the law.

**The Law:**

Both Counsel have submitted and first I shall consider whether the bill was taxed before the right court.

The matter from which the costs arose was in the Court of Appeal. An attempt was made by the Appellant to have his costs taxed in the Supreme Court but a single justice ruled that the venue was the High Court; **Joseph Byamugisha V National Social Security Fund** – Civil Reference 2 of 2012.

In the Court of Appeal, the Judicature (Court of Appeal Rules) Directions, Rule 109(3) covers taxation and provides for both situations namely; party to party costs and advocate-client costs. While they retain the taxation of the former in the Appellate Court itself before the Registrar who is the taxing master, it removes "the remuneration of an advocate by his or her client in respect of the appeal or application and places it before the High Court. It also stipulates the rules and scales applicable in the circumstances.

It reads in 109(3);

> *"The remuneration of an advocate by his or her client in respect of the appeal or application shall be subject to taxation in the High Court and shall be governed by the rules and scales applicable to proceedings in that court."*

The matter was therefore rightly placed before the Registrar in the High Court.

The contention however of the Appellant is that the rules under which the taxation was conducted, conflict with the Constitution in a much as they are discriminatory.

He submitted that rule 109(3) which places the Advocate/Client bill of costs under the Advocates (Remuneration & Taxation of Costs) Rules subjected the advocate to a lower scale of costs which was as low as 1% of the value of the subject matter. He submitted that this was much below the 10% he would otherwise get if he had remained with instructions and filed a party to party bill of costs under rule 109(1) which empowered the Registrar of the Court of Appeal to "tax the costs between party to party or arising out of any appeal or application to that Court."

Counsel submitted;

> *"We contend that the learned Registrar erred in using the High Court scale since the scale, even on its face indicates that it is only, applicable to costs on the High Court and Magistrates Courts."*

A Registrar of the High Court is given very wide discretion when taxing. This discretion must however be exercised judiciously. In the taxation of costs he does not operate in a vacuum. He operates under certain laws and this requirement is spelt out in Section 43 of the Judicature Act whose subsection 2 provides;

> *"Subject to Article 133 of the Constitution, the officers of the Court of Judicature shall perform such duties as may be assigned to them under the rules of Court."*

Once the law directed to file ther pleadings, bills and others in the High Court, the Registrar in that court could only deal with it using the law that his jurisdiction gives him.

The rules that have been availed to the Registrar to conduct taxation from whatever source are the Advocates (Remuneration & Taxation of Costs) Rules. In **Bank of Uganda V Banco Arabe Espanol** [1999]2 EA then Lordship held;

> *"The law prescribes the guidelines for a taxing officer which must be followed."*

The taxing master had to do what the law required of him, if he did not and applied a formula other than the one specified in schedule VI(1) that would have been an error in principle, **Kipkorir Titoo & Kiara Advocates V Deposit Protection Fund Board** [2005]1 KLR.

If the taxing master went outside the rules availed him, he would be conferring jurisdiction upon himself. **Gicham J.A** in **M.G. Sharma V Uhuru Highway Development Ltd** 2001 EA 530 could not have put more clearly when he held

> *"Proceedings conducted without jurisdiction together with the subsequent ruling are a nullity."*

Such proceedings are nullity **Dasani V Warsaw** [1967] EA 351. In the premises the taxing master was expected to base his calculation on the value of the subject matter as it could be determined from the pleadings, **Thomas James Arthur V Nyeri Electric Undertaking** [1961] EA 492. He could determine the amount from the judgment or settlement between parties **Trade Bank Ltd** (**In Liquidation**) **V L. Z Engineering Construction Ltd and Another** Civil Appeal 117 of 2000.

The value would then be subjected to the 6th Schedule of the Advocates (Remuneration & Taxation of Costs) Rules. Where the fees 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 Appellant seeks that the ruling of the taxing master be set aside or varied.

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 ..."*

**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.

The Appellant's grief is that the amount awarded by the taxing officer is on the low side compared to the 10% scale awarded for party to party bills in the Court of Appeal. In my opinion, and stated by **Justice Remmy Kasule**, Rule 6(1) of SI 267 – 4 provides that in business of exceptional importance or of unusual complexity, an

advocate shall be entitled to receive and shall be allowed as against his or her client, a special fee in addition to the remuneration provided in these Rules.

**Ojwang J** of the High Court of Kenya in the case of **Republic V The Minister of Agriculture exparte W'njuguna & Others** [206]1 EA 359 (HCK), states;

> *"Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorizing clause in the law, or a particularized justification of the mode of exercise of any discretion provided for. The complex elements in the proceedings that guide the exercise of the taxing officer's discretion must be specified cogently and with conviction. The nature of forensic responsibility placed upon counsel*
>
> *when they prosecute the substantive proceedings must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and*
>
> *set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time consuming the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated apart, of course, from the need*

*to show if such works have not already been provided under a different heard of costs...”*

But it is not in any case that an advocate mentions that the matter was complex, he is given more. It is upon the Applicant to show either by referring to the judgment if it exists, that what he did was above the normal day to day chores of a legal practitioner. He must show that research was at such a high level as to justify an additional fee. It was upon the Applicant to show that the proceedings were lengthy and time consuming. It required and indeed a lot of research was carried out where lot of skill was engaged. It was the duty of the Applicant to show the volumes of crucial documents which he gathered and the enormity of research that was done so as to justify a higher pay. This was not done even during submission before this court. In the absence of such proof the taxing master was entitled to believe that the responsibility exhibited by Appellant in the proceedings was quite ordinary and called for nothing but normal diligence such as must attend the work of a professional in any field – Republic. The **Minister for Agriculture Ex Parte W’njuguna & Other** [2006]1 EA 359.

Going back to the taxation itself, there is no dispute that at the hearing of the taxation the parties agreed to reduce, the following items as follows;

Item 3 by 300,000=

Item 47 by 300,000=

Item 60 by 300,000=

Item 391 by 500,000=

Item 15 by 500,000=

Item 51 by 500,000=
Item 79 by 500,000=
Item 107 by 500,000=
Item 110 by 500,000=

Then only contention was on items 213 and 214. The taxing master determined these items by subjecting them to 1%. He awarded only item 213 and 214. He left out all the other items 1 – 212 yet they also formed part of the instruction fee. He left them out which meant even the VAT was reduced. VAT had to be calculated on all the instruction fees. Where VAT was lowered by Court because not all the instruction fee was taken into consideration the Appellant would have difficulty in explaining to the Revenue Authority.

In **Makumbi & Another V Sole Electrics** (U) Ltd [1990 – 1994] EA 306, the Supreme Court dealing with the issue of VAT wrote;

> *"Finance Act imposes a tax levy on advocates in respect of the professional fees they charge for legal services they vender to their clients.*
>
> *Disbursements not being fees but refund of money spent in the preparation and actual representation of the client should not be subjected to VAT."*

In the taxation the Registrar was expected to subject only but all the professional fees which included items 1 to 214to the 18% levy. It is for this reason that the rules of taxation demand that disbursements be shown separately at the bottom of the bill of costs, they actually demand a presentation of receipts at taxation.

The taxing master left out items 1 – 212 when awarding instruction fees which was an anomaly. He therefore failed to calculate VAT on the whole professional fees with exception of disbursements.

It was the duty of the taxing master to consider each and every item presented to him. What he did was contrary to the provisions of the rules of taxation. For those reasons, the taxation and award are set aside.

The Appellant and Respondent prayed that in event of fresh taxation, they be conducted by me in this judgment, because the case was old and sending it back to the taxing master would delay it further.

During submission, Counsel for the Appellant said they had conceded to all the rest save for items 3, 47, 60, 91, 15, 51, 79 and 107. These were however agreed upon when they appeared before the taxing master. The total sum to be taxed off those items was Shs. 3,900,000=. This sum of money shall be deducted from the subtotal.

Item 214 is based on the subject matter whose value is 34,695,393,544=. The first 20 million of it subjected to 12½% gives 1,387,500=.

The remaining sum of 341,675,393,544= subjected to 1% gives 346,753,935.44=. Add 1,387,500 equals to 348,141,435. As the instruction fees. Item 214 is 1/3 of 348,141,435= is equal to 116,047,145= as one-third between Advocate and client. It follows

that on item 213 Shs. 3,121,397,919= will be taxed off. It also follows that on item 214 Shs. 1,040,465,973= will be taxed off.

The total amount to be taxed off is therefore Shs. 3,900,000, 3,121,397,919= and 1,040,465,973= totaling 4,165,763,892.

To get the instruction fee then, the allowed sum on items 1 – 212 must be added to those allowed in item 213 and 214. This can simply be done by subtracting their total from the subtotal.

After a little scrutiny, I found that the item 1 – 212 as filed by the Appellant totaled to 11,556,000=. If you add 3,469,539,354= of claimed in item 213 and 1,156,513,118 claimed in item 214 you get a total of 4,637,608,472=. It is from this that is subtracted the taxed off amount to get the professional fees. So 4,637,608,472 minus 4,165,763,892 equals 471,844,580=.
The professional fee is therefore 471,844,580=.

It is this that is subjected to 18% to get VAT. So 471,844,580 x 18/100 = 84,932,024 VAT.

The two total 556,776,604. Add disbursements of Shs 362,996 = 557,139,600.
Shs. 65,000,000= was earlier advanced to the Appellant which if subtracted leaves Shs. 492,139,600.4= as the costs taxed and allowed.

Since the appeal succeeded in part, the Respondent shall bear the costs of this appeal.

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**David K. Wangutusi**

**JUDGE**

**Date: 14 - 11 - 2013**