THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS CAUSE No. 0057 OF 2020

LAWRENCE TUMWESIGYE & CO. ADVOCATES ……..…..…..…… APPLICANT

VERSUS

1. HIRRA TRADERS (U) LTD }
2. MAZAAR QAYYUM } **……..……..…..…..…...… RESPONDENTS**

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

The applicants were retained by the respondents to file and prosecute High Court Civil Suit No. 052 of 2012 on behalf of the 2nd respondent, and all interlocutory and post-judgment applications that arose thereunder. The suit was filed on 14th February, 2012 and judgment was delivered in the 2nd respondent's favour on 5th November, 2015. The applicants were further instructed by the respondents to file and prosecute Bankruptcy Cause No. 03 of 2020. Upon the successful completion of that litigation, the applicants demanded for the payment of their legal fees. The respondents have to-date refused to pay, contending that the agreed fee was only shs. 1,000,000/= which was paid upfront and therefore the applicants are not entitled to any further payment, hence this application.

a. The application;

The application is made under the provisions of sections 57, 58 and 60 of *The Advocates Act* and Order 52 rules 1, 2, and 3 of *The Civil procedure Rules*. The applicants seek an order granting theme leave to present an advocate-client bill of costs for taxation. They deny the existence of the oral agreement alluded to by the respondents and contend that in the absence of a written agreement, the controversy on the fess payable can only be resolve by taxation of their client-advocate bill of costs.

b. The affidavit in reply;

In the respondents' joint affidavit in reply, they contend that upon giving instructions to the applicants on 6th February, 2012 the 2nd respondent paid a sum of shs. 1,000,000/= upfront to meet the filing fees and professional fees. It was agreed that the applicants were to recover the rest of their fees by way of taking 50% of the amount recovered from the judgment debtor. When issuing the receipt, the applicants did not indicate that there was any outstanding balance. Upon the successful completion of the litigation, the applicants still did not present their bill of costs. They instead filed a party and party bill of costs which was taxed and allowed at shs. 7,176,500/= The applicants have never accounted for the proceeds thereof. The applicants handled the post judgment applications on behalf of the respondents but still did not demand for fees. It is only in August, 2020 that the applicants first resented the 2nd respondent with a client-advocate fee agreement which he refused to sign on ground that the agreement was for the respondents to pay shs. 1,000,000/- while additional fees would be recovered by way of 50% of the amount recovered from the judgment debtor. For the following period of about seven months the applicants continued to represent the respondents in multiple other applications thereafter despite the respondents' refusal to sign the client-advocate fee agreement. It is on 18th February, 2021 that the applicants wrote to the respondents terminating their services, prompting the respondents to engage another lawyer. The applicants are only entitled to 50% of the amount recovered from the judgment debtor, hence the bill of costs should not be taxed. The demand for payment is premature since the litigation from which they are entitled to recover has not ended yet.

c. The case stated;

When the matter came up before the Registrar for consideration, she decided to refer that question to this court for its opinion in light of the unusual complexity of the facts in whose context it arose. Under Order 50 rule 7 of *The Civil Procedure Rules,* if any matter appears to the registrar to be proper for the decision of the High Court the registrar may refer the matter to the High Court and a judge of the High Court may either dispose of the matter or refer it back to the registrar with such directions as he or she may think fit. At common law a consultative case stated is a procedure by which a court can ask another court for its opinion on a point of law. A consultative case stated is made at the discretion of a presiding judicial officer before he or she determines the case before

the court. The higher court to which the case is stated will refer the case back to the referring court with directions to correct its decision. The decision of the higher court is transmitted to the lower court which can then resume its hearing of the case, with the benefit of the legal advice of the higher court. Where a case is stated after aspects of the decision have been made, the higher may reverse, affirm or amend the determination in respect of which the case has been stated.

The court may reserve a question of law if it is satisfied that it is in the interests of justice to do so. A consultative case stated can be made at any time during proceedings before a final determination has been made. Before stating a case, the court below must consider: the extent of any disruption or delay to the trial process that may arise if the question of law is reserved; whether the determination of the question of law may; - (i) render the trial or hearing unnecessary; (ii) substantially reduce the time required for the trial or hearing; (iii) resolve a novel question of law that is necessary for the proper conduct of the trial or hearing; or (iv) in the case of questions reserved in relation to a trial, reduce the likelihood of a successful appeal. It is essential that the court below has made the necessary findings of fact on which the question(s) of law to be stated will be based (see *DPP (Travers) v. Brennan [1998] 4 IR 67 at 70*). In the meantime the final decision in the case is suspended until the case stated has been determined.

The factors which should weigh in the lower court's decision to require a case stated to a higher court are: (a) there has to be a real and substantial point of law open to serious argument and appropriate for decision by a higher court, (b) the point should be clear cut and capable of being accurately stated as a point of law and not a matter of fact dressed up, (c) the point should be of such importance that the resolution of it is necessary for the proper determination of the case. If those factors are satisfied the lower should state a case (see *Halfdan Greig & Co. A/S v. Sterling Coal and Navigation Corporation and A. C. Neleman's Handel-En Transportonderneming (The "Lysland") [1973] 1 Lloyd's Rep. 296*). On a stated case, this Court cannot receive additional evidence. It can only examine the record from which it may make additional findings of fact or draw inferences. It must determine the matter based on the facts included in the stated case.

d. Submissions of counsel for the applicants.

M/s Lawrence Tumwesigye and Co. Advocates submitted that it is not disputed that the respondents instructed the applicants and that the applicants duly rendered legal services to the respondents as instructed. It is further not disputed that the applicants are entitled to remuneration for that service. When a client fails or refuses to pay, *The Advocates Act* authorises the advocate to present an advocate-client bill of costs for taxation, provided the client is served at least thirty days before the application for leave to proceed to taxation of the bill, is made. The applicants have complied with this legal requirement. That procedure can only be avoided by the existence of a written and duly registered fee agreement. The parties to the application do not have such agreement. The sum of shs. 1,000,000/= paid by the respondents on 6th February, 2012 was a retainer fee. The respondents did not make further payment of instruction fees. The advocate-client bill of costs filed in court was drawn to scale and is a true representation of the volume of protracted legal work done on behalf of the respondents over a period of four years. The application therefore ought to be allowed.

e. Submissions of the respondents.

The respondents had no legal representation. When the application first came up for hearing on 23rd November, 2020 before a Registrar of the Civil Division, the 2nd respondent was in court and it was transferred to this Division. Before this Division it firsts came up on 17th February, 2021 but the respondents had no legal representation and it was adjourned to 24th March, 2021. On that day, the Registrar of this Division recused himself and it was re-allocated to the Deputy Registrar. It came up again on 13th September, 2021 when the 2nd respondent's wife reported to court that the 2nd respondent was too ill to attend court. It was adjourned to 6th October, 2021. On that day the 2nd respondent was in court whereupon the Deputy Registrar directed that the applicants file their written submission by 18th November, 2021 and a reply thereto was to be filed on that day. The learned Deputy Registrar fixed 25th November, 20121 for delivery of the ruling. To-date the respondents have never filed their submissions.

In a broad sense, the right to a fair trial in civil proceedings is interpreted as the right to be treated fairly, efficiently and effectively by the court in the course of its administration of justice. In observing the right to be heard, it is the duty of the court to create and notify the parties of the time available to them to take the necessary step. There must be an equal and reasonable opportunity for all parties to present their respective cases. It means that each party must be afforded a reasonable opportunity to present its case, under conditions that do not place it at a substantial disadvantage vis-à-vis the opposing party. The Court having done so, it is not its duty to ensure that a party takes advantage of the opportunity so created. I am of the considered view in the instant case that the respondents were afforded a reasonable opportunity to present their submissions, but for some unexplained reason have failed to do so to-date. The court therefore proceeds to deliver the ruling without their submissions.

f. <u>The decision</u>.

It is common ground in this application that the respondents instructed the applicants and that the applicants duly rendered legal services to the respondents as instructed. It is also not disputed that the applicants are entitled to remuneration for that service. It is further not disputed that the applicants have not been paid their legal fees in full. The only contention is as to the mode and quantum of payment. While the respondents contend that they have an agreement with the applicants to the effect that after receiving the initial payment of shs. 1,000,000/= the applicants are only entitled to 50% of the amount to be recovered from the judgment debtor, the applicants refute the existence of such an agreement and seek recovery following taxation of their bill.

There is no standard or universal fee chargeable for legal services. An advocate and client will negotiate a fee based on factors such as the advocate's overhead and reputation, the type of legal problem, the going rate for similar work, the paying capacity of the client, etc. *The Advocates (Remuneration and Taxation of Costs) Rules* only set a minimum scale. According to Regulation 4 thereof, no advocate may accept or agree to accept remuneration at less than that provided by those Rules except where the remuneration assessed under those Rules would exceed the sum of twenty thousand shillings, and in that event the agreed fee should not be less than twenty thousand shillings. Regulation 57 thereof further provides that in all causes and matters in the High Court

and magistrates courts, an advocate is entitled to charge as against his or her client the fees prescribed by the Sixth Schedule to those Rules.

In a contingent fee arrangement, an advocate receives a percentage of the monetary amount his/her client receives when they win or settle their case. The amount the advocate receives is contingent upon the result the advocate obtains and often on the phase of litigation at which the dispute is settled. The advocate only receives fees if he or she has successfully represented the client. The early common law expressed hostility towards champerty yet contingency fees are a form of champerty. It is mainly for that reason that Regulation 26 of *The Advocates (Professional Conduct) Regulations*, provides that an advocate may not enter into any agreement for the sharing of a proportion of the proceeds of a judgment whether by way of percentage or otherwise either as; (a) part of or the entire amount of his or her professional fees; or (b) in consideration of advancing to a client funds for disbursements (see also *Shell (U) Ltd and nine others v. Muwema & Mugerwa Advocates and Solicitors and another, S. C. Civil Appeal No.02 of 2013*). Similarly, section 55 (1) (b) of The Advocates Act invalidates any agreement by which an advocate retained or employed to prosecute any suit or other contentious proceeding stipulates for payment only in the event of success of that suit or proceeding.

Subject to that exception, section 50 (1) of *The Advocates Act*, provides that an advocate may make an agreement with his or her client as to his or her remuneration in respect of any contentious business done or to be done by him or her providing that he or she shall be remunerated either by a gross sum or by salary. It is a requirement of section 51 (1) of the Act that such agreement; (a) be in writing; (b) be signed by the person to be bound by it; and (c) contain a certificate signed by a notary public (other than a notary public who is a party to the agreement) to the effect that the person bound by the agreement had explained to him or her the nature of the agreement and appeared to understand the agreement. A copy of the certificate has to be sent to the secretary of the Law Council by prepaid registered post. Non-compliant agreements are not enforceable if any of these requirements have not been satisfied (see section 51 (2) of the Act).

In light of the above provisions, the respondent's argument that they had a fee arrangement with the applicants by way of an oral agreement to pay shs. 1,000,000/= upfront and thereafter 50% of

the amount to be recovered from the judgment debtor, is misconceived. Not only is such an agreement void but it is also unenforceable for its being non-compliant with the mandatory requirements of the law.

The only option then left to the parties as a mode of settlement of the dispute of the fee payable is therefore taxation of the advocate-client bill of costs. Advocate-client costs are the costs that an advocate claims from his or her own client and which the advocate is entitled to recover from a client, for professional services rendered to and disbursements made on behalf of the client. These costs are payable by the client whatever the outcome of the matter for which the advocates' services were engaged and are not dependent upon any award of costs by the court. In the wide sense, they include all the costs that the advocate is entitled to recover against the client on taxation of the bill of costs. The term is also used in a narrower sense as applying to those charges and expenses as between advocate and client that a client is obliged to pay his or her advocate which are not recoverable party and party costs, or costs which ordinarily the client cannot recover from the other party. These costs can arise either in contentious or non-contentious matters.

The combined effect of sections 57 and 58 of *The Advocates Act*, in respect of a Bill of Costs for advocate and client charges duly delivered would appear to be that: (1) the advocate cannot lawfully sue until after expiry of one month after delivery of the bill of costs; (2) the client has a period of one month after being served with it, within which to demand and obtain taxation of the bill of costs by a Taxing Officer. The special protection given to the client as outlined above is firstly meant to protect the client in an Advocate and Client relationship by creating ample opportunity for the advocate to communicate at a meaningful level with the client at an early stage of the taxation process. It prevents the possibility of acrimony that could otherwise arise from a dispute over fees rushed to court adjudication.

The thirty days given to a client before the advocate presents the bill for taxation are to enable the client, among other reasons, to sieve out which items in the bill of costs presented to him or her were incurred with his or her express or implied approval, or not. For contentious business, the bill of costs will furnish a detailed statement of all the legal costs to the client. It will contain; a summary of the legal services provided; the amount of fees payable in respect thereof and details

of the nature and quantum of all charges and disbursements incurred by the advocate in fulfilment of the instructions given by the client. This information enables the client determine the basis on which legal costs were charged and within the thirty day period, negotiate a costs settlement with the advocate, or obtain independent advise thereon. Failure of this, the client may then seek the bill to be taxed by a Taxing Officer whereupon such a Taxing Officer must consider: whether or not it was reasonable to carry out the work to which the legal costs relate, whether or not the work was carried out in a reasonable manner and the fairness and the reasonableness of the amount of costs charged. No suit can be commenced to recover any costs due to the advocate until one month after a bill of costs has been delivered in accordance with the requirements of section 57 of *The Advocates Act*. The requirements are;

a. The bill must be signed by the advocate, or if the costs are due to a firm, one partner of that firm, either in his or her own name or in the name of the firm, or be enclosed in, or accompanied by, a letter which is so signed and refers to the bill; and
b. The bill must be delivered to the party to be charged with it, either personally or by being sent to him or her by registered post to, or left for him or her at, his or her place of business, dwelling house, or last known place of abode.

The applicant in the instant case has attached a copy of the bill of costs dated 10th September, 2020 that was served on the respondents on 21st September, 2020. The applicants have satisfied court that they furnished the respondents with an itemised bill of costs as required by section 58 (2) of *The Advocates Act*. Regulation 10 of *The Advocates (Remuneration and Taxation of Costs) Regulations, S.I. 267- 4*, which provides for taxation of costs as between advocate and client on application of either party, states that the taxing officer may tax costs as between advocate and client without any order for the purpose, upon the application of the advocate or client.

In a case such as this where the client has not made a demand for taxation of the bill of costs within the stipulated thirty days after service, then the law authorises the court on the application of the advocate, upon such terms, if any, as it thinks fit, not being terms as to the costs of the taxation, to order that the bill shall be taxed. Consequently, the applicant has satisfied the requirements of the two provisions. Accordingly the application is allowed and leave is granted. The Taxing Officer has full authority henceforth to examine the nature and extent of the work done by the advocate in order to determine whether the costs incurred were reasonably incurred and therefore are recoverable from the client. The costs of the application are to be borne by the respondent.

Delivered electronically this 18th day of March, 2022

……Stephen Mubiru……..

Stephen Mubiru
Judge,
18th March, 2022.