

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
(COMMERCIAL DIVISION)
EXECUTION MISCELLANEOUS APPLICATION NO. 0289 OF 2022

5 (Arising from Civil Suit No. 0898 of 2019)

GRANT THONTON MANAGEMENT LIMITED APPLICANT

VERSUS

10 **VISARE UGANDA LIMITED RESPONDENT**

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

15 On or about 24th February, 2017 the applicant obtained a loan from KCB Bank Uganda Limited for facilitating the completion of the construction of a block of condominium residential apartments on its land comprised in LRV 2651 Folio 9 Plot 65A located along the Lugogo Bypass in Kampala. As security for the loan, the applicant executed a mortgage over the title to the same land in favour of the bank. The applicant constructed a total of forty-four (44) units of residential condominium apartments but defaulted on the loan. Upon default on the obligation to pay the US \$ 1,930,813 as agreed, the Bank initiated a process of foreclosure. The applicant filed HCCS No. 898 of 2019 to challenge the foreclosure and sale of the property by KCB Bank Uganda Limited. In order to raise part of the funds outstanding due under the mortgage, the applicant had on 31st December, 2019 signed an agreement with the M/s Grant Thornton Management Limited, selling twelve (12) out of the forty-four (44) units to M/s Grant Thornton Management Limited at the price of US \$ 2,400,000. M/s Grant Thornton Management Limited paid US \$ 500,000 to the bank in satisfaction of the condition for stay of the sale as ordered by court. It was agreed that in the event the applicant was unable to raise the balance outstanding by 31st December, 2020 the M/s Grant Thornton Management Limited was to raise an additional US \$ 1,900,000 in order to redeem the applicant's mortgage.

Subsequently, a tripartite memorandum of understanding between the applicant, M/s Grant Thornton Management Limited and KCB Bank was executed on 28th February, 2020 by which it was agreed that the mortgage would be redeemed upon payment of US \$ 1,930,813. It is on that basis that on 26th March, 2020 a consent judgment was entered in the suit between KCB Bank and the applicant. The suit was settled on 31st August, 2020 whereby part of the loan repayment was to be financed by the third party M/s Grant Thornton Management Limited. While the applicant reserved the right of redeeming the 12 units by 31st December 2020, M/s Grant Thornton Management Limited reserved the right to cause transfer of the 12 units into its name or sell the security in the event of the applicant's default.

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The applicant having defaulted and there being no independent titles yet to the 12 condominium units, M/s Grant Thornton Management Limited subsequently on or about 30th April, 2021 applied for attachment and sale of the entire land comprised in LRV 2651 Folio 9 Plot 65A, on account of the applicant's default. The applicant challenged the attachment in execution vide Civil Appeal No. 722 of 2021. The Applicant instructed the respondent to apply for stay of execution pending determination of the appeal. The respondent filed and represented the applicant in Miscellaneous Application No. 776 of 2021 for stay of execution, Miscellaneous Application No. 777 of 2021 for an interim injunction order, and Miscellaneous Application No. 882 of 2021 for a certificate of urgency. Later the respondent represented the applicant in Miscellaneous Application No. No 1122 of 2021 to challenge the taxation of an advocate-client bill of costs filed by M/s Gadala & Nshekanabo Advocates in Miscellaneous Application No. 533 of 2021.

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The applicant not having paid the agreed fee within the specified time, the respondent filed a summary suit against the applicant; Civil Suit No. 425 of 2023 seeking to recover the fee in the sum of US \$ 100,000 agreed under the remuneration agreement 27th October 2022. The applicant applied for leave to appear and defend the suit and at the same time filed an application seeking to have the remuneration agreement voided.

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30. The proceedings before the Deputy Registrar.

When the matter came up before the Registrar for consideration of whether or not the garnishee order nisi should be made absolute, he 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. 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.

When the issue arose before the Taxing Officer as to whether the bailiff was entitled to any fee in accordance with *The Judicature (Court Bailiffs) Rules, 2022*, a question that must be determined by reference to a Judge, the learned Deputy Registrar referred the matter to this Court.

c. The decision.

In all taxation proceedings, the Taxing Officer can only decide the amount of costs but cannot vary the costs order already made. Hence, if a party is not satisfied with the costs order, that party should consider appealing instead of raising objections to the costs order during taxation. The sole matter with which the Taxing Officer is concerned in respect of the items which are the subject matter of a bill of costs, is whether to allow in whole, or in part, or at all, the claims made by the advocate in the course of his or her practice, in respect of fees chargeable in accordance with the rules relating to party and party taxation, or advocate-client taxation. The reasons for objection to items in the bill of costs include; - that the work done is not covered by the terms of the costs order; the work done was not necessary or proper; the rate charged is excessive; the time claimed to have been incurred is excessive; the amount of costs claimed is excessive; the person doing the work was not qualified or over-qualified; or the disbursements are not backed by receipts, etc.

Save for the costs of taxation, the Taxing Officer does not award costs nor decide on issues of liability to pay costs; that is done by the court. Therefore the jurisdiction of a Taxing Officer is to determine quantum by taxing bills of costs in accordance with the applicable principles and schedule of *The Advocates (Remuneration and Taxation of Costs) Rules*, where there is no
5 dispute as to retainer, or where costs have been duly awarded by an order of Court. When sitting as a Judicial Officer to tax a bill of costs between an advocate and his or her client, the issue arises as to whether or not an advocate-client relationship existed, or whether or not general instructions were given in respect of the work billed, or the work done exceeded the scope of instructions given, that question must be determined by reference to the Judge.

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The mechanism for doing this can be found in Order 50 rule 7 of *The Civil Procedure Rules*, which provides that 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
15 may think fit. Similarly, section 62 (2) of *The Advocates Act* provides that if any matter arising out of a taxation of a bill of costs appears to the Taxing Officer proper for the decision of a judge of the High Court, he or she may on his or her own motion refer the matter to such a judge who may either dispose of the matter or refer it back to the Taxing Officer with such directions as the judge may think fit to make.

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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;
25 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
30 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).

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This consultative case stated was made in a manner akin to that envisaged by section 61 of *The Civil Procedure Act* providing that persons may agree in writing to state a case for the opinion of the court, which then has to try and determine the case in the manner prescribed. In resolving the controversy, this court has as well adopted a procedure akin to that specified in Order 35 of *The Civil Procedure Rules* which requires the parties to state the question(s) in the form of a case for the opinion of the court, and to concisely state such facts and specify such documents as may be necessary to enable the court to decide the question raised thereby. 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. It is for that reason the additional affidavits filed have been disregarded.

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Delivered electronically this 14th day of July, 2023

Mubiru.....

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.....**Stephen**

Stephen Mubiru
Judge,
14th July, 2023.

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