THE REPUBLICOF UGANDA

IN THE HIGH COURT OF UGANDA, AT KAMPALA

HCT-00-CU-MA-0785-2001

FROM: HCCS NO. 207 OF 1993.

THE ATTORNEY GENERAL AND

ANOTHER::

APPELLANTS

VERSUS

1. TURYAMUREEBA BENON AND 132 OTHERS]
2. STEVEN RWEHUTA AND 1096

OTHERS::

RESPONDENTS.

BEFORE: V.F.MUSOKE-KIBUUKA (JUDGE)

JUDGEMENT.

High Court Civil Suit No.207, of 1993, was determined by I.Mukanza J., (RIP) on l2" April, 1999. The case involved a total of 1230 plaintiffs. They all sued The Attorney General, in his representative capacity, and Kabarole District Council. They sought damages following their earlier eviction from Mpokya Game Reserve.

At some stage, before the hearing of the substantive case commenced, a total of 133 of the 1230 plaintiffs were allowed by the court, under Order 35 rule 1, of the Civil Procedure Rules, to present a test case. The outcome of the test case was to apply to the remaining plaintiffs. The court ordered all plaintiffs other than those who were listed among the 133 in relation to the test case, not to take any further steps in the matter until the test case was heard and determined. The 133 plaintiffs appointed one Turyamureeba Benon as their attorney for the purposes of pursuing the test case through the court process. The other 1097, plaintiffs first appointed one Steven

B.Rwehuta as their attorney but later appointed Busereda, as their lawful attorney for the purposes of their case.

On 12th April, 1999, I.Mukanza J. gave judgement in the test case. He found that all the plaintiffs had been evicted unlawfully from Mpokya sub-county, which was part of Kibale Forest Reserve/Game Corridor, since they were not encroachers but persons who had been lawfully settled there under the provisions of the Game (Preservation And Control) Act, Cap. 266. The learned judge also found that the eviction process had been executed in a high-handed, oppressive, inhuman and unconstitutional manner. The court awarded, with the consent of all the parties, a uniform sum of Shs. 10,000,000/=, general damages and Shs.2, 000,000/= exemplary damages, to each plaintiff. Interest, at court's rate, was to accrue to the decretal sum from the date of the filing of the case to the date of payment in full. The plaintiffs were also awarded the costs of the suit.

With regard to the general damages and exemplary damages awarded to each of the 133 plaintiffs, the gross award was Shs. I, 596,000,000/=. The gross award, in similar respects, to the 1097 plaintiffs amounted to Shs. 13,164,000,000/=.

On 13th July, 2001, a bill of costs, in relation to the 133 plaintiffs, was filed in court. It amounted to Shs.287, 899,400/=. Similarly, on the same day, another bill of costs, relating to the cases of the 1097 plaintiffs was also filed in court. It was a very huge bill, indeed, totaling to Shs. 1, 403,669,000/=.

The taxation Proceeding were conducted or 26th October, 2001, by the Deputy Registrar in charge of Civil matters. The learned Deputy Registrar taxed the first bill and allowed it at Shs.219, 468,300/=. Out of that amount, Ushs.160, 065,000/= was instruction fee. Similarly, the learned Deputy Registrar taxed the second bill of costs and allowed it at Shs. 1,400,499,000/=. The greatest portion of that sum, namely, Ushs. 1,400,499,000/= was awarded as instruction fee

in respect of the cases of the 1097 plaintiffs.

What is before this court now is an appeal arising out of the taxation proceedings. The appeal was filed by the Attorney General by way of chamber summons, under the provisions of section 6 1(1) of the Advocate's Act, 1970 and rule 3 of the Taxation of Costs (Appeals And References) Rules, S.I.258-6.

The chamber summons prosecuting the appeal read, an part, as below:

"1. This Honourable court be pleaded to set aside the award made by the taxing officer/Registrar, Her Worship Wolayo, delivered on the 26 day of October, 2001, in miscellaneous cause No.192 of 2000.
3. Costs of this application be provided for."

TAKE NOTICE that the grounds of this application are set in the affidavit of Hellen Obura which is attached herewith, but briefly are that;

a) The bill of costs as taxed to the tune of Ushs. 1,400,974,000/= instruction fees is in all circumstances manifestly excessive as to constitute an error in principle.

b) The taxing officer erred in considering individual awards as a basis of assessing instruction fees rather that the gross award for all the 1097 plaintiffs.

c) That the taxing officer erred, in principle in not taking into account adequately the public interest principle.

To argue the appeal, Mrs. M.Kaddu, appeared for the Attorney General. Mr. M. Mbabazi represented the opposite side. Before I set out and analyse the merits of the arguments made by both learned counsel in relation to the grounds of the appeal, I will first consider two important matters which appear to me to be of some preliminary significance.

The first matter relates to the extent or scope of this appeal. From the contents of both the chamber summons and the affidavit which was deponed by Hellen Obura, in support of the chamber summons, it is quite clear to me that this appeal is limited to the instruction fee which was awarded by the learned Deputy Registrar in respect to the second bill of costs which related to the cases of the 1097 plaintiffs. The instruction fee which was awarded in relation to the cases of the 133 plaintiffs, in the first bill of costs in the amount of Ushs.160, 065,000/= does not appear to me, from the pleadings as contained in the Notice of Motion and the affidavit deponed by Hellen Obura, in support of the Notice of Motion, to be covered by the appeal before me.

Mrs. M. Kaddu, however, in her submissions, attempted to extend her arguments to both awards of instruction fees. It is trite law that a party to any court proceedings is expected to be bound by his or her pleadings. Such party will, normally, not be allowed to succeed on a case not set up by him or her. A party will not be allowed to set up, at the trial, a case which is inconsistent with what is alleged in the pleadings filed in court by that party. See Interfreight Forwarders (Uganda Ltd) Vs. East Africa Development Bank (SCCA No.13 of 1993. unreported.

The second preliminary point relates to the competence of this appeal. In paragraphs 16 and *17,* of the affidavit in reply, the respondent claims that this appeal is not maintainable under section 61(1) of the Advocates Act since it arises from a party-to-party taxation. In paragraph 17, it is claimed that the appeal is time barred. Both counsel made submissions before me on both aspects of the competence of this appeal.

I will begin with whether this appeal is maintainable under Section 61(1) of the Advocates Act, 1970 or not.

With due respect, I find no merit in Mr. Mbabazi's submission to the effect that the provisions of section 61(1) of the Advocates Act excludes appeals which arise out of party-to-party taxation. Mr. Mbabazi cited no authority to support his submission. I have been unable to find any. Section 61(1) of the Advocates Act appears to me to be very broad in scope. It provides:
"61 (1) Any person affected by an order of a taxing officer made under the provisions of this part of this Act or any regulations made there under may appeal within thirty days to a judge of the High Court who on such appeal may make any order that the taxing officer might have made."

In the instant appeal, I find nothing to lead me to the conclusion that the Attorney General is not a person affected by an Order made by the taxing officer under part V of the Advocates Act. Mrs.Kaddu submitted that this point was adjudicated upon in Makula International Limited vs. Cardinal Nsubuga and Rev. Dr. Father Kyeyune, C.A No. 4 of 1981. I have perused the judgment of the court of Appeal and I have been unable to find anything relevant to the point before me. I am, however, in agreement with Mrs. Kadelu's submission that in Makula International Limited Vs. H.E. Cardinal Nsubuga and Rev. Dr. Father Kyeyune (supra) quite like in the instant case, the appeal arose from a party-to-party taxation. That appeal was maintained under section 61 (1) of the Advocates Act. There are a series of several similar cases so maintained by this court. See: Henry M.B Makmot Vs. George Cosomas Adyebo And 2 Others, HC. M.C.A. No. 430 of 1998. The preliminary issue must, therefore, be settled in favour of the respondent.

The other aspect of the objection relates to whether or not this appeal was time- barred. It was learned counsel, Mr. Mbabazi's submission that it was.

Section 61(1) of the Advocates Act provides a specific period of thirty days within which any person affected by an order or decision of a taxing officer may appeal to a judge of the High

Court. I have found no amending legislation which has reduced the period of thirty days to seven. Mr. Mbabazi himself cited none. The Attorney General lodged this Appeal on 19th November, 2001. The taxation order was issued by the Deputy Registrar on **26th** October, 2001. That was clearly within the statutory period of thirty days. The objection raised by learned Counsel, Mr. Mbabazi in that regard, is clearly not very well founded. It is rejected.

In the chamber summons and in the affidavit in support, deponed by Hellen Obura, three grounds of appeal were specified. They are:

a) the instruction fee of Shs. 1,400,974,000/= is in all circumstances manifestly excessive as to constitute an error in principle;

b) the taxing officer erred in considering individual awards as a basis of assessing instruction fees;

c) the taxing officer erred, in principle, in not taking into account, adequately, the public interest principle.

I will examine the first ground first.

The principles which the court must consider in determining whether or not an instruction fee is manifestly excessive as to constitute an error in principle were well laid down by the court of Appeal for East Africa in the famous case of Premchand Raichand Ltd. and Another Vs. Quarry Services of East Africa Ltd. And Others (No.3) F 19721 E.A 162. Those principles are:

a) that costs be not allowed to rise to such level as to confine access to courts to the wealthy;

b) that a successful litigant ought to be fairly reimbursed for the costs he has had to incur.

c) that the general level of remuneration to advocates must be such as to attract recruits to the profession; and

d) that so far as practicable there should be consistency in the awards made.

The court in Premchand's case adopted the approach for assessing an instruction fee which was proposed by Pennycuick J. in the English case of Simpson Motor Sales (London) Ltd. Vs. Hendon Corporation (1964) 3 All E.A.833. In their lordships words

"The correct approach in assessing a brief fee is, we think, to be found in the case of Simpson Motor Sales (London) Ltd. V. Hendon Corporation, [19641 3 All E.R. 833, when Pennycuick, J. said;

One must envisage a hypothetical counsel capable of conducting the peculiar case effectively but unable or unwilling to insist on the particularly high fee sometimes demanded by counsel of pre-eminent reputation. Then one must estimate what fee this hypothetical character would be content to take on the brief."

The above principles have been applied by the courts in Uganda in numerous cases.
See: Attorney General Vs. Uganda Blanket Manufacturers (1973) Ltd. SCCA No. 17 of 1993, Alexander J. Okello Vs. Ms Kayondo And Company Advocates, SCCA No.1 of 1997 and

Attorney General Vs. P.K. Ssemwogerere And Zachary Olum, SCCA No.20 of 2000.

Mr. Mbabazi has questioned the relevance of the principles applied by the Supreme Court of Uganda ,which has a separate set of rules, to an appeal such as the instant one which arise from the Taxing officer of the High Court who operates under remuneration rules with fixed scales. I do hardly see any merit in this argument. Principles have been applied by the Supreme Court of Uganda and appeals from the High Court (such as this one) ultimately end up in that court, then it is only logical that the High Court should follow the same principles. Besides, does the rule of following precedents not apply in matters of taxation? Is the High Court not bound by the decision of the Supreme Court of Uganda in all matters that are in pari materia? It also appears to me that the Advocates (Remuneration And Taxation of Costs) Rules 1982, in the sixth schedule, leave a Taxing Officer with a good deal of discretion especially with regard to the award of an instruction fee.

I agree with learned counsel, Mr. Mohammed Mbabazi, that as a whole, Civil Suit No. 207 was, in its initial stages, a fairly complex case. It involved 1230 litigants. A considerable amount of research was needed to establish the respective claims. However, the cases of 1097 litigants, to which the instruction fee of Shs. 1,400,974,000/= relates were never heard by way of trial. Even the trial of the test case for the 133 litigants was not, by any standard, long or complex. The plaintiffs called only seven witnesses while the defence called eight witnesses; it was a relatively short trial.

All the 1230 litigants initially sued through one Attorney, Turyamureeba Benon it was Benon who gave instructions to counsel. The power of Attorney given to Turyamureeba Benon was attached to the plaint. It was by all the 1230 plaintiffs. Although each litigant had a distinct cause of action, the instructions having been given by a simple attorney on behalf of all 1230 litigants, it was clearly unfair to the respondent for the Taxing Officer to consider individual awards instead of the gross award, in relation to the award of the instruction fees. It appears to me to have been even more unfair and, indeed, an error in principle, for the taxing officer to award a

uniform or similar instruction fee in respect of the 133 litigants involved in the test case which went through full trial and the 1097 litigants whose cases never went through any trial at all. The amount of work done by the advocate in both set of cases was by no means equal. It appears to me that there was very minimal work by the advocates with regard to the cases of 1079 plaintiffs. The instruction fee ought to have reflected that important fact.

In Alexander J OkeIlo vs. Kayondo and Company Advocates (supra) (at page 176), Mulenga, JSC, wrote,

"an instruction fee is manifestly excessive if it is out of proportion with the value and importance of the suit and the work involved." In the instant case, the instruction fee of Shs. 1,400,974,000/= was unfair in that regard. It clearly was awarded as a result of an error of principle.

I, therefore, find that the Shs. 1,400,974,000/= awarded by the taxing officer in respect of the cases of the 1097 litigants in Civil Suit No. 207 of 1993, is in all circumstances manifestly excessive as to constitute an error in principle. This court must, therefore, interfere for it would clearly be an injustice to the respondent to uphold the award. This appeal must succeed on the first ground.

Since the finding on the first ground is sufficient to dispose of the entire appeal, I will not analyse the rest of the grounds put forward by the Attorney General.

What would be the fair and just award of instruction fee in the circumstances of this case? There are several recent decisions which offer valuable guidance.

In Bank of Uganda Vs. Banco Arabe Espanol, SCCA No. 23 of 1999, the taxing officer had awarded Shs.200, 000,000/= as instruction fee for prosecuting and Shs.-6,000,000/= for opposing

an application for security of costs. The Supreme Court found the awards manifestly excessive. It reduced the first award from 200,000,000/= to 7,000,000/= and the 6,000,000/= to 300,000/=.

In The Registered Trustees of Kampala Institute Vs DAPCB, Civil Appeal No.3 of 1995, the Supreme Court of Uganda reduced an instruction fee of 70,000,000/= allowed by the taxing officer to Shs. 7,000,000/=. The court found that the Shs. 70,000,000/= had been awarded as a result of error of principle.

In Attorney General vs. Uganda Blanket Manufacturers (1973) Ltd, SCCA No. 17 of 1993, the total award of costs was Shs. 230,092,000/= arising out of a reference to a single judge. Out of that figure, Shs. 200,000,000/= was awarded as instruction fee. The instruction fee was reduced from Shs. 200 000,000/= to Shs. 50,000,000/=, which was in the opinion of the court, fair and reasonable in the circumstances.

In Attorney General vs. P.K.Ssemwogerere and Zachary Olum, SCCA No.20 of 2000, counsel for the successful party presented a huge bill of costs of Shs. 1,551,959,000/=, of which Shs. 1,550,000,000/= was instruction fee. The taxing officer awarded Shs.351 959,000/= Shs 350,000,000/= was awarded as instruction fee. The award of instruction fee was found to be excessive and was reduced from Shs 350,000,000/ to Shs. 30,000,000/= which the court found to be reasonable in the circumstances. In that case, applying the principal laid down in Premchand Reichand's case (supra) Tsekooko J.W.N., JSC observed, "the claim by the respondents for Shs.1 ,500,000,000/ has no sound basis whatever in this country. The award of Shs. 350,000,000/ was based on speculation and is by all standards quite unreasonable and manifestly excessive. I do not think that a reasonable advocate of whatever reputation would in this country and for the litigation involved in this case insist on such a fee from his client."

For the reasons, which I have set out above, though in brief, In the instant appeal, I would reduce the instruction fee of Shs.1,400,490,000/= awarded as instruction fee in respect of the cases of

the 1097 litigants. I would do so because in view of the unusual peculiarities of their cases, I consider a sum of Shs. 109,700,000/= to be reasonable as instruction fee. I would, therefore, substitute the award of Shs. 1,400,499,000/= with the sum of Shs. 109,700,000/= as the award in respect of the instruction fee.

I did observe earlier that the award by the taxing officer of the sum of Shs. 160,065,000/= was instruction fee, in respect of the cases of the 133 litigants was not covered by this appeal. I will not interfere with it.

In the final result, while the taxed bill of costs of Shs. 219,466,300/= in respect of the test cases of the 133 litigants remain intact, the bill of costs of Shs. 1,403,669,000/= awarded by the taxing officer in regard to the cases of the 1097 litigants is set aside and substituted by an award of Shs. 113,257,000/=.

V.F.Musoke-Kibuuka (JUDGE)

21.3.2003

The Registrar of the High Court may deliver this judgement on my behalf as I will be proceeding on leave on 24th March 2003.