THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT – 05 –MA- No. – 179 – 2012

(Arising from Election Petition No.0003 of 2011)

1. NASSER BASAJJABALABA :::::::::::::::::::: APPLICANTS
2. ELECTORAL COMMISSION

VERSUS

.

ODO TAYEBWA :::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: THE HON MR. JUSTICE BASHAIJA K. ANDREW

R U L I N G

This application is brought under ***Order 51 rule 6; Order 50 rule 4; Order 52 rr. 1 & 3 of the Civil Procedure Rules,*** and "all enabling provisions of the law." The Applicant, Nasser Basajjabalaba, is seeking for orders that:-

1. ***The Applicant be granted leave to appeal against the taxation order in Election Petition No. 0003 of 2011 out of time.***
2. ***Execution be stayed.***
3. ***Costs of this application be provided for.***

The application is supported by the affidavit of the 1st Applicant, but briefly the grounds of the application are that:-

1. ***The Applicants and their Counsel were not served with Taxation Ruling Notice or a Certificate of Taxation within the time allowed to appeal.***

2. ***The Applicant is dissatisfied with the taxation ruling as the sums allowed to the Respondent were excessive and or unjustified in the circumstances.***
3. ***It is fair, equitable and in the interest of justice that this application be granted.***

It should be pointed out at the outset that the presentation of parties to the application lacks clarity, and appears to have been a haphazard mix up. The orders sought refer to "the Applicant", while "ground I" of the application refers to "the Applicants". In addition the affidavit in support of the application sworn by Nasser Basajjabalaba only deposes to facts as they relate to him alone, and there is no indication that he deposed facts for and/or on behalf of the 2nd Applicant. At the hearing Mr. Kanduho, Counsel for the 1st Applicant, indicated that he also holds brief for Mr. Kandeebe, Counsel for the 2nd Applicant, but the 2nd Applicant did not put in an affidavit in support of the application. Court, therefore, proceeded on the premise that only the 1st Applicant has pursued this application. This position is further informed by "Annexture B" to the 1st Applicant's affidavit, in which the warrant of arrest in execution targets him personally, and only seeks to have attached the motor vehicles for the 2nd Respondent. Understandably, the warrant of arrest; and not the attachment and sale of the vehicles, is the subject in the application for a stay by the 1st Applicant. I believe this should put to rest the concerns raised by Mr. Ngaruye-Ruhindi, Counsel for the Respondent, as to which of the Applicants is subject of this application.

The application seeks orders for the extension of time within which to file an appeal, as well as for the stay of execution at the same time. It needs no emphasis to note that each of them involves a different set of legal principles, even though these may overlap at some point. I will start with the extension of time within which to appeal.

A court will normally look at the merits as to whether the applicant was prevented from acting within the prescribed time by sufficient cause. See the case of ***Mugo v. Wanjru [1970] EA 481 at 485,*** which was cited by Mr. Kanduho Counsel for the Applicant. It is further settled that sufficient cause must relate to the inability or failure to take the particular step. See ***Devlir v. Diamond Concrete Co. [1974] EA 48***. The Applicant must

prove to the satisfaction of the court that for sufficient cause, it was not possible to lodge an appeal within the time prescribed.

In the instant case, the Applicant was required to lodge an appeal against the orders of taxing officer within thirty days from the date of issue, under ***Section 62 (1)*** of the ***Advocates Act***. The Applicant states *(in his affidavit in support of the application, paragraph 4*) that he was not given any Taxation Ruling Notice or served with the Taxation Certificate, and that as a result he could not file the appeal in time.

The Respondent disputes the Applicant's depositions as false, and states *(in paragraph 4, of the affidavit in reply of Mugarura Mukongo)* that the taxing officer proceeded *ex-parte* in the matter after being duly satisfied that service had been effected on the Applicant as per "Annexture A" to the affidavit in reply.

The said "Annexture A" shows that the Taxation Hearing Notice was served on M/s Ntambirwaki Kandeebe & Co. Advocates, Counsel for the 2nd Respondent, who duly acknowledged it on 19/6/2012. Counsel Mr. Kandeebe then endorsed in his own handwrting the following:-

> ***"Received at Mbarara but on 25th June. I will be engaged in Kampala seek adjournment."***

Similarly, M/s Niwagaba & Mwebesa Advocates, Counsel for the 1st Applicant were served and duly acknowledged receipt of the Taxation Hearing Notice on 22/06/2012. They wrote the following on the copy:-

> ***"However, we have so many prior fixtures. We shall seek for adjournment to another date."***

These facts diametrically contradict the claims by the 1st Applicant that he and his lawyers were never served with the notice. They were duly served and were acutely aware of the date for the taxation. It is an obvious falsehood to claim otherwise, which materially fails to support the ground advanced in the application in that regard. It is one thing for the lawyers to write that they would be engaged elsewhere on the appointed date, and it is another to say they were not served. In addition, all indications

were that they would be seeking an adjournment on the appointed date, but not that they would be absent. They did not, and I find that the 1st Applicant's failure to file an appeal in time was not a result of non-service upon him or his lawyers.

Counsel Mr. Kanduho also submitted that by proceeding to deliver a ruling without giving notice to the 1st Applicant or his lawyers, it denied the Applicant the opportunity to benefit from the insulation under ***S.62 of the Advocates Act (supra).*** Further, that a party cannot be dissatisfied with an order unless the party gets to know about the order of court. Counsel maintained that the 1st Applicant was entitled to be served with a hearing notice, even though he or his lawyers did not attend the taxation hearing on 25/6/2012 and that, in any case, the ruling was delivered on 5/7/2012 and not on 29/6/2012 when the certificate was issued.

Mr. Kanduho relied on ***Regulation 50 of the Advocates (Remuneration and Taxation of Costs) Regulations S I 267 -1,*** arguing that the only instance where waiver of service of notice is envisaged is where the defendant has not been part; either personally or by advocate, to the proceedings.

Counsel Mr. Ngaruye – Ruhindi responded that since the parties and their lawyers were absent on the date named in the notice, the taxation proceeded *ex-parte,* and that it was analogous to any other proceedings that proceed *ex parte,* where the party who defaults appearing would not be entitled to a hearing or judgment notice. That it is up to the party to come to court and check, but if he fails he cannot later be heard to complain that he was not served.

Regulation 50 of 267 – 4 SI states as follows:-

> ***"It shall not be necessary for notice of taxation of costs to be given to a defendant against whom the costs are being taxed in any case in which the defendant has not appeared in person or by advocate."***

I understand the Regulation to refer to situations in which a case proceeds *ex- parte* right from the inception, due to the reason that the defendants and/or their advocates have put themselves out of the jurisdiction of court, by failing to file a defence. ***Regulation 50(supra),*** however, does not provide for a situation where a matter proceeds *inter partes;* but for one step during the proceedings the parties fail to appear. In the latter case, resort must be had to the ***Civil Procedure Rules,*** and the provisions which govern the non - appearance of the defendant where there has been due service would apply *mutatis mutandis*.

The waiver of notice under ***Regulation 50(supra)*** cannot in any way be interpreted to mean that it is mandatory for a party to keep serving notices on another party who chooses to absent himself or herself, just because it is a taxation proceeding; for to do so would only lead to absurdity.

Counsel for the 1st Applicant also raised the issue of gross *mala fides* reflected from the record of the taxing officer. He argued that based on these, the 1st Applicant merits extension of time in within which to appeal. The errors pointed out are that the taxing officer taxed the bill *ex-parte* on 25/06/2012, issued a Certificate of Taxation on 29/6/2012, but read the taxation ruling on 5/7/2012. Further, that the Certificate, being an extract would ordinarily come from a ruling, but that it was issued before the ruling from which it was extracted could be delivered.

Mr.Ngaruye-Ruhindi responded that the taxing officer made no mistake in that he reserved the ruling on 29/06/2012; and when the parties did not turn up, he read the ruling on 5/7/2012. That the taxation had taken place *ex-parte*; and that the issue of dates is a minor irregularity that is rectifiable under ***Sections 99 and 100 of the Civil Procedure Act.***

With due respect to Mr Ngaruye –Ruhindi's submissions, there was a mistake on part of the taxing officer, who taxed the bill *ex-parte* on 25/06/2012, and issued a Certificate on 29/06/2012 and read the taxation ruling on 5/07/2012. It is an irregularity that a ruling, out of which the Certificate is normally extracted, could be read on a date subsequent to the one on which the Certificate was issued. To that extent it was, indeed, an error on

part of the taxing officer. The question of whether or not, or how it could be rectified is a different matter.

The pertinent issue is whether the error/ mistake by the taxing officer would, in the circumstances, change the position as it relates to the time prescribed within which the 1st Applicant should have lodged his appeal. I find that it does not. Even if 5/7/2012 was to be the date from which to compute the time within which to file the appeal, thirty days would still have expired by 3/9/2012 when the application was filed.

I am also not persuaded that the 1st Applicant and his lawyers only got to learn of the matter on 14/08/2012, when they were served with "a notice to show cause". "Annexture B" to the affidavit in reply of Mugarura Mukongo shows otherwise. Without having to reproduce the contents in detail, suffice it to note that it is an extract of the proceedings in the Court of Appeal, where the 1st Applicant in the instant application was represented by the same lawyers of M/s Niwagaba & Mwebesa Advocates.

The relevant part of "Annexture B" relates to the lawyer's submissions that the Appellant filed other bill of costs in the High Court, which was taxed at Shs. 82, 000,000/=. The bill referred to is the same reflected in the Certificate of Taxation in the instant case. "Annexture B" is dated 12/7/2012, which was much before the 14/8/2012 when the 1st Applicant claims to have learnt of the matter for the first time. His assertions, certainly, pale in comparison to the glaring and obvious fact that he was all along aware of the existence of the Taxation Ruling, but took no steps to appeal against it.

Counsel Mr.Kanduho attacked "Annexture B" (supra), arguing that it is not a certified copy of the record of the Court of Appeal, and nor does it bear the signature of Obed Mwebesa, who at all material times acted personally as lawyer for the 1st Applicant. To support this view, Counsel cited ***Regulations 5 and 21 of the Advocates (Professional Conduct)Regulations SI 267 – 2,*** that a lawyer acts personally for a client, but that the proceedings do not show Obed Mwebesa to have been involved in the Court of Appeal.

I do not find plausible the reasons for attacking "Annexture B". It is clear that the document is drawn by M/s. Nuwagaba & Mwebesa Advocates, and there is no denying that Mr. Obed Mwebesa is part of that firm. It also makes clear reference to the matter before hand, and it was in existence even before this application could be filed. The document relates to the same parties as in this application. I find the attack on the document unjustified, and merely stretching the application of technicalities to absurd levels.

The reference to ***SI 267 – 2 Regulations 5 and 21*** by Mr. Kanduho is also misapplied. As a matter of fact the Regulations provide for one lawyer to brief another or partner in his or her firm to act for and on behalf; and for an advocate to act for a client of another advocate. This, actually, would not preclude another lawyer having appeared in the Court of Appeal for Obed Mwebesa, Counsel for the 1st Applicant.

Admissibility in evidence of "Annexture B", essentially, depends on whether it passes the reliability test, relevance and consistence with matters at hand. For the reasons given above, I find that it does, and its contents clearly demonstrate that the 1st Applicant and his lawyers were at all material times aware of the taxation ruling, even before the thirty days expired, but took no steps to appeal.

Regarding the issue of stay of execution, this court is guided by provisions of ***Order 43 rule 4 (3) Civil Procedure Rules***. They state as follows:-

> ***"No order for stay of execution shall be made under subrule (1) or (2) of this rule unless the court making it is satisfied –***
>
> ***(a) that substantial loss may result to the party applying for stay of execution unless the order is made;***
>
> ***(b) that the application has been made without unreasonable delay; and***
>
> ***(c) that security has been given by the applicant for the due performance of the decree or order as may ultimately be binding upon him or her."***

The preconditions must be satisfied before a stay of execution can be granted. No evidence has been adduced to prove to the satisfaction of this court that the conditions were complied with in the instant application.

Mr. Kanduho attempted to advance the view that provisions of ***Order 43 rule 4 (3) Civil Procedure Rules*** do not strip this court of its residual power to grant a stay under ***Section 62 (5) Advocates Act***. I respectfully disagree with the proposition. At best it amounts to inviting court to exercise its discretion as if in a vacuum. Court's power; residual or otherwise, is always guided and dependent. The bottom line is that it must be exercised judiciously. No convincing reason has been advanced which compels court to invoke its discretion.

Regarding the bill being excessive and/or unconscionable, this is invariably an issue that cannot be conveniently determined in this application. It is a matter that would be determined on merit on appeal, but the 1st Applicant notably squandered the opportunity to do so. The Applicant has failed to satisfy court as to the reasons for stay of execution. Accordingly the application is dismissed with costs.

BASHAIJA K. ANDREW
JUDGE
07/09/2012