

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MBALE

MISCELLANEOUS APPEAL NO. 0291 OF 2023

(Arising out of Taxation Application No. 52 of 2022)

(Arising from Election Petition Appeal No. 14 of 2021)

EKANYA GEOFREY :::::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

NYAKETCHO ANNET :::::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE LUBEGA FAROUQ

RULING

1. The Appellant brought this Appeal by way of chamber summons under section 62(1) of the Advocates Act Cap 267, section 33 of the Judicature Act Cap 13, Regulation 3 of the Advocates (Taxation of Costs) (Appeal and References) Regulation [S.1 267-5] and order 50 Rule 8 of the Civil Procedure Rules [S.1 71-1] for orders that;
 - a. That the decision of the taxing master allowing instruction fees at **Ugx 40,000,000/=** in Taxation Application No. 52 of 2022 be set aside
 - b. That item 1 of the bill of costs in Taxation Application No. 52 of 2022 on instruction fees be taxed according to justice and equity
 - c. That the award of professional fees on items on items 2,3,4,5,6,7,8,9,10,11,12,13,15,16,17,18,and 19 in the bill of costs that did not relate to the preliminary objection be set aside.
 - d. That the award on items 32,33,34,35,36,37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47 and 48 under disbursements in the bill of costs that did not relate to the preliminary objection be set aside and
 - e. Costs of the Appeal

2. Background

3. The background of this Appeal is that the Respondent/Petitioner instituted Election Petition No. 03 of 2021 challenging the declaration of the Appellant/Respondent as the duly elected Member of Parliament for Tororo County North. However, on the day the Petition came up for hearing after scheduling and having all the pleading admitted on the court record, the Appellant through his lawyer's M/s Ekirapa & Co. Advocates raised a preliminary point of law challenging the competency of the petition. The preliminary point of law was upheld by the trial judge and the Petition was dismissed. The petitioner Appealed and the Court of Appeal allowed the



Appeal, setting aside the orders of the trial court and allowing the appeal with costs both in the Court of Appeal and the Court below.

4. The Petitioner/Respondent then filed an application for taxation under taxation application No. 52 of 2022 where he filed a bill of costs and some of the items were agreed to by the parties and others were not. Among those not agreed to was instruction fees, items 2-19 for professional fees, and items 32-48 for disbursement. The Registrar allowed the instruction fees of **Ugx. 40,000,000/=** and the other items.
5. The Appellant/Respondent was dissatisfied with the awards by the Registrar hence this Appeal
6. The Appeal is based on the following grounds:

7. Grounds of Appeal

- a. That the Appellant is dissatisfied with the award of **Ugx. 40,000,000/=** as instruction fees in taxation Application No. 52 of 2022 made in favour of the Respondent
 - b. The learned taxing master did not exercise his discretion judicially when he taxed the bill of costs on instruction fees excessively
 - c. The learned taxing officer wrongly awarded costs for items that did not relate to the preliminary objection
 - d. It is in the interest of justice that the award in instruction fees and on items on professional fees and disbursements that did not relate to the bill of taxation be set aside.
8. The Appeal is supported by an affidavit sworn by the Appellant where he reiterated the grounds of Appeal. In reply, the Respondent in her affidavit averred that the instruction fees were in respect of the Petition without any anticipation of the preliminary objection to be raised and that the learned taxing officer correctly and rightly awarded the professional and disbursement fees.

9. legal Representation

10. Ekirapa & Co. Advocates represented the Appellant whereas the Respondent was represented by Okello Oryem & Co. Advocates.



11. **Determination of court**
12. Submissions by counsel for the Appellant
13. **Ground No.1:**
That the Appellant is dissatisfied with the award of Ugx. 40,000,000/= as instruction fees in taxation Application No. 52 of 2022 made in favour of the Respondent
14. **Ground No.2:**
The learned taxing master did not exercise his discretion judicially when he taxed the bill of costs on instruction fees excessively
15. Counsel for the Appellant submitted that the learned taxing master arrived at an erroneous decision since the Respondent's Bill of Costs should have been restricted to instruction fees for the preliminary objection and not instruction fees for hearing and trying the entire Petition. He argued that Election Petition No. 003 of 2021 was dismissed on a preliminary objection to the effect that the petition was incompetent because the affidavit in support of the Petition had been commissioned by an advocate without a valid practicing certificate which objection was overruled in its judgment of 1st June, 2021 and ordered for a trial of the Petition on its merit.
16. Counsel submitted that the petitioner is only entitled to the costs of the preliminary objection. He cited Civil Appeal No. 0095 of 2004 Lumweno and Company Advocates Vs. Trans-Africa Assurance Company Limited, where the Court of Appeal held that-

"It could not have been the intention of the legislature that the Advocate who only files and appears in court two or three times without the case proceeding on its merit would be remunerated in the same way as one who conducts the case on its merits. Logic and equity would dictate against it."

The court added-

"We therefore agree that the entitlement under instruction fees grows as the matter proceeds. A case that ends on a technicality cannot attract the same fees as the one that proceeds for trial."

17. Counsel further cited Rule 6 of the 6th schedule of the Advocates (Remuneration and Taxation or Costs) (Amendment) Regulation 2018, where the instruction fees to present and oppose a parliamentary election petition is a minimum of Ugx. 10,000,000/=

18. Following the above, counsel submitted that since the petition had not even commenced, an award of instruction fees of **Ugx. 3,000,000/=** for opposing a preliminary objection is reasonable.
19. **Ground No.3:**
The learned taxing master wrongly awarded costs for items that did not relate to the preliminary objection
20. Counsel submitted that the items 2-19 and 32-48 of the bill of costs do not relate to the preliminary objection but rather to the Petition itself which is yet to be tried. He argued that items 2-19 and 32-48 form part of the retried main petition and not the preliminary objection.
21. Submissions by counsel for the Respondent
22. **Ground No.1:**
That the Appellant is dissatisfied with the award of Ugx. 40,000,000/= as instruction fees in taxation Application No. 52 of 2022 made in favour of the Respondent
23. **Ground No.2:**
The learned taxing master did not exercise his discretion judicially when he taxed the bill of costs on instruction fees excessively
24. Counsel for the Respondent submitted that the learned taxing master properly awarded the sum of **Ugx. 40,000,000/=**. He argued that the award was consistent with the settled principles of taxation of costs.
25. Counsel referred to the case of Jaber Twalib and Another V. Global Hardwares Company Limited HCT Civil Appeal No. 28 of 2016 to submit that the Appellant has not demonstrated how the award violated the above principles but only argues that the Respondent is not entitled to the full costs of the case since the petition was determined on the point of law.
26. Counsel contended that full instruction fees to prosecute or defend a suit is earned by an advocate the moment a suit or defence is filed. He cited the case of Dison Okumu & 8 others Vs. Uganda Electricity Transmission Company Limited, Taxation Appeal No. 006 of 2019, where court held that-

**as a matter of principle, full instruction fees to defend a suit is earned the moment a plaint or defence is filed. The rationale is that pleadings*

are filed after the lawyer has been instructed and has applied his or her intellectual property to prepare and file the case”.

27. Counsel submitted that election petitions have specialized procedure that require the Advocate to prosecute election case by way of affidavit evidence. He cited **Rule 15 of the Parliamentary Elections (Interim Provisions) Rules SI-141** to argue that all pleadings and filing of affidavit evidence in Election Petition No.3 were closed before the case was determined on a point of law. He contended that all the affidavit evidence was read in open court before the matter was determined on point of law and like an ordinary case, a full trial had been done before the case was determined on a point of law and for that reason, the petitioner was entitled to full instruction fees on the law as well as the facts of the case.
28. Counsel further submitted that an election petition is not remunerated the same way an ordinary suit is remunerated because an election petition involves specialized field of practice. He argued that the instant petition was voluminous, complex, and intense and like all other election matters, the petition was contested up to Court of Appeal. He also alluded to the fact that there is no rule that fits in taxation of costs for election petition but each matter is determined on its own merits.
29. Counsel submitted that the Appellant has not demonstrated grounds for this court as an Appellate Court to interfere with the decision of the taxing officer and prayed that the contentions of the Appellant in respect of the award of **Ugx. 40,000,000/=** as instruction fees be rejected. He cited **Jaber Twalib and Another V. Global Hardwares Company Limited (Supra)** to support his submissions.
30. **Ground No.3:**
The learned taxing master wrongly awarded costs for items that did not relate to the preliminary objection
31. Counsel submitted that the filing and trial of an election petition proceed by way of pleadings filed together with the evidence in support of the Petition and once this is done, the Petitioner/Respondent is entitled to recover costs of the work done in drafting and filing both the Petition and the affidavits in support. He argued that before the trial court dismissed the Petition on a point of law, it first evaluated the evidence on the court record and came to its decision which the Court of Appeal over ruled and ordered for a re-trial and that is why the Petitioner/ Respondent remains entitled to the full costs of the original Petition. He prayed that the Appellant's contention be rejected.

32. **Analysis of Court**

33. **Duty of the first Appellate Court**

34. This court takes note that it is the first Appellate Court and therefore it is under a duty to evaluate the evidence on the court record and come to its own conclusion. See **Kifamute Vs Uganda SC Crim. Appeal No. 10/1997**

35. The grounds of this Appeal will be resolved as argued by counsel for both parties as below-

Ground No.1:

That the Appellant is dissatisfied with the award of Ugx. 40,000,000/= as instruction fees in taxation Application No. 52 of 2022 made in favour of the Respondent

Ground No.2:

The learned taxing master did not exercise his discretion judicially when he taxed the bill of costs on instruction fees excessively

36. **Rule 6 of Schedule 6 of the Advocates (Taxation of Costs) (Appeals and References) Regulations S.I 267-5** provides that-

"For instructions to present or oppose an election petition, the fee shall be as the taxing officer considers reasonable, taking into consideration the nature, importance, complexity and novelty of the petition, the place where and the circumstances in which work or a part of it was done, the time expended, the public interest and all other relevant circumstances, but the fees shall not be less than 5,000,000 shillings for petitions under the Local Governments Act and shall not be less than 10,000,000 shillings for petitions under the Parliamentary Elections Act"

37. In the instant case, the petition did not take off to its conclusion but instead was dismissed on a point of law. The point of law was that the affidavits in support were commissioned by an advocate without a valid practicing certificate and the same was over ruled by the Court of Appeal.

38. From the provision of the law as above quoted, the minimum award for instruction fees is **Ugx. 10,000,000/=** for the entire petition as defined under section 1 of the Parliamentary Election Act. However, contrary to

the instant Appeal, the instruction fees being challenged for being excessive arose from a preliminary point of law but not from the entire petition.

39. There is therefore a difference between a Petition that has reached its conclusion on merit and that which is determined on a point of law. The nature, importance, complexity and novelty of the Petition at whatever stage it is determined must be considered when awarding instruction fees.
40. The above provision did not envisage circumstances like in the instant appeal where the Petition was determined on a point of law. My view is that Rule 6 as above quoted would apply if the dismissal on the point of law had not been over ruled because in essence, the Petition would have been determined.
41. **Rule 9 Schedule 6 of Advocates (Taxation of Costs) (Appeals and References) Regulations** provides that-
- "(1) for instructions to sue or defend in any case not provided for in this Schedule, the fees shall be reasonable but shall not be less 2,000,000 shillings.*
- (2) for instructions to make or oppose interlocutory applications under items 1 to 9 in this Schedule, the fees shall be not less than 300,000 shillings."*
42. As it may be observed from the Rules, the instruction fees for defending a preliminary point of law are not provided for in the Schedule and in my view it falls under Rule 9 as above quoted.
43. Following the guidance in Rule 9, since the Rules are silent on the instruction fees to be awarded for a preliminary objection, the taxing master ought to award a lesser amount as opposed to **Ugx. 40,000,000/=** he awarded for defending a preliminary objection.
44. Having the two provisions in mind and the case of **Makumbi and another v Sole Electrics (U) Ltd [1990-1994] 1 EA 306** which gives principles governing taxation, I would accordingly find that the award of **Ugx. 40,000,000/=** as instruction fees awarded to the Respondent under Taxation Application No. 52 of 2022 was excessive. I agree with the decision in the case cited by counsel for the Appellants in **Civil Appeal No. 0095 of 2004 Lumweno and Company Advocates Vs. Trans-Africa Assurance Company Limited (Supra)**
45. In the result, using the powers vested in me under section 98 of the Civil Procedure Act Cap. 71 and section 33 of the Judicature Act Cap 13,

the award of **Ugx. 40,000,000/=** as instruction fees is hereby set aside and the Respondent is instead awarded **Ugx. 6,000,000/=** for instruction fees in both courts.

46. Grounds No. 1 and 2 are answered in the affirmative.

47. **Ground No. 3:**

The learned taxing master wrongly awarded costs for items that did not relate to the preliminary objection

48. From the submissions of both counsel, the items that are being contested are items 2-19 and 32-48 in the petitioner's bill of costs.

49. I have looked at the Respondent's bill of costs attached to the Application as annexure "A" and noted that all the items under 2-19 and 32-48 relate to the entire Petition.

50. It should however be noted that a finding on a preliminary point of law was over ruled and the Petition was sent back for a re-trial. This in essence means that whatever the Respondent was awarded under items 2-19 and 32-48 will again be awarded on conclusion of the Petition on merit hence, the taxing master awarded them in error at that stage.

51. Accordingly, the awards made by the taxing master in respect to items 2-19 and 32-48 are hereby set aside.

52. Ground No. 3 is answered in the affirmative.

53. This Appeal therefore, succeeds in following terms-

- a. The award of **Ugx. 40,000,000/=** for instruction fees made under Taxation Application No. 52 of 2022 is set aside.
- b. The Respondent is awarded **Ugx. 6,000,000/=** (Six Million Shillings) for instruction fees in both courts.
- c. The awards made under items 2-19 and 32-48 under Taxation Application No. 52 of 2022 are set aside.
- d. Costs of this Application are awarded to the Appellant

I so order.

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LUBEGA FARQUQ
JUDGE.

DATE:20th November 2023