

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
MISC APPLICATION 536 OF 2012
(Arising from Misc Cause No. 192 of 2011)

MUWEMA & MUGERWA ADVOCATES::::::::::::::::::::::::: APPLICANT

VERSUS

NATIONAL WATER & SEWERAGE CORPORATION : RESPONDENT

BEFORE: HON. JUSTICE ELDAD MWANGUSYA

RULING

This is an application brought under S.61 of the Advocates Act Cap 267 Laws of Uganda, Section 58 of the Contract Act, 2010, rules 4 and 5 of the Advocates Remuneration and Taxation of Costs Rules S. I 71-1, Section 33 of the Judicature Act Cap 33 Laws of Uganda, and Section 98 of the Civil Procedure Act Cap 71 Laws of Uganda seeking Declarations and orders that the Applicant's agreed remuneration and legal fees with their clients in the sum of shs 493.825.648= be charged and wholly paid to them by the Respondent from the sum of shs 2.256.045.088= recovered Uganda Revenue Authority pursuant to Misc Cause No. 192 of 2011 and that costs of this application be provided for.

The application is supported by the grounds set out in the affidavit of Brian Kabayiza a partner in the Applicant firm of Advocates and are stated briefly as follows:-

- i. That the Applicant firm was instructed by Patrick Semujju for and on behalf of numerous consumers of the Respondents was services to pursue the recovery of funds that had been illegally collected by the Respondents as Value Added Tax and remitted to Uganda Revenue Authority.

- ii. That the Applicant filed Misc Cause No. 192 of 2011 against the Respondent and Uganda Revenue Authority.
- iii. That the Applicant executed a Remuneration Agreement with their clients dated the 19th December 2011 specifying the sum they were to be paid for their services. That before Misc Cause No. 192 of 2011 was heard and determined by the court, Uganda Revenue Authority paid to the Respondent a sum of Shs 2.256.045.088= on the 19th April 2012 in settlement of its obligations to the Applicant’s clients; a consent judgment to that effect was executed by the parties thereof with each party to bear their costs.
- iv. The Applicant has made a demand to the Respondent for payment who is in possession of the refund monies has ignored, neglected and/or refused to pay the agreed legal fees of the Applicant.
- v. That Charging Declarations and Orders be made against the Respondent to secure the said legal fees and it be paid to the Applicant.
- vi. It is just and equitable and urgent that this application is granted.

The affidavit in support filed by Mr. Brian Kabayiza is in content similar to the above grounds. I only wish to cite paragraph 6, 7 and 10 of the affidavit because they highlight the substance of this claim.

“6) THAT before Misc Cause No. 192 of 2011 was heard and determined by the court Uganda Revenue Authority paid to the Respondent a sum of Shs 2.256.045.088= on the 19th April 2012 in settlement of its claim to the Applicant’s clients.

7) THAT the above payment by Uganda Revenue Authority finally resolved the issues for trial in Misc Cause 192 of 2011 and as such the parties concluded the modalities of a consent order to that effect on the 6th day of September 2012 with each party to bear their own costs.

8).....

9).....

10) THAT I am aware as an Advocate that his court can make a charge on the total amount of the refunded sum to secure and appropriate the Applicant’s legal fees as agreed with their client and order immediate payment thereof by the Respondent to the Applicant.

11).....

12).....”

The significance of paragraphs 7 and 10 will be fully analysed in this ruling after putting into consideration all the evidence adduced in this trial and the record in Misc. Application 192 of 2011.

The Respondent filed an affidavit in reply sworn by Edith Kateete, their Manager Legal Services. The gist of her affidavit is that the VAT complained of was collected on behalf of the Uganda Revenue Authority to whom it was remitted. After the coming into force of the VAT (Amendment) Act No. 18 of 2011 where VAT was abolished the Respondent got a refund from URA which they in turn refunded to their customers. According to Ms Kateete by the time the consent agreement was signed on 06.09.2013 the money had already been refunded to the customers. She avers that the application is misconceived because each party was to bear its own costs and there was no basis for the agreement between the Applicant and its clients which she described as fraudulent, unfair and unreasonable.

Following the affidavit in reply filed by the Respondent Mr. Brian Kabayiza filed an affidavit in rejoinder in which he depones that the Applicant has a lien on monies received pursuant to instrumentality in Misc Cause No. 192 of 2011 which lien was not vitiated by the Respondent's alleged issuance of credit notes to its customers.

In paragraph 2(c) he depones as follows:-

“In reply to paragraph 4 of her affidavit, the Applicant contends that;

- i. The Respondents alleged refund to customers of the money received from the fruits of the Applicant's action in Misc Cause No. 192/2011 is denied, alternatively it was an act of bad faith intended to defeat the Applicant's charge for fees and is therefore void against the Applicant.
- ii. The Respondent's water consumers are not entitled to take benefits of the applicant's work to seek a refund of monies without paying the applicant for the work.”

In a supplementary affidavit sworn by Ms Edith Kateete, she sought to adduce evidence that the Respondent had started refunding the VAT as early as 24th January 2012 and completed the exercise by April 2012.

At the trial the applicant was represented by Mr. Muwema Fred assisted by Mr. Siraje Ali and Mr. Terrence Kavuma while the respondent was represented by Mr. Fred Kizza of M/s Katende

Ssempebwa and Co. Advocates. The applicants had filed skeleton arguments which they adopted as their final submissions to which the Respondent filed a reply. The applicants filed a reply to the Respondent's skeleton arguments. From the skeleton arguments the following issues emerge for resolution by this court.

1. Whether or not court has jurisdiction to entertain this application.
2. Whether or not the Applicants are entitled to a charging and payment order for their fees of Uganda Shillings 493,825,648=
3. Whether or not court should re-open the Remuneration Agreement and require the Applicants to file a bill of costs.
4. Whether or not the Respondent refunded the monies recovered in Misc. Cause No. 192 of 2011 to its customers and if so, whether the Respondent is liable to pay the Applicant's fees claimed.
5. Whether or not the Applicant is entitled to costs of this application.

Before resolving the above issues I wish to make two observations about this application. The first observation stems from paragraph 2 of Mr. Brian Kabayiza's affidavit in support of the motion where he depones as follows:-

"THAT Patrick Semujju was granted a Representative Order and appointed by the court to act for an on behalf of the numerous consumers of the Respondents water services for the purposes of recovery of illegally collected Value Added Tax and or anything incidental thereto. [A copy of the order attached hereto marked 'A']

Paragraph 1 of the order is in the following terms:-

"The Applicant is hereby granted permission to sue on his own behalf and that of numerous consumers of the Respondent's water services in Uganda having interest in one suit for the determination of the legality of the Respondent's decision to impose and collect Value Added Tax on the supply of water at the rate of 18% after July, 2011.

My observation is that the issue of the legality or illegality of collection of VAT was never tried. The respondent still insists that the collection of the VAT was within the law and so was its remission to the URA. The refund of the money by the URA to respondent was done as a matter of course. In turn the respondent refunded the money to its customers which is raised as an issue in the application. The point is that if what the respondent did was within the law and the

customers whom the application was meant to protect would have got their refund without any suit I do not see the basis for the claim for the costs when at the conclusion of the case it was agreed that each party meets its own costs. My understanding of the phrase “Each party to bear its costs” is that each of the parties to the consent order namely, PATRICK SEMUJJU (Applicant), NATIONAL AND SEWERAGE CORPORATION (1st Respondent) and UGANDA REVENUE AUTHORITY (2nd Respondent) would bear its costs and i would not comprehend as to why one of the parties would be asked to bear the costs agreed between the applicant and his lawyers to which the respondent in this application was not a party. Their liability as to costs would be to their own counsel if at all.

Following from the above observation I also do not comprehend as to how S. 58 of the Contracts Act, 2010 one of the provisions of the law under which the application is made would be applied against the respondent. The provision relied upon by the applicants is as follows:-

“58 obligation of person enjoying benefit of non-gratuitous act.

- 1. Where a person lawfully does anything for another person, intending to do so gratuitously and the other person enjoys the benefit, the person who enjoys the benefit, shall compensate the person who provides the benefit in respect of or to restore, the thing done or delivered.***
- 2. Compensation shall not be made where the person sought to be charged had no opportunity of accepting or rejecting the benefit.***

In the instant case the respondent denies and rightly so of having enjoyed any benefit. The person(s) who enjoyed the benefit if at all are the customers of the Respondent who were catered for by the Respondent when their accounts were credited with the refunded VAT. According to sub-section (2) even if the Respondent had enjoyed the benefit they would not be bound by the agreement between the applicants and their client because the Respondent had no opportunity of accepting or rejecting the benefit on top of the fact they were not a party. In my view the above observations resolve this application but i will comment on other matters.

In their submissions the applicants raise the issue as to whether or not the Respondents did refund the money in issue to their customers. This issue never arose in the trial and i do not see its relevance in determining as to whether or not the applicants should be paid a fee they agreed with their client when the original application was filed and resolved by way of the consent order

already discussed in this ruling. I will revert to this issue when the fourth issue is discussed and I will start with it.

In their submissions the applicant denies that any refunds have been made and the refund envisaged under S. 30(1) VAT Act is for a tax that is properly chargeable but had been collected in excess. They submit that in the instant case the monies collected by the Respondent were illegal collections and not properly chargeable VAT since no law authorised the imposition or collection of VAT on water supply. I have already commented on the issue as to whether or not the collection were illegal and I needn't belabour the point. They also argue that any alleged refunds made by the Respondent were done in bad faith with the intention of defeating the Applicant's charge and recovery of its costs for work done. Again I have commented on the issue as to whether or not the recovery of the money from URA was as a matter of course because in my view that was what the Respondent was bound to do with the money which they had collected from their customers on behalf of URA and did not warrant a suit to refund it when the URA refunded it and I believe that they did unless the contrary is proved.

The 1st issue was whether or not the court had jurisdiction to entertain this Application or it is functus officio. To me the claim in this application is a fresh suit and this court has jurisdiction to entertain it. The only issue would be as to its merit which my opening observation have resolved. There is no question that any of the parties to the original suit can claim their costs from the other parties. I find no merit at all in this application and I do not need to go into the remaining issues which have no basis in view on my findings as to the liability of the Respondent in the agreement between the applicants in this case and their client.

In the circumstances this application is dismissed with costs to the Respondent.

Eldad Mwangusya

J U D G E

15.02.2013

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