THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISC APPEAL NO. 122 OF 2011

(Arising out of Misc Cause No. 170 of 2011)

MULTIPLE ICD LTD

VS-

KWESIGA – BATEYO & CO. ADVOCTATES

BEFORE HON. JUSTICE NYANZI YASIN

RULING

1. Kwesiga Bateyo & Co. Advocates acted for the appellant as defence counsel in two suits. The two suits **were HCCS NO. 147/2009 and C.S No. 288 of 2009** the parties to the suit were J**&M AIRPORT HOTEL& LEISURE CENTRE –VS- MULIPLE ICD LTD**

2. In respect of H.C.C.S NO. 147 OF 2009 the plaintiff sued the defendant for release of 30 containers general damages for detinue interest at commercial rate and costs of the suits.

3. Paragraph 5 of the plaint is a relevant fact in this appeal and I will reproduce it below.

5 The defendant as a shipper released some containers but unlawfully retained the plaintiff's 30 containers worth (Ug shs 12,000,000,000/= shillings twelve Billion) demanding shs 145,021,790 as storage charges before the said containers could be released.

4. On the 20th May 2010 the respondent firm of Advocates filed a consent judgment that had been reached between the two parties in respect of HCCS No 147/2009 but also affecting C.S No 288/2009.

   The consent is signed by Kwesiga Bateyo & Co. Advocates for the appellant and Muhumuza & Co. Advocates for J.M AirPort Hotels.

   It was endorsed by the Deputy Registrar on the same day 20/05/2010.

5. It appears after this consent was reached M/s Kwesiga Batego & Co. Advocates ceased to be the Advocates of the appellant. For that reason by letter dated 8/04/2011 they demanded to be paid shs 192,083,613 as shown in the Advocates client bill of costs of the same date. As the law requires the notice gave 30 days within which to pay.

6. The appellant did not pay and the matter proceeded on taxation by the taxing masters. The taxation hearing was interparty and the learned taxing master delivered his ruling on the 21/09/2011 awarding shs 121,187,500/= as instruction fees basing it on a subject matter of shs 12,000,000/=

7. It is that award that aggrieved the appellant and filed this reference under S.62(1) of the advocate Act Cap 267 and Rules 2 and 4 of the Advocates(Taxation and costs) Appeal and reference Regulation S1 267-5).

8. The grounds of this appeal are as follows:

i). That the learned Deputy Registrar erred in this ruling on the 21st Sept 2011 when he awarded shs 121,187,510 on item 1 as instruction fees.

ii) That the award of shs 121,187,510 was excessive and contrary to the established principle of taxation

iii) Ground 3 is in respect of the above two in a different language)

iv) It is just and equitable that the appeal is allowed

9. The appeal is supported by the affidavit if ALPESH PATEL the financial controller of the appellant company.

10. The Respondent firm of Advocates apposed this appeal and filed an affidavit in reply through Keneth Kwesiga Bateyo who is a partner in the same firm.

11. In paragraph 3 and 4 of that affidavit, Mr. Kwesiga justifies the award and attaches the plaint as annexture “A” and refers to paragraph 5 which I referred to earlier herein.

12. In his ruling of 21/09/2011 the learned taxing master agreed with the respondent. He seemed to have relied on paragraph 2and 4 of the affidavit of Kwesiga in reply and the contents of plaint Annexture A" .

13. He accordingly stated "Kituuma Magala challenged the bill on several items. The bone of contention though was on instruction fees. The applicant submitted that instruction fees should be based on a figure of 12,000,000,000/= (Twelve Billion) while the respondent submitted that it should be based on a figure of shs 380,230, 0422/=

On instruction fees it is clear that by the time the applicant was instructed it was meant to defend a claim worth 12 billion shillings. According to the plaint the 30 containers the plaintiff was claiming to be released by the defendant were worth 12 billion shillings. In other words if the defendant was not going to release the said containers that is what the plaintiff could have demanded for in the equivalent of course the plaintiff would have had to strictly prove that value but that is what the applicant was instructed to defend.

With respect I fail to appreciate where counsel for the respondent gets the figure 380,230,042/= as a basis for charging instruction fees I will award instruction fees of 121,187,500/= for the bill of costs in civil suit No 147/2009. The same will also be increased by 1/3 "

14. Ordinarily once a taxing master reaches such a decision on quantum the mere fact the quantum is high is no ground for this court to interfere with the exercise of his /her discretion in making the award.

15. There is a wealthy of authorities which state the principle that guide this court on cases of this nature. They include among others

-NICHOLAS ROUSSOUS -VS GULAM HUSSEIN HABIB SC 1996 (1 KARLR 44

-AKISOFERI OGOLA –VS- AKIKA & ANOR C.A NO. 18 /1999

- **JAFFER BOTHERS LTD –VS- DAPC BOARD SC CA 24/1999**
- **PATRICK MAKUMBI –VS- SOLE ELECTRONICS SCCA 11/ 1999**

16.The same authorities state other important principles on taxation and powers of a taxing master. They are:

- That the taxing master should take into consideration a fee which he /she considers as a fair value of the work having regard to the nature and importance of the case, amount involved and value for money.

- That the taxing master should find the appropriate scale and then consider whether the basic fee should be increased or reduced considering a fair value upon the work and the responsibility involved.

17. Of all the principle the one concerned with this appeal is that this court does not interfere with quantum perse.

18.There are however situations when court does so as held in

STEEL CONSTRUCTION ENGINEERING EA LTD-VS- UGANDA SUGAR FACTORY LTD [1970] EA 141

It was held that an appellant court will not interfere with an assessment of costs by a taxing master unless the taxing master has misdirected himself on a matter of principle but if the quantum of an assessment is manifestly extravagant, a mis -direction of principal may be a necessary inference.

19.The question for this court to decide is whether they are any grounds legal or otherwise for it to interfere with the quatum of instruction fees based on the suit value of shs 12b/=

20. An exceptional case allowing court to interfere with the assessment of taxing master on quantum is where he/she applied a wrong principle in arriving at that amount. See **JAMES AG –VS JAMES KAMOGA & KIMALA CIVIL APPLICATION NO 2/2008**

21. Earlier in his ruling I cited a passage where the learned taxing master took shs 12.bn as the subject value of the subject matter for purposes of assessment of instruction fees . He relied on the pleadings in paragraph 5 of the plaint which stated the value of 30 containers to be shs 12,000,000/=

22 . From the facts of this case, after pleadings closed the parties on the 20th May 2010 entered into a consent judgment. It is annexture A it spelt out terms of the agreement between the parties.

23. I must say it was a unique settlement that did not involve cash payment. It did not state any figure to be the value of the subject matter.

24 After the party entered into this consent became the new point of reference no matter what the parties had pleaded. In **ISMAIL .S HIRANI –VS-NOORRALI E. KASSAM 19 EACA 131** It was held that a consent decree is raised upon a new contract between the parties which supersedes the original cause of action.

25. **INGOODMAN AGENCIES LTD –VS-ATTORNEY GENERAL& HASS AGENCIES LTD CONSTITUTIONAL AGENGICIES PETITION LTD** No 3/2008 It was held that consent judgments are treated as fresh agreements and may only be interfered with on limited grounds. The limited grounds are fraud, mistake, and misinterpretation or ignorance of the material facts.

26 Except where those grounds are successfully raised courts do not interfere with consent judgments.In the present case there was a consent that supers ceded the pleadings. After the consent judgment I believe it was an error on the part of the taxing master to cite and rely on paragraph 5 of the plaint. That was a mere

pleading that had not been proved and from which parties had moved by consenting to different terms.

27 As all court are bound by a consent judgment as a new agreement between parties except for fraud, mistake or ignorance of material facts, the taxing master is equally bound. He or she cannot go back to pleadings after parties have entered into a new agreement by consent. I would compare what was done here to a situation where the taxing master would ignore the award made by the judge and in the court judgment and use pleadings (plaint) to reach an assessment on instruction fees. That was an error that would warrant this courts interference with the award that was based on shs 12 bn as the value of the subject matter. With respect I do not agree with the approach the learned taxing master adopted.

28. I would further fault the taxing master for having correctly stated that the plaintiff would have had to strictly prove the shs 12bn as subject matter value but proceeded to use the approved value against the appellant even if the law allowed him to revert to pleadings which I earlier said is not allowed.

29 I would for those reasons interfere with the award and set it aside for reasons that it was reached by the taxing master applying wrong principles of the law relating to consent judgment.

30. Clause 1 (iv) of schedule six to the Advocates (Remuneration and taxation of costs) Regulations provides for the formula applicable to cases

> "where the value of the subject matter can be determined from amount claimed or the judgment.

31. My finding is that after the consent judgment the amount claimed was no longer applicable. The consent judgment itself gave no monetary figure but used containers to settle the claim. I did not find annexture "A" to affidavit of **C.A SUNIL MALHOTRA** giving a sum total summary of declarations to URA useful. It is not a formal document but a mere complication done by the appellant.

It is not explained why the deponent did not attach the declaration forms themselves instead of developing a summary list. Annexture A cannot be relied on to establish the value.

32. Secondly just like the learned taxing master concluded it is difficult to appreciate where from and how learned counsel Mr. Kituume Magala came up with a figure of shs 380,280,042 in HCCS 147/009 as the value of the subject master. His explanation appearing at page 2 of the typed copy of proceedings is very inadequate with due respect. That figure also is not acceptable.

33.The only point of reference remains the consent judgment which used containers as currency point to settle the claims of each party. For example clause 2 of the consent judgment allowed the appellant to retain and sell any four

containers to recover dues in **HCCS NO. 288/2009. CLAUSE 6,21** containers were to be released. clause 3 costs were to be paid in form of containers. It is only clause 4which stated that the appellant would be paid shs 50m at the execution of the consent judgment.

34. I must then say that the consent judgment never stated the correct value of the subject matter of the case. It is such a case where court has to come out and decide the reasonable fees to charge.

35. In my view the consent was more important to J&M AIR PORT HOTEL & LEISURE CENTER LTD- than to the defendant it is the defendant. It is them who got their goods released under the consent and took value the appellant was only interested in the charges and related costs for taking custody of the containers. The dependant had no claim to the value of the goods.

36. I agree some work was done for the defendant but not as important as for the plaintiff as the learned taxing master seemed to have believed when the reasoned in his ruling that:

> "In either words If the defendant were not going to release 0020he said container that is what the plaintiff could have demanded.

That is not correct .If no settlement had been reached it was the plaintiff to lose more than defendant.

BANCO ARABE ESPANOL–VS BANK OF UGANDA CA. NO 8 ./1998 Mulenga JSC (RIP) had this to say in a similar situation

> "For the plaintiff the appeal was very important because if it was not presented or if it was dismissed the plaintiff stood to lose the suit and would have had to initiate other proceedings in pursuit of its claim, all very expensive in terms of costs. to defend. it was important, albeit to a lesser degree because if the appeal was dismissed, the defendant stood a chance of getting off the hook of liability.

37 I notice from the consent that it was drawn and filed by the respondent firm of Advocates but I do not believe it was a very difficult case I am aware that a settlement may involve negotiations after and counter offers but the amount of work is not similarly to court room work.

35. **IN BANCO ARABE ESPANOL –VS- B.O.U C.A NO. 8/1998(SUPRA)**

Because the work involved was not so complicated instruction fees reduced from shs 200,000,000/= to merely shs 7,000,000/= on appeal to the supreme court.

36. Applying the same principle in the above case for the present one I would reduce the fees awarded. By the authority of AG –VS- J. kamoga .j kimala(supra) where court finds the taxing officer to have erred on a principle, the practice is to remit. the question of quantum is to be decided by the same or another taxing officer.

37. I will however deviate from that practice this case started in 2009 and consent was reached in May 2010. The ruling appealed from is dated

21/Sept/ 2011. it is now coming to 3 years with this appeal in court. If i remit the file, I would have over elongated litigation which must have an end. By virtue of S.33 of the Judicature Act. I would make the reasonable assessment myself for the reason first above given.

38. Considering all the circumstances of the case, I would reduce the figure on instruction fees from 121,187,500/= to shs 40,000,000/= as appropriate instruction fees

I award costs of appeal to the appellant

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NYANZI YASIN

27/06/2011

27/06/2014

Mr. Kituuma Magala for appellant

Mr. Kwesigwa Bateyo present

Sunil GIM of appellant present

Aisha Court- clerk

Court: Ruling delivered in the presence of the above in chambers

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NYANZI YASIN

JUDGE

27/06/ 2014