THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

MISCELLANEOUS CIVIL APPLICATION No. 0007 OF 2016

(Arising from the decision of the Taxing Officer in Civil Suit No. 0021 of 2010)

1. ARUA DISTRICT LAND BOARD }
2. ARUA MUNICIPAL COUNCIL } …….… APPLICANTS

VERSUS

BRAN CHEKEN }
(t/a ARUA UNITED DOMINOES CLUB } ……..……. RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

These proceeding have been presented by way of Notice of Motion under Order 50 rule 8 of *The Civil Procedure Rules*, Part III of the sixth Schedule of *The Advocates (Remuneration and Taxation of Costs) Rules*, section 19 of *The Government Proceedings Act* and section 98 of *The Civil Procedure Act*. The appellants seek orders setting aside an award of costs of Uganda shillings 4,100,000/= alongside a valuation report on basis of which that taxation proceeded, and a direction for a fresh evaluation of property at plot 2A Godown Road in Arua Municipality.

The application is supported by an affidavit of the second applicant's Town Clerk who avers that the applicants have no alternative land to give to the respondent but undertake to compensate the respondent with a sum equivalent to the current fair market value of plot 2A Godown Road, provided the process of valuation is done in a transparent manner, with the involvement of all parties. The valuation undertaken at the instance of counsel for the respondents is disputed since none of the applicants was involved. The applicants have since the valuation never been provided with a copy of the report which in any case was produced without any notification being given to them of the process of valuation. It is only on 6th March 2015 that the applicants came to learn that the Chief Government Valuer had determined the market value of plot 2A Godown Road to be shs. 345,000,000/= which value the applicants contest.

In his affidavit in reply, the respondent avers that the application is an abuse of court process since the Chief Government Valuer is independent, impartial and transparent. In any event, the applicant does not point out anything wrong with the content of the report. Counsel for the applicants was present in court when the report was submitted to the Assistant Registrar.

The background to this application is that in his plaint filed on 23rd December 2010, the respondent sued both applicants jointly and severally for special and general damages, interest and costs for breach of contract when the applicants granted him a five year lease over plot 2A Godown Road in Arua Municipality, which they wrongfully re-allocated to a third party after he had accepted the offer and paid the requisite dues. In a judgment delivered on 2nd July 2013, judgment was delivered in his favour whereupon the court ordered, inter alia, that the applicants were within 90 days from the date of judgment, to allocate the applicant an alternative plot failure of which they were to compensate the applicant at the current market rate, the value of an undeveloped plot of attributes similar to those of plot 2A Godown Road, as determined by the Chief Government valuer whereupon the sum so determined shall be payable within thirty days after the report is filed and endorsed by the Registrar.

The applicants not having taken any steps towards implementation of those orders, the respondent was through his advocate prompted to initiate the process of valuation. By their letter dated 2nd September 2014, they requested the Chief Government Valuer to undertake a valuation of plot 2A Godown Road which was duly done on 6th February 2015. The Chief Government valuer then issued his report dated 23rd February 2015 by which he indicated the current market price for the plot 2A Godown Road as being shs. 345,000,000/= Counsel for the respondent filed that report in court on 5th March 2015 submitting therewith a bill of costs for expenses incurred in the procuring of that report which was taxed on 22nd January 2015 and allowed at shs. 4,100,000/=.

As I understand the nature of this application, the report of the Chief Government valuer is being challenged not so much on grounds of its content but rather the procedure through which it was generated. It is clear though from the outset that the applicants were guilty of dilatory conduct. The order of court in the decree imposed an obligation on the applicants, upon failure to allocate the respondent an alternative plot within 90 days from the date of judgment, to compensate the respondent at the current market rate, the value of an undeveloped plot of attributes similar to

those of plot 2A Godown Road, as determined by the Chief Government valuer. The compliance period thus expired at the end of October 2013. A year later, as at 2nd September 2014 when counsel for the respondent took the initiative to kick-start the process of compensation, the applicants had not taken the requisite steps, they had neither offered an alternative piece of land nor intimated to the respondent steps taken towards establishing the quantum due as compensation. Now in paragraph 4 of the affidavit in support of the application, it is disclosed that the applicants "have no alternative land to give to the respondent currently." It is not disclosed when they came to this realisation but whatever view is taken of their conduct, it manifests an attitude bordering on contempt of Court.

Be that as it may, the right to a fair trial guaranteed by article 28 (1) of *The Constitution of the Republic of Uganda, 1995* subsists until final execution of the decree. It guarantees the right of participation by both parties and to be heard at all stages of the proceedings, except where the parties prevent themselves from exercising that right. Implicit in that guarantee is the fact that nothing should get onto the court record in violation of any of the party's right to be heard. Decisions taken on basis of material placed before court without giving an opportunity to the parties to be heard, or in violation of the principles of natural justice, once brought to the attention of court, will be set aside.

In the instant case, the direction of court appointing the Chief Government Valuer to determine the market price of a comparable piece of land was not a licence for an ex-parte process of valuation. The parties may not have had any useful input into the process but they were entitled to be notified of the date the process was to be undertaken, to be afforded an opportunity to make representations to the valuer or bring to the attention of the valuer such matters or facts as they may have deemed necessary to guide the valuer in the determination of the value, and to be present at the time of the physical site inspection. By the order contained in the judgment, the Chief Government valuer was constituted into a quasi-judicial body with power to determine questions affecting the rights of both parties as to the quantum and was thus obliged to act judicially. The court will invoke its inherent jurisdiction and intervene where its agent appointed by its order as in the instant case, though competent but with no particular procedure prescribed for the discharge of the duty imposed, has acted in flagrant disregard or in violation of the

principles of natural justice. That counsel for the applicant was present at the time the report was presented to court did not cure the procedural defect. Consequently the report of the Chief Government valuer dated 23rd February 2015 is hereby expunged from the court record.

The other order sought is one setting aside an award of costs of Uganda shillings 4,100,000/= as costs for procuring the report of the Chief Government Valuer. The circumstances in which a Judge of the High Court may interfere with the Taxing Officer's exercise of discretion in awarding costs were restated by the Supreme Court in the case of *Bank of Uganda v Banco Arabe Espanol, S.C. Civil Application No. 23 of 1999 (Mulenga JSC)* to be the following:

> Save in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs are matters with which the taxing officer is particularly fitted to deal, and in which he has more experience than the judge. Consequently a judge will not alter a fee allowed by the taxing officer, merely because in his opinion he should have allowed a higher or lower amount.
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> Secondly, an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the taxing officer exercised, or applied a wrong principle. In this regard, application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or manifestly low.
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> Thirdly, even if it is shown that the taxing officer erred on principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties.

Additional principles are further stated in *First American Bank of Kenya v Shah and Others [2002] 1 EA 64*, as follows;

1. The Court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle;
2. It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration Order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the

interest of the parties, the general conduct of the proceedings and any direction by the trial judge;

3. If the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high;

I am guided further by the decision in *Thomas James Arthur v. Nyeri Electricity Undertaking, [1961] EA 492* wherein it was held that:

i. Where there has been an error in principle the court will interfere, but questions solely of quantum are regarded as matters which taxing Officers are particularly fitted to deal with and the court will intervene only in exceptional circumstances.
ii. The fee allowed was higher than seemed appropriate, but in a matter which must remain essentially one of opinion; it was not so manifestly excessive as to justify treating it as indicative of the exercise of a wrong principle.

Taxation of bills of costs should be pursuant to an order of court awarding such costs. In the instant case, the decree is silent as to the costs of valuation. The Taxing Officer therefore erred in principle when he taxed costs that were not awarded by the Judge who heard the suit. The certificate of taxation awarding the sum of shillings 4,100,000/= as costs for procuring the report of the Chief Government Valuer therefore is accordingly set aside.

The applicants although successful, it is by reason of their dilatory conduct that the instant proceedings arose and they will therefore be penalised in costs. The costs of this application are awarded to the respondent.

Dated at Arua this 2nd day of March 2017. ……..

Stephen Mubiru
Judge.