

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
MISCELLANEOUS CIVIL APPLICATION No. 0023 OF 2017

PETER JOGO TABU **APPLICANT**

VERSUS

PETER LANGI **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

RULING

This is an application under section 57 of *The Advocates Act* and Order 52 rules 1 and 3 of *The Civil procedure rules* seeking and order authorising taxation of an advocate / client bill of costs, on grounds that the applicant, an advocate in private legal practice, rendered legal services to the respondent as an appellant in High Court Civil Appeal No. 10 of 2008 for which the respondent has either failed, neglected or refused to pay. In the affidavit supporting the application, the applicant avers that he was instructed by the respondent to represent him in the abovementioned appeal in which judgment was delivered on 17th October 2013 whereupon court directed each party to bear its costs. The applicant proceeded to serve an advocate / client bill of costs upon the respondent on 16th September 2014 but despite several reminders thereafter, the respondent has to-date failed, neglected or refused to settle the bill.

The respondent having not filed an affidavit in reply and he having failed to turn up at the hearing of the application despite existence of a return of service on court record proving that he had been effectively served, court allowed the applicant to proceed ex-parte and his counsel Mr. Jimmy Madira submitted that the application be allowed since the respondent was duly served with a copy of the advocate / client bill of costs which he has not settled to-date.

Advocate / client costs are the costs that an advocate claims from his own client and which the advocate is entitled to recover from a client, for professional services rendered to and disbursements made on behalf of the client. These costs are payable by the client whatever the

outcome of the matter for which the advocates' services were engaged and are not dependent upon any award of costs by the court. In the wide sense, they include all the costs that the advocate is entitled to recover against the client on taxation of the bill of costs. The term is also used in a narrower sense as applying to those charges and expenses as between advocate and client that a client is obliged to pay his or her advocate which are not recoverable party and party costs, or costs which ordinarily the client cannot recover from the other party. These costs can arise either in contentious or non-contentious matters.

In contentious matters, the better practice envisaged by s 50 of *The Advocates Act* is for the advocate and the client to agree at the time instructions are given or within a reasonable time thereafter as to the fees and disbursements the client shall have to meet in the course of the advocate's prosecution of the client's instructions. Such an agreement enables the client to negotiate a reasonable fee with the advocate; it creates an opportunity for the client to obtain an estimate or range of estimates of the total legal costs likely to be incurred, details of the intervals (if any) at which the client will be billed, any surcharges (if any) that the law practice charges on overdue fees, an estimate of the range of costs that may be recovered from another party if the client is successful in litigation and the range of costs the client may be ordered to pay to another party if the client is unsuccessful, the client's right to receive progress reports, the avenues open to the client in the event of a dispute in relation to legal costs and details of the person whom the client may contact to discuss issues of the legal costs.

Such agreements are required to be in writing, signed by the client, and to contain a certificate signed by a notary public to the effect that the person bound by the agreement had explained to him or her, the nature of the agreement and appeared to understand the agreement. A copy of the certificate is required to be sent to the secretary of the Law Council by prepaid registered post. Agreements of this nature are not enforceable if any of those requirements is not satisfied (see s 50 (2) of *The Advocates Act*). However, a valid agreement of this nature is neither subject to taxation nor to the requirements of signing and delivery of an advocate's bill of costs (see s 54 of *The Advocates Act*). In such cases, a Taxing Officer has no authority to examine the nature and extent of the work done by the advocate in order to determine whether the costs incurred had

been reasonably incurred. A valid agreement takes the issue of costs payable by a client to the advocate, out of the jurisdiction of a Taxing Officer.

In the instant case, there does not appear to have been any written agreement between the applicant and the respondent as to the amount payable as fees and disbursements in the prosecution of the respondent's instructions. Given that no written agreement is in existence, this is a case where the Taxing Officer would have full authority to examine the nature and extent of the work done by the advocate in order to determine whether the costs incurred were reasonably incurred and therefore are recoverable from the client.

However, in absence of an agreement for fees, if a dispute arises between an advocate and a client regarding the amount of fees payable such that the costs have to be taxed, the client is provided with a special protection under the taxation process. In such a case, no suit can be commenced to recover any costs due to the advocate until one month after a bill of costs has been delivered in accordance with the requirements of section 57 of *The Advocates Act*. The requirements are;

- (a) the bill must be signed by the advocate, or if the costs are due to a firm, one partner of that firm, either in his or her own name or in the name of the firm, or be enclosed in, or accompanied by, a letter which is so signed and refers to the bill; and
- (b) the bill must be delivered to the party to be charged with it, either personally or by being sent to him or her by registered post to, or left for him or her at, his or her place of business, dwelling house, or last known place of abode.

Although an advocate / client bill of costs can be in the form of a lump sum bill (a bill that describes the legal services to which it relates and specifies the total amount of costs), s 58 (2) of *The Advocates Act* requires it to be an itemized bill (a bill that specifies in detail how the legal costs are made up) if it is to be settled after taxation. *In Re An Advocate; In Re A Taxation of Costs [1955] 2 QB 252*. Denning L.J. confirmed this distinction in the following terms:

There is a great difference for advocates between "contentious business" and "non-contentious business." A bill for contentious business must be made out item by item, with a separate charge against each item; but a bill for non-contentious business can be charged by a lump sum. The difference in the method of charging

leads to a difference in the amount, which the advocate receives. Non-contentious business is, I believe, more remunerative than contentious business.

Being based on instructions given in a contentious matter, the applicant in the instant case has not attached a copy of the bill of costs sent to the respondent. Annexure “A” to the affidavit in support of the application too does not make any reference to an itemised bill of costs. As matters stand, it would appear that the applicant did not furnish the respondent with an itemised bill of costs as required by s 58 (2) of *The Advocates Act* but rather a lump sum bill.

Nevertheless, the combined effect of sections 57 and 58 of *The Advocates Act*, in respect of a Bill of Costs for advocate and client charges duly delivered would appear to be that: (1) the advocate cannot lawfully sue until after expiry of one month after delivery of the bill of costs; (2) the client has a period of one month after being served with it, within which to demand and obtain taxation of the bill of costs by a Taxing Officer. If demand for taxation of the bill of costs is not made by the client within that period, then on the application either of the advocate or of client, the court may upon such terms, if any, as it thinks fit, not being terms as to the costs of the taxation, order that the bill shall be taxed.

The special protection given to the client as outlined above is firstly meant to protect the client in an Advocate and Client relationship by creating ample opportunity for the advocate to communicate at a meaningful level with the client at an early stage of the taxation process. It prevents the possibility of acrimony that could otherwise arise from a dispute over fees rushed to court adjudication. Secondly, the other rationale behind this provision can be found in the distinction between the principles underlying the award of party and party costs on the one hand and advocate / client costs on the other. The principle underlying the award of party and party costs was explained in *Tobin and Twomey v. Kerry Foods Ltd.*, [1999] 1 I.L.R.M. 428 at 432 by Kelly J. that; “it is clear that the basis of party and party costs is one of indemnity.” Similarly in *Gundry v Sainsbury* [1910] 1 KB 645 Cozens-Hardy, M.R. had regard to the nature of party and party costs and held as follows:

What are party and party costs? They are not a complete indemnity, but they are only given in the character of an indemnity. I cannot do better than read the opinion expressed by Bramwell J. in *Harold v Smith*.”...Costs as between party and party are

given by law as an indemnity to the person entitled to them; they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the demagnification can be found out, the extent to which the costs ought to be allowed is also ascertained.”

This distinction in treatment between the two types of legal costs was set out as follows in *Dyotte v. Reid* (1876) 10 I.L.T.R. 110, thus;

Costs as between party and party are not the same as advocate and client costs. In costs between party and party one does not get a full indemnity for costs incurred against the other. The principles to be considered in relation to party and party costs is that you are bound in the conduct of your case to have regard to the fact that your adversary may in the end have to pay your costs.

The effect of this premise is that a party is entitled to have all costs reasonably incurred in the defence of his or her rights not as a complete indemnity, but only in the character of an indemnity. Parties are bound in the conduct of their respective cases to have regard to the fact that the adversary may in the end have to pay the costs. The successful party cannot be allowed to indulge in a “luxury of payment.” For that reason, in a party and party taxation of costs, any charges merely for conducting litigation more conveniently will be called “luxuries” and must be paid by the party incurring them. The costs chargeable under taxation as between party and party are limited to all that which was necessary to enable the adverse party to conduct the litigation, and no more.

On the other hand, in a client / advocate bill of costs, the basic premise is that the advocate is entitled to be paid all costs claimed for, other than such costs as may be unreasonable. On a taxation as between advocate and own client, there is an almost irrefutable presumption that all costs incurred with the express or implied approval of the client evidenced by writing are presumed to have been reasonably incurred, and where the amount thereof has been so expressly or impliedly approved by the client, to have been reasonable in amount. For that reason, whereas any charges merely for conducting litigation more conveniently will be called “luxuries” in a party and party bill of costs and must be paid by the party incurring them, in a client / advocate bill of costs such “luxuries” are charged to a client, except where they were not incurred with the express or implied approval of the client.

It would appear therefore that in the thirty days given to a client are to enable the client, among other reasons, to sieve out which items in the bill of costs presented to him or her were incurred with his or her express or implied approval, or not. For contentious business, the bill of costs will furnish a detailed statement of all the legal costs to the client. It will contain; a summary of the legal services provided; the amount of fees payable in respect thereof and details of the nature and quantum of all charges and disbursements incurred by the advocate in fulfilment of the instructions given by the client. This information enables the client determine the basis on which legal costs were charged and within the thirty day period, negotiate a costs settlement with the advocate, or obtain independent advise thereon. Failure of this, the client may then seek the bill to be taxed by a Taxing Officer whereupon such a Taxing Officer must consider: whether or not it was reasonable to carry out the work to which the legal costs relate, whether or not the work was carried out in a reasonable manner and the fairness and the reasonableness of the amount of costs charged.

It is therefore of extreme importance that a client is not deprived of the opportunity to determine whether the bill of costs represents costs that were incurred with his or her express or implied approval, and to negotiate a costs settlement with the advocate, or seek an independent opinion before the bill is presented to be taxed by a Taxing Officer through action commenced by the advocate. That appears to be the purpose of section 57 (b) of *The Advocates Act*. The question in the instant application is whether the respondent was accorded that opportunity by service of the bill of costs upon him, and if not, whether the application should therefore fail.

In paragraph 5 of the affidavit in support of the application the applicant deposes having served the respondent on 16th September 2014 with both a covering letter referenced JCA/PL/186/08 and the bill of costs. He has neither attached a copy of that letter nor that of the bill of costs sent to the respondent. Annexure “A” to the affidavit in support of the application too does not make any reference to an itemised bill of costs. The applicant had the burden of proving service of the bill of costs upon the respondent, beyond a mere assertion. Where service is properly effected, the return of service should ordinarily have annexed to it the original process or document served accompanied by an affidavit of service stating the time when and the manner in which the document was served, and the name and address of the person, if any, identifying the person

served and witnessing the delivery or tender of the document (analogy drawn from Order 5 r 16 of *The Civil Procedure Rules*). Paragraph 5 of the affidavit in support of the application only states that the respondent was served on 16th September 2014 by way of e-mail. I therefore find that the applicant has not discharged the burden and there is no proof that the respondent was served with the bill of costs on 16th September 2014.

Section 57 of *The Advocates Act* is in the nature of a procedural rather than a jurisdictional provision. The court has jurisdiction to tax the bill of costs but the jurisdiction to tax should not be invoked until the client has been afforded an opportunity to determine whether the bill of costs represents costs that were incurred with his or her express or implied approval, and to negotiate a costs settlement with the advocate. The provision creates a regulatory procedural requirement which imposes obligations on advocates as to recovery of legal costs with particular emphasis to costs in contentious matters.

The Irish High Court in the case of *A & L Goodbody Advocates v Colthurst and another* [2003] IEHC 74 (judgment of Mr. Justice Peart, High Court, 5th November 2003) had occasion to consider the impact of non-compliance with s 68 of the *Irish Advocates (Amendment) Act, 1994* which requires advocates on taking of instructions to provide legal services to a client, or as soon as is practicable thereafter, to provide the client with particulars in writing of; the actual charges, or an estimate of the charges, or the basis on which the charges are to be made and the circumstances, if any, in which the client's liability to meet the charges which will be made by the advocate of that client for those services will not be fully discharged by the amount, if any, of the costs recovered in the contentious business from any other party or parties (or any insurers of such party or parties). Sub-section (6) requires an advocate to show on a bill of costs to be furnished to the client, as soon as practicable after the conclusion of any contentious business carried out by him on behalf of that client, among other items, a summary of the legal services provided to the client in connection with such contentious business and that the bill of costs should show separately the amounts in respect of fees, outlays, disbursements and expenses incurred or arising in connection with the provision of such legal services. Subsection (7) reserves the right of any person to require an advocate to submit a bill of costs for taxation,

whether on a party and party basis or on an advocate and own client basis. The court found that non-compliance did not deprive the advocate of the right to recover fees.

In another case interpreting and applying the same provision, *Luke Boyne v Dublin Bus / Bus Átha Cliath and James McGrath, (2006) IEHC 209*, the Defendants submitted as a preliminary objection that the Plaintiff was not entitled to recover any costs from the Defendants on a Party and Party Taxation in circumstances where the Plaintiff was not under a legal liability himself to discharge the corresponding part of his own Bill of Costs, being the amount therein sought to be recovered on Taxation. The central thrust of the Submissions made on behalf of the Defendants was to the effect that there has been no compliance with Section 68 (1) (c) of the *Advocates (Amendment) Act, 1994*, because on taking the instructions of the Plaintiff, the Plaintiff's Advocates did not then, or as soon as practicable thereafter, provide the Plaintiff with particulars in writing of the basis upon which charges were to be made as required by Section 68(1) (c). The Defendants submitted that the letter of the 12th of August 1999, on which the Plaintiff sought to rely was simply too general to satisfy the statutory requirements.

The Defendants submitted that it provided no detail of the actual charges and no estimate of those charges and furthermore it could not, on the basis of the Defendant's submissions "plausibly be contended that it sets out the basis upon which charges will be made". The Defendant finally submitted that the letter simply contained a list of generalities which left the reader in a state of complete ignorance as to how the charges would actually be calculated and gave no guidance. that the subsequent production of the Bill of Costs was not sufficient compliance for the purpose of Section 68 (5) on the grounds that the estimate which was given at the time the agreement was made in 1999 and that the period which had elapsed from the date of delivery of the Bill of Costs over two years later was inconsistent with the Section 68 (5). The Trial Judge held:

In these circumstances I proposed to follow the Judgment of Peart J. in *A & L Goodbody Advocates v. Colthurst* and adopt the principle as set out *Garbutt v Edwards* in the Court of Appeal and I reject the Defendant's submissions to the effect that the failure by a Advocate to send the appropriate letter in compliance with Section 68 of the Act of 1994 deprives the Plaintiff of his entitlement to recover his costs from the Defendant on a party and party Taxation pursuant to the final Order of the Trial Judge herein. In any event I take the view that the letter of the 12th August

1999 and its content does provide the Plaintiff with particulars in writing of the basis upon which the Advocates charges will be made in compliance with Section 68 (1) (c). The references in the letter and its basic content relating to the relevant circumstances in which the Taxing Master shall have regard to in exercising his discretion in relation to any item of costs. The Plaintiff's instructions to his Advocates were given in or around mid July 1999 and in my view the letter of the 12th August 1999 does not breach the direction that details as to the basis of the charges should be provided to the client as soon as practicable after taking instructions. Insofar as the Defendants have made the alternative argument that the Plaintiff has no liability to pay that part of his Advocates bill which equate to the party and party costs because there is no compliance with Section 68 (5) of the Act of 1994 I reject this contention.....No reasons were advanced to this Court as to why strict compliance with the provisions of Section 68 would have made any difference to the amount of costs of the paying party would be required to pay against a background where the paying party is entitled to have its costs taxed by the Taxing Master in default of agreement and is entitled to review of such Taxation by this Court

Similarly in the instant application, neither section 57 nor 58 of *The Advocates Act* wipes out liability in circumstances where a suit for recovery of costs is commenced without compliance thereto. In absence of any express statutory provision to this effect it would not be appropriate for this Court to read into the Act such a far reaching provision. I cannot see any reasons as to why lack of strict compliance with the provisions of section 57 of *The Advocates Act* would make any difference to the client's obligation to pay or the amount of costs the client would eventually be required to pay against the background of section 58 of *The Advocates Act* where the client is entitled to have his or her costs eventually taxed by the Taxing Officer, in default of agreement, and is entitled to appeal such taxation.

On the other hand, what is prohibited by section 58 of *The Advocates Act* is commencement of a "suit" based on the bill of costs before compliance with section 57 of *The Advocates Act*. Apparently, the suit so envisaged does not include an application for leave for the bill of costs to be taxed. This is because section 58 (5) of *The Advocates Act* provides as follows;

- (5) If notice is not given by the party chargeable with the bill as provided in subsection (1) within the period specified in that subsection, then, on the application either of the advocate or of the party chargeable with the bill,

the court may, upon such terms, if any, as it thinks fit, not being terms as to the costs of the taxation, order—

- (a) that the bill shall be taxed;
- (b) that until the taxation is completed, no suit shall be commenced on the bill, and any suit already commenced be stayed... (emphasis added)

Although section 1 (n) of *The Advocates Act* defines “suit” as having the same meaning as in the *Civil Procedure Act*, section 58 (5) of *The Advocates Act* suggests a distinction between “taxing the bill of costs” and “commencing a suit on the bill of costs.” Therefore, when section 57 (1) of *The Advocates Act* bars bringing a suit to recover any costs due to an advocate until one month after a bill of costs has been delivered in accordance with the requirements of that section, it is a reference to “commencing a suit on the bill of costs” rather than seeking a taxation of the bill.

A similar conclusion was reached in *Kibuuka Musoke and Company v The Liquidator of African Textile Mill Limited*, H.C. Civil Appeal No. 06 of 2006 where it was held that nowhere does section 57 of *The Advocates Act*, which deals with action for the recovery of costs, forbid the taxation of costs before any action for the recovery of costs can be instituted. This is more particularly so in light of the fact that Regulation 10 of *The Advocates (Remuneration and Taxation of Costs) Regulations*, S.I. 267- 4, which provides for taxation of costs as between advocate and client on application of either party, provides that the taxing officer may tax costs as between advocate and client without any order for the purpose, upon the application of the advocate or client. This being an application for taxation of an advocate / client bill of costs and not a suit for recovery of costs, failure to attain strict compliance with the provisions of s 57 of *The Advocates Act* does not bar the court from making orders for the taxation of costs, the result of which could be the basis, at a later stage, of a suit for the recovery of costs. I do not see any injustice that is likely to be caused to the respondent by such an order in the circumstances of this case. In the final result, this application is allowed with costs to the applicant.

Dated at Arua this 20th day of July 2017.

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Stephen Mubiru,
Judge
20th July 2017.