THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

TAXATION APPEAL NO. 023 OF 2022

(Arising from Kasese Civil Suit No. 032 of 2021)

UMEME LIMITED :::APPELLANT

VERSUS

BUSINGE HILDA MAATE :::RESPONDENT

<u>BEFORE: HON. JUSTICE VINCENT EMMY MUGABO</u>

JUDGMENT

This appeal is made under section 62 of the Advocates Act Cap 267, Section 98 of the Civil Procedure Act cap 71 and Regulation 3 of The Advocates (Taxation of Costs) (Appeals and References) Regulations S.I 267-5, wherein the appellant seeks to set aside the taxation and an award of **UGX 3,304,800/=**. The appellant also prays for the stay of any further taxation in respect to the ruling of the Chief Magistrate of Kasese dated 15th December 2021 until final determination of the main suit as well as a stay of execution in respect to the impugned award.

The background to the appeal is that the Respondent sued the Appellant vide Civil Suit No. 032 of 2021 in the Chief Magistrate's Court of Kasese for recovery of among others compensation of UGX 50,000,000/=, general damages and costs of the suit. The appellant raised preliminary objections to the suit to the effect that the court did not have jurisdiction to hear the matter, that the respondent did not have *locus standi* to bring the suit and that the plaint did not disclose a reasonable cause of action. The said objections were overruled by the presiding chief magistrate who then awarded costs to the respondent. The respondent presented her bill

for taxation and the same was taxed and allowed at **UGX 3,304,800/=**. The respondent has now commenced execution proceedings to recover the taxed costs. Hence this appeal.

The appeal is supported by the affidavit of Lubang Vincent and the main grounds of appeal are the following;

a. That it was erroneous for the trial magistrate to tax the bill in the absence of an order directing the immediate taxation and payment of costs
b. That the bill was taxed without conducting the mandatory pre-taxation meeting
c. That the trial magistrate awarded an amount which is manifestly high, harsh, unconscionable and contrary to the known taxation principles

The Respondent filed her affidavit in reply and deposed that the appellant has not disclosed any reasonable issues of law or fact that would warrant the interference with the award of the taxing master. The respondent raised an objection to the appeal, to wit;

i. That the affidavit in support of the Chamber Summons fatally offends the Civil Procedure Rules and the Advocates (Professional Conduct) Regulations and it ought to be struck out.

Representation and hearing

At the hearing of this appeal, Shonubi, Musoke & Co. Advocates represented the appellant while Bagyenda & Co. Advocates represented the respondent. Upon the directions of this Court, counsel for both parties filed written submissions which have been considered in this judgment.

Preliminary objections

In his submissions, counsel for the Respondent raised several concerns against this appeal. I will deal with them first. **The first** is that the affidavit in support of the chamber summons was not sworn by a recognized agent of the appellant and therefore offends the provisions of **Order 3 rules 1 & 2 of the civil procedure rules**. Counsel prayed that the said affidavit be struck out as defective.

The appellant did not file an affidavit or submissions in rejoinder and did not therefore respond to these objections. I have carefully looked at the affidavit in support of the chamber summons and I note that it was sworn by one Lubang Vincent. In paragraph 2 of this affidavit, he claims to be the appellant, well conversant with the facts leading to the appeal, is dissatisfied by the ruling of the taxing master and that he swears the said affidavit in that capacity.

In the first place and as can be seen from the pleadings herein, there is no appellant in the names of Lubang Vincent. The appellant herein is UMEME LTD and there is no person that claims to have sworn any affidavit on behalf of the appellant. It is quite clear that the affidavit we have on record is alien to this appeal as there is no appeal in the name of the deponent. The deponent does not claim to be a director, secretary, employee or recognized agent of the appellant.

Regulation 3 of the Advocates (Taxation of Costs) (Appeals and References) Regulations requires that every appeal shall be by way of summons in chambers supported by affidavit that lays down the matters in regard to which the taxing officer is alleged to have erred. The present appeal is without a supporting affidavit and this leaves it devoid of reasonable grounds of appeal as well as evidence. This appeal would be defective and cannot be left to stand. This objection would therefore

succeed.

The **2nd objection** relates to the fact that the affidavit in support of the chamber summons was sworn by the appellant's advocate and yet it is a contentious case. Counsel for the respondent argues that this contravenes **Regulation 9** of the Advocates (Professional Conduct) Regulations and that the same ought to be struck out.

Looking at the ruling of the Chief Magistrate dated 15th November 2021, Mr. Lubang Vincent represented the present appellant in the main suit and is the same advocate who raised the preliminary objections in respect to which the ruling was made. He is the deponent of the affidavit in support of the present chamber summons.

Whereas the contents of the affidavit could be factual as per the entire record of the suit, para 2 of the affidavit in support is not true and is a deliberate falsehood. It is as follows; "*2. That I am the appellant in this matter, being dissatisfied by the ruling of the taxing master, as such well-versed with the facts leading to this appeal and I swear this affidavit in support of the appeal and in that capacity"* emphasis added.

Counsel does not in the first instance, disclose that he was authorized by the appellant to depose on its behalf or to do so within the meaning of Order 3 rule 1 of the Civil Procedure Rules. In fact, counsel claims to be the appellant and makes no mention of UMEME LTD. Secondly, the deponent has not disclosed the source of information that the appellant is aggrieved and dissatisfied with the ruling of the trial magistrate.

It is now settled that an advocate may swear an affidavit on behalf of his or her client but such affidavit must be limited to the facts that the advocate can he himself prove and that are within his knowledge.

Regulation 9 of the Advocates (Professional Conduct) Regulations offers additional guidance in an instance where counsel finds himself in a position of a witness for his client. The foregoing is what was castigated by courts in ***Banco Arabe Espanol Vs B.O.U S.C.C.A No.8/1998*** and ***M/s Simon Tendo Kabenge Advocates Vs M/s Mineral Access Systems (U) Ltd H.C.M.A No.565/2011***. In these authorities, such affidavits were found defective and were accordingly rejected. I have no reason to depart from the same. This objection would also succeed.

Be that as it may, I will briefly address the merits of this appeal as if the same were properly supported by an affidavit.

The scope of an appeal from a taxation order;

The circumstances in which a Judge of the High Court may interfere with the Taxing Officer's exercise of discretion in awarding costs generally are;

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.

(See ***Thomas James Arthur v. Nyeri Electricity Undertaking, [1961] EA 492*** and ***Bank of Uganda v. Banco Arabe Espanol, S.C. Civil Application No. 23 of 1999***).

Taxation of bills of costs is not an exact science. It is a matter of opinion as to what amount is reasonable, given the particular circumstances of the case, as no two cases are necessarily the same. The power to tax costs is discretionary but the discretion must be exercised judiciously and not capriciously. It must also be based on sound principles and on appeal, the court will interfere with the award if it comes to the conclusion that the Taxing Officer erred in principle, or that the award is so manifestly excessive as to justify treating it as indicative of the exercise of a wrong principle or that there are exceptional circumstances which otherwise justify the court's intervention.

The fundamental principle of costs as between party and party is that they are given by the court as an indemnity to the person entitled to them; they are not imposed as punishment on the person who must pay them. Party-and-party costs are in effect damages awarded to the successful litigant as compensation for the expense to which he has been put by reason of the litigation (see ***Malkinson v. Trim [2003] 2 All ER 356***). The rationale for the award was explained by Justice Cumming in ***Fullerton v. Matsqui, 74 B.C.L.R. (2d) 311***,

The principle of indemnity requires that only costs "reasonably incurred" as opposed to all "necessary costs," may be recovered. The effect of the principle of indemnity applied to party and party costs is that a party is entitled to have all costs reasonably incurred in the defence of his or her rights not as a complete compensation or indemnity, but only in the character of an indemnity. Parties are therefore 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.

Therefore, orders for party and party costs made under section 27 of *The Civil procedure Act*, must be construed as permitting recovery only of reasonable and necessary fees and litigation costs by a successful party who has substantially prevailed. What is reasonable and necessary will, of course, depend on the nature and facts of the individual case, the degree of work required, and the skill, and experience of the advocate performing the work. See ***The Electoral Commission Vs Kidega Nabinson James HCCA No. 076 of 2016***.

Having stated as above, I now delve into the particular grounds upon which this appeal lies

The **first ground** of appeal is that the Chief Magistrate erred when he taxed the bill of costs when there had not been a pre-taxation meeting. Counsel for the appellant argues that **Regulation 13A of the Advocates (Remuneration and Taxation of Costs) (Amendment) Regulations** makes it mandatory to hold a pre-taxation meeting before any taxation of costs can be made. This position was emphasized in the case of ***Walakira Jacob Vs Nakalanzi Rose Taxation Appeal No. 02 of 2019***.

In response, counsel for the respondent argued that the appellant was given chance to hold the pre-tax meeting on two occasions when taxation

hearing notices were served but did not do so and chose to be absent when the taxation was done.

I note that the 1st taxation hearing notice that was served on the appellant on 02nd February 2022 indicated that the appellant was required to conduct a pre taxation with counsel for the respondent before the hearing date. Counsel for the appellant indicated that he had another matter scheduled for the same date and that the parties needed to pre-tax before the taxation hearing date. Taxation was subsequently moved to 28th March 2022 and a notice of the said date was served upon counsel for the appellant on 10th March 2022 but neither the appellant nor the advocate made an appearance on the same date. In addition, the appellant has not indicated any steps it took to hold a pre-taxation meeting with counsel for the respondent before the hearing date.

While a pre-tax meeting is a mandatory procedure before taxation of costs, I would agree that the appellant was given a chance to do a pre-tax meeting but it chose not to. I find no merit in this ground of appeal.

The **second ground** is that the trial magistrate erred when he went ahead to tax the bill when there was no order for the immediate taxation and payment of costs in the matter. Counsel for the appellant relied on the case of ***Homi Dara Adrinwala Vs Jeanne Hogan & another [1966] 1 EA 290*** where the High Court of Tanzania held that there should be only one taxation in a matter unless the court orders for the immediate taxation and payment of costs in an interlocutory application.

Counsel for the respondent argued that the order of the Chief Magistrate was clear that costs of the preliminary objections had been awarded to the respondent. The order did not specify when the said costs would be

paid.

I agree with the reasoning of the High Court of Tanzania in the case of ***Homi Dara Adrinwala (supra)*** that it is improper to tax multiple bills arising from interlocutory matters in the same suit unless there is an order to the contrary. But I hold that much as this causes the inconvenience, it is not legally wrong. It is usually prudent that the courts differ the taxation of the bills of costs arising out of a suit to the conclusion of the said suit. This ground also fails.

Thirdly, the appellant argues that the award of **UGX 3,304,800/=** made by the Chief Magistrate is manifestly harsh and excessive.

It is a well-established guiding principle, re-stated in ***Auditor General vs. Ocip Moses and others Taxation Reference No. 089 of 2014,*** that in all taxation appeals, the Judge ought not to interfere with the assessment of what the taxing master considered to be a reasonable fee unless the award is considered manifestly excessive, exorbitant and without any legal or factual justification. It is generally accepted that questions which are of quantum of costs are matters which the taxing master is particularly suited to deal with and in which he or she has more experience than the Judge. The Judge will not alter a fee allowed by a taxing master merely because in the Judge's opinion he or she should have allowed a higher or lower amount.

With due respect to the submissions of counsel for the appellant, I don't see the sum of UGX 3,304,800/= as an excessive award of costs for an interlocutory matter. I find no reason to interfere with the magistrate's assessment.

In the final result, the appeal wholly fails and is hereby dismissed. Costs of this appeal shall abide by the outcome of the suit in court below.

I so order.

Date at Fort Portal this 28th day of October 2022.

Vincent Emmy Mugabo

Judge

The Assistant Registrar will deliver the judgment to the parties

Vincent Emmy Mugabo

Judge

28th of October 2022.