

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
TAXATION APPEAL NO. 029 OF 2022

Arising out of LD-TAX No. 026 of 2022, Misc. Application No. 028 of 2022 and Civil Suit No. 04 of 2022

FINCA UGANDA LTD :::APPELLANT

VERSUS

BIRUNGI MALIZA :::RESPONDENT

BEFORE: HON. JUSTICE VINCENT EMMY MUGABO

JUDGMENT

This appeal is made under section 62 of the Advocates Act and Regulation 3 of The Advocates (Taxation of Costs) (Appeals and References) Regulations S.I 267-5, wherein the appellant seeks to set aside an award of **UGX 10,490,000/=** following the taxation of the bill of costs, as being manifestly excessive and contrary to the taxation rules in the circumstances of the case.

The background to the appeal is that the respondent filed Civil Suit No. 04 of 2022 against the appellant claiming that the appellant registered a mortgage over land in which the respondent is interested as a spouse of the mortgagor without obtaining her consent. She then filed Misc. Application No. 028 of 2022 to a temporary injunction to stop the sale of the mortgage property. The said application was heard and granted by the registrar of the court with costs. The respondent's bill of costs was taxed and allowed at **UGX 10,490,000/=** and this award is sought to be set aside. The supporting affidavit of Deogratious Mugenyi brought out the following grounds;

- i. The learned taxing officer erred in law and in fact when he awarded instruction fees of UGX 5,000,000/= without any legal justification
- ii. The costs allowed in the said suit are high, excessive and unconscionable in the circumstances of the case.
- iii. The costs allowed under items 1, 4, 7-22, 23, 26, 31, 36, 37, 44, 45, 46, 49, 51, 55, 57 and 61 in the respondent's bill are not in line with the regulations governing the taxation of costs.

The respondent filed an affidavit in reply to the appeal and contended among others that Deogratiuous Mugenyi who deposed the affidavit in support was not a party to the taxation and as such his evidence is hearsay. She also states that the instruction fees awarded was reasonable because the application was contentious. Further that all the disputed items were taxed and awarded according to the law.

Representation and hearing

At the hearing of this appeal, the appellant's legal department represented the appellant while Ngamije Law Consultants & Co. Advocates represented the respondent. Upon the directions of this Court, counsel for both parties filed written submissions which are considered in this judgment.

Preliminary matters

In her affidavit in reply, the respondent stated that Deogratiuous Mugenyi who deposed the affidavit in support was not a party to the taxation and as such his evidence is hearsay. No submissions were made on this assertion.

I need to state that in the case of ***Bank One Ltd Vs Simbamanyo Estates Ltd HCMA 645 of 2020***, it was stated that Affidavits are a means of adducing sworn, written evidence and must be used in applications where

sworn evidence is required by the court. The validity of the affidavit therefore is subject to the same rule as that which governs oral evidence under the Evidence Act, to wit; all persons are competent to swear an affidavit unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions. Competency to swear an affidavit is pegged to ability “to depose to the facts of the case,” which in turn is circumscribed by the deponent’s ability to “swear positively to the facts,” on account of personal knowledge or disclosure of the source, where that is permitted, not whether he is a party or not.

Courts have established the practice of severance when dealing with affidavits containing possible hearsay and facts based on knowledge. When considering such type of affidavits courts have followed a liberal approach. In **Col (Rtd) Dr. Kizza Besigye Vs Museveni & anor, Election Petition No. 1 of 2001** Odoki JSC (as he then was) stated that:

“In the present case the only method of adducing evidence is by affidavit. Many of them have been drawn in a hurry to comply with the time limits for filing pleadings and defend the petition. It would cause great injustice to the parties if all the affidavits which do not conform to all the rules of procedure were rejected. This is an exceptional case where all the relevant evidence that is admissible should be received in court. I shall reject those affidavits which are based on hearsay, and only parts which are based on knowledge will be relied upon...” (Underling for emphasis)

The respondent’s assertion is overruled.

Consideration of the appeal

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***,

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

Excessive instruction fees:

Counsel for the appellant argued that **Regulation 9(1) of The Advocates (Remuneration and Taxation of Costs) (Amendment) Regulations, 2018** (hereinafter the regulations) provide an amount not less than UGX 300,000/= as instruction fees to make or oppose interlocutory applications but the learned taxing officer awarded UGX 5,000,000/= without justification which amount is manifestly excessive when the application was not a complex one. Counsel argues that much as the taxing officer has discretion to determine the quantum of fees, such discretion needs to be checked.

Counsel for the respondent argues that the amount of UGX 5,000,000/= as instruction fees is reasonable considering the fact that the application sought to stop a sale of property worth over UGX 800,000,000/=. Counsel relied on the case of ***Bank of Uganda (supra)*** to argue that a judge should not interfere with the assessment of a taxing master if he or she considers the same to be reasonable.

I agree with the authority cited by counsel for the respondent. See also ***Auditor General vs. Ocip Moses and Others Taxation Reference No. 089 of 2014***. It is a well-established guiding principle, 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.

I am alive to the fact that **Regulation 9(1) of the Regulations** provide for a minimum of UGX 300,000/= as instruction fees to make or oppose interlocutory applications. In his ruling, no reasons were given to amplify this amount to more than sixteen fold. It has also not been shown that the application for a temporary injunction involved any complexity.

In the case of **Attorney General Vs Uganda Blanket Manufactures SCCA No. 17 of 1993**, court observed that, "*the intention of the rules is to strike the right balance between the need to allow advocates adequate remuneration for their work and the need to reduce the costs to a reasonable level so as to protect the public from excessive fees...The spirit behind the rules is to provide some general guidance as to what is a reasonable level of Advocates' fees*".

It is my considered opinion that an award of UGX 5,000,000/= on an item where the rules provide for UGX 300,000/= may be considered excessive in absence of any justification to the contrary. And I so hold. This court notes that there is a duty on the taxing master to give substantial reasons for allowing or disallowing certain items on the bill especially where there is a deviation from the regulations.

In the circumstances of this appeal, I award the sum of UGX 2,000,000/= as instruction fees in Misc. Application No. 028 of 2022.

The costs allowed under items 1, 4, 7-22, 23, 26, 31, 36, 37, 44, 45, 46, 49, 51, 55, 57 and 61 in the respondent's bill are not in line with the regulations governing the taxation of costs

Counsel for the appellant submitted that the items listed above were not taxed in accordance with the regulations. He argued that item 4 should have been allowed at UGX 200,000/=, that items 7-22, 23, 26 in respect to supplementary affidavits were wrongly included and taxed since the said affidavits had no bearing on the outcome of the application and were not relied on by the registrar. Further that items 31, 37, 45, 46, 51 and 61 referring to the attendances of the clerk are not provided for by the Regulations.

In response, counsel for the respondent argued that for items 7-22, 23, 26 in respect to supplementary affidavits, it would be baseless for the appellant to claim that the registrar did not rely on the supplementary affidavits. Costs for the same are provided for under **Regulation 10(2) of the Regulations**. Counsel further submitted that attendances by clerks are provided for under **Rule 12 in the 6th Schedule** to the Regulations. For items 31, 45, 46, 51, 55 and 61, counsel argued that the costs were reasonably awarded because the clerk travelled from Fort Portal to serve the documents in Kampala.

I will consider each item as disputed by the appellant to confirm whether they were taxed in accordance with the Regulations. I need to re-emphasise that the Regulations provide a guide to be followed by the taxing officer but the officer still retains the discretion to award amounts that he considers reasonable.

- Item 4 – this item was not allowed by the taxing officer

- Items 7-22 – I note that these items relate to the preparation of the supporting affidavit and supplementary affidavit in support of Misc. Application No. 028 of 2022. **Regulation 10(2) in the 6th Schedule** of the Regulations provides for UGX 200,000/= as the cost for preparation of court papers including a motion and affidavits. I find that with respect to these items, the bill was drawn and taxed to scale. The appellant’s argument that the registrar did not rely on the supplementary affidavits when making his decision in Misc. Application No. 028 of 2022 is only speculative.
- Item 31 – the taxing officer awarded UGX 300,000/= for a clerk’s facilitation to serve court process in Kampala from Fort Portal. I find this reasonable.
- Item 37 is disallowed. Fees for perusals are catered for in instruction fees
- Item 45 - the taxing officer awarded UGX 300,000/= for a clerk’s facilitation to serve court process in Kampala from Fort Portal. I find this reasonable
- Item 46 is disallowed. Counsel ought to have arranged to serve the court process served under item 45 together with that in 46.
- Item 51 is disallowed for the same reason as item 46
- Item 55 - the taxing officer awarded UGX 300,000/= for a clerk’s facilitation to serve court orders in Kampala from Fort Portal. I find this reasonable
- Item 61 - the taxing officer awarded UGX 300,000/= for a clerk’s facilitation to serve the bill of costs in Kampala from Fort Portal. I find this reasonable

I find that most of the items on the respondent's bill of costs drawn and taxed to scale and I have no reason to interfere with the taxing officer's award of the same save for those on which I have commented.

Before I take leave of this matter, I need to state that it is inconvenient to tax multiple bills arising from interlocutory matters in the same suit when the suit is still proceeding unless it is required that costs be taxed and paid before further proceedings. It is understood that much as it is not legally wrong to tax the multiple bills, 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. Refer to High Court of Tanzania case of ***Homi Dara Adrinwala Vs Jeanne Hogan & another [1966] 1 EA 290***. In interlocutory applications like Misc. Application No. 028 of 2022 which are to the convenience of one party to the suit should ordinarily differ costs to the conclusion of the suit. A case in point would be to obtain a temporary injunction with costs and then you lose in the main suit and you have to pay costs.

In the final result, this appeal succeeds. The award of the taxing officer is altered to provide for the following;

- a. Instruction fees are revised from UGX 5,000,000/= to UGX 2,000,000/=
- b. The rest of the bill is allowed save for items 37, 46 and 51. This would translate the amount allowed for the entire bill to UGX 6,865,000/=. This is inclusive of the amount in a. above.
- c. Each party shall bear its own costs

It is so ordered

Dated at Fort Portal this 15th day of February 2023



Vincent Emmy Mugabo

Judge.

Court: The Assistant Registrar shall deliver the judgment to the parties.



Vincent Emmy Mugabo

Judge

15th February 2023