

REPUBLIC OF UGANDA

HIGH COURT OF UGANDA AT KAMPALA

FAMILY DIVISION

MISCELLANEOUS CAUSE No. 02 OF 2012

Arising out of Mengo MA 1319 OF 2012 and MA 30 OF 2012
Arising out of CIVIL SUIT NO. 108 OF 2009

Agnes Lyazi

(The Administrator of the Estate of the Late Samuel Lyazi)=====APPELLANT

V

1. Lydia Sempa

2. Muwema Mugerwa and Co Advocates =====RESPONDENTS

M

Catherine Bamugemereire

Ruling

This was an application to set aside the taxed bill of costs and the certificate of taxation. It is an appeal against a taxation order and a certificate. It is made under 62(1, 4) and Regulation 3(1) of the Advocates Regulations. The Applicant prayed for orders that:

1. The Taxation Decision/Order of Her Worship Juliet Nakitende Magistrate Grade One / Taxing Officer) made on 12th January 2012 in Mengo Miscellaneous Application No. 1319 of 2010 and 1320 of 2010 be set aside.

The grounds for this Application were supported by the affidavit of the Applicant/ Appellant.

1. The Applicant was the Appellant/ Applicant in the Advocate Client Bill of costs dated 11th January 2012 which was taxed on 12th January 2012. The Advocate/Client bill of costs was marked annexure A.
2. That sometime in November 2010 the Appellant/ Applicant instructed Mssr Muwema Mugerwa and Co Advocates, the Firm, to file an Application for an interim and substantive application for stay of execution and sale of property comprised in Block 4 on Rubaga Road on behalf of the estate of the late Samuel Lyazi, the Deceased.

3. That the Appellant/ Applicant did not receive any formal notice of the taxation hearing or even a copy of the bill to be taxed. Instead on 11 January 2012 one Roscoe Yiga sent the appellant an SMS message summoning her to attend the proceedings at Mengo Magistrate's Court.
4. That Appellant/ Applicant was neither given adequate notice to prepare a response nor was she was given an opportunity to engage a lawyer to assist her in contesting the Bill.

On 3rd February 2015, the date mutually agreed upon by both Counsel and slated for the hearing of this appeal neither of the lawyers from the Firm showed up. Given the length of time the matter had taken in out system, this is an appeal filed in 2012, I did not find a reasonable cause given for a further adjournment. In deciding this matter though, I bore in the Respondent's affidavit in reply.

In the affidavit in reply the Respondent stated that the application was fatally and incurably defective and its subsequent amendment after two years could not sure and circumvent the law and cure the defects. Respondent further argued that the amendment was unacceptable since it sought to defeat the respondent's defence and a statutory right.

According to the 2nd Respondent, the Applicant was introduced to the second respondent by one David Lumu a journalist at the Observer Newspaper who allegedly briefed the firm about the complexity of the matter. Apparently paragraph 7 of the Affidavit of Friday Roberts Kagoro is riddled with hearsay.

The information, allegedly given by David Lumu regarding the Appellant's apparently quarrels with law firms and refusal to pay remained unsubstantiated and is inadmissible.

The 2nd Respondent further suggested in reply that the law firm was contracted to handle and prosecute the case to its final conclusion. The 2nd Respondent added that due to the complexity of the matter and the value of the estate valued at UGX 420.000.000 the applicant and her brother agreed to pay 5.000.000 UGX and therefore a part payment of UGX 1.490.000 was received by the firm's cashier Ms Joy Muwema.

It was further pleaded by the 2nd Respondent that the Applicant became elusive and evasive and could not be reached by phone and therefore the bill of costs was served on her brother David Lumu and further that the the proceedings at the taxation hearing do not prove that the Appellant protested to the magistrate for non representation.

Mr. Wante for the Appellant submitted that appellant attended the hearing of the Application at short notice and had no time to call her lawyers. She further claimed that service was by SMS. It was the contention of Counsel that these matters of taxation are technical. Mr. Wante submitted that the appellant was not given a fair hearing. He added that although it is claimed by the other side that Mr. Mbogo representing the plaintiff that was not the case since Mr. Mbogo there in his

capacity as an advocate but for a different matter. It was noted that Mr. Mbogo was never instructed by the appellant and had no instructions to represent the appellant.

Counsel for the Appellant further argued that the taxing master did not follow the principles of taxation as laid down in taxation of costs rules and case law. The award was exorbitant extensive and unjustified.

Mr Wante for the Appellant/Applicant relied on the case of **Western Highland Creameries Ltd and Lee Ngugi v Stanbic Bank Uganda Ltd Tax Appeal Reference No. 10 of 2013** (High Court Commercial Division) in which Madrama J dealt with the issue of a right to a fair hearing but more importantly held that

Where the Value of the subject matter can be ascertained from the judgment or claim, instructions fees are prescribed by the rules and therefore there is no discretionary power in the award of instructions fees.

The two main issues in this case where:

1. Whether the Appellant was granted a fair hearing
2. Whether the Taxing Officer followed the taxations principles and was fair in reaching her decision?

In regard to issue number one it is not disputed that the appellant was notified of the taxation hearing by SMS messaging. It was also the defence of the 2nd Respondent that they took a brief from the appellant's brother and that it was this David Lumu who was served. I found this casual manner of conducting legal business and serving Court process rather worrying. It should be noted that the right to a fair hearing is a fundamental right. Furthermore it is a rule of natural justice that a party should not be condemned unheard. While the rules for taxation hearings do not make service mandatory they do not by any means deny a party who appears before a taxing officer the right to be heard.

The right of hearing is so fundamental that no derogation is permitted from it. In the case of **Carolyn Turyatema and 4 others versus Attorney General and Another Constitutional Petition Number 15 of 2006** the Constitutional Court considered the right to be heard and held that the right of hearing is provided for under article 28 (1) of the Constitution. The article provides that in the determination of civil rights and obligations a person is entitled to a fair, speedy and public hearing before an independent adjudicating body established by law. The right is so fundamental that no derogation is permitted from it under article 44 of the Constitution. The concept of "fair hearing" involves the right to present evidence, cross examine and to have findings supported by evidence.

Before I proceed to issue number two I wish to note that the 1st Respondent to this claim is one Lydia Sempa. I found the inclusion of Lydia Sempa a misnomer and misjoinder. This is an

Advocate-Client taxation and for that reason matter in controversy was between the advocate and his client. I therefore order that the 1st Respondent be struck off. I note that this individual never appeared and was never inconvenienced and therefore no costs shall be awarded to the 1st Respondent.

Regarding issue number two, let me state from the outset that there exist a plethora of authority on taxation of costs. In the case of **Nicholas Roussos versus Gulam Hussein Habib Virani and Nasmudin Habib Virani in Civil Appeal No.6 of 1995 (CAU)** it was held thus

...that court should interfere where there has been an error in principle but should not do so in question's solely of quantum as that is an area where the taxing officer is more experienced and therefore more apt to the job. The court will intervene only in exceptional cases..."

The following principles can be gleaned out from the case of Premchand Raichand Ltd. & Another versus Quarry Services of East Africa Ltd. & Others [1972] EA 162 which case was cited with approval in the case of **Akisoferi Ogola versus Akika Othieno & Another, Civil Appeal No. 18 of 1999 (CAU)** as follows: -

- a. The court will only interfere with an award of costs by the taxing officer if such costs are so low or so high that they amount to an injustice to one of the parties.
- b. Costs must not be allowed to escalate to such levels so as to restrict access to justice.
- c. While cost must be curbed, a successful litigant ought to be fairly reimbursed for costs he or she had to incur.
- d. The average remuneration of advocates must be such as to attract recruits to the profession, and finally,
- e. On the whole, there should be some consistency in the award of costs.

The Advocates (Remuneration and Taxation of Costs) Regulations SI 267-4 set out the procedure for calculating instruction fees.

Item 1 (a) (III), (IV) and (VI) of the sixth schedule to the Advocates (Remuneration and Taxation of Costs) Rules for ease of reference. They are set forth herein below:

“(iii)In a suit where the settlement is reached prior to confirmation of the first hearing date of the suit the fee shall be 85 percent of the fee chargeable under item 1 (a)iv

(iv) to sue or defend in any other case or to present or oppose an appeal where the value of the subject matter can be determined from the amount claimed or the judgment—

(A) where the amount does not exceed 500,000 shillings—12½ percent on the amount claimed;

- (B) where the amount exceeds 500,000 shillings but does not exceed 5,000,000 shillings—12½ percent on the first 500,000 shillings and 10 percent on the next 4,500,000 shillings;
 - (C) where the amount exceeds 5,000,000 shillings but does not exceed 10,000,000 shillings—12½ percent on the first 500,000 shillings and 10 percent on the next 4,500,000 shillings, and 7½ percent on the next 5,000,000 shillings;
 - (D) where the amount exceeds 10,000,000 shillings but does not exceed 20,000,000 shillings—12½ percent on the first 500,000 shillings and 10 percent on the next 4,500,000 shillings, 7½ percent on the next 5,000,000 shillings and 5 percent on the next 10,000,000 shillings;
 - (E) where the amount exceeds 20,000,000 shillings— 1 percent on the excess of 20,000,000 shillings;
- (v) to sue or defend or to present or oppose an appeal in any case not provided for above in any court, not less than 75,000 shillings;”

Having given careful consideration to the law, the pleadings and the submissions in this case, I find that in this matter, the legal firm of Mugerwa and Muwema was contracted for only part of the time and therefore did not follow the case to its conclusive end. Additionally this matter was agreed upon by consent and therefore the law, firm, not being Mugerwa and Muwema and Co was not taken through the rigours of an adversarial trial. It is noted that indeed it appeared that quite a few firms represented the appellant. The descent and honourable option for Mugerwa and Muwema was to have computed their fees up to the point they acted for this client. I agree with the Appellant that the taxing officer did not take the fact that this was part representation into consideration neither did she consider the taxation rules in her taxation proceeding or at all.

Having given due consideration this matter, I find that the taxing officer charged exorbitant and out of range filing fees, UGX 2.400.000. In regard to the instruction fee, the taxing officer appears to have arbitrarily arrived at the fee of UGX 4.200.000 without paying due regard to the rules regulating this area of practice. While the taxing officer may have some level of discretion the discretion must be exercised judiciously. That notwithstanding, where the rules are clear and unambiguous, discretion is fettered by the said rules and they must be adhered to. In this case SI 267-4 set the parameters within which to act.

I have noted that there is a belated submission filed by Muwema and Co Advocates. Most of the issues raised in the belated submission were dealt with in the Affidavit in reply. I find it odd that submissions are filed after the Judgment day.

In Conclusion after giving utmost care to the application before me and having painstakingly studied the affidavits in support of the application, in reply and in rejoinder

to the attendant application I hereby set aside the taxation decision entered on 12th January 2012.

I order that a fresh bill of costs be taxed. The Appellant out to be accorded opportunity to be represented by a lawyer of her choice.

The Appellant is granted costs.

Catherine Bamugemereire

Judge

10 February 2015