THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPEAL NO. 43 OF 2020

(ARISING FROM TAXATION APPLICATION NO.42 OF 2020)

(ARISING OUT OF CIVIL SUIT NO.598 OF 2012)

JULIET KABUGO::APPELLANT

VERSUS

UGANDA NATIONAL ROADS AUTHORITY::::::::::::::::::::::::::::::::::::RESPONDENT

Before: Lady Justice Alexandra Nkonge Rugadya.

JUDGEMENT

Introduction:

This is a reference in the form of an appeal in taxation from the orders of the learned Deputy Registrar brought by way of Chamber Summons under ***Section 62 of the Advocates Act Cap. 267*** and ***Regulation 3 of the Advocates (Taxation of Costs) (Appeals and References) Regulations S.I 267-5,*** by which the Appellant seeks orders that;

1. ***The taxing master's decision and/or ruling in Taxation Application No.42 of 2020 be set aside.***
2. ***The Court substitutes the award of the taxing master in its own award.***
3. ***Costs of the Appeal.***

The application is supported by the grounds of facts as contained in the affidavit of Mr. Betunda Yusuf wherein he states that the parties entered a consent on 21st February, 2020 and the appellant filed her bill of costs and that most of the items therein were agreed upon during the taxation conference, save for *items 5 and 159.*

That when the matter came up for hearing, the parties were directed to file written submissions and in her ruling, delivered on 24th November, 2020, the Deputy Registrar allowed the appellant's bill at ***UGX. 37,876,219/=*** *(Uganda Shillings Thirty Seven Million Eight Hundred Seventy Six Thousand two hundred and nineteen only).*

Further, that the learned taxing master erred in law and fact not only when she awarded ***UGX 13,857, 219/=*** (Uganda Shillings Thirteen million eight hundred fifty seven thousand, two hundred nineteen only) as instruction fees without taking into account the principles applicable to taxation of costs but also when she awarded ***UGX 5,000,000/=*** (Uganda Shillings Five million

shillings only) without regard to any legal and factual basis and that this figure was manifestly lower than what the appellant incurred for the professional services of the surveyors geologists and valuers over the course of the dispute.

In addition, the learned taxing master erred in law when she taxed items that were presented as uncontested items in disregard of the agreement/consent of the parties reached at the taxation conference.

The respondent on the other hand opposed this appeal through the affidavit in reply of Ms Pecos Mutatina wherein she supports the findings of the learned taxing master. She states that the Taxing master in her ruling gave her reasons which were backed by law and precedent and that upon correctly applying the principle under ***Regulation 1 (1) of the 6th schedule*** to the ***Advocates (Remuneration and Taxation of Costs) Regulations (as amended),*** the taxing master rightly found that the only sum due was ***Ugx. 13,857,219/=.***

That the taxing master not only correctly found that no additional fee could be claimed by counsel for the applicant owing to the complexity of the matter because he had not applied for a certificate of complexity, but she also correctly applied the law on costs claimed for disbursements and given the fact that no proof of expense had been presented by the applicant in proof of the alleged expenditures coupled with the applicant's refusal to file submissions in rejoinder, the taxing master correctly awarded ***Ugx.5,000,000/=*** as a fair and reasonable amount which was actually a generous offer from the respondent who in their submissions in reply could have opted to offer a much less sum.

Further, that at no point was any inter party pre taxation agreement reached in respect of all or other items of the bill and that the arithmetic error occasioned by a discrepancy between the total allowed sum as set out in the ruling and the actual total sum arrived at by correctly adding the sum taxed and allowed on each page is not disputed by the respondent who communicated the same to court and has since paid the same to the appellant.

That the appellant has not demonstrated any valid ground for setting aside the decision of the learned Taxing master and this court should be disinclined to grant the application.

The appellant did not file a rejoinder.

Representation.

The applicant was represented by ***M/s Godfrey S. Lule Advocates*** while the respondent was represented by its ***Directorate of Legal Services.***

As directed, both parties filed written submissions, the details of which are on court record and which I have taken into consideration.

From the pleadings, evidence and submissions of counsel, the main issue of contention is:

1. ***Whether or not the Taxing Officer applied the correct principles of law in taxation of Miscellaneous Application No.42 of 2020.***

In resolving the issues arising herein, I am guided by the decision in ***M/s. Alcon International Ltd. Versus Standard Chartered Bank of Uganda & 2 Others - Reference No. 1 of 2014*** where the court stated that:

> ***"It is settled law that a court hearing a reference against a ruling involving the exercise of a Taxing Officer's discretion in a taxation cause, will not normally interfere with the ruling merely because it thinks it would have awarded a different figure had it been the one taxing the bill. This is so because taxation of costs is not a mathematical exercise. It is a discretionary process. Interference by the court in that process would only be justified where there is proof that either the amount taxed was manifestly excessive or so manifestly deficient as to amount to an injustice; or the Taxing Officer followed a wrong principle(s) or that the Taxing Officer applied a wrong consideration(s) in coming to his or her decision."***

1. ***Instruction fees under item No. 5***:

Counsel for the appellant in his submissions argues that the instruction fee under *item no.5* of the bill of costs was ***Ugx. 27,560,000/=*** was arrived at after considering that the suit which was for trespass as well as vacant possession was filed 9 years ago and that the taxing master erred in law and fact when she failed to take into consideration the fact that the appellant was entitled to damages for the trespass and compensation for the eventual takeover of the land and that before the consent was arrived at, the appellant waived the assessment of damages under the understanding that costs would be enhanced to cover for the same thereby creating a legitimate expectation to the appellant while assessing her bill of costs.

Further, that the award of ***Ugx. 13,857,219/=*** (Uganda Shillings thirteen million eight hundred fifty seven thousand two hundred nineteen only) as instruction fees is manifestly low and that had the taxing master applied the above principles, she ought to have concluded that the amount taxed off was reasonable to be included in the bill of costs as instruction fees since she would have provided for the damages that were not catered for in the settlement, the time taken in litigating the suit the complexity of the geological studies as well as assessments and the inconvenience the appellant suffered in securing the necessary reports that were the basis of arriving at the settlement figure.

The law governing the taxation of Advocate-Client Bill of costs is ***The Advocates (Remuneration and Taxation of Costs) Regulations*** made under the ***Advocates Act***. Under ***regulation 2*** of those rules, the remuneration of an Advocate of the High Court by his client must be in accordance with the regulations.

Regulation 57 provides that, ***"in all causes and matters in the High Court..., an advocate shall be entitled to charge as against his client the fees prescribed in the 6th Schedule to the regulations".***

In ***the Advocates Taxation rules*** applicable in the High Court, for most of the cases, the rules provide an elaborate formula for the taxing officer to follow in calculating the instruction fees.

Rule 37 of the rules provides that "***A bill of costs incurred in contentious proceedings in the High Court ....shall, subject to any other order pronounced by the court in regard to any particular case, be taxable according to the rates prescribed in the 6th schedule to these Rules***".

The schedule provides an arithmetic method of calculating the fee for instructions to sue or defend a suit or to present or oppose an appeal, in cases ***"where the value of the subject matter can be determined from the amount claimed or judgment"***.- ***(6th schedule paragraph 1 (a) (iv).)***

The fee is accordingly calculated as a percentage of the value of the subject matter, on a sliding scale, starting with the highest rate of 12.1/2 % of the first ***Ugx. 500,000/-*** and concluding with the lowest rate of 1% of the amount in excess of ***Ugx. 20,000,000/-.***

In my view, in cases where the value of the subject matter is ascertainable, the taxing officer does not have to exercise any discretion but has to simply apply the arithmetical formula. However, where the Taxing Officer cannot determine the monetary value he/she is entitled to use his or her discretion in assessing the instruction fees,

In her ruling, the learned taxing master rightly pointed out:

> ***"I do agree with counsel for the defendant. Considering the value of the subject matter per the consent judgement is Ugx132, 860,939/= the calculation gives Ugx.13,857,219/= under the 6th schedule 1(g).....In this case no such certificate was applied for. So I have awarded Ugx.13, 857, 219/= under item 5"***

The learned taxing officer clearly took into consideration the agreed value of the suit property as per the consent and correctly applied the principles of taxation and further gave her reasoning for not awarding a higher figure as instruction fees on the basis of a default on the side of counsel for the Appellant.

Under ***regulation 37, regulations 5 and 6 paragraph 1*** , Counsel handling a complex matter is entitled to claim a higher fee. However, this is conditional upon the Advocate ***"applying to the Presiding Judge ... for a certificate allowing him to claim a higher fee"***. In which case, ***"the Judge is obliged to specify the fraction by which the instruction fee should be increased"***. ***See the case of Western Highlands Creameries Vs Stanbic Bank (U) Ltd Taxation Appeal No.10 of 2013*** (cited by counsel for the respondent).

In the instant case, despite the clear provision which was clearly pointed out by the taxing master that under 6th Schedule 1(a) (ix) of the Regulations, a higher fee can be considered appropriate if the advocate applies for a certificate allowing them to claim a high fee, it is apparent in the present case that counsel for the appellant claimed a higher figure without such certificate.

The claim that the taxing master had erred in law and fact when she failed to take into consideration the fact that the appellant was entitled to damages for the trespass and compensation for the eventual takeover of the land was not supported by any evidence that the taxing master could have relied on.

Nor was it anywhere recorded as an agreement between the parties that the appellant had waived the assessment of damages under the understanding that costs would be enhanced to cover for the same, thereby creating a legitimate expectation to the appellant while assessing her bill of costs. This was a discretionary matter and court would not be required to interfere with the ruling merely because it thinks it would have awarded a different figure had it been the one taxing the bill. ***(M/s. Alcon International Ltd. Versus Standard Chartered Bank of Uganda & 2 Others (supra)).***

The Taxing Officer therefore correctly applied the principles of taxation in denying the award of a higher figure as instruction fee. I find no justification to interfere with the Taxing Officers' discretional award since she did not apply wrong principle and since therefore no proof is availed that the award was excessively high or excessively low, it is confirmed by court.

2. Disbursement towards instructing Surveyors and Valuers: item No. 159:

The appellant also disputes the Taxing officers' award in regard to *item no.159* which relates to disbursements.

Counsel argues that the award of ***Ugx. 5,000,000/=*** by the taxing officer solely based on the reason that it is what the respondent was willing to pay was erroneous and that court in allowing this figure abdicated its responsibility of determining the fee allowable under this for services which were consumed.

Counsel for the respondent on the other hand cited the authority of ***Aisha Agaba v Mable Bakaine Taxation Appeal No 4 of 2011*** which was relied on by the taxing officer in her ruling for the position that claims for disbursements must be specifically proved and that claims for reimbursement must be as much as possible kept within the reality of indemnifying the litigant by replacing what she actually spent and avoid the process to unfairly enrich any litigants or their advocates.

In her ruling the taxing officer clearly stated:

> ***"In this case, the plaintiff adduced no evidence of incurring the claimed sum despite it being receiptable. As such I ought disallow the claim in item 159..... "***

It is evident from the above excerpt that the learned taxing officer did not base the award of ***Ugx. 5,000,000/=*** solely on the willingness of the respondent to pay the said sum but also took into consideration the fact that the appellant adduced no evidence in proof of the said expenditure, a position that I have no basis to disagree with.

Regulation 51 of the Advocates (Remuneration & Taxation of costs) Regulations (supra) requires that all receipts or vouchers for all disbursements charged in a bill of costs to be produced at taxation if required by the taxing officer.

Upon perusal of the record in ***TA No.42 of 2020,*** this court discovered that the appellant in filing the bill of costs did not attach any evidence of the said disbursements. The taxing officer therefore had no evidence as to the truthfulness of the sums claimed by the appellant and therefore duly

exercised her discretion to award the bare minimum. Court therefore finds no reason to vary or set aside the said award.

The appellant further contends that the taxing master erred in law and fact when she taxed items that were presented as uncontested items thereby disregarding the agreement/consent of the parties reached at the taxation conference.

In its affidavit in reply, it is deponed for the respondent specifically under *paragraph 14* that items 5 & 9 of the bill of costs were the only items that were uncontested and that at no point was any *inter partes* pre taxation agreement reached on all other items of the bill. This fact was not rebutted by the appellant by way of a rejoinder and it is deemed therefore to be admitted.

It is now settled law that facts as adduced in affidavit evidence which are neither denied nor rebutted are presumed to be admitted.***(Eridadi Ahimbisisbwe v World Food Program & others [1998] IV KALR 32).***

The appellant failed to show, even on a balance of probabilities, where and how the learned Taxing Officer took into consideration wrong principles, and/or applied wrong considerations. The appellant had a duty to prove its allegations. It failed to do so.

It is not sufficient to merely allege that the Taxing Officer improperly exercised his or her discretion or that he or she acted upon a wrong principle, the appellant must come out clearly and point out the wrong principle followed and demonstrate how the discretion was wrongly exercised.***(See: Alcon International V Standard Chartered Bank (supra))***

In the final result, this court therefore finds that the tax master was objective in her approach as she dealt with each item that was in contention and taxed them accordingly, giving reasons for her decisions.

This appeal therefore fails and is dismissed with costs.

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Alexandra Nkonge Rugadya
Judge
28th October, 2021

Delivered via email
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