THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION

MISCELLANEOUS APPLICATION NO. 73 OF 2022
(ARISING FROM LDT APPLICATION NO. 064 OF 2020)
(ARISING FROM H.C.C.S NO. 354 OF 2019)

NIJEL RAWLINS :: APPLICANT

VERSUS

TITO TURIYO :: RESPONDENT

BEFORE HON. JUSTICE NAMANYA BERNARD

JUDGMENT

Introduction:

1. The applicant brought this appeal under ***Section 62*** of the ***Advocates Act (Cap 267)*** and ***Regulation 3*** of the ***Advocates Taxation of Costs) (Appeals and Reference) Regulations (S.I 267-5)*** seeking for orders that:
   a) The decision of the Taxing Officer allowing instruction fees at Ushs. 9,200,000 be set aside and be reduced.
   b) The decision of the Taxing Officer to tax the bill of costs after the entire bill of costs was consented to during the pre-taxation meeting, be set aside.

2. The grounds of the appeal are that:
   a) The Taxing Officer erred in law when she proceeded to tax the bill of costs after the entire bill of costs was consented to during the pre-taxation meeting.
   b) The Taxing Officer erred in law when she awarded instruction fees of Ushs. 9,200,000 on a matter that did not proceed to trial.

3. The grounds of appeal are supported by an affidavit in support of chamber summons sworn by the applicant. The appeal is opposed by the respondent who swore an affidavit in reply.

4. The applicant was represented by *M/s. Ekirapa & Co Advocates* while the respondent was represented by *M/s. Mwesige, Mugisha & Co Advocates*. Both parties filed written submissions which I have considered.

5. The background of this appeal is that the applicant sued the respondent in H.C.C.S No. 354 of 2019 seeking to recover land which suit was withdrawn shortly afterwards before any court appearances. The respondent then filed a party to party bill of costs that was taxed by the Taxing Officer and allowed at Ushs 11,093,000.

6. The applicant contests the decision of the Taxing Officer to award the full instruction fees of Ushs 9,200,000 on a matter

that did not proceed to a full blown trial, and prays that the same should be set aside or be reduced. The applicant does not seem to contest other items of the bill of costs.

Preliminary Objections:

7. The respondent raised two preliminary objections to the Appeal:
   i. That ***Annexure B*** to the affidavit in support of the application (the alleged consent judgment) refers to a different suit (H.C.C.S No. 629 of 2017) and should be struck out.
   ii. That the applicant's affidavit contains falsehoods and should be struck out.

8. I have carefully considered the preliminary objections raised by the respondent and I find no merit in them. Under ***Article 126(2)(e)*** of the ***Constitution of Uganda***, substantive justice should be administered without undue regard to technicalities. I accordingly dismiss both preliminary objections and I will now proceed to consider the grounds of the appeal.

Grounds of Appeal:

Ground 1: The Taxing Officer erred in law when she proceeded to tax the bill of costs after the entire bill of costs was consented to during the pre-taxation meeting.

9. The main thrust of the applicant's arguments under this ground of appeal is that the parties agreed that the applicant would pay Ushs 5,000,000 in full and final settlement of the bill of costs, and even executed a consent judgment to that effect (see paragraphs 4, 5, and 6 of the applicant's affidavit).

10. The respondent, in paragraphs 6, 10, 11 & 15 of his affidavit in reply, denies the existence of the alleged consent judgment.

11. I have carefully considered the submissions of the parties on the alleged consent judgment for payment of the bill of costs. The alleged consent judgment is signed by Advocates representing the parties but is not endorsed by the Court. The parties are not signatories to the consent judgment. The title of the consent judgment refers to a H.C.C.S No. 629 of 2017 instead of H.C.C.S No. 354 of 2019.

12. I am therefore, persuaded by the respondent's submissions that there is no valid consent judgment on the bill of costs since no such consent judgment was endorsed by the Court. A consent judgment is not valid unless it is endorsed by the Court (see ***Order 50 Rule 2*** of the ***Civil Procedure Rules, S.I 71-1***) ***("CPR")***.

13. Counsel for the applicant argues that the respondent's Advocate had already committed him to a consent to taxation and that under the ***Regulation 13(A)*** of ***Advocates (Remuneration &***

Taxation of Costs) (Amendment) Regulations, 2018, only Advocates can appear in pre-taxation hearing and not the parties themselves. The respondent opposes this argument, and states that a party can represent himself. The respondent relied on ***Order 3 rule 1*** of the ***CPR*** for this submission.

14. ***Regulation 13(A)*** of ***Advocates Remuneration Regulations*** (supra) provides that:

> *"(1) The advocates for the respective parties or the parties themselves, if unrepresented, shall jointly identify the costs, fees and expenses on which they agree, if any, before the taxation of a bill of costs."*

15. I am unable to find anything in the law that prevents a party from representing himself/herself in a pre-taxation hearing if he chooses to do so. In fact, ***Regulation 13(A)*** *of* ***Advocates Remuneration Regulations*** (supra) allows a party if unrepresented, to participate in identifying costs, fees and expenses on which they agree, before taxation of a bill of costs. I am not persuaded by the arguments of counsel for the applicant on this issue.

16. Ground 1 of the appeal fails and it is dismissed.

Ground 2: The Taxing Officer erred in law when she awarded instruction fees of Ushs. 9,200,000 on a matter that did not proceed to trial.

17. The overall thrust of the applicant's arguments is that the Taxing Officer awarded the full instruction fees of Ushs 9,200,000 on a matter that did not proceed to full trial.

18. On his part, the respondent submits that he entitled to the full instruction fees at the time of receipt of instructions, and that the subsequent progress of the suit is irrelevant.

19. The crux of the dispute between parties is whether the respondent's Advocate becomes entitled to the full instruction fees upon receipt of instructions to defend the suit irrespective of the progress of the suit and the level of effort put in by the Advocate. Should the Taxing Officer have considered subsequent progress of the suit in determining the quantum of instruction fees?

20. I understand the position of the law to be that instruction fees grow as the suit proceeds, and therefore, where a full blown trial has not been conducted, full instruction fees cannot be awarded. An Advocate does not immediately become entitled to claim the whole instruction fees that he may ultimately claim in a full blown trial (see ***Lumweno & Co Advocates v.***

Transafrica Assurance Company Ltd, Court of Appeal Civil Appeal No. 0095 of 2004 [Hon. Justice Richard Buteera, JA; Hon. Justice Solomy Balungi Bossa, JA; Hon. Justice Kenneth Kakuru, JA (dissenting)].

21. For clarity, the relevant parts of the holding of the Court of Appeal of Uganda in the ***Lumweno case*** (supra) (pages 14, 15, 17 & 18) are reproduced below:

> *"…an advocate will not ordinarily become entitled at the moment of instruction to the whole fee which he may ultimately claim…The whole picture of his input only emerges as the case progresses…We therefore agree that the entitlement under instruction fees grows as the matter proceeds. A case that ends on a technicality cannot attract the same fees as the one that proceeds for trial. By the same logic, an advocate who only files pleadings and makes a few appearances cannot be remunerated the same way as one who takes a case through a full blown trial. At the end of the case, a minimum fee may be reviewed upwards or even downwards, based on the advocate's involvement, complexity and other related matters…While we accept that an advocate is not allowed to charge a client below the minimum fee allowed by the Rules, this does not fetter the discretion of the taxing officer to determine whether*

the amount charged is commensurate with the work done…If an advocate does not conduct his client's case to the end, … then a taxing officer is empowered to determine the appropriate fee…it is therefore our judgment that an advocate is not entitled to the full instruction fees on filing and subsequent progress on a case is relevant…It is also our judgment that the learned Principal Judge did not err in law and applied the correct principles of law when he held [t]hat a lawyer is not entitled to the whole of the instruction fee when the matter is withdrawn from him…It is also our finding that the Learned Principal Judge did not err in law by holding that the instruction fee is determined by the subsequent progress of the matter."

22. The case of ***Bank of Uganda v. Banco Arabe Espanol, Supreme Court Civil Application No. 23 of 1999*** (per ***Justice Joseph Mulenga, JSC***) outlines three pertinent principles that ought to be considered by a Judge when considering whether or not to interfere with the decision of the Taxing Officer:

"[…] I should reiterate briefly some pertinent principles applicable to review of taxation […] The first is that save in exceptional cases, a judge does not interfere with the assessment of what the taxing officer consider to be a reasonable fee. This is

because it is generally accepted that questions which are solely of quantum of costs are matters with which the taxing officer is particularly fitted to deal, and in which he has more experience than the judge. Consequently a judge will not alter a fee allowed by the taxing officer, merely because in his opinion he should have allowed a higher or lower amount [...] Secondly, an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the taxing officer exercised, or applied, a wrong principle. In this regard, application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or manifestly low. Thirdly, even if it is shown that the taxing officer erred on principle the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties."

23. Having regard to the pleadings, the evidence and the law, it is my finding that the Taxing Officer applied a wrong principle in allowing the full instruction fee of Ushs 9,200,000 in a suit that did not proceed to full trial. The application of this wrong principle affected the Taxing Officer's decision on the quantum

of instruction fees and upholding the decision of the Taxing Officer would cause injustice to the applicant.

24. This is an exceptional case where the Judge can interfere with the decision of the Taxing Officer. As the matter did not proceed to trial, only a fraction of the instruction fee commensurate with the level of effort put in by the respondent's Advocate in defending H.C.C.S No. 354 of 2019 should have been awarded.

25. Ground 2 of the appeal succeeds, and I award Ushs 6,000,0000 as instruction fees, in place of the Taxing Officer's award of Ushs 9,200,000.

Conclusion:

26. In the result, as Ground 2 of the appeal has succeeded, **I ORDER** as follows:
    (a) The Taxing Officer's award of Ushs 11,093,000 is set aside.
    (b) The total award on the respondent's bill of costs is reduced to Ushs 7,893,000.
    (c) Each party shall bear its own costs for this appeal.

I SO ORDER.

NAMANYA BERNARD
Ag. JUDGE
2nd September 2022