THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

(LAND DIVISION)

MISCELLANEOUS APPEAL NO. 41 OF 2020

(Arising out of LDTA No. 13 of 2019)

(Arising from Civil Suit No. 616 of 2007)

PENNY WAYNE NAKABUYE :: APPELLANT

VERSUS

1. **KALULE RICHARD**
2. **HON. HENRY BANYENZAKI :: RESPONDENTS**

BEFORE: HON LADY JUSTICE IMMACULATE BUSINGYE BYARUHANGA

RULING

This appeal is brought by way of notice of motion under Section 62 (1) of the Advocates Act, Section 33 of the Judicature Act, Section 98 of the CPA and Order 50 rule 8 of the CPR seeking the following orders;

a. The taxation ruling of the 2nd respondent's bill of costs by the taxing master and the certificate of taxation in Civil Suit No. 616 of 2007 be set aside for being manifestly excessive, harsh and unjustified.
b. An order that the 2nd respondent's taxed bill of costs be re-taxed.
c. Costs of the application be provided for.

Background

In Civil Suit NO. 616 of 2007, Hon. Justice J.W. Kwesiga entered judgment in favor of the plaintiff and dismissed the same suit against the 2nd defendant/ respondent. A bill of costs was filed and taxed by the taxing master and it the source of this appeal.

The appeal is supported by the affidavit of Ezekiel Muhwezi deponed on 9th December 2020. The grounds of the appeal are laid out in the application and the affidavit in support of the application. The 2nd defendant's bill of costs was taxed to a tune of Uganda shillings 49,869,710 (Forty-nine million, eight hundred sixty nine thousand seven hundred and ten shillings) hence this appeal.

Representation

At the hearing of the appeal, **Abbas Advocates** represented the appellant while the 2nd respondent was represented by **LUKA Advocates**. At the hearing, Counsel for the appellant submitted that despite being served, counsel for 2nd respondent did not attend court. Court made directives where by Counsel for the appellant and Counsel for the 2nd respondent were directed to file written submission such that both parties are heard. Both counsel complied and filed written submissions.

Counsel for the appellant submitted that according to Section 62 (1) of the Advocates Act, a person affected by an order or decision of a taxing officer may appeal within 30 days to a judge of the High Court who on that appeal may make an order that the taxing officer might have made. Counsel relied on the cases of **Bank of Uganda versus Banco Arabe Espanol SCCA No. 23 of 1999** where it was stated that it is trite that save in exceptional cases, a Judge should not interfere with the assessment of what the taxing officer considers to be a reasonable fee and exceptional cases were defined in **Gulu Institute of Health Science versus Bwomu Gerald HCCA No. 163 of 2016 as** 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. Application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive.

Counsel further submitted that the taxing master in allowing the instruction fees under item 1 at Ugx 30,000,000, exercised her discretion wrongly as

opposed to exercising it judiciously. On item 11 and 12, counsel submitted that the items were deliberately or by mistake repeated as they were both in relation to counsel attending court on the same date of 11/12/2014 and the taxing master allowed the same as drafted.

Finally, counsel submitted that an addition of the items on the bill makes a total of Ugx 31,584,500 yet the taxing master allowed the bill at Ugx 49,869,710. Counsel prayed that the appeal be allowed with costs and the bill of costs be set aside.

In reply, counsel for the 2nd respondent submitted that this appeal is incompetent as it was brought in the wording of the notice of motion as opposed to the memorandum of appeal.

Furthermore, counsel submitted that that the application was brought under Order 50 rule 8 of the CPR which is meant for appeals against orders of the registrar and in this case taxed costs are not court orders.

On the issue of the merits of the application, counsel for the 2nd respondent submitted that several acts of the defendant's advocates were properly taxed the defendant's advocates' attendance in court was reflected in the court record. On the issue of the instruction fees, counsel submitted that this item was done at the discretion of court.

In conclusion, Counsel for the 2nd respondent submitted that this application lacks merit as the taxing officer properly taxed the bill within his discretion and as such the appellant brought this appeal to deal the 2nd respondent from recovering his costs and as such this appeal was brought in bad faith and the same should be dismissed.

Decision

Before, I proceed to the merits of the appeal, I shall first consider the preliminary objection raised by Counsel for the 2nd respondent.

It is counsel for the 2nd respondent's submission that this appeal is incompetent because this appeal was filed as an application instead of an appeal.

Counsel argued that **Section 62 (1) of the Advocates Act** refers an appeal to the high court arising from Taxation matters, yet, in the wording of this appeal, it is titled notice of motion by the applicant and not an appellant.

Counsel further argued that Order 50 rule 8 of the Civil Procedure Rules under which this application was brought is meant for appeals against orders of the Registrar and the instant case arose out of taxed costs and not court orders.

Counsel for the 2nd respondent prayed that the application be struck out with costs.

Section 62 (1) of the Advocates Act provides that;

> *"Any person affected by an order or decision of a taxing officer made under this part of this Act or any regulations made under this part of this Act may appeal within thirty days to a Judge of the High court who on appeal may make any order that the taxing officer might have made."*

It should be noted that, the Advocates Act is subject to the Civil Procedure Act and the Civil Procedure Rules which govern procedure in civil matters in the High Court and subordinate Courts. According to Counsel for the 2nd respondent, decisions of a Registrar arising from taxation of costs proceedings are not court orders, and therefore, ought not to be entertained under **Order 50 rule 8 of the Civil Procedure Rules**.

According to **Section 2 (0) of the Civil Procedure Act**, *"order"* means the formal expression of any decision of a civil court which is not a decree and shall include a decree nisi.

In this case, the taxation decision of the registrar amounts to an order of court since it did not lead to a formal decree and it only expressed a formal decision regarding taxation of costs since the registrar was not determining issues in the main suit.

Therefore, the current appeal was properly filed under Order 50 rule 8 of the Civil Procedure Rules which provides as follows;

> *"Any person aggrieved by an order of a registrar may appeal from the order to the High Court. The appeal shall be by motion on notice."*

I shall now proceed to the merits of the appeal. Having considered Counsel's submissions, I shall proceed to make my decision. I have critically looked at the bill of costs taxed on the 16th day September 2019 to a tune of Uganda Shillings 49,869,710 (Forty-nine million, eight hundred sixty-nine thousand seven hundred and ten shillings) in favour of the 2nd respondent by the Learned Deputy Registrar.

Before proceeding to the merits of the appeal, it is important to establish the law applicable for taxation of the above bill of costs. Whereas, the taxation of the bill of costs was concluded on the 16th day of September 2019, High Court Civil Suit No. 616 of 2007 (*from which LDTA 13 of 2019 arises)* was determined through a Judgment which was delivered on the 30th day of March 2015.

This implies that when the main suit was commenced and concluded, the Advocates (Remuneration and Taxation of cost) Regulation SI 267-4 was in operation. However, the 2nd defendant's bill of cost was taxed in 2019 after the Advocates (Remuneration and Taxation of Costs (Amendment) Regulations of 2018 were operationalized.

Section 18 (7) of the Interpretation Act provides;

> *Section 13 (2) shall apply on the revocation of a statutory instrument as it applies on the repeal of any Act.*

Effect of repeal

Section 13 (1) of the Interpretation Act provides that

> *Where this Act or any other Act repeals and reenacts, with or without modification, any provision of a former Act, references in any other*

enactment to the provisions so repealed, shall, unless the contrary intention appears, be construed as references to the provisions so reenacted.

Section 13 (2) of the same act provides that;

Where any Act repeals any other enactment, then unless the contrary intention appears, the appeal shall not-

(b) affect the previous operation of any enactment so repeated or anything duly done or suffered under any enactment so repealed.

The above provision indicates that a new provision does not affect acts done under the previous provision unless the contrary intention appears in the reenacted provision. In this case, the Advocates (Remuneration and Taxation of Costs) Regulations, 2018 do not indicate that they apply retrospectively to actions before 2018. Hence, the law applicable is the Advocates (Remuneration and Taxation of Costs) regulations SI 267-4.

The most important fact to put into consideration, is to look at the events leading up to items that were taxed in the bill of costs as opposed to when the bill was taxed.

It is trite that the law cannot operate or be applied retrospectively unless such an intention is drawn from the amendment itself. (**See Article 92 of the 1995 Constitution of the Republic of Uganda).**

According to **Hon. Erias Lukwago & ors versus Electoral Commission 7 Ors HCMA 431 OF 2019, Justice Ssekaana stated that,**

***"...** The ordinary rule of interpretation of Statute is that an enactment or a rule having a force of law is not to be taken retrospectively, unless such intention appears clearly from the language of the enactment or the rule.*

It is a fundamental rule of interpretation that a Statute other than one dealing with procedure shall not be construed to have retrospective

effect unless the intention of the Legislature that it should have such effect appears in terms or by clear and necessary implication.

Therefore, retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter or procedure, unless that effect cannot be avoided without doing violence to the language or the enactment."

Therefore, since Civil Suit 616 of 2007 was filed in August 2007 and concluded on 30th March 2015, and the items taxed in LDTA 13 of 2019 are a result of HCCS 616 of 2007, the bill ought to have been subjected to the Advocates (Remuneration and Taxation of costs) Regulations Statutory Instrument No. 267 -4 which was the applicable law at that time.

The Sixth Schedule of the Advocates (Remuneration and Taxation of Costs) Regulations No. 267-4, provided for the costs in the High Court. I shall proceed to subject each item of the bill to the sixth schedule.

Item 1

Item 1 is in reference to the Instruction fees to defendant HCCS No. 616 of 2001 for recovery of property worth 1 billion situated in Munyonyo and lost income to a tune of USD 96,000. Counsel for the appellant submitted that an award of Uganda Shillings 30,000,000 (Thirty million shillings) was manifestly high as the subject matter in HCCS No. 2997 was not definite. Counsel for the appellant further submitted that there was no evidence of a valuation report availed to Court to guide the taxing master.

According to the record of proceedings, the 2nd respondent testified that he spent about Uganda shillings 100,000,000 (One hundred million shillings) to complete the house on the suit land which he thought he would occupy for about 10 years but due to the pressure of the appellant/ plaintiff, he moved out of the house.

I have studied the pleadings and whereas a valuation report was not attached, the appellant/plaintiff did not contest the fact that the 2nd respondent spent

Uganda shillings 100,000,000 (One hundred million shillings) to complete the house on the suit land. Therefore, since there is no valuation report on court record, I shall use the uncontested figure of Uganda shillings 100,000,000 to determine the costs on instruction fees. The record does not show how the registrar awarded instruction fees.

According to **item 1 (a) (iv) (E) of the sixth Schedule, Advocates (Remuneration and Taxation of Costs) Regulations,** *where the amount exceeds Uganda shillings 20,000,000 1 percent on the excess of 20,000,000 shillings.*

In the instant case, arithmetically, 1% in the excess of 20,000,000 Uganda shillings is Uganda shillings 800,000 Uganda shillings. Therefore, instruction fees shall be taxed to a tune of Uganda shillings 800,000 (Uganda shillings eight hundred thousand).

Item 11 and 12

According to the bill of costs, both item 11 and 12 are in reference to Counsel attending Court for hearing of the matter for two hours. I find that Counsel was not specific as to the particular dates when court was attended for two hours.

Therefore, I shall treat the same as a repetition, and I shall only allow item eleven and exclude item twelve from the bill of costs of the 2nd respondent.

Item 2 –item 31

Counsel for the appellant did not contest the amounts attached to items 2 to item 31 but rather queried the sum total of the items. When I add item 2- item 31 excluding item twelve the total is Uganda shillings 1,484, 500 (Uganda shillings One million four hundred and eighty-four thousand, five hundred shillings. When all the items are added up, the bill is Uganda shillings 2, 284,500 (Uganda shillings two million two hundred and eighty- four thousand, five hundred shillings.

On the issue of V.A.T, it is trite law that before the issuance of V.A.T, a certificate should be presented as proof of Counsel's law firm's V.A.T registration. In the instant case, there is no evidence of Counsel's Law firm V.A.T's registration and yet the taxing master awarded the 2nd respondent V.A.T of 18%. This is procedurally wrong.

Therefore, items 1 and 12 of the bill of costs are set aside and the same is remitted back to the tax master for re-taxation.

Ruling delivered in High Court, land Division on the 31st day of March, 2023.

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Immaculate Businge Byaruhanga

Judge

31-03-2023