REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: TSEKOOKO, KAROKORA AND KATO, JJ.S.C)

CIVIL APPLICATION NO. 22 OF 2002

BETWEEN

C. C. CHANDRAN..APPLICANT

AND

KENGROW INDUSTRIES LTD...RESPONDENT

[Taxation reference from ruling of a single Justice (G. W. Kanyeihamba, J.S.C) dated 21st November, 2002 in Civil Application No. 17 of 2002.]

<u>RULING OF THE COURT</u>:

This is a reference to us from the ruling of Kanyeihamba, J.S.C as a single Justice of this Court on a reference from the Registrar as a taxing officer. The learned Justice reduced the amount awarded by the taxing officer.

We give a brief background. There was an appeal in this Court in which the present applicant was the respondent while the present respondent was the appellant who lost the appeal. The former presented a bill of costs to the Registrar of this Court. The Registrar, as taxing officer, awarded the applicant shs. 16,000,000 as instruction fees. The respondent was unhappy with the award. He referred the matter to the single Justice.

The single Justice reduced the award from shs. 16,000,000/= to shs. 5,000,000./=. The applicant was dissatisfied. He has now referred the matter to us. The reference is made under Rules 105(7), 41(1) and 1(3) of the Rules of this Court. The reference is by way of motion. In the motion, the applicant asks the Court to reverse the decision of the single Justice. The motion sets out the following grounds in support of the reference: -

a). The instruction fee of shs. 5,000,000 which was awarded by the learned Justice was manifestly inadequate and an error in law.

b). The learned Justice of the Supreme Court erred both in law and fact in holding that the subject matter of the appeal was a sum of shillings slightly above 30,000,000.

c). The learned Justice of the Supreme Court erred and/or exercised/applied wrong principles in determining/ assessing the instruction fees, thereby making an erroneous award.

d). The learned Justice of the Supreme Court erred at law and misguided himself, and made an erroneous award when he based his decision* to *reduce the award of the taxing master (sic) on the dimentional reduction in other decided cases cited, by him, other than the awards themselves made therein and the principles relied on.

Mr. Muziransa, counsel for the applicant, made an affirmation dated of 27th November, 2002 in support of this reference. The contents of the affirmation are similar to the grounds set out in the motion and reproduced above. Before us, Mr. Muziransa, as counsel for the applicant, first argued grounds (b), (c) and (d) together before he argued ground (a):

In respect of the three grounds [(b) (c) and (d)], Mr. Muziransa submitted that the learned Justice did not direct his mind to the principles governing taxation of costs in this Court and especially Paragraphs (2) and (3) of rule 9 of the Third Schedule to the Rules of the Court. He referred to a number of cases decided by this Court including: **A.A. Kassam and 2 others vs. Habre International** Civil Application 16/99 (unreported). Counsel contended that the single Justice erred when he held that the subject matter was shs. 30,000,000/= which, according to learned counsel, should be shs. 64,945,000/=. Therefore, contended counsel, the award of shs.5m/= was too low. Dr. Byamugisha, for the respondent, supported the decision of the single Justice contending, and here we agree with him, that Mr. Muziransa was mistaken in regard to the subject matter of the appeal because Mr. Muziransa considered the award to be the amount appearing in the decree of the Court of Appeal as the subject matter rather that the amount decreed by this Court which was relevant for purposes of the taxation of costs in this Court. Dr. Byamugisha submitted that each case must be decided on its own facts. He referred us to **General Parts (U) Ltd Vs Non-Performing Assets Recovery Trust -** Civil Application 21/2000 (unreported) for the view that inflation should be taken into account in awarding costs. Learned counsel referred to a number of other decisions illustrating the trend regarding taxation of costs in this Court. In each of these cases the Court reduced the awards made by taxing officers. Learned counsel asked us to give guidance on taxation of instruction fee. Although arguments on grounds (b), (c) and (d) were general. It is neater for us to consider each. We begin with ground (b). The passage in the ruling from which this reference arose and for which Mr. Muziransa criticised the learned Justice appears at pages 8 and 9 and states: -

> ***"The record shows that when the respondent's appeal was allowed in this Court, the Court awarded him a sum of US $ 12,600 which according to the then applicable rate at shs. 1800 to the dollar is approximately same shs. 13,000,000. He was also awarded other sums amounting to shs. 7,240,000 making a total of slightly over shs. 30,000,000. The sum awarded includes an award of shs. 5,000,000 as general damages for breach of contract. Consequently the claim the respondent hoped to get from this Court when he filed the appeal was in the range of about shs. 25,000,000. In the respondent's bill of costs dated 17th June, 2002, Counsel drew up a***

bill of shs. 61,582,000 which included an instruction fee of shs. 50,000,000. In my view, where a successful party has been claiming shs. 25,000,000 and is awarded a sum of shs. 30,000,000/= to claim the sum of shs 61,582,000 and ask to be awarded the sum of shs. 50,000,000 costs and instructions fee respectively is outrageous. I find it hard to understand minds of counsel who can boldly present bills of costs which are about the same as or greater than the value of the subject matter of the litigation."

Obviously in the last part of the above passage, the learned Justice expressed himself very strongly to demonstrate his disapproval of the claim for instruction fee in the case. Whilst exaggerated bills of costs must be discouraged by Courts, we may say, in passing, that each case must be decided on its own facts. For it is not impossible to find a case where the taxed costs in a case exceed the value of the subject matter. Many factors would influence the calculation of costs to be awarded. Such factors may include cost of transport occasioned by many adjournments.

With respect to Mr. Muziransa, we can not agree that the learned Justice misdirected himself on the law especially rule 9 of the 3rd Schedule and on the facts. The learned Justice was alive to the facts of the case. We have just reproduced a passage from his ruling showing how the Justice computed the figure of shs 30 million. At page 9 of his ruling the Justice stated: **-"*I note that neither Counsel nor the learned taxing officer showed keen interest in computing the actual sum in shillings which was finally awarded. Mr. Muziransa figured that the subject matter of the litigation was Sixty million shillings. It is a mystery as to where he got the sum from. The taxing officer stated boldly in his ruling that the matter was around shs. 40,000,000. M/s Enid Endroma, Counsel for the applicant, seems not to have bothered about the sum of money awarded by this Court in Civil Appeal No. 7 of 2001."***

This certainly demonstrates that the learned Justice directed his mind to the facts of the case. In his address to us Mr. Muziransa has not shown that in the facts mentioned by the Justice, the Justice quoted wrong figures. After the Justice noted the deficiencies in submissions before the taxing officer of counsel for both sides, the Justice concluded

that the amount of shs. 50,000,000 claimed and the amount of shs. 16,000,000 awarded by the taxing officer was manifestly excessive. The Justice then referred to the recent decisions by this Court relating to the taxation of costs and wondered why taxing officers do not refer to such decisions. Of course, before us Mr. Muziransa contended that the learned Justice was wrong in relying on those cases, instead of relying on the cases cited by Mr. Muziransa, to decide the reference. Counsel argued that the Justice was wrong to assume that the subject matter was shs.30,000,000/= Incidentally these same cases relied on by the Justice have been cited to us. They include: **Bank of Uganda Vs Banco Arabe Espanol** Civil Application 23 if 1999 (unreported), **Attorney General Vs Uganda Blankets Manufacturers,** Civil Application 17 of 1993 and **General Parts (U) Ltd Vs Non - Performing Assets Recovery Trust,** Civil Application 21 of 2000.

We note from his ruling that in fact the learned Judge considered these and other cases before he concluded that the amount awarded as instruction fees of shs. 16m/= was excessive and therefore he reduced it to shs. 5m/=.

We have not been persuaded by Mr. Muziransa that the Justice misdirected himself either on the facts or in law when he concluded that the subject matter of the appeal was shs. 30M/ = . That is what the decree of this court really reflects, though in dollars and Uganda shillings. The finding was based on the facts of the case. That is a finding, which we are unable to upset because no error has been pointed out to us.

We now have to answer the question: Did the Justice misapply rule 9(2) and (3) as contended by Mr. Muziransa? These provisions read as follows: -

> ***"9(2) The fee to be allowed for instructions to appeal or oppose an appeal shall be a sum that the taxing officer considers reasonable, having regard to the <u>amount involved</u> in the appeal, its nature, importance and difficulty, the interest of the parties, the other costs to be allowed, the general conduct of the proceedings, the fund or person to bear the costs and all other relevant circumstances.***

(3) The sum allowed under sub paragraph (2) shall include all the work necessarily and properly done in connection with the appeal and not otherwise chargeable including attendances, correspondence, perusals, and consulting authorities."

The framers of sub paragraph (2) (quoted above) for some reason did not consider it necessary to set out a scale of instruction fee to be paid in respect of appeals in this Court. As the Rules show, the assessment of fees is left to the good judgment of the taxing officer who must award a figure which he/she "considers reasonable". In other words, he exercises judicial discretion. In the case of **Premchand Raichand Vs Quarry Services (No.3) (1972) EA 162** at page 164, the East African Court of Appeal referred to an English decision regarding assessment of a brief fee which is the same thing as instruction fee and said: -

[The correct approach in assessing a brief fee is, we think, to be found in the case of **Simpsons Motor Sales (London) Ltd Vs Hendon Corporation** (1964) 3 ALL. E.R.833 in which PENNYQUICKS, J., said ***"One must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particularly high fee, sometimes demanded by counsel of pre-eminent reputation. Then one must estimate what fee this hypothetical character would be content to take on the brief]***

This approach which we think reflects the correct approach was adopted in the recent decision by this Court in the case of **Paul Ssemogerere & Olumu Vs Attorney General -** Civil Application No.5 of 2001 [unreported]. Court expanded on the Pennyquicks J's summary of what the lawyers for each side had submitted to him. In **Ssemogerere case** this Court stated: -

"In our view, there is no formula by which to calculate the instruction fee. The exercise is *an intricate balancing act whereby the taxing officer has to mentally weigh the diverse general principles applicable, which sometimes, are against one another in order to arrive at the reasonable fee. Thus while the taxing officer has to keep in mind that the successful party must be reimbursed*

expenses reasonably incurred due to the litigation, and that advocates, remuneration should be at such level as to attract recruits into the legal profession, he has to balance that with his duty to the public not to allow costs to be so hiked that courts would remain accessible to only the wealthy. Also while the taxing officer is to maintain consistency in the level of costs, it is settled that he has to make allowance for the fall, if any, in the value of money. It is because of consideration for this intricate balancing exercise that taxing officer's opinion on what is the reasonable fee, is not to be interfered with lightly. There has to be a compelling reason to justify such interference. See ***Premchand Raichand Ltd.*** *case (Supra).* ***Attorney General Vs Uganda Blanket Manufactures Ltd,*** *(Supra); and* ***Departed Asians Property Custodian Board Vs Jaffer Brothers*** *(Supra).*

These considerations apply to a taxing officer as well as to a single Judge or a court reviewing taxed costs."

Since there is no mathematical formula for calculating the instruction fee for prosecuting or defending an appeal, this appears to us to be a compromise approach.

What is required of a taxing officer is to exercise his or her discretion judiciously so as to award an amount he/she "considers reasonable." That of course is where the problem of balancing lies. As stated in **Ssemogerere case** (supra) we have many cases of this Court which set out guidance in the taxation of instructions fee: See **Makula International Ltd Vs H.E. Cardinal Nsubuga and Another** (1982) HCB 11 and **The Registered Trustees of Kampala Institute Vs Departed Asians Property of Custodian Board,** Civil Application 3 of 1993, among others. Yet in spite of these guidelines, taxing officers continue erring by awarding exhorbitant costs as instruction fee.

Rule 101 (1) of the Rules of this Court gives this court power to assess costs. It states:-

"When making any decision as to payment of costs, the Court may assess or direct them to be taxed................."

In view of these provisions and the apparent inability by taxing officers to follow guidelines set out by decisions of this Court, it may be time now for this Court itself to assess costs at the conclusion of each Civil Appeal. At any rate taxing officers can be left to tax disbursements while instruction fee is assessed by the court. Normally the court would know the nature of the case

The contention of Mr. Muziransa in effect is that the amount on the basis of which taxation should have been made should have been the amount set out in the decree of the Court of Appeal namely shs. 64,945,000/= because that was the basis of the appeal. That amount includes interest at the rate of 20%. He relied on a number of decisions of this Court. One of the decision is **General Parts Vs NPART** (supra) which in our view is not quite to the point. In that case a single Justice had ruled, on a reference to him from a taxing officer, that no amount of money was involved in arguing the appeal from which the taxation arose. Upon his ruling being referred to the Court where he was criticised for that holding, the full Court agreed with him that the point argued in that appeal was a point of law. No amount of money had been involved in the appeal. The Court, however increased the award from 5m/= to 15m/= on grounds which do not arise in the present reference. Mr. Muziransa also relied on **Kassam's case** (supra). That is a decision of a single Justice of this Court, Mukasa Kikonyogo, JSC, as she then was. It was a reference from a taxation ruling of a Registrar. Mr. Muziransa submitted that in that case the subject matter of litigation was shs. 60m/= and that the single Justice had awarded shs. 15m/ = as instruction fees and a further shs. 5m/= as fees for arguing additional grounds. On the basis of that, counsel argued that in the present case the single Justice's award of shs. 5m/= is too low.

We think that that **Kassam's case** is distinguishable from the present case. In the first instance, the original amount which was the subject of litigation in **Kassam's case** was shs. 70m/=. Even if it is assumed that that amount was the issue for the decision and that that was the amount involved in that appeal, that amount is clearly more than the amount involved in the present case. Secondly, and this is the most important distinction, the principal issue argued in **Kassam's appeal** in this Court involved one

main point of law, namely the interpretation of Sections 11 (2) and 14 (1) of the **Expropriated Properties Act, 1982 and Regulation 8 of the Regulations** made under that Act. Counsel for the appellant in **Kassam's case** lodged a bill in which he claimed two sums one as instruction fees to argue the appeal and the second as instructions fees for arguing additional grounds of appeal. The taxing officer awarded to the appellant shs 30m/= in respect of the former and shs 15m/= in respect of the latter. In the reference before the single Justice in that case the complaints about these amounts were grounds 2 and 5.

A number of cases of this Court as well as rule 9 (2) and (3) (supra) were cited to the single Justice. She referred to the cases and the law and stated that the taxing officer correctly stated the law [Rule 9 (2) and (3))] and the principles laid down on taxation. She held that an award of shs 30m/= to argue the appeal was excessive, and therefore she reduced it to 15m/=. She further held that an award of shs 15/= for arguing additional grounds was excessive since the amount involved in the appeal was shs 70m/= and reduced this last award to shs 5m/ = . This particular aspect of **Kassam's case** is actually against the argument by Mr. Muziransa that the award of shs 5m/= is too low in an appeal where the amount involved is say shs 64m/=. Ground [b] must therefore fail.

We shall next consider ground (c). With respect to Mr. Muziransa, we have not been persuaded that the learned Justice erred and/or exercised/applied wrong principles in determining/assessing the instruction fee. In his affirmation in support of the reference, Mr. Muziransa stated:

3. "That in assessing and determining the reduction, the Learned Justice erred and/or misapplied the principles of taxation and misguided himself when he based his decision on authorities not applicable to the matter at hand.

4. That the subject matter appeal involved complicated questions of law and fact.

5. That the learned Judge erred in principle when he failed to properly take into consideration the inflation and the fact that the subject matter appeal (sic)

was a final disposal of all matters and issues at hand as between the parties in the original suit."

There are three complaints. The first is that the Justice failed to apply properly the principles of taxation. The second is that the appeal involved complicated questions of law. The last is failure to take inflation into account. We have in a way dealt with these complaints. Mr. Muziransa contended that the learned Justice did not direct his mind to the principles governing taxation of costs in this Court and relied on the **Kassam case** (supra) **Habre International Case** (Supra) and Rule 9 (2) and (3). We are puzzled by these contentions of Mr. Muziransa. The record before us does not include the address to the single Justice by counsel, but in his ruling, the Justice states that Dr. Byamugisha had cited a number of cases including **Premcharnd Richard Vs Quarry Services of East Africa** (1972) EA 162, **Bank of Uganda Vs Banco Arabe Espanol,** and **Attorney General Vs-Uganda Blankets,** and rule 9 (2). We have mentioned these authorities already. The Justice further states that Mr. Muziransa addressed him on the same Paragraph 9 (2) as well as on the decision of this Court in **General Parts Vs Non performing Assets recovery Trust,** (supra) to support the view that the taxing officer had applied proper and relevant principles of taxation in this case and that he had taken inflation into account. Mr. Muziransa had also relied on **Kassam's case** (supra).
Then the learned Justice opened his opinion with these words: ***"Having perused the record of proceedings and the ruling of the learned taxing officer and having heard counsel for both parties and reviewed the authorities cited, it is my opinion that the decision of the taxing officer of this Court is guided by the provisions of Rules 9 of the Rules of this Court"***

The Justice then analysed the Figures in the proceedings and concluded that he was guided by such decision as **Bank of Uganda Vs Banco Arabe Espanol**_(Supra), **Attorney-General Vs Non - Performing Assets Recovery trust** (Supra) and the **Registered Trustees of Kampala Institute Vs Departed Asians Property Custodian Board.** After alluding to the figures and amounts awarded, the learned Justice revised the award given by the taxing officer from shs 16m/= to 5m/=. With respect we do not see the basis on which Mr. Muziransa criticised the learned Justice on grounds that the Justice misguided himself and did not properly apply the law and principles applicable

to taxation of costs in this Court. Rule 9 of the 3rd Schedule to the Rules of this Court contains the principal provisions of the law which govern taxation of instruction fee by taxing officers in this Court. That law was cited to the Justice by counsel and the Justice applied it. The Justice relied on cases cited to him by counsel for both sides. In these circumstances, we find Mr. Muziransa's criticism of the

Justice both unwarranted and baseless. Ground. (C) must, therefore, fail.

Ground (d): has been set out earlier.

In the foregoing discussions, we have disposed of this ground. Cases relied on by the learned Justice cited by both sides. In any case, in considering any issue raised before him a Justice is not prohibited from considering authorities not cited by counsel so long as such authorities are relevant to the controversy between the parties Ground (d) must fail.

We now discuss ground (a). Mr. Muziransa's complaint is that the instruction fee of shs 5m/= which was awarded by the learned Justice was manifestly inadequate and an error in law. Counsel argued that the amount of shs 16m/= awarded by the taxing officer was not manifestly excessive. He criticised the Justice for relying on cases decided in 1990, contending that because of inflation the Justice should have upheld the award of shs 16m/ = . On the other hand Dr. Byamugisha referred to the latest decisions on the subject and these have been cited earlier in this ruling. The case in point is **General Parts (U) Ltd** (Supra) which case also alludes to inflation. We do not agree that the Justice relied on the decisions of 1990s. **General Parts** (Supra) was decided on 12/1/2001 by a bench of three. **Bank of Uganda** (supra) was decided on 19th April 2000 and **Kassam's case** was decided by a single Justice on 12/1/2000. These are recent decisions. All of them were cited to the Justice for his consideration. In his ruling the Justice states that he reviewed all the cases cited to him. He specifically stated that he was guided by two of these same cases, among others. Indeed the ruling of the Justice indicates that Mr. Muziransa relied on **General Parts** case, in his submission before the Justice for the view that General Parts is one of the cases which reflect the general principle that are applied in taxation of costs in this Court.

We agree that inflation has to be borne in mind when taxation of costs is done. But we cannot accept that inflation should be a basis for awarding exhorbitant costs. Many other factors set out in paragraph (2) of rule 9 of **Schedule 3** must be considered - Moreover, we think that under Rule 105 (3) of the Rules, a Justice exercises discretion in deciding whether the bill of costs as taxed is manifestly excessive or manifestly inadequate. He makes a decision on the basis of materials before him or her. The Justice in this reference before us demonstrated in his ruling that he reviewed the materials available before him including the Rules of Court and the case law. We have power to vary, discharge or reverse decision of the single Justice. However we have not been persuaded that the learned Justice exercised his discretion injudiciously and or wrongly in reducing the award from shs 16m/= to 5m/=. Ground (a) must therefore fail.

In the result the reference is unsuccessful. The application is dismissed. The respondent shall have the costs of this reference and those before the single Justice.

Dated at Mengo the 14th day of May 2003.

J.W.N. TSEKOOKO

JUSTICE OF SUPREME COURT

A.N. KAROKORA

JUSTICE OF SUPREME COURT

C.M. KATO

JUSTICE OF SUPREME COURT