THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: OKELLO, JSC.)

CIVIL APPLICATION NO. 02 OF 2008

B E T W E E N

ATTORNEY GENERAL: :::::: :::::: :::::: APPLCANT

A N D

1. JAMES MARK KAMOGA

2. JAMES KIMALA: :::::: :::::: :::::: RESPONDENTS

[A reference to a single Judge from the decision of the Taxing Officer, (Ms. H. Wolayo, Registrar of the Supreme Court) in Civil Appeal No. 08 of 2004].

RULING OF G. M. OKELLO, JSC:

This is a reference to me under rule 106 (1) of the Rules of this Court from the ruling of the taxing officer in the Civil Appeal referred to above wherein the respondents' bill of costs was taxed and allowed at the total sum of Shs. 70,418,500=.

Out of that amount, Shs. 70,000,000= was awarded as instructions fee for defending the appeal. In the reference, only the sum allowed in item I of the bill of costs as instructions fee was contested.

The brief background to the proceedings that gave rise to this reference is as follows, in 1997, Charles James Mark Kamoga and James Kimala filed Civil Suit No. 1183 of 1997 in the High Court against the Attorney General, the Uganda Land Commission and 11 other people for a declaration that they (the plaintiffs) were the lawful registered proprietors of the land comprised in Freehold Register Volume 306 Folio No. 20 situated at Mbuya Hill, Kampala District. For purposes of clarity, I shall hereinafter refer to the Attorney General as the "applicant" and to Charles James Mark Kamoga and James Kimala jointly as the "respondents." James Kimala, the second respondent, had granted leases curved from the said freehold land to several people.

Sometime in November 1998, the applicant and another filed an amended written statement of defence in which they averred that the respondents had never been successors in title to the Freehold, which I shall henceforth herein refer to as the suit land. They also averred that the suit land was never bequeathed to the respondents. The applicants again filed another amended written statement of defence dated 15th December 2000, in which there averred that the respondents were not and had never been the rightful proprietors of the suit land but that they acquired the title to the suit land through fraud and misrepresentation.

The parties appeared to have entered a consent judgment before the Deputy Registrar on 24-09-2007, under Order 46 rule 2 of the Civil Procedure Rules settling the suit in favour of the respondents.

The terms of the consent judgment which are not essential for the determination of the application before me, are not on the record. On the 24th March 2002, the applicant and another filed in the High Court Civil Application No. 162 of 2002 under sections 82 and 98 of the Civil Procedure Act seeking the review of the consent judgment or order praying that the said consent judgment or order be set aside with costs in favour of the applicants.

The application was heard by Katutsi, J, who allowed it and set aside the consent judgment. The respondents, however, successfully appealed against that decision to the Court of Appeal which restored the consent judgment. The applicant's appeal to this court against the decision of the Court of Appeal was dismissed with costs in favour of the respondents in this court and in the two courts below.

The respondents' bill of costs was taxed by the Registrar of this Court in her capacity as the taxing officer. It is this decision of the Taxing Officer that is referred to me as stated above.

There are three grounds of reference framed as follows:

(1) - That the Bill of costs taxed to the tune of Shs. 70,418,500= is, in all circumstances manifestly excessive.

(2) - That the taxing officer erred in principle in not taking into account the [principle which requires that costs be kept at a reasonable level so as not to keep away poor litigants.

(3) - That the taxing officer erred when she took into account a valuation report that was not part of the court record and therefore erroneously based her award on the value stipulated in the said extraneous report.

Before I consider these grounds, I should reiterate that sub-rules (1) and (3) of rules 106 of the Rules of this Court empower a person who is dissatisfied with a decision of the taxing officer, to refer the decision to a single Judge of this Court on the ground either that there was an error of law or of principles or that the bill of costs as taxed is, in all the circumstances of the case either manifestly high or manifestly inadequate as to require the judge to make such deduction or addition as will render the bill reasonable. I should add also that it is necessary to summarise some pertinent principles applicable firstly to the assessment of instruction fee and secondly, those pertinent principles that are applicable to the review of taxation.

The principles governing the taxation of costs are contained in sub-paragraphs 2 and 3 of paragraph 9 in the third schedule to the Rules of this Court as follows:

"(2) The fee to be allowed for instructions to appeal or to oppose an appeal shall be a sum that the taxing officer considers reasonable having regard to the amount involved 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) of this paragraph shall include all work necessarily and properly done in connection with the appeal and not otherwise chargeable including attendances, correspondence, perusals and consulting authorities."

It is clear that the provisions of sub-paragraph (2) above gives the taxing officer discretion to determine what sum is reasonable to be allowed for instructions fee after taking into account the relevant factors stated in the sub-paragraph and all the circumstances of the case. However, like in all judicial discretion, the taxing officer must exercise his or her discretion judicially and not capriciously.

In ***Premchand Raichand - vs - Quarry Services (1972) EA 192*** the Court of Appeal for Eastern Africa stated at page 164 as follows:

" The brief fee is based on the amount of work involved in preparing for the hearing, the difficulty and importance of the case and the amount involved. These factors apply to the respondent as well as to the appellant. The advocate for the respondent, if he is not to be taken by surprise, must make just as a thorough study of the case and the relevant authorities as the advocate for the appellant. The advocate for the appellant does, however, have the responsibility of advising his client to attack a judgment of a court and this would, we think, justify his being allowed a slightly higher fee to include this element."

There is no magic formular which, when applied by a taxing officer, would arrive at an automatic reasonable fee for instruction to prosecute or defend an appeal. Estimation of costs is a matter of opinion based on experience. Every case, therefore, must be decided on its peculiar circumstances. These would include the prolixity and complexity of the case in its preparation and any complication in its presentation in court and the amount involved in the appeal.

While a successful litigant ought to be fairly reimbursed the costs he has incurred in the litigation, a taxing officer has a duty to the public to ensure that costs do not rise above a reasonable level so as not to limit access to court to only the wealthy. This must be balanced with the need to keep the general level of remuneration of advocates such as will attract worthy recruits to the profession. Consistency in the awards too must as much as possible be maintained.

The next are the principles applicable to review of taxation. These may be restated as follows:

> ***"(1) It is settled that where upon review it is found that a taxing officer has erred on a principle, the practice has been to remit the question of quantum to be decided by the same or another taxing officer in accordance with the decision of the Judge on the point of principle.***

(2) The decision of the taxing officer on question of quantum is conclusive and only in exceptional cases that the Judge will interfere with it.

(3) 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.

(4) Application of a wrong principle may be inferred from an award which is manifestly excessive or manifestly inadequate.

(5) Even where it is shown that the taxing officer has erred on a 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.

The above principles were stated in ***Attorney General - vs - Uganda Blanket Manufacturers (1973) Ltd.,*** Civil Application No. 17 of 1993; ***Bank of Uganda - vs - BANCO ARABE ESPANO***, Civil Application No. 33 of 1999, SCU.***"***

At the hearing of this application, Ms. Jacinta Anying, State Attorney, represented the applicant while Mr. Tibaijuka-Atenyi, represented the respondents.

Arguing the three grounds of reference together, Ms. Anying submitted that sum of Shs. 70,000,000= awarded by the taxing officer as instructions fee to defend the appeal is, in all the circumstances of the case manifestly high. She reasoned that taxing officer fell into that error when she wrongly took into account, in assessing the instructions fee, the amount indicated in a valuation report that was not part of the record of the Appeal as the value of the suit land, the subject matter of the principal suit. She contended that the value of the sub-matter of an appeal is taken into account, in assessing instructions fee, only when it is a ground of the appeal. She criticized the taxing officer for even relying on the figure stated in the valuation report without affording the applicant an opportunity to rebut the figure by filing their own valuation report. She urged me to set aside the amount awarded as instructions fee and condemn the respondent to pay costs of this reference. Learned State Attorney did not suggest any figure she considers reasonable as instructions fee for defending this appeal in case her prayer was answered.

Mr. Tibaijuka-Atenyi opposed the application. He first pointed out that the Uganda Land Commission which was a joint appellant with the applicant did not oppose the taxed costs as it did not challenge it.

On the grounds of the reference, learned counsel submitted that the amount awarded for instructions fee is not manifestly excessive. In his opinion, that is a reasonable reimbursement of the costs incurred by the respondents in the litigation. He relied on ***Attorney General - vs - Uganda Blanket Manufacturers*** (supra). In that case, this court emphasised the need to make allowance for the fall, if any, in the value of money when assessing instructions fee.

He disagreed with Ms. Anying's view that the value of the subject matter of the appeal is taken into account in assessing instructions fee only if it was a ground of the appeal. Learned counsel contended that sub-paragraph (2) of paragraph 9 of the third schedule to the Rules of this court permits the *"amount involved in the appeal"* among other factors to be taken into account in assessing instructions fee. He opined that what constitutes *"the amount involved in the appeal"* is depended on the circumstances of each case.

In his opinion, where damages only are awarded or if the award is the recovery of property, then the value of the property assessed at the end of the judgment or the sole damages so awarded, would constitute *the amount involved in the appeal.*

Learned counsel finally sought to persuade me to draw a distinction between an award that is higher than it seems appropriate and one which is so manifestly excessive as to warrant interference. He submitted that in the former case, and impliedly in the instant case, court would not interfere. He relied on ***Alexander Okello - vs - Ms. Kayondo & Co. Advocates, Civil Appli9cation No. 01 of 1997.*** He urged me to dismiss the application with costs in favour of the respondents.

It seems clear to me from the above summary of the arguments of counsel for both parties that the applicant's attack was targeted at the quantum of what was awarded by the taxing officer as instructions fee in item I in the respondents' bill of costs.

The learned taxing officer while assessing the instructions fee said:

> ***"The value of the subject matter in this appeal is a relevant factor in assessment of instruction fee. Although the appeal originates from an order reviewing a consent judgment in the High Court, the consent judgment was in respect of prime property in Mbuya comprising five plots with developments thereon. The valuation Report puts the value at Shs. 1, 293,000,000="***

Then she concluded:

> ***"In view of the importance of the appeal, calling for research and clarity in presentation of arguments, the value of the subject matter, the principle of consistency in awards and the factors of inflation since the Uganda Blanket's case, I shall award a sum of Shs. 70,000,000= as instruction fee - - - ."***

As shown above, sub-paragraph (2) of paragraph 9 of the third schedule to the Rules of this Court permits a taxing officer, while assessing what in a given appeal is a reasonable sum for instructions fee, to have regard, inter alia, to *"the amount involved in that appeal."* The pertinent question that arises is what constitutes *"the amount involved in the appeal?"*

Mulenga, JSC, as he then was, had an opportunity to deal with the issue in ***Bank of Uganda*** (supra) where he said:

> ***"Undoubtedly, in his ruling the learned taxing officer took the view that the monetary claim in the principal suit was*** "the amount involved in the appeal." ***With respect, however, this was a misdirection. Although the principal suit and therefore, the monetary claim therein, was sound to be and was actually affected by the outcome of the appeal, the monetary claim was not involved in the appeal. It was not an issue or a question to be determined in the appeal."***

I agree with the above interpretation of sub-paragraph (2) of paragraph 9 as to what constitutes ***"the amount involved in the appeal."***

It can be deduced from the above passage that the test to be applied to determine what constitutes "*the amount involved in the appeal*" is the question whether the amount was an issue or a question to be determined in the appeal. The sole damages awarded in the appeal or the value of the subject matter of the appeal as argued by Mr. Tibaijuka, do not constitute "*the amount involved in the appeal*" unless they were issues for determination in the appeal.

The excerpt of her ruling reproduced here above shows that the taxing officer was conscious of the principles governing taxation but like in the ***Bank of Uganda case*** (supra), she also fell into the error of taking the view that the monetary value of the subject matter of claim in the principal suit constitutes "*the amount involved in the appeal*" to be taken into account in assessing instruction fee. As stated in ***Bank of Uganda case*** (supra), that is a misdirection. The value of the suit land was not an issue or a question for determination in the appeal. The issue or question for determination in the appeal was whether the Court of Appeal was wrong on the High Court review of the consent judgment entered into by the parties before the Deputy Registrar. The learned taxing officer, therefore, erred in taking into account the value of the suit land contained in the valuation report.

It was argued that the sum of Shs. 70,000,000= allowed as instructions fee is, in all the circumstances of this case excessive. The impending question here is whether that amount is so excessive as to warrant interference?

In ***Premachand Ramchand Ltd. (supra),*** the Court of Appeal for Eastern Africa said to the effect that in assessing the instructions fee, the taxing officer must envisage an hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel of pre-eminent reputation. Then one must estimate what fee this hypothetical character would be content with to take on the case.

Upon considering all the relevant principles and the circumstances of this case, I have come to the conclusion that the sum of Shs. 70 million allowed by the learned taxing officer as instructions fee is so manifestly excessive as to indicate an error of principle justifying this Court to interfere.

It seems clear to me that the taxing officer was significantly influenced by the value of the suit land which was put in the valuation report at 1,293,000,000=.

Even if that appeal was difficult, which I do not accept, I cannot imagine that a reasonably competent advocate would demand 70 million shillings to handle it. This kind of award of costs is incongruous with the spirit to balance between keeping costs of litigation at a reasonable level so as not to restrict access to court to only the wealthy and the need to allow reasonable

level of remuneration of advocates to attract worthy recruits to the profession.

In the result, I hold that the sum of Shs. 70 million awarded as instructions fee is manifestly excessive. I am satisfied that upholding that figure shall cause injustice to the appellant. I therefore, allow the application and reduce the instructions fee to Shs. 17,500,000= as being fair and reasonable in the circumstances of this case. Consequently, the total costs is reduced from Shs. 70,418,500= to Shs. 17,918,500=.

I also award costs of this reference which I set at three million shillings to the applicant.

Dated at Mengo this 10th day of February 2009.

G. M. OKELLO
JUSTICE OF THE SUPREME COURT