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(CORAM: KITUMBA, TUMWESIGYE, KISA AKYE J.J.S.c.)

AND

Applicant: *RESPONDENT*

25 [Application from the ruling on taxation Reference to a single Justice (B.M Katureebe JSC) dated 18th March, 2013 in Reference No 4 of 2013]

30 This reference is brought under rule 106 (7) and (8) of the rules of this court/ from a ruling of a single justice. The single Justice upheld the taxation ruling by the Deputy Registrar of this Court which allowed the applicant's bill of costs at shs. 7,624,670/= inclusive of shs. 6,000,000/= allowed as instruction fee. The 35 applicant contends that the bill of costs taxed is manifestly low.

BACKGROUND:

The following is the background to this reference. The applicant filed a suit against the respondent vide HCCS No. 48 of 2001.

5 This case arose out of a loan agreement between the two parties.

Before the trial, the respondent raised a preliminary objection arguing that under cap 53 of the Laws of Uganda, no suit could be maintained against it unless a waiver was obtained from its president. The High Court upheld the objection and dismissed the

10 suit. The applicant then unsuccessfully appealed to the Court of Appeal.

On appeal to this Court, the applicant's appeal was allowed and it was held that a waiver was not necessary to sustain a suit against 15 the respondent. This Court further ordered as follows:

3. *remit the case to the High court For hearing on merit.*

4. *the respondent to pay the applicant's costs here and*

20 *in the Court of Appeal.*

:5. *costs in the High Court to abide the outcome of the hearing of the case.*

At the taxation proceedings before the Deputy Registrar as a taxing officer of this court, the appellant's bill of costs was taxed 25 and allowed at shs. 7,624,070/=, as already stated.

The applicant was dissatisfied with the ruling of the taxing officer, and unsuccessfully made a reference to a single Justice of the Supreme Court who upheld the taxing officer's ruling that

30 awarded ShS.6, 000,000/= as instruction fee.

5 The applicant was not satisfied with the ruling of the single Justice and made a reference to the full bench on four grounds, which we shall state later in this ruling.

During the hearing of the reference before us the applicant was 10 represented by Mr. Mohammed Kajubi and the respondent was represented by Mr. Samuel Serwanga - Ssengendo. Counsel for both parties filed written submissions.

In his written submissions counsel for the applicant argued 15 grounds 1 and 2 together and grounds 3 and 4 separately. Counsel for the respondent argued grounds 1, 2 together and 3, 4 jointly.

In this ruling we shall deal with grounds 1, 2 and 3 jointly and ground 4 separately and in that order.

20 Grounds 1, 2 and 3 read as follows:

1. That the learned Justice of the Supreme Court respectfully erred in principle and law when he upheld the taxing master's award of Shs.

25 **6,000,000/= (Six million shillings) as the instruction Fee For the Appeal.**

2. That the learned Justice of the Supreme Court respectfully erred in principle and law when he

30 **Failed to consider the interpretation of cap 5~ Laws**

Ground 3***That the learned Justice of the Supreme Court respectfully***

10 *erred in principle when he failed to consider the principle of consistency in the award of instruction fee.*

Counsel for the applicant submitted that the learned single Justice noted that counsel for the applicant had submitted that the 15 matter involved novel issues of the Interpretation of the Eastern and Southern African Trade and Development Bank Act/ Cap 53 Laws of uganda.

However/ the learned single Justice held that counsel for the applicant wished the instruction fee to be based on the of size of
20 the loan. The learned single Justice held that the taxing officer properly directed herself on the right principles of taxation and properly exercised her discretion. He upheld her decision and dismissed the reference.

Applicant's counsel argued that he had clearly dropped the issue of
25 the monetary value of the loan and had indicated that he would rely on the issue of interpretation of cap 53. Counsel criticised the learned single Justice for considering a ground that had been abandoned and for failing to take into account the issue of interpretation of Cap 53 Laws of uganda/ consistency of awards

30 and research as the basis of the instruction fee. 4

5 Counsel for the applicant argued that during the trial before the single Justice the authority of ***Ebrahim A.Kassim & Others Vs Habre International***, Taxation Reference NO. 16 of 1999 was cited to him. That reference involved an appeal on interpretation of a statutory provision and Shs. 15,000,000/= was awarded as

10 instruction fee and shs 5,000,000/= was awarded for arguing an additional ground of appeal. Counsel submitted that the learned single Justice did not consider that authority.

Applicant's counsel contended that the award of the instruction fee of shs, 6,000,000/= as given by the taxing officer was

15 manifestly too low and amounted to an injustice to the applicant in the circumstances of the case.

He argued that this was a case where the single Justice was justified to interfere with the taxing master's award and he should have done so. According to counsel the learned single Justice

20 erred in principle.

In support of his submission he relied on ***premchard Rairchard Ltd & Anor vs Quarry services of East Africa Ltd & Others NO.~119721 E.A.162***. He prayed court to allow grounds 1,2 and 3 of the reference.

25 In his written submissions in reply, Mr. Samuel serwangaSsendo, learned counsel for the respondent supported the decision of the single Justice which upheld the Taxing Officer's award of Shs. 6,000,000/= as instruction fee. He argued that the

5 applicant's counsel had not abandoned the ground of reference of the suit that attacked the Taxing Officer for rejecting the monetary value (value of the subject matter) as the basis of taxation.

He submitted that the same is not on record and the learned

10 single Justice was justified to consider all the grounds of reference.

The respondent's counsel submitted that the learned single Justice was alive to the principles governing taxation/ and correctly held that the Taxing officer properly addressed herself to the right principles and exercised her discretion properly. He further

15 submitted that the learned single Justice was alive to the issues of interpretation of Cap 53 Laws of uganda/ consistency of the awards and the research as the basis of instruction fee.

Counsel contended that the though authority of ***Ebrahim A. Kassim & Others vs Habre International*** (Supra) involved a 20 matter of statutory interpretation; it did not support the applicant's case.

Firstly in the above case the court only allowed 15/000/0001 = as instruction fee whereas in the instant case the applicant seeks to be awarded Shs. 100/000/0001= as instruction fee. Secondly the

25 facts in ***Ebrahim A. Kassim & Others Vs Habre International*** (supra) are totally different. The taxation of the bill of costs in that case was based on the monetary value of the subject matter. In the instant case the appeal involved only the interpretation of a

5 statutory provision without taking into account the monetary value. Thirdly/ the award in the case was final because the decision was final and settled the rights between the parties.

However/ in the instant case the matter decided by this court was interlocutory and the case had to be remitted to the High Court

10 for hearing. According to counsel there cannot be consistency of the awards in view of the above differences in both cases.

Counsel for the respondent submitted that the principles of consistency are that cases having similar facts attract similar awards.

15 Counsel finally argued that the award of 6/000/000/ = as instruction fee was consistent with many decisions of this court based on similar facts. He cited the case of **patrick Makumbi vs. Sole Electrics Ltd [1990-1994] E.A 306** (in application NO. 11/94/ an appeal in an interlocutory proceedings on a point of law where the

20 Supreme Court awarded shs. 2/000/000/ = as instruction fee. He also cited the case of **The Registered Trustees of Kampala Institute vs. DAPCB Civil Application No.3 of 1995** which involved an appeal to the supreme Court on a matter of interpretation of The Expropriated properties Act in which the Supreme Court reduced

25 the award of 70/000/000 to 7/000/000. He further cited the case of **Bank of uganda vs. Banco Arabe Espanol EALR (1999) E.A 45** which was an appeal to the Supreme Court against the interpretation of Order 23 rule 2 of the Civil Procedure Rules where

5 the Supreme Court reduced the taxed costs from shs. 200,000,000 to 7,000,000. Respondent's counsel supported the decision of the single Justice and submitted that the criticism of the learned single justice, was, therefore, not justified. He prayed to this court to dismiss the three grounds of appeal.

In rejoinder, counsel for the applicant submitted that authority of **Ebrahim A. Kassim vs Habre International** (Supra) was on all fours with the instant case because it was on interpretation of the Expropriate properties Act and this case involved the

15 interpretation of Cap 53 Laws of Uganda.

He reiterated his arguments that the monetary value of the subject matter had been abandoned. He re-emphasised the point that the suit was very important because it involved novel issues and counsel did a lot of research. During the hearing of the appeal

20 two counsel represented the applicant.

Besides, the respondent was a regional trade bank which could pay costs. It was relevant to note that in the Court of Appeal, Shs. 50,000,000 = was awarded as instruction fee and in counsel's view instruction fee in the Supreme Court should be UGX 100,000,000 =.

25 We have read the record of reference and the written submission by both counsel. The gist of the applicant complaint in grounds 1, 2 and 3 of the reference is that the learned single Justice erred in law when he upheld the taxing officer's award of shs. 6,000,000 =

5 as instruction fee and did not consider the interpretation of cap 53 Laws of uganda as the basis of the instruction fee.

Applicant's counsel submitted that he had abandoned the issue of basing the instruction fee on the monetary value of the subject matter. In his endeavour to prove that, he has referred to P 17, 2nd

10 paragraph of the record of reference. In reply, counsel for the respondent submitted that he had not abandoned that issue. On our part we have perused the whole record of the reference. We have paid particular attention to p 17 of the record of reference. We are unable to find anywhere on record where counsel for the

15 applicant abandoned the issue of the value of the subject matter which was his 2nd ground of reference before the single Justice and stated:

That the learned Deputy Registrar erred in principle in not taking into account the subject matter of the suit as

20 *the preliminary objection disposed of the original suit that has since been amended for retrial at the Commercial Court. "*

Since the ground of reference was not dropped, the learned single Justice was justified to consider it.

25 Applicant's counsel has strongly criticised the single Justice for failure to take into account the fact that novel and important issues regarding the interpretation of Cap 53 Laws of uganda were

5 involved and a lot of research was done by counsel for the applicant.

Counsel for the respondent supported the whole decision of the learned single justice. He argued that the learned judge took into account the principles that had to be observed in taxation.

10 In his ruling the single Justice considered arguments that were advanced by counsel regarding the issue whether the taxing officer followed the right principles in her ruling.

The single Justice considered the provisions of Rule 9(2) of the Third schedule and quoted its provision thus:

9(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

20 **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. ” (Emphasis addecJ)**

Then he went on to state in his ruling thus:

25 **“Clearly the Taxing OFFicer has been given a very wide discretion. This Court has on many occasions pronounced itself on the nature and extent of that**

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discretion and how a decision made by the taxing

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Learned counsel on both sides have cited some of the cases to guide the court. In the PREMCHAND case (Supra) it was laid down, inter alia, that court will

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only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party'~ The court in that case stated thus:-

"The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, and particularly where he is an officer of great experience, merely because it thinks the award is somehow too high or too low: it will only interfere if it thinks the award is so high or so low as to amount to an injustice to

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one party or the other."

Then he considered other authorities of this court on taxation and finally held that what was decided by this court was an interlocutory matter and was a matter of principle, irrespective of value of the subject matter. The suit had to be returned to the

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High Court where more costs would be incurred. We entirely agree with him.

5 In his sUbmissions counsel for the applicant dwelt a lot on the need of consistency of taxation awards. He quoted the authority of *Ebrahim A. Kassan &Ors vs Habre* (Supra).

Counsel for the respondent has ably distinguished the above authority from the instant case. In the instant case the appeal was

10 on an interlocutory matter whether the respondent could be sued without a waiver from its President. The merits of the suit were not finally determined.

Counsel for the applicant has criticised the single Justice for not taking into account the fact that the respondent is a regional bank

15 having the capacity to pay costs.

we appreciate that rule 9(2) of the third schedule to the rules of this court states that when awarding instruction fee the taxing officer must consider "*the fund or person to bear the costs*"

Be that as it may, we are of the considered view that costs should 20 be fair and courts should avoid awarding exorbitant amounts as costs simply because the party has the ability to pay the amount. Other circumstances must be taken into account.

Counsel has argued that since the taxing officer awarded the costs of shs 50,000,0001 = as instruction fee from which the instant 25 matter arises this court should award instruction fee of shs 100,000,0001= .

5 With due respect to counsel, this court should not base the amount of instruction fee on what
was awarded by the Court of Appeal. In our view, we appreciate that when awarding
instruction fee, the taxing officer has to take into account "*all other relevant circumstances*".
In the reference before us, the single Justice took
10 into consideration the relevant fact that the case was for retrial on merits and instruction fee would
still be awarded.

However, he did not consider the fact that the applicant had been
forced to argue the appeal up to this court by the respondent bank
which raised the preliminary objection. The preliminary
15 objection was finally determined in favour of the applicant. we are of the considered view that if the
learned single Justice had taken that into account he would have awarded the applicant slightly a
higher instruction fee. we respectfully hold that Shs 6,000,000/ = was manifestly too low considering
the appeal stages this case
20 went through. The instruction fee awarded by the single Justice slightly distorts the picture.

Grounds 1 and 2 of the reference succeed, but ground 3 fails.

We now deal with ground 4 which reads:

Ground 4.

25 ***That the learned Justice of the Supreme Court respectfully erred in principle when he
did not evaluate the evidence on record and disallowed the applicant's reference and
awarded costs of the same to the respondent***

5 Counsel for the applicant repeated his arguments on consistency of awards. He criticised the learned single Justice for awarding shs 6,000,000/ = as instruction fee inspite of the fact that the authority of *premchard Raiichard Vs Ouarry Services of East Africa Ltd* and Others NO. 3 [1972] 162 had been quoted to him. He

10 submitted that the learned single Justice did not consider decisions of the court concerning the taxation of instruction fee on appeals involving statutory interpretation and consistency of the awards that had been quoted to him.

Counsel for the respondent supported the ruling of the single 15 justice. He submitted that the single Justice evaluated all the evidence on record.

We have had the benefit of reading the submissions of both counsel regarding the fourth ground of the reference. This ground is very similar to the three grounds we have already dealt with.

20 The issue for determination by this court is whether the learned Justice properly re-evaluated the evidence before him regarding the principles of taxation of costs. We are of the considered opinion that he considered all the evidence before him and the authorities. Ground 4 has no merit and fails.

25 We have taken into account the fact that the applicant had to make the appeal to the Court of Appeal and finally to the Supreme Court because the respondent made the preliminary objection to its suit. We consider this to be a relevant factor which the single

5 Justice should have taken into account and allowed the instruction fee to appeal to this court at higher amount than Shillings 6,000,000/ =, as we have already stated.

In the result, this reference is allowed, the ruling of the single Justice is set aside and sUbstituted with an order allowing the

10 instruction fee at Shs 30,000,000/ =. Other costs remain as awarded by the taxing officer and confirmed by the single Justice. The applicant should get half of the costs of this reference and the reference before the single justice. We have decided so because ground 3 of the reference has failed and the case is for trial on

15 merits and more costs will be incurred.

Dated at Kampala thi5~daY Of~

2013

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C.N.B. KITUMBA,
JUSTICE OF THE SUPREME COURT

J.TUMWES IGYE,
JUSTICE OF THE SUPREME COURT

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E. KISAAKYE
JUSTICE OF THE SUPREME COURT