THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

MISCELLANEOUS APPLICATION NO. 17 OF 2014

(ARISING FROM SCCA NO. 2 OF 2013)

UGANDA REVENUE AUTHORITY.....APPLICANT

VERSUS

SHELL (U) LTD & 9 OTHERS.....RESPONDENTS

RULING OF A.G. OPIFENI ON TAXATION

Respondent's Counsel's Opening Submissions.

This was a taxation hearing in which the respondent's counsel filed and claimed a total bill of costs of 228,585,393/= from the applicant. It was counsel's contention that the bill should be allowed as presented since it was drawn to scale. In the bill, counsel claimed an instruction fee of 188,934,384/= basing this on 10% of the subject matter of the application and also on the Supreme Court authority of **National Insurance Corporation Vs Pelican Service Limited**, Civil Reference No 13 of 2005.

Applicant's Counsel's Submissions in Reply.

The applicant's counsel conceded to items 10, 11, 12, 13, 14, 16, and 17 and opposed the rest of the items. They submitted that it was erroneous for the respondents to base their claim for instruction fees on the purported *value of the subject matter*. They urged that the *value of the subject matter* was only considered where taxation relates to an appeal and not an application as was in the instant matter. In support, they cited Rule 9(1) of the Rules of this court and distinguished it from Rule 9(2) where *amounts involved* are considered as was in the case of **Francis Rutagarama Bantarinza Vs Habre International Trading Co.** Civil Application No 21 of 2002, adding that the Rule places greater importance to an appeal when the amount of instruction fee was being considered compared to applications.

Counsel contended that in considering *reasonable amount*, the taxing master should exercise his discretion judicially and not capriciously as was held in the

case of **Pardan Vs Osman**, [1969] E.A. 528 Which was followed in **Attorney General Vs Uganda Blanket Manufacturers**. That there must be consistency in awards as was ruled in **Premchand Raichand Vs Quarry Services (No. 3)** [1972] E.A. 162, which was followed in **Uganda Blanket Manufacturers.**

Counsel suggested an instruction fee of 2,000,000/= as reasonable for each law firm in view of the legal minimum for applications of 1,000/=, totalling to a sum of 6,000,000/=.

In the alternative and without prejudice to the foregoing, counsel submitted that in case court finds that Rule 9(2) applied, it should find that the subject matter of application No.17 of 2014 had no value since the subject matter for determination was *interpretation and enforcement of judgment of this court in SCCA No. 2 of 2013*, a fact conceded to by the respondent's counsel in their written submissions in this case. In this regard, counsel for the respondent referred to the court's interpretation of a phrase he quoted from page 14 of the court's ruling delivered on 31st March 2013 and concluded that even if the court was to follow the provision of paragraph 9(2) of the Rules of this Court, it would be found out that the subject matter had no value since it was purely a question of interpretation of the judgment of Court. To him, it was the respondent's opposition to the said application for interpretation that gave rise to the current bill, hence the respondent's advocates were wrong to to premise their claim of instruction fees on *a value*. This argument, learned counsel supported with a portion of the ruling of Justice Mulenga (RIP) at page 6-7 from the case of **Bank of Uganda Vs Banco Arabe Espanol**, Civil Application No. 23 of 1999, where his lordship ruled that it was a misdirection for the taxing officer to take the view that the monetary claim in the principal suit (in High Court) was the amount involved in the appeal. Counsel maintained that court grants a reasonable amount which he had proposed i.e. 6,000,000/=.

Lastly on this point, learned counsel submitted that the case of **National Insurance Corporation Vs Pelican Services Ltd**, Civil Reference No. 13 of 2005, cited by the respondents was distinguishable since there, the subject matter that resulted in the taxation was money amounting to *75 million shillings*, and not an interpretation question and the matter was an *appeal, and not an application* as the instant one. Thus paragraph 9(1) of the Third Schedule to the Rules was not applicable. Least, he mentioned the case of **Haruna Mubiru & 3 Others Vs Nakato Bashira & Another**, Civil Reference No. 59 of 2012.

On item No 2 concerning perusal, counsel argued that it should be 150,000/= for 30 folios upon applying the 6th schedule to the Rules governing Taxation in the High Court.

On item 3 for making copies, he said the High Court Rules only provide for copies of pleadings drawn by a party. He submitted that the respondent here never drew the applicant's pleadings and so this item should not be allowed.

Regarding item No 4 concerning drawing affidavit in reply, counsel said the total should be 130,000/= since the first 2 folios attract 15,000/= and each additional folio costs 5,000/=.

As for item 6 on perusal of skeleton arguments, he argued that it should be 75,000/= since a folio is 5,000/=.

On item 7 concerning drawing conferencing notes falling under "necessary documents" he counted them at 8,000/= per folio hence, 5 folios amounted to 40,000/=.

Under the head of court attendance under items 8 and 9, counsel proposed 200,000/= and 150,000/= respectively, while for item 18, he argued that the law requires that disbursements be proved by receipts as per paragraph 4(2) and (3) of the Third Schedule to the Rules of this Court. That since no receipts were produced in court, if allowance is made at all, it should be 100,000/= as reasonable.

Respondent's Submissions in Rejoinder.

In rejoinder, the respondent's counsel submitted concerning the instruction fees that the bill be taxed basing on the subject matter of the case and as presented, in accordance with the law and principles governing taxation. He submitted that the subject matter in Miscellaneous Application No. 17 of 2014 was recovery of 1,889,384,914/= and that it followed protracted negotiations. Counsel denied that the instant application was a mere application but a unique matter seeking orders for recovery of an ascertainable sum of UgShs 1,889,384,914/= and was vehemently contested and prepared for by the applicant. He enjoined the taxing master to rely on and follow the principles laid down in the case of **Patrick Makumbi and Another Vs Sole Electrics (U) Ltd,** Civil Application No. 11 of 1994 (unreported) and allow for inflation, complexity and difficulty involved as discerned from the different applications and garnishee proceedings. He called upon the court to note that a loss of UgShs 1,889,384,914/= would have resulted

to the respondents in the event of losing the application, hence, the hypothetical counsel would not have insisted on such a low instruction fees as proposed by the applicant's counsel.

Learned counsel then proceeded to consider how instruction fees were determined on percentage basis in the cases of **NIC Vs Pelican Services Limited**, Court of Appeal Civil Reference No 13 of 2005 where 10% was applied. In that case of Pelican, the case of **Bank of Uganda Vs Trespert Ltd,** SCCAppeal was cited where 8%-9% was allowed as instruction fees, meanwhile in that of **Sietco Vs Noble Builders**, SCCApplication No 31 of 1993, also cited by counsel in the same case of **Pelican**, 10% of the subject matter was allowed. He also drew the court's attention to the authority of **Hope Rwabinumi Vs Julius Rwbinumi**, Civil Application No. 1 of 2009

This was then followed by enumeration of guiding principles in taxation of costs considered in the cases of **Makula International Vs Cardinal Nsubuga & Another**, [1982] HCB 11, **Nicholas Roussos Vs Gulam Hussein Habib Virani and Nasmudin Habib Virani**, Civil Appeal No. 6 of 1995, and a discussion of Paragraphs 9(1) and (2) of the Third Schedule of the Rules of this court.

Lastly, counsel cited the case of **Alexander Jo Okello Vs Kayondo & Co Advocates**, SCCA No. 1 of 1997, from which he quoted certain passages. Copies of these cases were not supplied to court.

On discretionary powers of the taxing master, learned counsel submitted that the 2,000,000/= proposed by applicant was out of touch with the economic realities of the times. He insisted that the decision in the case of **Hope Rwabinumi Vs Julius Rwabinumi**, Civil Application No. 1 of 2009 be applied. Counsel lastly quoted a passage was from the case of **Paul Semogerere & Another Vs Attorney General**, among others.

On attendance, counsel insisted on the amount of 200,000/=, which he argued was way beyond the reasonable.

Lastly on disbursements, he rejected the 100,000/= proposed by the applicant's counsel saying it was not in tune with the current transport costs.

Resolution of Counsel's Arguments by Court

The court has considered the submissions of both counsel regarding the arguments. As regards instruction fees, Rule 9(1) of the Third Schedule of the Rules of this court on the Quantum of costs provides that:

"The fee to be allowed for instructions to make, support or oppose any application shall be a sum that the taxing officer considers reasonable but shall not be less than one thousand shillings."

Rule 9(2) provides that:

"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."

In the case of **General Parts (U) Ltd Vs Non-Performing Assets Recovery Trust**, Supreme Court Civil Appeal No. 21 of 2000, the court held at page 4 of its judgment as follows:

"The second point is that in his ruling the learned Justice appears to criticise the taxing officer for laying emphasis on paragraph 9(2) of the 3rd Schedule and not considering paragraph 9(1). We think this was a slip. Paragraph 9(1) relates to costs in applications. The bill of costs before the taxing officer was in respect of an appeal." (emphasis mine).

In the instant case, the subject that led to this bill of costs was also an application and not an appeal. It is therefore the view of this court that the primary duty of counsel was to *oppose* that application. The subject matter of application No. 17 of 2014 primarily had no value. The monetary value of the application to be opposed was an incidental factor. The main subject matter of the bill of costs was an *instruction to oppose an application.*

To buttress this position, Item 1 of the respondent's/judgment creditor's bill of costs on the front page itself states that:

"29/07/14 1. To instructions to oppose an application of the court in SCCA No 2 of 2013 (regarding the collection of Ug Shs 1,888,934,384/= from the Applicant, Uganda Revenue Authority;" *(emphasis added).* Prima facie, the arguments of the applicant's counsel that the instruction fees should be tagged to the subject matter of the case does not, therefore, arise. It arises in ancillary

manner in so far as the magnitude of the monetary value surrounding the application is concerned. Otherwise the situation would have been different if this amount involved was small.

In the instant case then, there is no doubt that the respondent's counsel had to work hard to ensure that the colossal sum involved of 1,888,934,384/=, is not lost to the applicant.

In the case of **Francis Rutagarama Bantariza Vs Habre International Trading Company**, Supreme Court Civil Application No. 21 of 2002, after citing rule 9(1) of the Third Schedule to the Rules of this court, Kanyeihamba, JSC, said:

"The subrule confines the taxing officer to allow costs for the application and for nothing else of what he considers to be reasonable under the circumstances of the application, per se." (emphasis mine)

After citing subrules (2) and (3) of Rule 9 of the Third Schedule, the learned Justice noted that:

"Consequently, by taking into account those subrules and the authorities arising therefrom, and not confining himself to Rule 9(1), the taxing officer did not exercise his discretion judiciously. It is apparent that the sum of 3,500,000/= was arrived at after the taxing officer had taken into account matters which ought not to have been considered."

Following the above decisions therefore, it is the view of this court that the court has to confine itself to Rule 9(1) and award a sum that is considered reasonable and that it shall not be less than one thousand shillings. This means that the respondents counsel's submissions that the instruction fees should be based on the value of the subject matter of UgShs 1,889,384,914/= as per the case of **Patrick Makumbi and Another Vs Sole Electrics (U) Ltd,** does not apply.

As for applicant's counsel's submission that the court should award 10% of the value of the subject matter as instruction fees, Odoki, JSC had the following to say in the case of **Attorney General Vs Uganda Blankets Manufacturers,** Supreme Court Civil Application No. 17 of 1993:

"The principal of 10% as a basis for assessing instruction fee was rejected by the Advocates (Remuneration and Taxation of costs) Rules 1982 (S.I. No. 123/82) which introduced a sliding scale for charging instructions fees

ranging from twelve and a half per centum to one per centum of the value of the subject matter. I know that these rules do not apply to this court as they apply only to taxation of costs in the High Court and Magistrates Courts, but I believe that the intention of the Rules was to strike the right balance between the need to allow advocates adequate remuneration for their work and the need to reduce the costs to a reasonable level so as to protect the public from excessive fees. I think that the spirit behind these rules should provide some general guidance as to what is a reasonable level of advocates fees."

This also means that the arguments fronted by the respondent's counsel regarding determination of instruction fees based on percentages based on the decisions in the cases of **NIC Vs Pelican Services Limited, Bank of Uganda Vs Trespert Ltd, Sietco Vs Noble Builders** and that of **Hope Rwabinumi Vs Julius Rwabinumi**, cited above, do not apply.

As for exercise of discretion, this court finds benefit in the observation of the court in the case of **Attorney General Vs James Mark Kamoga & Another**, Supreme Court Civil Application No. 2 of 2008, by Okello, JSC, where the Hon Justice said:

"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 proxility and complexity of the case in its preparation and any complication in its presentation in court and the amount involved in the appeal."*(though in the instant case it is an application).*

As far as discretion is concerned, the learned Justice earlier said in the above case that:

"However, like in all judicial discretion, the taxing officer must exercise his or her discretion judicially and not capriciously."

In the instant case, the application no doubt involved an application for wresting a colossal amount of money from the applicant and this means that the amount of work involved was much as far as preparation for such a hearing was concerned. There were three firms involved in the matter.

In this court's judgment, an instruction fee of UgShs 25,000,000/= (apportioned at about UgShs 8.3 million for each of the three firms) is adequate and reasonable for handling the application instead of the UgShs 188,934,393/= claimed, which is far too excessive.

Consequently, this court agrees with learned counsel for the respondent that the amount of 2,000,000/= proposed by the applicant's counsel as instruction fees, for each of the firms that participated in the application, is way out of touch with the economic realities of the day.

Item 2 on perusal of the application is allowed, item 3 on copies is taxed to 400,000/=, item 4 for preparing an affidavit is taxed to 100,000/=, item 5 for clerk's attendance is allowed, item 6 for perusing the skeleton arguments is taxed to 100,000/=, item 7 for preparation of conferencing notes in opposition of the application is disallowed, as it is part of the instruction fee, item 8 on attendance is taxed to 400,000/=, item 9 for attending ruling is taxed to 200,000/=, items 10 to 14 are allowed. Item 15 is taxed to 200,000/= as written submissions were presented on the taxation by both counsel. Items 16 and 17 are allowed, item 18 is taxed to 300,000/= as no receipts were provided.

On VAT, the respondent's counsel claimed a sum of 34,782,009/= as being on VAT No. 11104-E. The quoted receipt for the VAT alleged to have been paid to the tax body was not attached by counsel for the respondent. In the case of **Punjani Motors Vs Sam K. Njuba**, High Court Miscellaneous Application No. 1144 of 1997, it was decided that, where the amount claimed as VAT is not proved to have been paid to the tax body, the claim for it should not be allowed. In the instant case, since that proof has not been furnished by the respondent's counsel, the claim for VAT amounting to 34,782,009/= is not allowed.

In the final analysis, the respondent's bill of costs is taxed and allowed for the three firms at UgShs 27,139,000/=.

DATED at Kampala this.....18th.....day of ...January.....2017

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A.G. OPIFENI

DEPUTY REGISTRAR SUPREME COURT