THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

TAXATION CIVIL REFERENCE NO.18 OF 2018

BETWEEN

MBALE RESORT HOTEL (U) LTD::::::::::::::::::::::::::::::APPLICANT

VERSUS

BABCON (U) LIMITED::RESPONDENT

(Reference from the Ruling of the Deputy Registrar of the Supreme Court upon taxation of costs in civil appeal No.06 of 2018)

RULING OF MWANGUSYA, JSC.

This is a reference under Rule 106 of this court from the ruling of the Deputy Registrar in his capacity as taxing officer, wherein the applicant's Bill of costs of Shs.245.211.180 /= was taxed and allowed at total sum of Shs.4.351.000/= out of the Shs 4.351.000/= shs. 3,000,000/= was awarded as instruction fee for raising a preliminary objection.

The brief background to the proceedings that gave rise to this reference is that the applicant entered into a construction contract with the respondent to erect and construct an annex building to the existing Mbale Resort Hotel in Mbale Municipality. The contract was agreed at Shs.666,337,984/=. The date of practical completion was 30th October 2007. On the 2nd October 2007 the applicant terminated the contract and this resulted into the dispute which was referred to an arbitrator. The parties agreed on Hon. Mr. Justice Karokora (Rtd) who made the award in favour of the respondent on the 18th April 2010 as follows:-

(a) Claim for costs incurred in the modification of the original design..... Shs.132,585,395.34

(b) Claims arising out of wrongful termination of the contract ..... Shs. 1,272,700,857.00

(c) Various other claims (outstanding certificates valuations interest or delayed payments and retention monies)

(d) General damages for unilateral breach of contract ..... Shs. 100,000,000.00

Total Shs.1,712,880,153.34

The awards made under (a) and (b) would attract interest at 10% p.a. from the date of the breach while the general damages would attract interest at 8% p.a. from the date of the award.

The applicant was dissatisfied with the arbitral award and sought to set it aside in accordance with Section 34 of the Arbitration and Conciliation Act. The High Court heard the application to set aside the award and partially granted the application by the applicant, by setting aside the portions relating to special damages of shs.1,272,700,875 and general damages of Shs.100,000,000.The court awarded the respondent 1/3 of his taxed bill of costs.

The respondent was dissatisfied with the decision and order of the High Court Commercial Division and filed an appeal against the arbitral award in the Court of Appeal against only setting aside part of the award. When the appeal was called for hearing in the Court of Appeal Counsel for the applicant raised a preliminary objection on a point of law. The parties were allowed to argue the appeal including the preliminary point of law raised so as to save time of Court and the parties. Basically the preliminary objection on a point of law was that the appeal was incompetent in that the respondent had no right of appeal to the Court of Appeal. The contention was that this matter arose out of a decision of the High Court made under Section 34 of the Arbitration and Conciliation Act (ACA).

The Court heard the parties on the Preliminary point of law and the merits of the case together and struck out the appeal on account of its being incompetent and set aside the Ruling of the High Court and substituted it with a dismissal order. It further ordered that

the respondent pays one half of the costs of the Court of Appeal and one half of the costs of the High Court.

The respondent being dissatisfied with the decision of the Court of Appeal appealed to this court in Civil Appeal No.6 of 2016.This court heard the appeal, up held the objection on point of law and dismissed the appeal with costs to applicant.

The applicant's Bill of costs was taxed by the Deputy Registrar in his capacity as the taxing officer. It is this decision of the taxing officer that is referred to me as stated above.

There are two grounds of reference framed as follows:

1. **The Learned Deputy Registrar of the Supreme Court erred in law, principle and fact when he allowed UGX 3,000,000/= as instruction fees, which fees is manifestly inadequate having regard to proceeding in Civil Appeal No.06 of 2015 and the value of the subject matter involved.**
2. **The Learned Deputy Registrar of the Supreme Court erred in law, principle and fact when he disallowed the claim for Value Added Tax (VAT) under item 13 of the applicant's Bill of Costs.**

At the hearing of the reference, Senior Counsel Dr.Byamugisha Joseph represented the respondent while Counsel Paul Rutisya represented the applicant.

Counsel for applicant submitted that the Learned Deputy Registrar erred in law when he allowed Shs. 3,000,000/= as instruction fee which is manifestly inadequate having regard to the proceedings in the Court and also regarding subject matter. He further contended that Deputy Registrar erred in law in disallowing claim for VAT under item 13.

Counsel prayed that, that decision of awarding 3,000,000/= be set aside as being manifestly inadequate, the claim of 200,000,000/= as instruction fee be allowed as it was based on the subject matter.

He prayed that Court finds that the matter was not decided on preliminary objection as indicated by the Deputy Registrar, as all the grounds of appeal were argued.

Counsel cited the case of **PremchandRaichand Ltd & Anor vs Quarry Services of East Africa Ltd & Ors No3 of [1972] E.A .162, Ebrahim Kassim & Ors vs Habre International Ltd (2001) 1 EA 98, Concorp International Ltd Vs. Eastern & Southern Trade & Development Bank Civil Reference No.1 of 2013, Paul Ssemogerere & Anor Vs Attorney General, Misc. Application No.5 of 2001 and National Insurance Corporation Vs Pelican Services Limited (2000) 2 EA 236,** in support of his arguments.

Counsel prayed that the decision of the Deputy Registrar in regard to VAT be set aside and applicant be awarded VAT and costs.

Counsel for respondent on other hand submitted that he did not appear before the Deputy Registrar because he was not aware of the hearing. So he was not in position to say anything in regard to whether there was a VAT certificate on the file. But he contended that the holding of the Deputy Registrar was finding of fact that there was no VAT certificate which was not appealed against. That what was appealed against in ground two is disallowance of the claim under item 13. Counsel contended that if the applicant was aware that certificate was on the file he would have pointed out the error.

Counsel cited the cases of **Punjani Motors vs Sam .K. Njuba, High Court Miscellaneous Application No.1144 of 1997** which is a leading authority on VAT and **Twinobusingye Severino vs Attorney General Constitutional Reference No.27 of 2003,** where Justice Kakuru JA. disallowed a claim for VAT for non-production of a VAT certificate. Counsel prayed that finding of Deputy Registrar must stand and that the finding that there was no certificate was not challenged by applicant.

Counsel submitted that the grounds of appeal did not include the value of the subject matter. He referred court to page 8 of the record item two, and submitted that value of subject matter was not

included as a consideration. That the Learned Deputy Registrar in his ruling noted that it would be an injustice that would be inflicted by applicant on the respondent by claiming 200,000,000 without proof of payment.

Counsel submitted that counsel for applicant did not submit on the difficulty of the matter as noted by Deputy Registrar and that all the grounds are on right of appeal and not the subject matter.

Counsel contended that amount of Shs 3,000,000/= was justified and prayed that reference be dismissed with costs.

Counsel for the applicant in rejoinder submitted that counsel for the respondent did not dispute the fact that the matter was not decided on preliminary objection as learned Deputy Registrar erroneously found. Counsel contended that the subject matter was raised during submission and was ignored by the learned Deputy Registrar. On VAT, he submitted that ground two of the reference, it canvassed the mistake of fact and it was explicit. He prayed that the reference be allowed.

Consideration of court

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 principle 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.

The above principles were stated and summarized in various cases of; **Attorney General vs Uganda Blanket Manufacturers (1973) Ltd Civil Application No. 17 of 1993; Bank of Uganda vs Banco Arabe Espanol, Civil Application No. 33 of 1999, Paul K. Ssemogerere& Another vs Attorney General Civil Application No.5 of 2001, Nicholas Roussos vs Gulamhussein Habib Virani & Another Civil Appeal No.6 of 1995** and the most recent one of **Muwanga Kivumbi vs Attorney General Civil Reference No.38 of 2017**.

On **ground one,** Counsel for applicant argued that the matter was not decided on a preliminary point of law as indicated by the Deputy Registrar. Counsel for the respondent did not specifically address the point which according to counsel for applicant was disputed. The Deputy Registrar in his ruling on page 5 of record of reference stated I quote:

"The court upheld the preliminary point of law together with the decision and orders of the court of appeal and dismissed the appeal with costs. It is the view of this court that raising a preliminary point of law is not a complex matter for an advocate. The purported appeal was held not to have been instituted in first place, the actual matter before the court involved statutory interpretation"

Upon perusal of the judgement of this Court in Civil Appeal No.06 of 2016 on page 3 which is on page 28 of record of reference, at Court of Appeal, a preliminary point of law was raised by respondent who is now the applicant to the effect that appeal was incompetent as the appellant then who is respondent now had no right of appeal to the Court of Appeal. The Court of Appeal heard that Preliminary point of law and the merits of case. It struck out the appeal on account of being incompetent and set aside the ruling of the High court and substituted it with a dismissal order. It, on that basis that the respondent brought the Civil Appeal No. 06 of 2016 to this court. The ground one of the appeal which concerned the Preliminary point of law was raised at the Court of Appeal which was allowed was on the right of appeal and the other grounds concerned the outcome of the judgement of Court of Appeal which were also heard on merit. When the Civil appeal No.6 of 2016 come up for hearing, again counsel for the applicant raised a Preliminary point of law that there was no appeal before the Supreme court under **Section 6(1) of Judicature Act Cap 13**, which counsel for the respondent opposed and referred Court to **Section 14(1) of the Judicature Act** and **Section 34(1) of the Arbitration and Conciliation Act.** Judge who wrote lead judgment, Justice Mwondha JSC allowed the Preliminary point of law and the rest of judges on the Coram, agreed with her, she stated on page 37 of record of appeal I quote:

"It is my considered view therefore that the objection has merit and I am satisfied that the appeal doesn't fall under the S. 6 (I) of the Judicature Act. The appellant have no automatic right of Appeal to Supreme Court. The objection is accordingly upheld.

By upholding the objection it would logically follow that the appeal falls by the way side or dismissed since there was actually no appeal in law before this Court. However, for purpose of completion I am convinced that it will be fair and just to dispose of the grounds of appeal nevertheless."

The court allowed the preliminary point of law raised by counsel for applicant. But for purposes of completion, the court went on to evaluate all the grounds of the appeal and found no merit in all the six grounds of appeal which were dismissed with costs to applicant.

It is worth observing from above that at the Court of Appeal, the applicant raised Preliminary point of law, it was upheld but the court went on to determine the matter on merit and the same was done by this court. The preparation for the appeal including the written submissions included all the grounds of appeal which were disposed of by the court. So the consideration for the work done by counsel for the applicant cannot be restricted to the Preliminary point of law.

On issue of instruction fee, Counsel for applicant submitted that the instruction fee of Shs. 3,000,000/= was manifestly inadequate and claimed for Shs.200,000,000/= based on the subject matter. Counsel for respondent submitted Shs.3,000,000/= was justified, that value of the subject matter was not included as consideration.

I have looked at record. I agree with counsel for respondent that the value of subject matter was not indicated in item 2 of the Bill of costs as justification of instruction fee of Shs.200,000,000/=. The applicant indicated complexity of the matter, importance of appeal, attendance, perusal and consulting authorities as justification the instruction. Counsel for applicant submitted that that was included

in applicant's submission which is correct. However parties are bound by their pleadings. The applicant should have included the subject matter in item 2 of bill of costs. See **Interfreight Forwarders Uganda Ltd. Vs. East African Development Bank SC, Civil Appeal No. 13 of 1993.**

I have also read the entire judgement and the value of the subject matter was never an issue as to form the basis for a claim of Shs.200,000,000/= which I consider exorbitant.

In case of **Attorney General and Another v James Mark Kamoga and Another (Civil Appeal No.2 of 2008) Justice G.M.Okello JSC, held that:**

> **"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.**
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> **The learned taxing officer while assessing the instructions fee said:**
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> ***'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..."

I agree with above position. The claim for costs from arbitration and awards which were awarded by High Court do not constitute the amount involved in the appeal and are not value of subject matter since they were not issues for determination in the appeal.

I turn on the issue of whether Shs.3,000,000/= was manifestly low as submitted by counsel for applicant well as it is justified by counsel for respondent.

In **Nicholas Roussos v Gulam Hussein Habib Virani, Nasmudin Habib Virani ((Civil App. No. 6 of 1995))** Justice Manyindo D.C.J held that:

"The question here is simply whether the learned Judge was justified in interfering with the instructions fee allowed by the Taxing Officer. Was the award so manifestly excessive as to indicate an error in principle entitling the High Court Judge to interfere? In my judgment the instruction fee ought to take into account the amount of work done by the Advocate, and where relevant, the subject matter of the suit as well as the prevailing economic conditions. As was pointed out in Premchand Raichand Ltd. v. Quarry Services (1972) E.A. 182 by the Court of Appeal for East Africa in assessing the instructions fee, the correct approach is that stated by

Pennycuick J. in Simpsons Motor sales (London) Ltd. v... Hendon Corporation. (1964) 3 All E.R 833, when he 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 prominent reputation. Then one must know that tee this hypothetical character would be content to take on the brief.'

Clearly, it is important that Advocates should be well motivated but it is also in the public interest that costs be kept to a reasonable level so that justice is not put beyond the reach of poor litigants. In the instant case there was an interlocutory application to restore the suit for hearing. The suit concerned very valuable property. Mr. Mulenga had to start the matter from scratch as the original plaintiff and her Advocate had died. Nevertheless the case did not end there. In the circumstances I am of the view that the instructions fees as taxed by the Taxing Officer were unduly excessive. The learned Judge was right to intervene but then his reassessment was manifestly on the low side. He gave no reason for such a low figure except to say that assessment of instructions fee is a matter of guess work! I think the fee should have been less than awarded by the Taxing Officer but more than what the learned Judge allowed. I would allow a sum of shs. 6,000,000/=..."

The above principles are also echoed in case **of Paul K. Ssemogerere and Anor v Attorney General ((Civil Application No. 5 of 2001))** where this court held that:

"In our consideration of what should be a reasonable instruction fee and which is consistent with justice to all the parties in the instant case, we shall begin by referring to what the East African Court of Appeal said in the case of Premchand and Raichand -vs- Quarry Service (supra) as

what should be the test in assessing a brief fee (which is the same as instruction fee under the Rules of our Court). We agree with what that Court said on page 164, which is this:

"The correct approach in assessing a brief fee is, we think, to be found in the case of Simpson's Sales (London) Ltd. -vs-Herndon Corporation (1964), A .E.R. 833 when Pennycuick said:

One must envisage an 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."

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 Manufacturers Ltd.

(supra); and Departed Asians Property Custodian Board -vs- Jaffer Brothers (supra)..."

The claim of the applicant of Shs.200,000,000/= as instruction fee is manifestly high and unreasonable as this would be doing injustice to respondent. On the other hand the instruction fee of Shs. 3,000,000/= awarded by taxing master is manifestly low. I have already held from above that applicant did reasonable work in raising the Preliminary point of law and opposing the grounds of appeal in which he succeeded in all of them. That amount awarded to him by the Deputy Registrar cannot cover the amount of effort he put in preparing for the appeal and raising and arguing the Preliminary point of law.

In the circumstances, I increase the instruction fee to Shs. 16,000,000/= (sixteen million shillings) which I consider fair and reasonable in the circumstances of this case.

On **ground two,** Counsel for applicant submitted that Deputy Registrar erred in law in disallowing claim for VAT under item 13. Counsel for respondent supported the finding of taxing master and he contended that applicant did not appeal on finding that there was certificate and counsel for applicant submitted that ground two covered all the issues on VAT.

Upon perusal of the record, I found VAT certificate of the applicant's counsel registered in the firm's name on page 22 of record of reference. The issue to determine is whether there was VAT certificate attached at the hearing of the taxation. Counsel for the respondent was not at the hearing and was not in position to submit on it. The applicant's submission in support of his Bill of cost dated 06th November 2017 made reference to the VAT Certificate which was attached as annexture "B".

The VAT certificate is part of record of reference which is duly certified by the same Deputy Registrar as true copy of the original file. The Deputy Registrar may have missed to look at the annextures of the Bill of costs where the certificate was attached. Having found that there was VAT certificate, the authorities of

Punjani Motors and **Twinobusingye Severino** cited by counsel for respondent don't apply in this case.

In result this reference is allowed. The instruction fee is increased to shs.16, 000,000 (Sixteen million) and VAT is allowed at 18% of Shs.16,000,000/= that is 2,880,000/= (Two million eight hundred eighty thousand shillings).This is what I consider as fair, just and reasonable in circumstance of this case. I make no order as to costs in these proceedings.

Dated at Kampala this ..... Day of 2018

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Hon. Justice Mwangusya Eldad

JUSTICE OF THE SUPREME COURT