THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CORAM: ARACH-AMOKO; MWANGUSYA; OPIO AWERI; MUGAMBA; BUTEERA JJ.S.C

CIVIL APPEAL NO. 04 OF 2017

(ARISING FROM COURT OF APPEAL CIVIL APPEAL NO. 199 OF 2013)

(ITSELF ARISING FROM HIGH COURT CIVIL APPEAL NO. 707 OF 2012, ARISING FROM TAXATION RULING IN HIGH COURT CIVIL SUIT NO. 009 OF 2009)

ROCK PETROLEUM (U) LTD :: APPELLANT

VERSUS

UGANDA REVENUE AUTHORITY :: RESPONDENT

[Appeal against the judgment of the Court of Appeal by Remmy Kasule, Solomy Balungi Bossa and Kenneth Kakuru JJA].

JUDGMENT OF PAUL K. MUGAMBA, JSC

This is an appeal from the decision of the Court of Appeal rendered in Civil Appeal No. 199 of 2013 on 8th November 2017. The judgment of the Court of Appeal overturned the decision of the High Court concerning instruction fees due to counsel who had successfully prosecuted a suit using Originating Summons. In this Appeal the Appellant seeks for an order setting aside the decision of the Court of Appeal, an order reinstating the taxation award made by the High Court Judge and costs of the appeal. The five grounds of appeal advanced read:

1. *The Learned Justices of the Court of Appeal misapprehended the judgement of the High Court in Originating Summons 09 of 2009, when they found*

that no monetary award had been made in the said suit despite specific orders having been made for an account to be rendered of all monies/taxes wrongly collected and a refund of the same ordered against the respondent.

2. *The Learned Justices of the Court of Appeal erred in law and fact when they confined the subject matter for taxation of costs in a representative suit to only the monetary interest of the party authorised by the Court to represent other persons with interest in the suit.*
3. *The Learned Justices of Appeal erred in law and in fact when they interfered with the decision of the Learned taxing master and the High Court Judge had correctly exercised their judicial discretion.*
4. *The Learned Justices of Appeal made a taxation award that was so manifestly low as to amount to an error in principle.*
5. *The learned Justices of Appeal erred in law and in fact when they made orders of refund extraneous to the Appeal before them.*

Representation

Mr. Oscar Kihika, Senior Counsel, assisted by Mr. Anthony Bazira, Mr. Brian Kabaiza, Mr. Siraji Ali and Mr. Denis Kavuma, represented the appellant. Mr. George Okello, Assistant Commissioner, Litigation, in the Legal Department of Uganda Revenue Authority represented the respondent.

Both parties to this appeal filed written submissions. At the time the appeal was heard it was stated on their behalf that the parties relied on their written submissions. Nevertheless counsel for both sides made brief oral

submissions on the occasion confirming what was in the written submissions.

Submissions

Submitting on ground 1 of this appeal it was argued on behalf of the appellant that besides the impugned Originating Summons seeking the interpretation of the law in issue, it sought a refund of the money collected by the respondent under the Excise Tariff (Amendment) Act No. 5 of 2008 from 1st November 2007 to 27th June 2008. The appellant related to the questions which were set out for determination in the suit and stated that they were more inclusive than what the Justices of Appeal made them out to be. In the same connection reference was made to paragraph 7 of the affidavit in support of the suit as well as the resulting judgment. It was submitted that the subject matter of the suit was the money to be refunded as wrongly collected, amounting to Shs. 48,631,499,082/=.

Regarding ground 2 it was submitted on behalf of the appellant that the costs being sought were granted to the appellant against the respondent, and not against the beneficiaries. As such, it was argued, they are party to party costs and the appellant was entitled to recover taxation of the amount accounted for as wrongly collected by the respondent.

It was submitted on behalf of the appellant regarding ground 3 that the taxing master had judiciously exercised her discretion taking into account the nature of the matter (a representative action affecting an entire industry), the amount of research and industry employed to prosecute it and the interests involved. It was contended that those considerations were

not contested by the respondent either before the taxing master or subsequently when they were referred to a High Court Judge. However it was denied that the decision of the taxing master was arrived at on consideration of the complexity of the case as stated by the Court of Appeal. The appellant faulted the Court of Appeal for so finding, saying that the finding affected the decision which was reached. The appellant therefore prayed that the decision as such should be set aside.

It was argued on behalf of the appellant concerning ground 4 that the Court of Appeal applied a wrong principle and that the Court gave no reason for interfering with the decision of the taxing master and the Judge, in effect arriving at a low instruction fee of Shs. 3,000,000/=. The appellant cited the authority of **Bank of Uganda v Banco Arabe Espanol, Supreme Court Civil Appeal No. 8 of 1998** in support of the case for the appellant and prayed that the award of Shs. 3,000,000/= by the Court of Appeal be set aside. It was further prayed that the award of the High Court Judge be reinstated.

With regard to ground 5 it was argued on behalf of the appellant that it was erroneous for the Court of Appeal to order for the refund of costs when the relief was nowhere pleaded by the respondent and when the appellant was not given a hearing concerning it. The appellant prayed for that order to be set aside.

In reply the respondent sought to have the entire appeal dismissed with costs, saying it bore no merit.

On ground 1 counsel for the respondent submitted that the initial suit before the High Court sought interpretation of the law then in issue and

that neither the pleadings before the Court nor the subsequent judgment mentioned a specific amount of money on which the contested instruction fees could be pegged. It was the respondent's submission also that court made an equitable order to account and that in the order there was no ascertainable monetary value to be related to.

On ground 2 it was submitted on behalf of the respondent that the suit was a representative suit with several beneficiaries who because they never applied to be so regarded were not parties to the suit. As such, it was argued, what entitlements were due to those beneficiaries should not be used to hike the appellant's claim for instruction fees and costs from the respondent given that those other beneficiaries were mere 'free riders'. It was further contended by the respondent that justices of the Court of Appeal related to the matter which generated this ground as merely incidental, in case they were wrong in their decision contested in the first ground of this appeal.

Regarding ground 3 it was contended by the respondent that the Court of Appeal was right to interfere with the exercise of discretion of the taxing master and the Judge of the high Court, when the matter was referred to him. It was submitted also that the taxing master had been addressed regarding the purported complexity of the case, a matter affirmed on behalf of the appellant but opposed by the respondent. According to the respondent the Court of Appeal correctly held that the instruction fees earlier awarded were made in error given that the matter was not complex and no certificate of complexity had been issued as required by the law. It

was further submitted that the award was not only arbitrary but also excessive in the circumstances.

Ground 4 was also opposed by the respondent with the argument that the Court of Appeal can in appropriate cases interfere with a taxation decision made by the lower court especially when such a decision is a result of the Judge applying wrong principles. It was contended that the instruction fees in issue could not have exceeded the Shs. 3,000,000/= the Court of Appeal awarded.

Concerning Ground 5 the respondent supported the orders of the Court of Appeal including the order for refund of Shs. 5,407,203,464 /= earlier received on behalf of the appellant as part of the costs. It was argued that the respondent is entitled to the amount it had earlier paid out to the appellant subsequent to the High Court award which was set aside by the Court of Appeal.

Consideration

I have not only listened to the submissions of both parties but I read them in script. I have looked at the relevant record and considered the authorities proffered in support of the arguments.

In **Kifamunte Henry v. Uganda, Criminal Appeal No. 10 of 1997** this Court laid down the guideline when it stated:

> *'On second appeal the Court of Appeal is precluded from questioning the findings of fact of the trial court, provided that there was evidence to support those findings, though it may think it possible, or even probable, that it would not*

have itself come to the same conclusion, it can only interfere where it considers that there was no evidence to support the finding of fact, this being a question of law...'

The emphasis above is intended.

In a subsequent case, **Bogere Moses and Another v Uganda, Criminal Appeal No. 1 of 1997** the position was driven home thus:

'What causes concern to us about the judgement, however, is that it is not apparent that the Court of Appeal subjected the evidence as a whole to scrutiny that it ought to have done. And in particular it is not indicated anywhere in the judgement that the material issues raised in the appeal received the court's due consideration. While we would not attempt to prescribe any format in which a judgment of the court could be written, we think that where a material issue of objection is raised on appeal, the appellant is entitled to receive an adjudication on such issue from the appellate court even if the adjudication be handed out in summary form ..... In our recent decision in Kifamunte Henry v. Uganda we reiterated that it was the duty of the first appellate court to rehear the case on appeal by reconsidering all the materials which were before the trial court and make up its own mind..... Needless to say that failure by a first appellate court to evaluate the material evidence as a whole constitutes an error in law.'

In the first ground of appeal the decision of the Court of Appeal which held that the High Court in the Originating Summons No.9 of 2009 had given no monetary award in its judgment is questioned. I have looked at the Originating Summons material to this matter. In the Summons the plaintiff sought of the High Court answer to two questions which read:

'1. *Whether the defendant could legally impose and collect the increased Excise duty on Diesel and Petrol from 1st November 2007 onwards under the Excise Tariff (Amendment) Act No. 5 of 2008.*
2. *Whether the plaintiffs are entitled to a refund of monies collected by the Defendant from 1st November 2007 onwards under the Excise Tariff (Amendment) Act No. 5 of 2008.'*

The Originating Summons were accompanied by an affidavit sworn by a Director of the plaintiff company. The name of that Director was given as Papoaka Allen Dokoria. It is noteworthy that when the suit was filed the plaintiff therein, who is the appellant in this appeal, had obtained leave of court to file a representative action on behalf of the petroleum companies which were similarly affected. It is equally noteworthy that the appellant solely litigated the matter. Indeed at the conclusion to the hearing the High Court determined as follows:

'1. *The Defendant legally assessed and collected Excise Duty at the rates proposed in the budget estimates for the Financial Year 2007/2008 from 1st July to 1st November 2007 and from 27th June 2008 onwards.*

2. *The Defendants could not legally impose and collect the increased Excise Duty on Diesel and Petrol imports under the Excise Tariff (Amendment) Act No. 5 of 2008 from 1st November 2007 when the Provisional Collection Order expired up to the 27th June 2008 when the Excise Tariff (Amendment) Act No. 5 of 2008 was published in the Gazette.*
3. *The Defendant shall within thirty (30) days from the date of this Judgment, file in Court an account of all monies collected from each of the diesel and petrol importers in excess of Ug.Shs. 450/= per litre of Diesel and Ug.Shs. 720/= per litre of Petrol between 1st November 2007 and June 2008.*
4. *The Defendant shall refund to each of the Diesel and Petrol Importers all the monies so collected in excess.*
5. *The Defendant doth pay the costs of this suit.'*

In its judgement the Court of Appeal noted that the Originating Summons in issue sought interpretation of the law and that the order given by the High Court was in answer to the questions posed. The learned Justices were emphatic that no monetary award was made in the circumstances. I find no ground to fault the finding of their Lordships in this respect. The High Court ordered the respondents herein to render an account. This meant that after due computation they had to pay back all those monies they had earlier collected, which money they should not have collected in the first place. Suffice it to say that at the point in time when the judgment was read no specific sum was envisaged by the High Court. In this respect

I cite **Black's Law Dictionary**, 8th Edition in reference to rendering an account:

> ***'The action of account lies where one has received goods or money for another in a fiduciary capacity, to ascertain and recover the balance due. It can only be maintained where there is such relationship between the parties, as to rise an obligation to account, and where the amount due is uncertain and unliquidated.'***

The emphasis above is added.

I agree with the finding of the Court of Appeal that no liquidated or specific sum was awarded by the High Court in answer to the Originating Summons. This ground of appeal shall fail.

With regard to ground 2 of this appeal the appellant faults the Court of Appeal for confining the subject matter for taxation of costs in a representative suit to only the monetary interest of the party authorised by court to represent others with interest in the suit. The core of this matter is instruction fees due to counsel in the Originating Summons. Referring to the account rendered by the respondent following the order of the High Court, the Court of Appeal observed:

> *'That figure was the consequence of the determination of the suit and not its subject matter. Even then it was the total sum of all the amounts payable to all the 42 claimants. Each claimant had a separate and distinct claim. The respondent was only entitled to Shs. 3,350.560/= the other beneficiaries had not instructed the respondent's counsel to bring that suit on their behalf.*

They were not party to the suit and as such could not have been condemned to pay costs. They were "free riders". See ***Supreme Court Civil Appeal No. 02 of 2013, Shell (U) Ltd and 9 Others v Muwema & Mugerwa Advocates & Solicitors & another.'***

Indeed it was decided by this Court in **Civil Appeal No. 02 of 2013** afore said that counsel for the appellant herein was not entitled to claim remuneration for representing parties other than the appellant herein. Kitumba Ag. JSC had this to say:

' I agree with counsel for the appellants. The order that was obtained to represent the appellants was specifically to represent them in court to have their money refunded by URA. It did not authorise Rock Petroleum (U) Ltd at any one time to enter into a remuneration agreement that was to charge 16% of their money without their consent. Rock Petroleum (U) Ltd and the 1st respondent should have consulted the appellants before entering into such an agreement. I do not, therefore, accept counsel for the 1st respondent's submission that the representative order gave Rock Petroleum (U) Ltd power to enter into a remuneration agreement.'

Further in the judgment the learned Justice observed that the representative order obtained from the High Court was to represent the ten oil companies in court but not to enter into a remuneration agreement which turned out to be unenforceable. The learned Justice added that the said agreement was never brought to the notice of the appellants even

when the 1st respondent supposed it would bind them in future. Court concluded that being 'free riders' in an action brought by Rock Petroleum (U) Ltd on their behalf the various other oil companies were under no obligation to meet the costs of the suit incurred by the 3rd respondent unless court so ordered. It never did. Furthermore the decision of this court on the occasion finally sealed the matter.

In the circumstances the Court of Appeal arrived at a proper finding given the absence of any compact between the oil companies and any other person. Ground 2 also lacks merit and is dismissed.

Regarding ground 3 of appeal the appellants contended that the Court of Appeal erred in law and in fact when it interfered with the decision of the High Court Judge in circumstances where both the taxing master and the High Court Judge had correctly exercised their judicial discretion. Needless to say an appeal is a venture undertaken to have a decision of a court reconsidered by a higher court. There is no doubt when the Court of Appeal received the decision of the High Court it was exercising its mandate. What should be subject of the proceedings before this court is not the mandate but rather the outcome of the appeal.

Counsel for the appellant submitted that the Court of Appeal was wrong to determine that the Taxing Master's decision was influenced by consideration that the matter in issue was complex. Counsel observed that such an assertion appears only in the judgment of the Court of Appeal. Indeed in its Judgement the Court of Appeal in this connection noted:

'Be that is (sic) *it may, under regulation 6 (ix) whenever an Advocate considers a matter to be complex, the regulation requires that the Advocate applies to the court, which issued the decree for a certificate to allow him or her to claim a higher fee. Upon such an application court must determine and specify the fraction or percentage to be applied. It appears to us clearly that an application brought under this sub- regulation 6 (ix) must be made and determined before a bill of costs is presented to court for taxation is taxed* (sic).

The Learned Taxing Master erred in our view when she applied a percentage rate in absence of a certificate of complexity, which is a mandatory pre-requisite. The word "may" in that sub-regulation refers only to the option of a party to apply or not to apply for such a certificate. In this case therefore, even if we had found the matter to be complex, which we have not, we would still have set aside the formula of 10% applied by the taxing master, the same having been applied in the absence of a certificate of complexity.'

A glance at the contested decision of the learned taxing master however reveals that nowhere did the learned taxing master bring complexity of the matter into the equation of her decision. Respectfully the Court of Appeal erred when it found that the decision of the taxing master was an outcome of her considering the matter complex. It was not. That far I find the concerns of the appellant justified. But that need not detain me.

I take into stock the merits of the taxation in issue as considered in ground 2 of this appeal. I do not find it useful to rehearse here my reasoning in

ground 2. In the premises I find that the Court of Appeal ultimately reached a decision I do not fault. This ground is so resolved.

In ground 4 it is argued on behalf of the appellant that the taxation award was manifestly low as to amount to an error in principle. It was submitted that the Court of Appeal awarded a manifestly low amount as instruction fees, far below that awarded by the High Court. What needs to be answered is whether there is a paradigm for award of costs. Obviously it exists but each case must be considered on its own peculiar merits. So it was that Mulenga JSC, of good memory, in **Bank of Uganda v Banco Arabe Espanol, Supreme Court Civil Appeal No. 23 of 1999** held inter alia:

> *'Secondly, 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. In this regard, application of a wrong principle is capable of being inferred from an award of an amount, which is manifestly excessive or manifestly low. Thirdly, even if it is shown that the officer erred on 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 taxing master had awarded Shs. 5,818,419,105/= as instruction fees to the appellant. The award was reviewed by the Judge and reduced to Shs.

5,000,000,000/=. Of course the Shs 3,000,000/= eventually awarded by the Court of Appeal was considerably lower than the earlier awards. In the process the Court of Appeal reviewed the facts behind the High Court award and concluded that not only was there lack of evidence of the alleged instruction but also that the awards were premised on wrong principles as is evident in my finding in ground 2 of this appeal. Given the circumstances of this appeal to question the adequacy of the Shs. 3,000,000/= awarded is a futile exercise. This ground too fails.

As regards ground 5 the appellant faults the Court of Appeal for making orders of refund, stating that the order was extraneous to the appeal before that Court. The contested order was:

> *'All the money paid to the respondent and or his advocates as legal costs in High Court Taxation Reference O.S. No. 009 of 2009 is to be refunded less the taxed costs with the instruction fee therein being Shs. 3,000,000/= as determined in this Judgment within 30 (thirty) days from date hereof.'*

It was the appellant's submission that neither of the parties submitted either for or against a claim for refund of costs and that the failure by the Court of Appeal to hear the appellant on the issue of the refund was a violation of the appellant's right to a fair hearing as enshrined under Article 44 of the Constitution. For the record, it is not disputed that the money decreed by the Court of Appeal for refund was earlier paid by the respondent herein to the appellant herein. The appellant's argument is premised on the contention that the subject of refund was never canvassed

in the arguments before the Court of Appeal and that as such even disputed payments should lie where they fell. In this respect Rule 102(c) of the Judicature (Court of Appeal) Rules was cited. Therein it is provided that the Court shall not allow an appeal or cross appeal on any ground not set forth or implicit in the memorandum of appeal or notice of cross appeal, without affording the respondent, or any person who in relation to that ground should have been made a respondent, or the appellant, as the case may be, an opportunity of being heard on that ground.

It is apparent in the judgement of the Court of Appeal that no ground was smuggled into the appeal but rather that after a verdict was arrived at regarding what was contested in the appeal the Court proceeded to pronounce itself on the consequence of that verdict. Needless to say earlier on the parties involved had made their respective arguments on the merits of the ground of appeal involved. That was as it should be given that justice should pervade all spheres of the matter in contest. In **Makula International Ltd v His Eminence Cardinal Nsubuga and Rev. Dr. Kyeyune, Court of Appeal Civil Appeal No. 4 of 1981** a similarly challenging scenario was encountered when court relevantly stated:

> *'The 4th objection is that the appellant cannot recover the costs voluntarily paid by him should the appeal succeed and the taxed costs are reduced. We ask ourselves why not? We were not told the law which does prevent him from recovering these costs. The learned author of the Supreme Court Practice, 1996,Vol. 1 at p.931 stated the law as follows:*

"A plaintiff who successfully sues to set aside a judgment wrongly obtained against him in a former action is entitled to the costs of the former action as well as those of the action...."

In Holder v Benorjee [1871] ER 711 the Judicial Committee, on reversal of a decree of the High Court from India, ordered such costs, as were allowed by the practice of the courts in India to a successful plaintiff suing in forma pauperis, and paid, to be restored to the defendant. With respect, we agree with these decisions....otherwise, counsel for the successful litigant would rush through the taxation of his bill of costs in the hope that, should the appeal succeed, he would not have to pay back those costs to the successful appellant. We would reject this objection.'

In the circumstances I find that there was nothing amiss in the procedure adopted by the Court of Appeal to order for the impugned refund since it followed a well trodden path. This ground too is dismissed.

None of the grounds advanced in this appeal bears merit. Consequently I uphold the judgment of the Court of Appeal and dismiss this appeal with costs.

Dated at Kampala this 6th day of November 2018.

PAUL K. MUGAMBA
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KOLOLO

Coram *:(Arach-Amoko, Mwangusya, Opio-Aweri, Mugamba, Buteera JJ.S.C)*

CIVIL APPEAL NO.04 OF 2017

BETWEEN

ROCK PETROLEUM (U) LTD..... APPELLANT

VERSUS

UGANDA REVENUE AUTHORITY..... RESPONDENT

JUDGMENT OF ELDAD MWANGUSYA, JSC

I have had the benefit of reading in draft the judgment of my brother Mugamba, JSC. I agree with his analysis and decision that the appeal should fail. I also agree with the orders proposed.

Dated at Kampala this 6th day of November 2018

Mwangusya Eldad

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT KAMPALA

(*CORAM:* Arach-Amoko, Mwangusya, Opio-Aweri, Mugamba, Buteera; JJSC.)

CIVIL APPEAL NO. 04 OF 2017

BETWEEN

ROCK PETROLEUM (U) LIMITED::::::::::::::::::::::::::::APPELLANT

AND

UGANDA REVENUE AUTHORITY::::::::::::::::::::::::::RESPONDENT

{Appeal arising from the judgment of the Court of Appeal at Kampala (Kasule, Bossa and Kakuru, JJA), in Civil Appeal No. 199 of 2013 dated 8th November, 2017}

JUDGMENT OF M.S.ARACH-AMOKO, JSC

I have had the benefit of reading in draft the Judgment of my learned brother, Hon. Justice. Mugamba, JSC, and I fully agree with his decision that this appeal has no merit and should fail for the reasons he has given in his Judgment.

As the majority of the members on the Coram agree, this appeal is dismissed with costs. We uphold the Judgment and orders of the Court of Appeal.

Dated at Kampala this 6th day of November 2018

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M.S. ARACH-AMOKO
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: ARACH-AMOKO; MWANGUSYA; OPIO-AWERI; MUGAMBA; BUTEERA; JJ.SC)

CIVIL APPEAL NO O4 OF 2017

ROCK PETROLEUM (U) LTD----------APPELLANT

V E R S U S

UGANDA REVENUE AUTHORITY----------RESPONDENT

THE JUDGMENT OF BUTEERA, JSC

I have had the advantage of reading in draft the judgment of Mugamba, JSC. I concur with the judgment and the orders he proposes. I have nothing to add.

Delivered at Kampala this 6th day of November 2018.

Hon. Justice Richard Buteera
JUSTICE OF THE SUPREME COURT.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

Coram: Arach-Amoko, Mwangusya, Opio-Aweri, Mugamba, Buteera JJ.S.C.

CIVIL APPEAL NO. 04 OF 2017

BETWEEN

ROCK PETROLEUM (U) LIMITED :::::::::::::::::::::::::::::::::::APPELLANT

AND

UGANDA REVENUE AUTHORITY :::::::::::::::::::::::::::::::RESPONDENT

(Appeal from the Judgment and Orders of the Court of Appeal at Kampala by Kasule, Bossa and Kakuru, JJA, dated 8th November 2017 in Civil Appeal No. 199 of 2017)

JUDGMENT OF OPIO-AWERI, JSC

I have had the benefit of reading in draft the judgment of my learned brother Hon. Justice Mugamba, JSC. I agree with him that the appeal has no merit and should be dismissed with costs.

Dated at Kampala this......6th..........day of.......November..........2018.

OPIO-AWERI

JUSTICE OF THE SUPREME COURT