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The Republic of Uganda

In the High Court of Uganda at Soroti

Taxation Appeal No. 0044 of 2022

(Arising from Taxation Application No. 001/2022)

(Arising from Civil Suit No. 006 of 2021)

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Omakeny Silver Applicant

Versus

Osekeny Alex Michael Respondent

Before: Hon. Justice Dr Henry Peter Adonyo

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Judgement

1. Background:

This is taxation appeal brought by way of Notice of motion under section 62(1) of the Advocates Act, section 98 of the Civil Procedure Act, section 33 of the
20 Judicature Act and order 50 Rule 8 of the Civil Procedure Rules for orders that;

1. The taxation ruling of the trial magistrate in respect of the above named suit and application be set aside.
2. Taxation of the bill of costs be done by this honourable court as the justice of the case requires.
- 25 3. Costs of this application be provided for.

The grounds of this appeal as set out in the application are that;

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- 5 1. The learned trial Magistrate erred in law and fact when he dismissed the applicant's contention that the respondent is not entitled to costs arising from his failure to issue a mandatory notice of intention to sue.
2. The trial Magistrate erred in both law and fact when he awarded excess fees for attendance of counsel for the respondent.
- 10 3. The learned trial Magistrate erred in law and fact when he awarded drafting fees to the respondent well knowing that he is not a licensed advocate.
4. The learned trial Magistrate erred in law and fact when he awarded the respondent full instruction fees yet the matter was settled through mediation without any trial.
- 15 5. The learned trial Magistrate erred in law and fact when he awarded amounts not provided under the law.

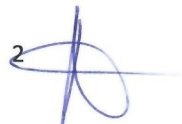
The respondent in his reply stated that his counsel shall raise preliminary objections on points of law that the application is bad in law, baseless and

20 meritless, the application is frivolous and vexatious full of conjectures and the matter of demand notice is res judicata. He denied all the averments in the affidavit in support contending that the applicant was served with a notice of intention to sue. That the applicant was aware of the demand letter and responded to it in his Written Statement of Defence. That a pre-taxation hearing

25 was conducted in court in presence of the applicant and the parties amicably agreed on many items save for a few which were determined by the trial magistrate. That the taxed amount was largely arrived at during the pre-taxation hearing held inter-party. That the applicant is bound by the decisions of his lawyer M/s Namanya Kaafureeka & Co. Advocates during the pre-taxation and taxation

30 process in the main civil suit.

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5 2. Representation:

The applicant was represented by M/s Isodo & Co. Advocates while the respondent was represented by M/s Ilukor Advocates & Solicitors.

3. Determination:

10 Counsel for the respondent raised four preliminary objections on points of law which will be determined first.

These points of law are that this Application is bad in law, baseless and meritless, the Application is frivolous and vexatious, full of conjectures and speculations and the matter of Demand Notice is Res judicata.

15 Counsel submitted that it's prudent to note that, the Appellant is a literate adult of sound mind who was legally represented by M/s Namanya Kafureeka & Co. Advocates after the execution of the Consent Judgment between the parties on the 9th-February, 2022.

20 That this Appeal still raises issues/objections that, were determined by the Trial Court on the 5th-July, 2022 following the Appellant's lawyers written and oral objections on Points of law.

If the Appellant together with his Counsel were dissatisfied with the said Ruling of the lower court, they ought to have sought leave to appeal against the same and ought to have appealed with Thirty (30) days as provided for under **Sec.79(1)(a)** of the Civil Procedure Rules, with leave of court under **O.44 r.1(2) &**
25 **(3)** of the Civil Procedure Rules, which was not done in this case.

They purport to smuggle the said issues in this taxation Appeal which ought to be strictly against the costs awarded and not any other issues such as these.

5 That furthermore the Appellant together with his former lawyers' M/s Namanya Kafureeka & Co. Advocates were part and parcel of the Pre-taxation and Taxation process and as such is estopped from purporting to raise issues against the said Taxation process and award, yet he was part and parcel of the said legal process.

Counsel further contended that the Appellant was afforded a fair hearing by the
10 Trial Magistrate under Article 28 of the Constitution, he freely consented to executing the said Consent Judgment dated 9th-February, 2022 contrary to his allegations and he was dully represented by M/s Namanya Kafureeka & Co. Advocates prior to and during the taxation of the Respondent's Bill of Costs.

Counsel additionally submitted the very issues of Demand notice, costs,
15 mediation etc. being raised by Counsel for the Appellant in this Appeal and his Submissions-in-Chief, were earlier and ably raised and argued by M/s Namanya Kafureeka & Co. Advocates on behalf of the Appellant during trial, he responded to the same before the trial court made a decision thereof.

Yet, the Appellant chose not to appeal against the same within 30 (Thirty) days
20 and/or after seeking leave to appeal required under **Sections.79 (1)(a)** of the Civil Procedure Act and **O.44 r.1(2) & (3)** of the Civil Procedure Rules.

Counsel for the applicant did not make any reply to these objections.

From the record of proceedings attached to the respondent affidavit in reply, on
02/06/2022, the parties and their counsel appeared for taxation of the
25 respondent's bill of costs and an objection was raised by counsel for the appellant to the effect that it was in bad faith, drawn out of scale and not proper before court.

Counsel further stated that under Reg. 39 of the Advocates (Taxation & Remuneration of Costs) Rules the respondent needed to seek leave before

5 presenting the bill as the suit was filed without giving the defendant/appellant notice of intention to sue. He prayed that the bill is dismissed and counsel for the respondent made a reply to this objection.

On 05/07/2022 the matter came up for ruling and the trial magistrate determined two issues that is whether the plaintiff's suit was filed without giving the
10 defendant a notice of intention to sue and whether the costs claimed are improper, out of scale and unnecessary.

The trial magistrate found that the applicant was ably served with the demand notice leading to the filing of civil suit no. 006 of 2021 and thus the plaintiff was entitled to costs. On the second issue the trial magistrate found that the parties
15 agreed to tax a bill of costs when they entered a consent judgment on the 9th of February 2022 and that the amount to be taxed would be at the discretion of the taxing officer and before the taxation has happened the defendant could not claim that the bill was not up to scale.

These objections were thus dismissed and the plaintiff now respondent was
20 directed to extract taxation hearing notices. On 12.09.2022 the matter then proceeded for the taxation hearing.

The applicant never appealed from this decision and now seeks to have it determined as part of the taxation appeal.

The ruling was separate from the taxation process and the applicant ought to
25 have sought leave to appeal under Order 44 rule 2 and 3 of the Civil Procedure Rules before the bill was fixed for hearing.

Having failed to appeal the ruling, it is taken that the orders of the trial magistrate have not been overturned and as such he cannot seek to appeal the bill of costs

5 with regard to the issue of the notice of intention to sue which was already settled in the lower court and thus *res judicata*.

It is thus my finding that ground 1 of the appeal is *res judicata* and this court cannot make a determination on the same.

As for the second issue considered by the trial magistrate relating to the bill not
10 being up to scale, his finding was that issue was premature as the bill had not yet been taxed. These issues are therefore not *res judicata*.

Counsel for the respondent further submitted that the applicant together with his former lawyers' M/s Namanya Kafureeka & Co. Advocates were part and parcel of the pre-taxation and taxation process and as such is estopped from
15 purporting to raise issues against the said Taxation process and award.

Pre-taxation hearings are a mandatory process prescribed by the Advocates (Remuneration and Taxation of Costs) Regulations as amended.

The **Advocates (Remuneration and Taxation of Costs), (Amendment) Regulations, 2018** introduced Regulation 13A which provides for Pre-taxation meeting of
20 advocates or parties, specifically it states that;

(1) The advocates for the respective parties or the parties themselves, if unrepresented, shall jointly identify the costs, fees and expenses on which they agree, if any, before the taxation of a bill of costs.

(2) For every taxation, the taxing officer shall record the costs, fees and expenses
25 that are identified in sub-regulation (1) if any, and then proceed to tax the costs, fees and expenses on which there is no agreement, if any.

Counsel for the respondent throughout his submissions on all grounds of the appeal brings up the issue of the pre-taxation hearing as a defence to all claims

5 made by the applicant, however, it should be noted that there is no evidence of this pre-taxation meeting on record.

From the record of proceedings on 12.09.2022, counsel for the respondent/plaintiff stated that they were able to do a pre-taxation hearing and the trial magistrate then proceeded with the taxation hearing after confirming
10 that the applicant/defendant was comfortable with the process because he had earlier lodged a complaint with the Chief Magistrate that the trial magistrate was compromised by counsel for the plaintiff.

There is nothing on record showing that the trial magistrate/ taxing officer recorded the costs, fees and expenses that were identified and agreed upon
15 during the pre-taxation hearing as required by Reg. 13A (2).

Without the record of what the parties agreed on this court cannot ascertain what the parties agreed to during pre-taxation especially since the applicant is now represented by a different counsel than the one at taxation.

With such an irregularity this court cannot determine whether the items on the
20 bill of costs contested by the applicant were truly agreed upon.

The pre-taxation procedure is meant to meet the parties' interests before the taxing officer handles issues not agreed upon and as such the taxing master should ensure that it is duly conducted before the taxation hearing.

Accordingly, I would find that in the absence of a record or agreement on pre-
25 taxation is an irregularity which warrants setting aside the taxed bill of costs since it is even clear that the respondent contends that most items on the bill of costs were agreed to during that meeting yet there is no proof that such a meeting took place and agreed on particular items or not. Without such proof, this court cannot understand how the taxing master came to the final award.

- 5 In *Bank of Uganda v Banco Arabe Espanol, S.C. Civil Application No. 23 of 1999*
Mulenga JSC reiterated some of the pertinent principles applicable to review of
taxation including the following;

10 *"The first is that save in exceptional cases, save in exceptional cases, a judge
does not interfere with the assessment of what the taxing officer considers
to be a reasonable fee. This is because it is generally accepted that questions
which are solely of quantum of costs are matters with which the taxing
officer is particularly fitted to deal, and in which he has more experience than
the judge. Consequently, a judge will not alter a fee allowed by the taxing
officer, merely because in his opinion he should have allowed a higher or
15 lower amount.*

*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
20 which is manifestly excessive or manifestly low.*

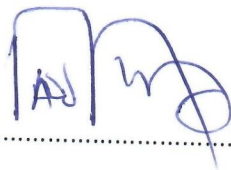
*Thirdly, even if it is shown that the taxing officer erred on principle, the judge
should interfere only on being satisfied that the error substantially affected
the decision on quantum and that upholding the amount allowed would
cause injustice to one of the parties."*

- 25 While the taxing master has discretion under Regulation 13 of the Advocates
(Remuneration and Taxation of costs) Regulations to allow costs as authorised by
the regulations, in the instant case, his failure to record the results of the pre-
taxation meeting was contrary to the requirements of Reg. 13A and makes
determination of this appeal impossible.

5 Consequently, save for the issue of the demand notice which is *res judicata*, this appeal succeeds.

The taxation award arising from Taxation Application No. 01 of 2022 is accordingly set aside and it is hereby directed that the impugned bill of costs be placed before the Chief Magistrate Kumi for taxation. *no order as to*

ca 800
10 I so order.



Hon. Justice Dr henry Peter Adonyo

Judge

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4th May 2023