

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KABALE**

**HIGH COURT CIVIL MISC. APPEAL 0171 OF 2005**

*(From Rukungiri Grade I Magistrate's Court Divorce Cause No. 002 of 2004, Before Her Worship Buchana Lilian)*

JOSELENE KENGEIGA :::APPELLANT

**VERSUS**

JUSTUS TIBYAHATI & ANOTHER:::RESPONDENT

**BEFORE HON. JUSTICE J.W. KWESIGA**

**J U D G M E N T**

This appeal was brought by Notice of Motion made under Section 62 of the Advocates Act (Cap 267), The Advocates (Remuneration and Taxation of costs) (amendment) Rules and Orders 48 of the Civil Procedure Rules, contesting the awarded costs by the Magistrate Grade I sitting as a taxing officer in the above matter. Sometime in October, 2004, the Appellant filed a Divorce Cause against the first Respondent, her husband and the second Respondent as a Co-Respondent in the said Divorce Cause before Grade I Magistrate's Court at Rukungiri.

**On 15<sup>th</sup> November, 2004** : The Respondents, through their Advocates filed a reply to the petition. After a number of fixtures which for different reasons did not materialize in hearing the petition on its merit,.

**On 22<sup>nd</sup> April, 2005** : The Petitioner applied to withdraw the whole petition. The Respondents counsel conceded to the withdraw but prayed for the costs which were granted subject to taxation. The Respondent's Bill of Costs were taxed and a Certificate of Taxation was issued by the taxing officer for Sh. 2, 528,500/= . Perusal of out of the total costs allowed Sh. 1, 500, 000/= was awarded as Advocates instructions fees to defend this petition.

The Appeal sets out 7 grounds of objection and supported by The Affidavit Mr. Mwene-Kahima Mwesigye counsel for the Appellant dated 20<sup>th</sup> October, 2005 and that of Joselene Kengeiga, Appellant deponed on the same date. The Respondent filed an affidavit in reply dated 1<sup>st</sup> April, 2006 Drawn and filed by M/S Kwizera & Co. Advocates for the Respondents.

The appeal was first set for hearing on 4<sup>th</sup> April, 2006 and since then hearing was adjourned 10 times last of which was today 24<sup>th</sup> March, 2011. this appeal is over five (5) years old in Court and has been adjourned for 10

times majority of which were due to absence of parties. This is a typical case, that calls for termination to save this court from being turned into a warehouse of files containing unreasonably slow proceedings that contribute to the mischief of case backlog in this court. All the pleadings were completed and evidence of what is complained of is by affidavits and on the basis of the Affidavits of the parties without allowing further delays, I will proceed to decide this case.

Section 17 (2) (a) of The Judicature Act grants this court powers to prevent abuse of process of the court by curtailing delays, in trials and delivery of judgment including the power to limit and discontinue delayed prosecutions. Also under Section 33 of The Judicature Act, this court has powers to grant such remedies to any of the parties in a suit before it if the remedies are legal or equitable to resolve controversies between the parties and finally determine the legal proceedings concerning the matter in question. Pursuant to the above statutory powers under section 17 (2) (a) and 33 of The Judicature Act, rather than dismiss this appeal for want of prosecution, I have decided to examine the evidence on record in light of the pleadings and give judgment. Article 126 (2) (b) gives this court a duty to ensure that justice shall not be delayed because justice delayed is justice denied.

The matter under examination is the taxed bill of costs the basis of the taxation certificate. The Law applicable is The Advocates (Remuneration and Taxation of costs) (Amendment) Rules made pursuant to The Advocates Act, Cap. 267. Section 62 (i) of The Advocates Act provides that any person aggrieved by an order or decision of a taxing officer as specified may appeal to the High Court within 30 days from the date of the decision or order and a Judge of the High Court on Appeal may make any order that the taxing officer might have made. This provision enjoins the High Court sitting in its appellate jurisdiction to apply the appropriate regulations or scale to the Bill of cost in light of the evidence and make the appropriate award.

The Bill of costs in contention was taxed on 9<sup>th</sup> September, 2005 and allowed at Sh. 2,528,500/=. The certificate of Taxation is dated 9<sup>th</sup> September, 2005. This Appeal was filed in the High Court on 20<sup>th</sup> October, 2005. Less than 30 days from the date of taxation which makes the Appeal properly before this Court as filed within prescribed time. This settles the contention in paragraph 4 of Justus Tibyahati's affidavit in reply that this Appeal is time-barred which he intended to raise as a preliminary objection. From the pleadings and affidavits in support of each party's case the issue to be determined is "Whether or not the learned Magistrate Grade I sitting as the Taxing Officer applied the right scale of the Advocates (Remuneration

and Taxation of cost) (Amendment ) Rules and if so, whether she arrived at the correct decision of the a wards the Respondents were entitled to.”

In determining the above issue I will proceed to examine the grounds of objection individually in the order they were presented by the Appellant.

(a) Whether the award of Sh. 1, 500, 000/= for instruction fees was manifestly excessive?

The matter in issue is taxation of Bill of costs arising from a divorce cause which was terminated by withdrawal of the petition before hearing started. Therefore this is a matter is contentious over un liquidated subject matter. Rules 37 of the Regulations provide, that the Sixth Schedule of these regulation is applicable. Under sixth schedule, 1 (vi) provides’ “to present or oppose petition for winding up a company or a divorce or other matrimonial proceedings.....not less than 75,000/=.” This is the minimum fee chargeable as Advocates instruction fees. Therefore the upper limit has to be determined by the court depending on circumstances of each case. Under schedule six (ix) it is provided that where due to complexity of a case, a higher fee is considered appropriate, the advocate for either party may apply to the presiding Magistrate or Judge for a higher fee. The Judge or Magistrate shall then specify the fraction or percentage by which the instruction fee should be increased. In the case before me the Respondents’

Advocate sought in the Bill of costs Sh. 2,000, 000/= as instruction fees to defend the Divorce petition. The taxation Officer allowed Sh. 1, 500, 000/=. It is clear that the Magistrate ignored the scale under Schedule six (vi) and (ix) which is the law applicable. The a ward is about 1.200 % of what is provided in 6<sup>th</sup> schedule (vi).

The guiding taxation principals is that the Taxing Officer should first identify the basic fee, which in this case was Sh. 75,000/= and then decide to increase it, giving reasons why the basic fee should be increased. There are several decided cases on this point but reference has been made to **Arthur Vs Nyeri Electricity undertaking (1961) EA 492 at 494. Steel contruction and Petroleum Engineering (E.A) Ltd Vs Uganda Sugar Factory Ltd (1970) EA 141 at 144.**

It was settled in the case of **MAKULA INTERNATIONAL LTD VS CARDINAL NSUBUGA AND ANOTHER CIVIL APPEAL 4 OF 1981 (CAU)**

That the practice where taxing officers make a wards without having regard to the basic scale fee and not following schedule six is illegal and must be stopped and the Appellant court has powers to intervene where the a ward is illegal for contravention of schedule six. I have considered the issue of the

complexity of the matter and I have found nothing complex in the matter. The Advocate filed a reply to the Petition contained in (2) two pages whose contents are basically denial. The list of Intended Authorities shows only two cases which shows no involving research done by the advocate. Similarly the Petition which he replied two was just two pages and depicted no complexity calling for tedious study. The case was terminated on the first appearance before the Magistrate when the Petitioners withdrew it. Therefore the matter handled by the Respondents' counsel was not difficult to call for the award of Sh. 1, 500,000/= as instruction fees for the above task and input. I find that the award was manifestly excessive in the circumstances of this case and the award was made contrary to Law and therefore illegal and it is hereby set aside.

Pursuant to Section 33 of The Judicature Act, I do hereby exercise my inherent powers to consider and award the appropriate cost the item of instruction fees. I have considered the fact that Respondents counsel attended to the Respondents to draw and filed a brief reply to the petition (2 pages). I have considered that the petition was withdrawn when he had prepared for the hearing and he was actually in court and therefore he deserved more than the basic instruction fees of Sh. 75,000/= provided by the sixth schedule 1 (vi) above referred to. I have also considered that this is

a petition terminated by a wife against a husband which ought to have been a positive action that should not attract penal costs or scare aggrieved spouses from accessing Justice in settlement of domestic disputes. The Appellants affidavit, paragraph 2 thereof states that they cannot afford to pay the awarded sums. Her approach to the dispute by withdrawing it justify a discount on costs. Excessive costs would be punitive and not equitable in the circumstances of this case. I have found guidance in the decision in **ELMANDRY VS SALAM (1956) 23 EACA 313** followed with approval by the Court of Appeal for Uganda in the case of **MAKULA INTERNATIONAL LTD** (Supra) That where the a ward was so unduly high, having been arrived at not judiciary or on wrong principles can be reduced by the appellate court. In view of the above principles and settled Law on the subject matter I hereby a ward instruction fees of Sh. 75,000/= plus 2/3 of the basic prescribed award (75,000/= plus 50,000/=) which gives a total of Sh. 125,000/= as the instruction fees.

Grounds (b) to (g) of the Appeal are not supported by any evidence of what is available on record and I have found no justification to interfere with the Taxing Officers award under the said items. This appeal shall therefore succeed in part with the following results;



- (a) The instruction fees payable to the Advocate be reduced to Sh. 125,000/=.
- (b) The rest of the awards are upheld. The total Respondents Costs are allowed at Sh. 984,000/= (Nine hundred and eighty four thousand only)

Given under my hand and seal of this honourable Court this 24<sup>th</sup> day of March, 2011.

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**J.W. KWESIGA**  
**JUDGE**

**Delivered:**

In absence of all parties and their respective counsel.